DEPARTMENT OF JUSTICE

Antitrust Division

United States v. American Bar Association Civ. No. 95–1211 (CRR) (D.D.C.,); Response of the United States to Public Comments

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), the United States publishes below the written comments received on the proposed Final Judgment in *United States* v. *American Bar Association*, Civil Action No. 95–1211 (CRR), United States District Court for the District of Columbia, together with the response of the United States to the comments.

Copies of the written comments and the responses are available for inspection and copying in Room 207 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530 (telephone: (202) 514–2481) and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, Room 1825A, United States Courthouse, Third Street and Constitution Avenue, NW., Washington, DC 20001.

Rebecca P. Dick,

Deputy Director of Operations.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, v. American Bar Association, Defendant. Civil Action No. 95–1211 (CRR).

United States' Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16 (b)–(h), the United States is filing this Response to public comments it has received relating to the proposed Final Judgment in this civil antitrust proceeding. The United States has carefully reviewed the public comments on the proposed Final Judgment. Entry of the proposed Final Judgment, with some limited modifications, will be in the public interest. After the comments and this Response have been published in the Federal Register, under 15 U.S.C. 16(d), the United States will move the Court to enter the proposed Final Judgment.

This action began on June 27, 1995 when the United States filed a Complaint charging that the American Bar Association (''ABA'') violated Section 1 of the Sherman Act, 15 U.S.C. 1, in its accreditation of law schools. The Complaint alleges that the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The Complaint also alleges that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and providing valuable information to consumers, the legitimate purposes of accreditation, the ABA acted as a guild that protected the interests of professional law school personnel.

Simultaneously with filing the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the defendant consenting to the entry of the proposed Final Judgment, after compliance with the requirements of the APPA.

Pursuant to the APPA, the United States filed a Competitive Impact Statement (''CIS'') on July 14, 1995. The defendant filed a Statement Of Certain Communications on its behalf, as required by Section 16(g) of the APPA, on July 12, 1995, and amended its statement on October 16, 1995. A summary of the terms of the proposed Final Judgment and CIS, and directions for the submission of written comments relating to the proposal, were published in the The Washington Post for seven days from July 23, 1995 through July 29, 1995. The proposed Final Judgment and the CIS were published in the Federal Register on August 2, 1995. 60 Fed. Reg. 39421–39427 (1995). The 60-day period for public comments began on August 3, 1995 and expired on October 2, 1995.[1] The United States has received 41 comments, which are attached as Exhibits 1–41.

I. Background

The proposed Final Judgment is the culmination of a year-long investigation of the ABA. The Justice Department interviewed numerous law school deans, university and college presidents, and others affected by the ABA's accreditation process. Twenty-seven depositions were conducted pursuant to Civil Investigative Demands (''CIDs'') the Department issued. In addition, the Department reviewed over 500,000 pages of documents in connection with this investigation.

At the conclusion of its investigation, the Department determined that the ABA accreditation process and four specific rules arising from that process violated the Sherman Act. The Department challenged the four rules and, more importantly, the accreditation process itself, and it negotiated a proposed Final Judgment with the defendant that adequately resolves its competitive concerns. The ABA indicated its willingness to reform its accreditation process before the Complaint was filed. After preliminary discussions with the Department, the ABA began to implement the reforms. The Department, however, insisted that the elimination of anticompetitive behavior should be subject to the terms of a court-supervised consent decree.

The focus of this case was the capture of the ABA's law school accreditation process by those who used it to advance their self-interest by limiting competition among themselves and from others. The case was not based on any determination by the Department of Justice as to what, specifically, most individual accreditation rules should provide. The Department is not particularly qualified to make such an assessment and has not attempted to do so. The Department concluded that the process that had produced the present rules was tainted. The appropriate solution—and the relief imposed by the proposed decree—was to reform the process, removing the opportunity for taint, and then to have the cleansed process establish new rules.

II. The Legal Standard Governing the Court's Public Interest Determination

A. General Standard

When the United States proposes an antitrust consent decree, the Tunney Act requires the court to determine whether ''the entry of such judgment is in the public interest.'' 15 U.S.C. § 16(e) (1988). As the D.C. Circuit explained, the purpose of a Tunney Act proceeding ''is not to determine whether the resulting array of rights and liabilities 'is one that will *best* serve society,' but only to confirm that the resulting settlement is 'within the *reachs* of the public interest,' '' *U.S.* v. *Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995) (emphasis in original); *accord*, *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *see also United States* v. *Bechtel*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975.[2] Hence, a court should not reject a decree ''unless 'it has exceptional confidence

[1] The United States has treated as timely all comments that it received up to the time of the filing of this Response.

[2] The *Western Elec.* decision involved a consensual modification of an antitrust decree. The Court of Appeals assumed that the Tunney Act standards were applicable in that context.

that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.' '' *Microsoft,* 56 F.3d at 1460 (quoting *Western Elec.*, 993 F.2d at 1577). Congress did not intend the Tunney Act to lead to protracted hearings on the merits, and thereby undermine the incentives for defendants and the Government to enter into consent judgments. S. Rep. No. 298, 93d Cong. 1st Sess. 3 (1973).

Tunney Act review is confined to the terms of the proposed decree and their adequacy as remedies for the violations alleged in the Complaint. *Microsoft,* 56 F.3d at 1459. The Tunney Act does not contemplate evaluating evaluating the wisdom or adequacy of the Government's Complaint or considering what relief might be appropriate for violations that the United States has not alleged. *Id.* Nor does it contemplate inquiring into the Government's exercise of prosecutorial discretion in deciding whether to make certain allegations. Consequently, a district court exceeds its authority if it requires production of information concerning ''the conclusions reached by the Government'' with respect to the particular practices investigated but not charged in the Complaint, and the areas addressed in settlement discussions, including ''what, if any areas were bargained away and the reasons for their non-inclusion in the decree.'' *Id.* at 1455, 1459. To the extent that comments raise issues not charged in the Complaint, those comments are irrelevant to the Court's review. *Id.* at 1460. The Court's inquiry here is simply whether the accreditation process set in place by the proposed decree will cure the taint of self-interest that, the Complaint alleges, had infected the process.

In addition, no third party has a right to demand that the Government's proposed decree be rejected or modified simply because a different decree would better serve its private interests in obtaining accreditation or being awarded damages. For, as this Circuit has emphasized, unless the ''decree will result in positive injury to third parties,'' a district court ''should not reject an otherwise adequate remedy simply because a third party claims it could be better treated.'' *Microsoft,* 56 F.3d at 1461 n.9.[3] The United States—not a third party—represents the public interest in Government antitrust cases. *See, e.g., Bechtel Corp.*, 648 F.2d at 660, 666; *United States* v. *Associated Milk Producers* 534 F.2d 113, 117 (8th Cir.), *cert. denied,* 429 U.S. 940 (1976). The decree is intended to set in place a fair process that will produce fair results for those seeking accreditation. It is not designed to transfer to the Department the process of accreditation itself and require the Department to determine who should or should not be accredited.

Moreover, comments that challenge the validity of the Government's case and assert that it should not have been brought are beyond the scope of this Tunney Act proceeding. It is not the function of the Tunney proceeding ''to make [a] de novo determination of facts and issues'' but rather ''to determine whether the Department of Justice's explanations were reasonable under the circumstances'' for ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *Western Elec.*, 993 F.2d at 1577 (internal quotations omitted). Courts have consistently refused to consider ''contentions going to the merits of the underlying claims and defenses.'' *Bechtel,* 648 F.2d at 666.

B. Special Commission

Finally, the fact that the consent decree includes a condition that will occur after its entry is not a bar to its entry now. Many courts have approved consent decrees requiring defendants, after entry of the decree, to take actions that must be approved by the Government or the court. For example, courts have entered consent decrees with provisions requiring defendants to divest assets within a certain time period after entry of the decree to a company approved by the Government and requiring the court to oversee divestiture by a trustee if the defendant did not meet the divestiture deadline. In *United States* v. *Browning-Ferris Industries,* 1995–2 Trade Cas. (CCH) ¶ 71,079 (D.D.C. 1995) (Richey, J.), this Court entered a decree requiring the defendant to divest assets within 90 days after entry, unless the Government agreed to a partial divestiture. The decree gave the Government authority to determine whether the buyer was a viable competitor. Moreover, if Browning-Ferris did not meet the 90-day deadline, the Court would appoint a trustee whose activities the Court would oversee. *Id.* at pp. 75,166–67. Several courts have entered very similar decrees. *E.g., United States* v. *Baroid Corp.*, 1994–1 Trade Cas. (CCH) ¶ 70,752 (D.D.C. 1994); *United States* v. *Outdoor Systems, Inc.*, 1994–2 Trade Cas. (CCH) ¶ 70,807 (N.D. Ga. 1994); *United States* v. *Society Corp.*, 1992–2 Trade Cas. (CCH) ¶ 68,239 (N.D. Ohio 1992) (similar decree provisions); *United States* v. *General Adjustment Bureau, Inc.*, 1971 Trade Cas. (CCH) ¶ 73,509 (S.D.N.Y. 1971); *United States* v. *Mid-America Dairymen,* 1977–1 Trade Cas. (CCH) ¶ 61,509 (W.D. Mo. 1977) (mandating divestiture within two years after entry and allowing Government to object to proposed sale in court).

Other decrees have included conditions that must be implemented after their entry. In *United States* v. *Baker Commodities, Inc.*, 1974–1 Trade Cas. (CCH) ¶ 74,929 (C.D. Cal. 1974), the district court entered a decree requiring each consenting defendant, within 90 days after entry, to independently re-establish its prices and to file with the court and the United States an affidavit stating that they have complied. Moreover, within two years after entry, defendant Baker was required to divest certain interests to a person approved by the Government or the Court upon a proper showing by Baker. *Id.* at pp. 96,160–61. Finally, if the Government objected to certain future acquisitions, then the court would decide the matter, with Baker having to show that the acquisition would not substantially lessen competition. *Id.* This is akin to the hearing that could ensue here if the Government challenged the Special Commission's revisions as antitrust violations.[4]

In other cases, decrees have required defendants, after entry of the decree, to eliminate from their bylaws or codes any sections that are inconsistent with the decree. *E.g., United States* v. *American Inst. of Architects,* 1990–2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990) (Richey, J.); *United States* v. *Hawaii Island Contractors' Ass'n,* 1988–1 Trade Cas. (CCH) ¶ 68,021 (D. Hawaii 1988); *United States* v. *Society of Authors' Reps.*, 1982–83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982). In addition, defendants have been ordered to independently re-establish their prices after the decree is entered and to file statements with the Government

[3] *Cf. United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116 n.3 (8th Cir.) (''The cases unanimously hold that a private litigant's desire for [the] *prima facie* effect [of a litigated government judgment] is not an interest entitling a private litigant to intervene in a government antitrust case.''), *cert. denied,* 429 U.S. 940 (1976).

[4] *See also United States* v. *Primestar Partners, L.P.*, 1994–1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994) (decree prohibited defendant, after entry, from taking programming actions without prior Government approval); *United States* v. *Pilkington PLC,* 1994–2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994) (defendants forbidden after entry to assert certain patent claims except upon proper showing to Government); *United States* v. *Industrial Electronic Engineers,* 1977–2 Trade Cas. (CCH) ¶ 61,734 (C.D. Cal. 1977) (decree required defendant, within 90 days after entry, to write a policy statement approved by Government).

explaining their basis. *E.g., United States* v. *Brownell & Co., Inc.*, 1974–1 Trade Cas. (CCH) ¶ 74,945 (W.D. Tenn. 1974); *United States* v. *First Washington Net Factory, Inc.*, 1974–1 Trade Cas. (CCH) ¶ 74,941 (N.D. Ala. 1974); *United States* v. *Capital Glass & Trim Co.*, 1973–1 Trade Cas. (CCH) ¶ 74,388 (M.D. Ala. 1973).

III. Entry of the Decree is in the Public Interest

Entry of the proposed decree is clearly well within the reaches of the public interest under the standards articulated in *Microsoft* and other decided cases. It prevents the ABA from fixing faculty compensation and from enforcing its boycott barring ABA-approved law schools from offering transfer credit for courses completed at state-accredited laws schools and enrolling in their LL.M. programs graduates of state-accredited law schools and members of the bar. Most important, the proposed consent decree ends the capture of the accreditation process.

Much as in most cases, the decree here requires subsequent action that does not necessitate delay in its entry. The problem identified in the Complaint—the capture of the ABA's accreditation process—has been eliminated. Absent that capture problem, the ABA should be allowed to set standards in areas principally involving educational policy. This Court retains jurisdiction to ensure that the ABA's Special Commission does not produce standards that are the product of capture. Nothing more is legally required.

We received over 40 comments, which we have divided into seven categories: other accrediting agencies; faculty; university administrators; law schools not approved by the ABA; graduates and students at non-ABA approved law schools; practicing attorneys; and the general public.

A substantial number of the comments raise educational policy questions and are directed to issues outside the allegations in the Complaint. For example, they propose the ABA require additional clinical education, modify the rules about required seating in the library, or use bar passage rates to assess law school quality. Such comments, while relevant to educational policy, go beyond the allegations in the Complaint. Hence, they are not relevant to the Tunney Act proceeding. Other comments criticize the Government for bringing suit or argue that the Complaint is not justified. For example, the former ABA Consultant on Legal Education contends that the ABA has not conspired to fix faculty salaries. But comments about the underlying merits and defenses are irrelevant in a Tunney Act proceeding, as explained above. In addition, some commentators complained about state rules requiring approval from an ABA-accredited law school prior to taking the bar examination. Others complain about other state government activities. Under *Parker* v. *Brown*, 317 U.S. 341 (1943), such state actions are exempt from antitrust prosecution. Some state-accredited law school students and graduates complained about ABA-approved law schools denying them transfer credit or refusing to admit them to LL.M. programs. The decree stops the ABA from forbidding law schools from offering such credit or enrolling these students. But the individual decision of whether to do so remains up to the individual school.

Furthermore, some commentators worried that the decree prevents accrediting agencies from assessing the quality of educational institutions engaging in legitimate accreditation activities. The decree is directed only at the activities of the ABA. By preventing the ABA from violating the antitrust laws, the decree ensures that the ABA will engage in the legitimate accreditation activity of assessing the quality of legal education programs. Four accrediting agencies argued that the proposed decree is inconsistent with the *Marjorie Webster* decision and that there may be an implied repeal of antitrust enforcement because accreditation is regulated by the Department of Education. *Marjorie Webster Junior College Inc.* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.D. Cir.), *cert. denied*, 400 U.S. 965 (1970). But *Marjorie Webster* itself held that antitrust laws would apply to restrictions with a commercial motive and practices that fix compensation and enforce a boycott have. In addition, the agencies' *Marjorie Webster* argument goes directly to the merits of the underlying claims and defenses, an inquiry that is irrelevant in a Tunney Act proceeding, as noted above. Furthermore, under the case law, there is no implied repeal and the Department of Education has specifically deferred to the Justice Department on the antitrust issues.

The Massachusetts School of Law (''MSL''), a private plaintiff in antitrust actions in Pennsylvania and Massachusetts, recommends altering the decree, delaying its entry, and requests the production of documents from the Government's files. The Government opposes the modifications and recommends no delay in entering the decree. Some of MSL's comments go beyond the allegations in the Complaint. While MSL may believe that its recommended changes are the ones that will ''best serve society,'' the issue in a Tunney Act proceeding is only whether the settlement is ''within the reaches of the public interest.'' *Microsoft*, 56 F.3d at 1460. No third party may demand that the proposed decree be rejected or modified just because a different decree would better serve its private interests. We further oppose MSL's discovery request, as we believe it is improper to grant discovery collaterally in a Tunney Act proceeding to a party whose discovery requests have been denied in its own case.

The parties' agreement that the Special Commission should have the first opportunity to report on issues that involve education and antitrust policies is a reasonable accommodation. That the Special Commission's report, ABA Board approval, and a possible Justice Department challenge will occur after entry of the decree is no bar to entry of the decree now. The decree prohibits a number of practices for which there were no apparent educational policy justifications. The accreditation standards on which the Special Commission will report do not on their face constitute naked antitrust restraints, but the Government seriously questioned the process by which these standards were administered. The defendant had taken measures to reform its accreditation process before agreeing to the consent decree and affording it the first opportunity to address the remaining issues is a reasonable compromise. The public has had the opportunity to comment on the process and on the subject matter of these issues, although only a few chose to do so. The Special Commission's report will be made public and third parties will have the opportunity to provide the Justice Department with possible objections.[5]

Because the proposed decree is within the scope of the public interest, the Court should enter it after the Government's responses to the public comments are published in the Federal Register and the Government certifies compliance with the APPA and moves for entry of judgment.

IV. Response to Public Comments

This case has generated a large number of comments, despite the absence of any apparent organized effort

[5] Additionally, as part of its supervisory powers, the Court could, after entry of the decree, require the parties to report on the Special Commission's report.

to solicit comments. Because of the number of comments, the Government has organized its Response based on the categories of those who submitted comments.

A. Other Accreditation Agencies

The Department received five comments from other accrediting agencies and one from an individual who has headed an accrediting agency since 1973. These comments are generally critical of the severity of the proposed Final Judgment and are concerned with its possible effect on the practices of other accrediting agencies.

1–2. The Association of Specialized and Professional Accreditors (''ASPA'') (Exhibit 1), and National Office for Arts Accreditation in Higher Education (Exhibit 2)

ASPA is an umbrella organization with a membership of 40 specialized accrediting agencies (one of which is itself an umbrella agency for 17 allied organizations). The National Office for Arts Accreditation in Higher Education consists of four separate accrediting agencies for schools of art and design, music, theater, and dance. ASPA believes that the consent decree could produce ''unintended consequences'' for other accrediting agencies by equating the presence of expertise in an accreditation area with its automatic capture by a vested interest and criticizes the data collection and other limitations imposed by the consent decree as unnecessarily restrictive or unnecessarily prescriptive. ASPA fears that the requirements of the consent decree will create a climate in which fraudulent institutions may use ''antitrust terrorism'' against accrediting agencies.

We share ASPA's concern that this action should not be used to diminish accreditation's legitimate role as a guarantee of quality and a source of information to the public. The requirements of the proposed Final Judgment apply only to the defendant and only for the duration of the decree. The terms of the decree are designed to remedy the defendant's anticompetitive practices. They are not meant to be a generalized prescription for other accrediting agencies.

The limitations in the decree on the collection and use of certain data are directed only to remedy the defendant's conduct. The ABA required by law schools to respond to detailed annual and site inspection questionnaires that included providing extensive salary data. The defendant used the data to raise the salaries of law school deans, full-time faculty, and professional librarians during the accreditation process. Because of this abuse, the proposed consent decree prohibits the defendant from conditioning accreditation on the compensation paid professional personnel or collecting salary data that could be used to determine individual salaries.

Nor does the Government seek to discourage the participation of individuals with ''professional expertise'' in the accreditation process and the consent decree will not have that effect. The defendant permitted its accreditation activities, however, to be captured by legal educators who used it to advance their own personal interests. The proposed consent decree remedies the defendant's abuses. The Government is not suggesting it apply to other accrediting agencies whose accreditation processes promote quality rather than the self-interest of a group that controls the process.[6]

ASPA's concern that the proposed consent decree may promote ''antitrust terrorism'' against accrediting agencies by institutions seeking accreditation is unwarranted. This is the first Justice Department antitrust case brought against an accrediting agency in the 105-year history of the Sherman Act. The Government cannot prevent the filing of meritless or harassing actions by private institutions, but does note that such actions are costly to the plaintiff, and meritless actions are subject to court sanctions.

Finally, ASPA points out that some of the requirements of the proposed Final Judgment may conflict with the requirements of the Higher Education Act. The Justice Department consulted with the Department of Education concerning this objection. Sections VI (C)(1), (D)(1) and E(1) of the decree require that elections and appointments to the Council, the Accreditation Committee, and the Standards Review Committee of the Section of Legal Education and Admission to the Bar (''Section of Legal Education'') must be subject to the approval of the ABA's Board of Governors (''Board'') for a period of five years. This provision appears to conflict with 20 U.S.C. 1099b, requiring agencies to be ''separate and independent'' of related trade associations. The Department of Education recognizes the Section of Legal Education as a specialized accrediting agency for law schools and has determined that the ABA is a related trade association from which the Section must be ''separate and independent.'' Giving the ABA's Board power to ''approve'' elections and appointments to the Section's Council and Committees thus may breach the ''separate and independent'' requirement of § 1099b. Consequently, the United States and the ABA have proposed to modify the decree by substituting a notification requirement in Section VI for the approval requirement.[7] The parties intended that these and other requirements in the proposed consent decree would assist in the ABA's oversight of the Section of Legal Education's accreditation activities. Changing the approval requirements should not impair the ABA's oversight while simultaneously ensuring that the requirement of 20 U.S.C. 1099b is not offended.

The National Office for Arts Accreditation joins in ABA's comments. The National Office is particularly concerned that the Justice Department may be setting an inappropriate precedent or providing loopholes that may prevent accrediting bodies from working effectively with problem institutions. While we are sympathetic to the National Office's concern, the Justice Department believes that the remedies in the proposed consent decree are directed just to the facts in this case, not to the activities of other accrediting agencies. The Department does not believe that effective antitrust enforcement—which requires entry of the relief in this case—is at all incompatible with quality accreditation.

3. Association of Collegiate Business Schools and Programs (''ACBSP'') (Exhibit 3)

ACBSP has 500 business school members and is one of two accrediting agencies in the business school area. ACBSP commented that a number of States require that their state business schools must obtain accreditation from the other business school accrediting agency, thereby locking out ACBSP. The actions of States are exempt from the antitrust laws under the ''state action'' doctrine announced in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. Consequently, the activities ACBSP complains of are beyond the reach of antitrust enforcement and outside of the matters in the Complaint.

4. American Library Association (''ALA'') (Exhibit 4)

The ALA commented on two points: the size and composition of

[6] ASPA questions other specific consent decree provisions, not because they are unwarranted in this proceeding, but because their application to other accrediting agencies would produce bad results. The provisions of the proposed Final Judgment, of course, apply to the ABA.

[7] The proposed modification is attached as Exhibit 42.

accreditation site inspection teams; and the proposed consent decree's effect on accreditation agencies' functions. Without citing specific examples, the ALA believes that the remedies in the consent decree are overly prescriptive and may promote a bureaucratic and regulatory environment antithetical to the analysis and accreditation of higher education. The consent decree should not affect the composition of ALA accreditation teams or its accreditation practices. The decree is designed to ensure that the accreditation process proceeds on the basis of legitimate academic concerns; the decree does not confine or constrain the process in any other way.

5. Bernard Fryshman (Exhibit 5)

Dr. Fryshman has headed a nationally-recognized accrediting body since 1973 and has been very active in the accreditation field.[8] Dr. Fryshman's principal point is that the cooperative nature of higher education is intended to produce different bottom-line results than commercial enterprises. Accordingly, Dr. Fryshman believes that higher education should not be judged under antitrust standards. In his wide-ranging comment, Dr. Fryshman appears to question the applicability of the antitrust laws to any of the defendant's practices challenged in this action, including the imposition of higher salaries. Dr. Fryshman suggests a review of the corrective actions in the proposed consent decree.

Admittedly, higher education differs in some important respects from commercial enterprises; but it is a significant and growing part of the national economy. While this Circuit has held that the antitrust laws do not apply to the ''non-commercial'' aspects of post-secondary accreditation, *Marjorie Webster*, 432 F.2d at 650, the efforts of an accrediting agency to fix the salaries and perquisites of professional staff and engage in other guild activities unrelated to quality assurance are clearly commercial activities that restrain trade. We agree with Dr. Fryshman that it is ''inappropriate for government to determine how lectures are to be delivered, what books are to be read and what facilities are appropriate,'' but disagree that antitrust enforcement has no role in eliminating anticompetitive distortions of the process.

[8] We believe that Dr. Fryshman's agency accredited rabbinical and Talmudic schools.

6. Accrediting Bureau of Health Schools, Accrediting Council of Continuing Education and Training Accrediting Council for Independent Colleges and Schools, and National Accrediting Commission of Cosmetology Arts and Sciences (''Four Agencies'') (Exhibit 6)

These Four Agencies have filed a joint comment and request a hearing concerning possible modification and entry of the proposed Final Judgment. The Four Agencies suggest that the proposed consent decree is inconsistent with the *Marjorie Webster* decision and that there may be an ''implied repeal'' of antitrust enforcement in this area because accreditation is regulated by the Department of Education. The Four Agencies request that Section XI(C) of the proposed Final Judgment be amended by adding: ''Nothing in this judgment shall be construed to modify any of the provisions of the Higher Education Act of 1965, as amended, or any of the regulations adopted pursuant thereto, or any existing law concerning the recognition of private accrediting agencies, or the activities of such agencies relating thereto.''

This Circuit's decision in *Marjorie Webster* does not prevent the Court from finding entry of this proposed consent decree is in the public interest. In *Marjorie Webster*, the Court held that an accrediting agency's refusal to accredit a junior college solely because it was organized as a for-profit corporation did not violate the antitrust laws because the Sherman Act does not apply to the noncommercial aspects of the liberal arts.[9] The Court noted that antitrust policy would be applicable to restrictions that had a commercial motive. 432 F.2d at 654–55.[10]

An institution's form of organization should not be the basis for totally excluding it from an industry,including the provision of a legal education. Significantly, the ABA eliminated its Accreditation Standard 202, which denied the accreditation of for-profit law schools, during the Justice Department's investigation. In its enforcement activities in industries in which some competitors are organized as not-for-profits and some as for-profits (e.g., hospitals), the Antitrust Division does not find that an entrant's particular form of organization is of decisive significance in antitrust analysis. Nor do courts. *See United States* v. *Rockford Mem. Corp.*, 898 F.2d 1278 (7th Cir. 1990), *cert. denied*, 498 U.S. 920 (1990); *FTC* v. *University Health, Inc.*, 938 F.2d 1206, 1214–16 (11th Cir. 1991). Since the ABA has already abandoned Standard 202, since its ''market power'' is signficantly greater than that of the defendant in *Marjorie Webster*, and since entry into the law school field should not be unreasonably restricted, the Four Agencies' comment that the relief of the proposed Final Judgment is inconsistent with *Marjorie Webster* is incorrect and, therefore, no bar to the Court's finding that entry is in the public interest.

Subsequent to *Marjorie Webster*, the Supreme Court held that the Sherman Act applies to all anticompetitive restraints, regardless of the non-profit status of the defendant. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787–89 (1975). To the extent *Marjorie Webster* suggests a ''liberal arts'' exemption from the antitrust laws, that suggestion has been rejected. As one district court observed, ''*Marjorie Webster* is of questionable vitality after *Goldfarb*, to the extent that it draws bright lines between education and business or accreditation policy and commerce.'' *Welch* v. *American Psychoanalytic Ass'n*, 1986–1 Trade Cas. (CCH) ¶ 67,037 (S.D.N.Y. 1986).

The Four Agencies also contend that there is an ''implied immunity'' from the antitrust laws for the activities of accrediting agencies because they are subject to Department of Education oversight. The implied immunity doctrine is not nearly so broad as the Four Agencies would suggest. The leading case on this point is the Supreme Court's decision in *National Gerimedical Hospital versus Blue Cross*, 452 U.S. 378 (1981). Prior to *Gerimedical*, the Supreme Court had held that antitrust repeal was implied only if necessary to make the regulatory statute work, and even then only to the minimum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). In *Gerimedical*, the Supreme Court clarified this standard, holding that: ''Implied antitrust immunity is not favored and can be justified only by a convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system.'' 452 U.S. at 390–91 (emphasis added). The Four Agencies have not, and cannot, make this clear

[9] In reaching its decision, the Court doubted that Marjorie Webster ''will be unable to operate successfully * * * unless considered for accreditation,'' 432 F.2d at 657; Marjorie Webster has since passed from existence. The Court also noted that the defendant did not possess monopoly power over accreditation, something the ABA clearly possesses in the 42 States where graduation from an ABA school is a prerequisite to taking the bar examination.

[10] In fact, in a civil antitrust action, liability may be shown by proof of either an unlawful motive or an anticompetitive effect. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

showing.[11] Indeed, in the Department of Education's ''Staff Analysis of the ABA's Section of Legal Education's Interim Report on its Standards to DOE and Massachusetts School of Law's Compliant,'' the staff noted:

One aspect of MSL's complaint against the Council that is totally outside of the Department's purview is the charge that the Council has violated federal antitrust laws for the economic benefit of law professors, law deans, and law librarians but to the detriment of students. That matter is currently before the Justice Department.[12]

Amending the proposed consent decree in the manner requested by the Four Agencies is unnecessary. While the comment claims that the Government and the ABA are asking the Court to approve ''a broad, in-depth intrustion of the Sherman Act * * * that will have a chilling effect on the entire accreditation process * * *'' (comment, p. 5), the proposed Final Judgment addresses three specific practices (it prevents the ABA from fixing salaries and engaging in a boycott). The decree does not interfere with the day-to-day accreditation process that determines whether law schools offer quality educations. The decree simply ensures that the process rests on legitimate educational principles. Nor does it conflict with controlling precedent in this Circuit or the doctrine of ''implied immunity.'' The decree binds only the parties to it. The Four Agencies fail to show how it will prevent the defendant from carrying out its accrediting obligations under the Higher Education Act or how it will prevent other accrediting agencies from doing so.

B. Law School Faculty

The Justice Department received nine comments from administrators and faculty at ABA-approved law schools.[13] The substance of these comments vary enormously, but all recommend some modification of the proposed Final Judgment.

1, Clinical Legal Education Association (''CLEA'') (Exhibit 7)

CLEA maintains that, because the accreditation process has been dominated by legal academics (i.e., research scholars) and deans, it has not served the function of insuring that law school graduates are adequately prepared to practice law. CLEA claims that the proposed consent decree will further entrench the power of legal academics and will interfere with the ability of accreditation to improve the quality of lawyers. CLEA further believes that requiring a university administrator not affiliated with a law school on each site inspection team will entrench legal academics since university administrators are concerned that law schools are not sufficiently ''academic,'' i.e., research-oriented. Additionally, according to CLEA, the proposed consent decree will not change the ABA standards that favor legal academics over clinicians with respect to tenure and law school governance. CLEA also believes that the proposed Final Judgment is not ''final'' because of the pendency of the report of the Special Commission and because the Government retains authority to review changes in the accreditation process.

Whether legal education is better served by emphasizing legal scholarship or practical clinical instruction is neither an antitrust issue nor an issue addressed in the Complaint. CLEA raiss an issue of educational policy, not antitrust policy, that should not be governed by the consent decree. Furthermore, to the extent that these comments raise issues not alleged in the Complaint, they are outside the scope of a Tunney Act review. *Mircosoft,* 56 F.3d at 1448, 1459. The inclusion of non-law school university administrators on site inspection teams is intended to reduce the likelihood that accreditation will be used to advance the narrow economic interests of law school faculty and administrators.

CLEA supports the provision in the proposed consent decree requiring the ABA to reconsider its standards regarding student-faculty ratios, but is concerned that the Special Commission is scheduled to make its report after entry of the consent decree. The Special Commission's August 3, 1995 preliminary report noted the wide-spread dissatisfaction with the past manner in which student-faculty ratios were computed for accreditation purposes and will report on this issue. CLEA also claims that the proposed consent decree gives the Government authority to review all changes in the ABA's accreditation process. This seems to be an unduly expansive reading of the Government's rights under Section VIII(D) and Section X of the proposed Final Judgment.

2. Howard B. Eisenberg (Exhibit 8)

Mr. Eisenberg is dean of Marquette Law School and a former dean at the Arkansas-Little Rock Law school. Dean Eisenberg expresses concern that the Government's law suit was ''commenced and settled without input from legal educators or consumers of legal education.'' He is also dissatisfied that Section VII of the proposed consent decree ''leaves open for future determination five issues of extraordinary importance to legal education.'' Dean Eisenberg believes that leaving these matters to the Special Commission strikes him ''as a guarantee that the Court will be involved in protracted and difficult litigation in the future over these matters.'' Consequently, Dean Eisenberg urges that entry of the proposed consent decree now is premature and not in the public interest, or that Section VII should be deleted entirely.

We believe that Dean Eisenberg has vastly overstated the likelihood of protracted and difficult litigation, or the possibility of any litigation at all, and also has exaggerated the breadth of the Government's involvement in the remaining five issues. The decree simply sets in place procedures to ensure that the accreditation requirement of paid sabbaticals, the computation of student-faculty ratios, and other standards should not be manipulated by a control group to further its own interests. The Special Commission may make recommendations that, as difficult questions of educational policy, cna be fairly disputed, but the Government does not anticipate that the Special Commission and the Board will fail to resolve our antitrust policy concerns or that the Special Commission's analysis will spark litigation.

3. John S. Elson (Exhibit 9)

Mr. Elson is a professor at Northwestern Law School. He has been on the Section of Legal Education Accreditation Committee, is a former chair of the Section's Skills Training Committee, and has served on about 15 site inspection teams since 1986. Professor Elson sees the proposed Final Judgment as offering a ''unique opportunity'' to return ABA accreditation to its only proper purpose, ''the adequate preparation of law students for competent and ethical legal practice.''

[11] In an advisory opinion, the Federal Trade Commission informed another accrediting agency, the Accrediting Commission on Career Schools and Colleges of Technology, that the 1992 Higher Education Act Amendments, specifically, 20 U.S.C. § 1099b(a)(5), relied upon by the Four Agencies, conveyed no implied repeal of the antitrust laws, finding no broad or inherent conflict between the antitrust laws and the Department of Education's regulatory regime. January 19, 1995 FTC Advisory Opinion, File No. P94 4015; *see* 5 Trade Reg. Rep. (CCH) ¶ 23,755.

[12] December 5–6, 1994 Staff Analysis appended as Exhibit 43.

[13] One of these comments is from the Clinical Legal Education Association, an organization of more than 400 clinical teachers who ''have a dual identity as law teachers and practicing lawyers.'' Comment, p. 1. Four of the nine faculty comments were from clinical instructors.

Professor Elson, therefore, proposes adding the following injunctive provision to Section IV of the proposed consent decree:

The ABA is enjoined and restrained from: * * *

(E) adopting or enforcing any standard, interpretation, rule or policy that is not needed in order to prepare law students to participate effectively in the legal profession.

Professor Elson is also concerned that the proposed consent decree will leave law school academics in control of the process. They will continue to emphasize the production of scholarship as a priority and relegate clinical training to a lesser role. Professor Elson also expresses his dissatisfaction with the Special Commission's initial report, which he believes affirms the priority given to legal scholarships and its explicit rejection of proposals emphasizing practical training. Professor Elson believes that his proposed modification will fairly and effectively protect the public interest in having adequately prepared law graduates without denying market entry to those who can satisfy that public interest.

While criticizing the provision of the proposed Final Judgment that seeks to open participation in the accreditation process, Professor Elson does not specifically address what procedures he would prefer. We agree that, in law school accreditation, just as in accreditation in other areas, participation in the process is more apt to come from people within the discipline and who have a stake in the effect of accreditation. The proposed consent decree makes reasonable efforts to include more outsiders. For example, no more than 50% of the membership of the Council, Accreditation Committee or Standards Review Committee may be law school deans or faculty. The term limitation will also produce greater turnover among those participating in the process.

Professor Elson plainly thinks that legal education should give a higher priority to practical training. This is a matter of educational, not antitrust, policy and it is outside the limits of the Complaint and proposed consent decree.

4. Jeffrey L. Harrison (Exhibit 10)

Mr. Harrison is the Chesterfield Smith Professor of Law at the University of Florida College of Law. His principal hope is that the Antitrust Division will devote further study to the issues of the proposed market definition, competitive harm, and the appropriate remedy. Other than the prohibition against price fixing in Section IV(A) of the proposed consent decree, Professor Harrison recommends abandoning all of the other prohibitions in the decree, at least until there is data showing that the ABA's accreditation process has unreasonably restricted entry. In the alternative, Professor Harrison believes the decree should be modified to permit the collection and dissemination of ''past'' compensation data because it ''can be critical'' in diagnosing the problems of a law school. Professor Harrison also recommends dropping the 50% membership limitation of legal academics on the Council, its Accreditition Committee, and the Standards Review Committee, describing them as ''counter-productive.''

While perhaps useful as an academic exercise, Professor Harrison's objections to the alleged theoretical weaknesses of the Government's case are not appropriate for a review of whether entry of the proposed Final Judgment is within the reaches of the public interest. The Court should assume that there is some basis to the allegations in the Complaint and determine whether the proposed consent decree sufficiently remedies the alleged violations. A value of the consent decree process is that it releases the Court and the parties from the time and expense of a Rule of Reason inquiry into all of the issues raised in the Complaint.[14]

The Government strongly disagrees with Professor Harrison's suggestion that ''past'' compensation data can be used as a surrogate for measuring quality. Observations of outputs are a more reliable measure of quality.

5. Gary H. Palm (Exhibit 11)

Mr. Palm is Clinical Professor of Law at the University of Chicago Law School. Professor Palm currently serves on the Council of the Section of Legal Education, was a member of the Accreditation Committee from 1987 to 1994, is a past member of the Clinical Education and Skills Training Committee, and served on 14 ABA site inspections from 1984 to 1994, nine of which were in Europe. Professor Palm believes that the proposed consent decree does not recognize that ''the real conspiracy'' involved just law school deans and academics, not other faculty, and that the proposed consent decree ''will likely result in a lessening of vigorous enforcement of accreditation standards.'' Professor Palm makes a number of proposals in his comprehensive comment. He recommends that another section of the ABA or some other entity should perform law school accrediting, claiming that the ABA has been a ''paper tiger'' with respect to ensuring adequate training in legal skills and values.

Finding a substitute for the Section of Legal Education would not be easy since a new agency will have to obtain Department of Education and state certifications. Additionally, the ABA initiated accreditation reforms before the consent decree discussions started. The Justice Department seldom, if ever, seeks to eliminate an entrant as antitrust relief and, unlike monopoly or merger cases, partial divestiture here is not a realistic remedy.

Professor Palm's comment, and those of other clinicians, are critical of the ABA accreditation requirement with respect to skills training. This is essentially a question of education, not antitrust, policy. Professor Palm believes that there is a need for substantial, additional diversification in the accreditation process, particularly the continued or greater involvement of clinicians on site inspection teams or as part of the law faculty representation on the Council and committees. Again, whether clinicians should be included among faculty appointments to site inspection teams and governing committees is not an antitrust issue.

Professor Palm also criticizes procedural difficulties with respect to the report of the Special Commission. He urges either that the public be given a chance to comment on the report or that the consent decree not be entered until after the Special Commission makes its report.

Professor Palm also makes specific comments with respect to several of the subjects on which the Special Commission will report. He criticizes the current computation of student-faculty ratios for excluding as ''faculty,'' adjuncts and part- and full-time skills teachers who have short-term employment contracts.

He defends the current application of the facilities standards. The precise contours of the facilities standard are not challenged by the Department nor are they before the Court. The Department does not intend to constrain the setting of legitimate educational

[14] We do not wish to ''try'' the issue of output restriction but do question the manner in which Professor Harrison uses statistics. Rather than the 30-year comparison in his comment (p. 3), a more appropriate period would be from when the current Standards were made applicable (1975) and when the Consultant's office regularized the ABA's current accreditation regulatory regime (late 1970s). Roughly halving the 30-year period used by Dr. Harrison, comparing 1980–81 statistics with those of 1994–95, the number of ABA-approved law schools increased only from 171 to 177 (+3.4%) and total J.D. enrollment in ABA-approved schools increased only from 119,501 to 128,989 (+7.9%).

standards. Because the facilities standards raise issues of legitimate educational policy that are within the Special Commission's expertise, the Department believes the Commission should have the first opportunity to reconcile the issues of antitrust and educational policy. Professor Palm also argues that the ''adequate resources'' standard should be applied to reallocate greater resources for skills instruction. This is neither an antitrust issue nor one raised in the Complaint. Professor Palm has suggested an appointment, as an *amicus curiae*, of a representative for the public interest. The Justice Department represents the public interest in this proceeding and Professor Palm has shown no breach of that representation. Most of Professor Palm's suggestions seem intended to advance clinical training at law schools. This is an educational policy issue that is irrelevant here and certainly one that does not call for a court-appointed representative.

6. Millard H. Ruud (Exhibit 12)

Former ABA Consultant on Legal Education Millard Ruud submitted an extensive comment criticizing the proposed consent decree.[15] He doubts that the ABA violated the antitrust laws. He believes that the ABA accreditation process is not a guild and that it has not been captured by legal educators. He also doubts that there was an agreement to ratchet up law teachers' salaries. Professor Ruud does not believe that deans want the ABA to impose unreasonably high salary requirements for full-time faculty and argues that deans only want to meet the competition set by market forces. He contends that leading law schools must compete with major law firms for highly-qualified faculty, and must offer competitive salaries to retain and recruit these faculty.

Professor Ruud also comments that the ABA has not ''monopolized'' accreditation through its own actions because state supreme courts and bar admission authorities gave the ABA the power to approve law schools. He notes that there are competitive disadvantages for unapproved law schools because these schools are considered to be lower in quality. ABA-approved schools have an advantage in recruiting quality students and faculty. Professor Ruud also questions the meaning of the phrase ''state-accredited'' law schools in the decree and correctly points out the decree only prohibits the ABA from requiring ABA-approved law schools not to accept credit for work at state-accredited schools.

Professor Ruud questions the decree's requirement that a university administrator who is not affiliated with a law school be included on site evaluation teams. He claims that it is present ABA practice to include university administrators when the law school is affiliated with a university. He asks why university administrators should be included in evaluating law schools that are not part of a university.

Professor Ruud further believes that the consent decree is an excessive intrusion into ABA governance and questions some specific decree provisions. He assets that the issues the Special Commission is to examine go beyond antitrust. He further believes that the decree should not set term limits for membership on the Council, Accreditation Committee, or Standards Review Committee. Finally, Professor Ruud describes the basic purpose of accreditation: ensuring that the school meets the basic requirements of quality and informing other schools that a degree from an accredited school should be recognized by them.

The purpose of this proceeding is not to evaluate the merits of the Government's case. To the extent comments challenge the Department's decision to bring this case, they are beyond the scope of this decision.

7. Roy T. Stuckey (Exhibit 13)

Mr. Stuckey is a professor in the Department of Clinical Studies at University of South Carolina Law School. Professor Stuckey served on the Council of the Section of Legal Education from 1988 to 1994 and the Standards Review Committee from 1990 to 1995. He has been a member of about 11 site inspection teams since 1982.

Professor Stuckey objects to entry of the proposed Final Judgment unless it is modified:

(1) to allow the ABA to continue gathering data about faculty compensation; (2) to allow the ABA to continue considering compensation as one factor in determining the quality of a law school's program of education; and (3) to allow the ABA to permit some people to serve at least six years on the Standards Review Committee.

Professor Stuckey believes that compensation is related to quality, knows of no data showing that law school faculty are compensated disproportionately to similarly qualified judges and lawyers, and points out that the ABA's data collection was reliable but will now have to be done by someone else.

The an on salary data collection is for only the 10-year term of the decree and is intended as a prophylactic. The defendant's practice, compiling a ''peer group'' salary comparison prior to a site inspection and pressuring the law school (or, more frequently, university administrators) to raise salaries without a finding that the law school was unable to attract and retain competent faculty, was an anticompetitive practice that artificially inflated law school personnel salaries. The consent decree prevents the defendant from collecting salary information to reduce the likelihood that the behavior alleged in the Complaint will recur. During the time that the consent decree limitations apply, site inspectors will be able to use such direct measurement of faculty quality like classroom instruction, scholarly production, and bar and practical skills preparation. The ABA is not enjoined from continuing to collect and disseminate other law school data.

The Standards Review Committee has in the past been totally dominated by law faculty. In addition to proposing new Standards, the Committee also adopted Interpretations that were not fully subject to public and Board review and were, at times, protective of law school professional personnel in an anticompetitive manner. The Standards Review Committee has staggered terms so that it will have varying levels of experience. The one-term limitation on service on the Standards Review Committee is a reasonable prophylactic provision designed to get more individuals involved in law school accreditation.

8. Lawrence A. Sullivan and Warren S. Grimes (Exhibit 14)

Mr. Sullivan and Mr. Grimes are professors at Southwestern University School of Law. Professors Sullivan and Grimes fear that the proposed consent decree may lead to a relaxation of accreditation standards that will be particularly harmful in California. They

[15] Professor Ruud was the ABA's first Consultant on Legal Education, serving from 1968 to 1973; was the Executive Director of the American Association of Law Schools which conducts joint law school accreditation inspections with the ABA; has participated in numerous law school site inspections; and has extensive experience in ABA and AALS law school accreditation. Professor Ruud was involved in drafting the Standards under which the ABA operated for many years. These include the Standards fixing faculty compensation. Professor Ruud has conducted over 40 site inspections, although all but three of these were before 1979. He is currently a professor at the University of Texas.

University of Texas Provost and its former law dean Mark Yudof has a somewhat different view of the consent decree than Professor Ruud. ''Yahoo!'' was the first response from Mark Yudof'' after he was told of the consent decree, the *Texas Lawyer* reported. Provost Yudot called the ABA's process an ''accreditation hammer'' that did not recognize diverse models of legal education. *Texas Lawyer*, July 3, 1995 at 7 (Lexis, News Library).

also oppose the prohibition against the defendant's collecting and disseminating salary data.

California has 16 ABA-approved law schools, 19 state-accredited law schools, and 37 uncertified law schools, according to the comment. Professors Sullivan and Grimes note that, while, admittedly, the ABA-approved schools are able to attract better qualified students, the August, 1994 California bar results for first-time takers show that the average pass rate for each of the ABA-approved schools was higher than those for any law school in each of the other two categories. The comment suggests that this raises consumer protection issues since students at non-ABA-approved schools are investing much time and money with a diminished likelihood of passing the bar or finding legal employment.[16] This case is not intended to inhibit in any way the setting of legitimate educational standards and the proposed Final Judgment does not do so. Accreditation is a consumer protection service. It informs students that an accredited school meets appropriate educational standards. The proposed Final Judgment leaves in place a process to provide this service.

	ABA-approved (percent)	State-accredited (percent)
July 1993	69–92	0–89
February 1993*	40–87	0–75
July 1992	63–90	25–75
February 1992*	54–85	5–61

*Most takers in February are repeaters and the results are for all takers.

The comment also fears that the consent decree will relax standards in two areas—student-faculty ratios and library facilities—permitting new schools to be accredited, thereby injuring the 12 ''second-level'' ABA-approved schools in California. The consent decree, however, does not address library facilities, and simply requires that student-faculty ratio standards be reassessed by an unbiased group.

Professors Sullivan and Grimes also believe that the collection of salary data serves a number of legitimate and important functions. We agree, but believe it should be kept separate from ABA accreditation because of past abuses.[17] A school that attracts a higher-quality faculty at a lower cost should be rewarded in the marketplace and not punished in an accreditation inspection. Consequently, the proposed consent decree restricts the ABA from this activity for its 10-year duration. The comment properly points out that other organizations, without the incentives of this one, should be able to collect this information.

9. Bardie C. Wolfe, Jr. (Exhibit 15)

Bardie C. Wolfe, Jr. is a professor of law and the law library director at St. Thomas University School of Law in Miami, Florida. Professor Wolfe submitted comments about the ABA annual questionnaire and Standards. The ABA sends out a questionnaire each year seeking law school operations information. Professor Wolfe believes that the annual questionnaire section on library resources should include computerized, not just paper, collections. Otherwise, the ABA, in effect, forces law schools to purchase expensive books and other paper publications that are available in electronic form. Professor Wolfe also is concerned about the ABA Standards for law libraries. He advocates law school libraries sharing electronic resources through networks and the Internet. This would enable libraries to share expensive but little used titles. He would also like to see electronic resources held by other parts of the university counted as part of the law schools' resources.

It may be a laudable goal to decrease library expenses by sharing electronic information. But the issue of what resources libraries must have for student and faculty research implicates issues of educational policy, not antitrust issues and is outside the ambit of this case and the Tunney Act proceeding.

10. Marina Angel (Exhibit 16)

Ms. Angel is a professor of law at Temple Law School. Her comment was transmitted on October 16, two weeks after the close of the comment period.

Professor Angel complains that Section IV(A) of the proposed consent decree, prohibiting the collection of salary data, may prevent the enforcement of ABA Accreditation Standards 211–213 that prohibit discrimination. While Professor Angel does not state it, salary data showing apparent discrepancies between protected and other groups may be a basis for pursuing discrimination claims. The consent decree does not prevent law schools, however, from maintaining that data. Additionally, as Professor Angel has noted, Section V of the decree notes that nothing in the proposed decree prohibits the ABA from conducting a *bona fide* investigation of whether a law school is complying with its accreditation standards.

C. University Administrators

1. Bernard J. Coughlin, S.J. President of Gonzaga University (Exhibit 17)

Gonzaga University President Bernard J. Coughlin, S.J., believes that 40% of a site inspection team should be people who are not law school deans or law faculty. He further believes that the consent decree should mandate the Special Commission to consider whether to revise ABA practices regarding control of financial resources. Father Coughlin is concerned that the ABA gives law school deans and faculty too much control of financial resources contributed to or generated by the law school. Father Coughlin also expressed concern that the ABA's proposed decree notification did not identify the officer to whom comments should be sent.

The ABA accreditation process was captured by legal educators. Section VI of the decree is designed to remedy this problem. The decree requires that site teams include a university administrator not affiliated with the law school and other public members. It also requires that law faculty make up no more than 50% of the Accreditation Committee and Council. Together, these provisions will significantly open up the process. Requiring site teams to include more people who are not law faculty may make it difficult to fill the teams. Being a member of a site team involves a substantial amount of work.

Intra-university resource allocation raises issues of educational policy. The resources standard will be initially addressed by the Special Commission.

Finally, Father Coughlin expressed concerns about notification by the ABA. In accord with the Antitrust Civil Process Act, the Justice Department published the proposed Final Judgment and CIS in the Federal Register and newspapers, informing members of the public that they may submit comments to the Antitrust Division of the Justice Department. The ABA, on its own, individually notified presidents of universities with ABA-approved law schools of the proposed Final Judgment.

[16] We have the 1992 and 1993 California bar results, but not for 1994. The results do not show what percentage of graduates of each law school ultimately passed the California bar. We agree with the comment's observation that better qualified applicants generally will choose to attend an ABA-approved school because, among other reasons, gradation from an ABA-approved school is a bar prerequisite in most States. The range of pass rate in 1992 and 1993 for July first-time takers and all takers in February is:

[17] The dean of one very high salary law school criticized the ABA's persistence in obtaining his school's salary data, stating that obviously his law school's salaries were adequate and the ABA was using the salary data to ''ratchet up'' salaries at lower paying law schools.

The legal education community is now well acquainted with this case and the proposed Final Judgment.

D. Law Schools Not Approved by the ABA

The Department received three comments from law schools not approved by the ABA.[18] They are generally critical of the limited scope of the Final Judgment.

1. University of La Verne (Exhibit 18)

The University of La Verne (''LA Verne'') is a law school accredited by the State of California but not approved by the ABA. While the California state court will admit graduates of California-accredited schools to its bar, most state bar admission rules require graduation from an ABA-approved school. First, La Verne believes that the consent decree does not restrain the ABA's support of bar admission or employer requirements that applicants graduate from ABA-approved law schools. Second, La Verne is concerned about the decree provisions relating to the physical facilities Standards and Interpretations. La Verne thinks that the ABA has required costly facilities in the past and is particularly worried that ABA Interpretations will continue to prohibit the leasing of law school facilities. Third, La Verne is opposed to the ABA's requirements about law library seating. Fourth, La Verne wants the Justice Department and Court to carefully review the Special Commission's proposals regarding calculating the faculty component of student-faculty rations. Fifth, La Verne fears that ABA inspection teams will use salary data available for other sources. Finally, La Verne believes that the ABA should ascertain the quality of law schools by measuring such outcomes as bar passage rates.

Preliminarily, we note that the consent decree is tailored to remedy the antitrust violations alleged in the Complaint: The ABA's acting as a guild for legal educators, and the resulting competitive distortion of the accreditation process. In addition, the decree is designed to remedy the four ABA accreditation practices that were alleged in the Complaint as Sherman Act violations. This is the purpose of a consent decree: to provide relief appropriate for the allegations in the Complaint. *Microsoft*, 56 F.3d at 1448, 1459.

La Verne's first concern, whether the ABA has encouraged States to require graduation from an ABA-approved school for bar membership, is outside the scope of charges in the Complaint and, consequently, is not addressed in the proposed Final Judgment. Moreover, in general, an organization's lobbying of state agencies is immune from antitrust liability under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The fact that individual employers may require graduation from an ABA-approved law school is not itself an antitrust violation and is outside the scope of the Complaint and relief in this case.

Second, La Verne is concerned about the ABA's rules on facilities. As we alleged in the Complaint, while adequate physical facilities is a relevant factor in assessing an educational program's quality, the facilities standards may have been applied inappropriately to enhance working conditions for law faculty. The ABA's facilities standards and practices, like others addressed in Section IV(D) of the Complaint, raise what are, in essence, educational policy issues. Hence, under the decree, they have been initially referred for re-evaluation to the Special Commission.

Third, the issue of library seating is not raised in the Complaint and is, thus, not a part of this proceeding.

Fourth, with regard to the student-faculty ration issue, the Department has required that this question of educational policy be reconsidered through a process not infected by capture. The Department will carefully review the Special Commission's report.

Fifth, the consent decree expressly forbids the ABA from taking any actions that impose salary requirements or using law school compensation data in connection with the accreditation or review of any law school. Consequently, ABA inspection teams cannot use any such data, regardless of its source, without the defendant risking contempt sanctions.

Finally, outcomes, like bar review passage rates, may be a useful measure of educational quality. This is, however, an issue of educational policy, not an antitrust issue and is outside the matters alleged in the Complaint.

2. Reynaldo G. Garza School of Law (Exhibit 19)

Reynaldo G. Garza School of Law (''Garza'') is a Texas law school that is not approved by the ABA. The Texas Supreme Court mandates that bar applicants be graduates of ABA-approved law schools. Garza complains that the proposed consent decree does not deal with the requirement that bar applicants be graduates of ABA-approved law schools and the effect of this Standard on graduates of unapproved law schools. Second, Garza alleges that the consent decree does not address the ABA requirement of a core library collection. Third, the decree does not address the ABA's requirement that law schools have a full time law librarian.

We respond by noting, first, that the decree was tailored to address the antitrust violations alleged in the Complaint. The Complaint does not challenge state requirements that bar applicants must graduate from ABA-approved schools. The actions of States are exempt from the antitrust laws under the ''state action'' doctrine announced in *Parker* v. *Brown, supra.*

The ABA Standards on core library collection and full-time librarian administrators are not challenged in the Complaint as antitrust violations and appear to involve solely questions of educational policy.

E. Graduates of Unapproved Law Schools

The United States received 13 comments from students and graduates of law schools that are not accredited by the ABA. Among the schools represented are Texas Wesleyan School of Law, the Commonwealth School of Law in Massachusetts, an unnamed state-accredited law school in Alabama, and five California schools: Western State University in San Diego; West Los Angeles School of Law; Glendale University College of Law; People's College of Law; and an unnamed law school. The majority of these comments describe the consequences of ABA accreditation for graduates of law schools not approved by the ABA.

Ten graduates and students criticized the rules in various States that require bar applicants to graduate from ABA-approved law schools only. They suggested that the consent decree abolish or weaken these rules. These graduates were: Deborah Davy (Western State University) (Exhibit 20); Joel Hauser (People's College of Law) (Exhibit 21); Wendell Lochbiler (West Los Angeles School of Law) (Exhibit 22); Larry Stern (Glendale College of Law) (Exhibit 23); Julie Ann Giantassio (Western State University) (Exhibit 24); Robert Ted Pritchard (enrolled in unnamed non-ABA approved law school) (Exhibit 25); Donald H. Brandt, Jr. (Texas Wesleyan University) (Exhibit 26); David White (Western State University) (Exhibit 27); Bill Newman (an unnamed unaccredited California law school) (Exhibit 28); and Russell R. Mirabile (school not named) (Exhibit 29).

[18] MSL's comment is responded to in Section IV.H.

Ms. Davy, Mr. Pritchard, and Mr. Stern suggested that graduates of state-accredited law schools should be allowed to take any state's bar examination. Mr. Mirabile proposed waiving graduates of all unapproved schools into the bar. Mr. Brandt proposed eliminating the ABA's power to accredit law schools. Mr. Brandt alleges that his school, Texas Wesleyan University, was granted provisional ABA approval on the condition that it graduate its third-year class before receiving that approval. Hence, Mr. Brandt did not graduate from an ABA-approved law school.

The ABA does not itself set state bar admission criteria. Approximately 42 States require graduation from an ABA-approved school as a condition for sitting for the bar. Such state requirements fall within the ''state action'' immunity from antitrust prosecution recognized by the Supreme Court in *Parker* v. *Brown, supra,* and its progeny. Consequently, we did not and cannot address state bar admission requirements in the proposed Final Judgment.

Five comments discuss graduates of unapproved law schools being denied admission into advanced legal degree (''LL.M'') programs at ABA-approved law schools. Ms. Davy contends that the ABA intrudes upon the discretion of the law schools and proposes amending the Final Judgment to make all individuals holding a Juris Doctor degree eligible for admission into ABA-approved LL.M. programs. Mr. Lochbiler explained that he was denied admission into a number of ABA-approved LL.M. and J.D. programs; each institution refused to accept a graduate of an unaccredited school. Mr. Stern said that he was denied admission into LL.M. programs because no ABA-approved school would consider him without risking its accreditation. Mr. White was recently denied admission to an LL.M. program at an ABA-accredited Florida law school. He claimed the school would not change its policy regardless of the consent decree. Mr. Brandt noted that has continued educational options have been limited, but did not describe these options.

Under the consent decree, the ABA may not bar a law school from enrolling a member of the bar or a graduate of a state-accredited law school in an LL.M. or other post-J.D. program. Previously, the ABA Standards had barred law schools from doing so. The decree permits individual law schools the discretion to admit whom they want in their graduate programs.

Five comments focus on the ABA's rules prohibiting approved schools from offering transfer credit for courses at unapproved law schools.

The author of one comment, who wished to remain anonymous, graduated from a state-accredited, but not ABA-approved, law school and is a member of the bar (Exhibit 30).[19] He wrote that the dean of an ABA law school in another State refused to grant credit for any of his courses. The dean was aware of the proposed Final Judgment. The author believes that the proposed Final Judgment should be modified to prevent approved schools from refusing to grant credit. Mr. Prichard described an admissions representative of an ABA-approved California law school who told him that the institution does not accept any credits earned at a non-ABA school. The admissions representative allegedly stated that the consent decree did not change this. Mr. Prichard advocates several modifications to the proposed Final Judgment, including requiring all law schools to sign the consent decree and mandating that all state-accredited law schools be automatically granted provisions approval by the ABA.

In his comment, Frank DeGiacomo proposes deleting from the proposed Final Judgment the phrase in Section IV(D)(2) that allows the ABA to require that ''two-thirds of the credits required for graduation must be successfully completed at an ABA-approved law school.'' (Exhibit 31). Mr. DeGiacomo contends that the provision deters competition from non-ABA law schools. He alleges that ABA-approved schools have few seats for transfer students and that transfer applicants from unaccredited schools are viewed less favorably than students from ABA-approved law schools who are perceived as having achieved greater academic achievement.

James B. Healy submitted to the Government a background brief by himself and three other students detailing the closure of the unaccredited Commonwealth School of Law. The closure prevented them from graduating (Exhibit 32). The four unsuccessfully sought to transfer to 15 law schools with credit for their courses at Commonwealth. Mr. Healy inquires whether the students have any recourse. Finally, Mr. Mirabile believes ABA-approved schools should give complete credit for all work at unapproved law schools.

Under the consent decree, the ABA may not prevent ABA-approved schools from offering transfer credit for work successfully completed at a state-accredited law school. The decree allows the ABA to require that two-thirds of the credits required for graduation be successfully completed at an ABA-approved law school. As with the LL.M. programs, the decree leaves the choice of whether to offer transfer credits to the individual school. Some schools may choose to do so; others may not.

Mr. DeGiacomo proposes eliminating the requirement that two-thirds of the credits be completed at an ABA-approved law school and Mr. Mirabile proposes granting credit for all work at unapproved law schools. For reasons of educational policy, an accrediting agency may require that the bulk of an education be completed at the degree-granting institution. The two-thirds requirement allows the ABA to ensure quality control—the legitimate purpose of accreditation. The decree provision rests on the ABA's existing parallel rule for credit for courses completed at foreign law schools, a rule that did not so directly implicate the guild interests that distorted the rule for transfers from domestic schools.

In addition to comments about bar admission and LL.M. requirements, Mr. Stern pointed out that the ABA's student-faculty ratio rules that no rational application to educational quality because they excluded part-time faculty from the ratio. Evidence that anticompetitive purposes had distorted the formulation of the present student-faculty ratio rule was the basis of the Department's allegation in the Complaint. But low student-faculty ratios may ensure smaller classes and more student-faculty contact, desirable educational outcomes. Because of this, the Special Commission will have the first opportunity to address this educational policy issue.

F. Other Practicing Attorneys

The Justice Department received comments from five other practicing attorneys.

1. William A. Stanmeyer (Exhibit 33)

William A. Stanmeyer is a practicing attorney and former law professor. He commends the Justice Department for bringing this action. He believes that many of the ABA's Standards are irrelevant to quality legal education, sometimes vague, and often applied arbitrarily. Mr. Stanmeyer is troubled by outgoing ABA President George Bushnell's denial of any wrongdoing and fears that the ABA will resist real change.

[19] The author requested having his name and address withheld from the comment because he has an application pending with an ABA-approved law school. We have redacted this information in the copy of the comment filed with the Court.

The Justice Department agrees that some of the ABA's accreditation practices had little to do with quality. The decree is designed to remedy these problems. In terms of Mr. Bushnell's comment, a defendant is not required to admit to the charges in the Complaint as part of a settlement. This is one of the incentives to enter a decree instead of proceeding to trial. Finally, the Department expects that the contempt sanction will be sufficient to ensure that the ABA will abide by the decree.

2. Four Concerned Lawyers (Exhibit 34)

The Justice Department received an anonymous comment from ''4 Concerned Lawyers.'' They congratulate the Department on the consent decree. They are concerned about having the ABA's Consultant on Legal Education, Jim White, reporting to the ABA's Executive Director, Bob Stein. They fear that friendship between White and Stein will prevent the latter from effectively supervising the former. Second, the four wish that the Justice Department would investigate the relationship between Consultant White and Indiana University, where he teaches, and examine the payment arrangements between them.

In response, we note, preliminarily, that the decree does not require the Consultant to report to the Executive Director. Moreover, there are strong incentives to ensure that the terms of the decree are carried out. Violations of the consent decree are punishable by contempt sanctions. In fact, the Consultant and Executive Director must sign annual certificates acknowledging this. In addition, the decree opens up the ABA's accreditation operations to more scrutiny. The Accreditation Committee, Council, and Standards Review Committee will have many members who are not affiliated with law schools. The payment antitrust concern or relate to the antitrust violations alleged in the Complaint.

3. Frederick L. Judd (Exhibit 35)

Frederick L. Judd is an attorney, certified public accountant, and a graduate of Brigham Young University (''BYU'') law school. He fears that the ABA's requiring law schools to set schedules that limit the amount of time students can work excludes students who need to work to pay for law school. Mr. Judd wished to work as a C.P.A. while a full-time BYU student, but was prevented from setting up a class schedule that would enable him to work during the day.

The ABA's Standard limiting full-time students to 20 hours of work per week does not raise antitrust concerns or relate to the violations alleged in the Complaint. There may be strong educational policy reasons to limit students' work so they may devote more time to their studies.

4. Michael L. Coyne (Exhibit 36)

Michael L. Coyne is an attorney in private practice in North Andover, Massachusetts, and is also associate dean of MSL. In his comment, Dean Coyne complains about deposition testimony of former Accreditation Committee Vice Chairman Claude Sowle and ABA Consultant on Legal Education James White, taken by MSL in its private action against the ABA. Dean Coyne believes that their testimony about salaries is at odds with Paragraphs 15 and 16 of the United States' Complaint, in which we allege that the ABA collected salary data for peer schools and found that schools which paid salaries below the median were non-compliant. Dean Coyne says that Mr. Sowle testified in the private action that the ABA has not paid attention to geographic or competitive salary information for some time. He asks the Department to clarify whether this testimony contradicts documentary evidence held by the Justice Department.

Dean Coyne also seeks disclosure of materials that were obtained under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311–1314. The Act imposes strict disclosure limits on the Government (15 U.S.C. 1313 (c) and (d), and the Government must comply with them.

The ''Government's Opposition To MSL's Motion For Intervenor Status and For Determinative Documents And Materials,'' filed on October 10, 1995, addresses MSL's request for documents in more detail. Were the Court to order production of the documents, there would be a substantial chilling effect on the Department's work. Defendants would be less willing to enter consent decree because they would fear it would lead to the production of their documents. MSL has a private action against the ABA and has sought discovery in that action. That is the proper forum for MSL's discovery requests.

Dean Coyne also attached pages 207–08 of Mr. Sowle's testimony to his comment. On those pages, Mr. Sowle admitted that the Accreditation Committee considered how salaries paid by a school compared to those paid by its peers. Dean Coyne's concern as to the substance of the deposition testimony regarding the use of salary information does not seem directly relevant to the issue in this APPA proceeding. That issue is whether entry of the proposed consent decree is in the public interest. Regardless of the testimony, the relief proposed adequately deters the defendant from using the accreditation process to fix salaries.

5. Jackson Leeds (Exhibit 37)

Mr. Leeds believes that the consent decree will allow state courts to violate antitrust laws in regulating admissions to the bar.[20] Mr. Leeds believes that the New York Court of Appeals wrongly requires law schools to be approved by the ABA, American Association of Law Schools, or the New York State Department of Education. Moreover, Mr. Leeds apparently requested from the City University of New York Law School at Queens College (''CUNY'') a copy of the ABA's site inspection report for CUNY. CUNY apparently refused because distribution of the report is limited to those authorized to receive it by the ABA's Council of the Section of Legal Education. Mr. Leeds also is upset that CUNY admits students with low traditional indicators (test scores and GPAs), and claims that CUNY does not enforce class attendance policies.

In response, the Justice Department notes that, under *Parker* v. *Brown, supra,* and its progeny, the actions of the state courts in determining bar admissions or in approving law schools are immune from antitrust prosecution. CUNY's apparent refusal to give Mr. Leeds the inspection report, CUNY's admissions standards, and its class attendance policies do not raise antitrust issues and are not related to the subject matter of the Justice Department's Complaint in this action.

G. Members of the General Public

The Justice Department received comments from three individuals whom we cannot identify as being in any of the preceding categories.

1. Robert Reilly (Exhibit 38)

Robert Reilly is concerned about practicing lawyers who are graduates of unapproved law schools but who are unable to practice in many States because those States require graduation from ABA-accredited law schools. Mr. Reilly believes that the States impose this requirement to limit competition and to deny graduates of unapproved law schools the ability to practice law in the place they wish to live.

State bar admission requirements restricting bar membership to graduates of ABA-approved schools may limit competition, but they cannot be

[20] It is not entirely clear that Mr. Leeds is a practicing attorney. His letter indicates legal training and, hence, we have classified him here as such.

challenged under the antitrust laws because of the ''state action'' immunity doctrine announced by the Supreme Court in *Parker* v. *Brown, supra.* Consequently, such requirements are beyond our enforcement jurisdiction.

2. Robert W. Hall (Exhibit 39)

Robert Hall, President and Director, Hawaii Institute for Biosocial Research, expressed dissatisfaction with the proposed Final Judgment, primarily because he believes that it does not remedy the ABA's role in ''anticompetitive admissions processes required by the ABA in the accreditation process.'' In particular, he criticized the control of the Law School Admissions Council (''LSAC'') by ABA-approved law schools. He does not believe that law schools should use the LSAC's aptitude test (the ''LSAT'') in the admissions process.

While the ABA's Accreditation Standards require that law schools use the LSAT, or a comparable aptitude test, we do not know that the ABA requires law schools to maintain median LSAT scores. The ABA's requirement appears consistent with Department of Education regulations mandating that accrediting agencies require that accredited schools employ a suitable aptitude test to screen applicants. Whether the LSAT, or any other test, is a reliable indication of an aptitude for a field of study seems to involve educational, not antitrust, policy questions. This issue is also not raised in the Complaint.

Mr. Hall also criticized the domination of the law school accreditation process by insiders and the lack of public involvement in the accreditation process. We recognize this problem and the consent decree remedies it by introducing more people outside of legal education into the accreditation process and by setting term limits for members of the committees that oversee law school accreditation. Mr. Hall further believes that the insider status of some members of the Special Commission may have the effect of putting the fox in charge of the chicken house. The proposed consent decree answers this, too, by requiring that the ABA's Board of Governors review the Special Commission's findings. Additionally, the Justice Department may challenge the Special Commission's recommendations in this case.

Mr. Hall further believes that the ABA has boycotted any law school that does not have small classes for at least some part of its total instructional program. He believes it will be costly for a proprietary school to offer small classes. In response, we note that the size of classes usually raises issues of educational policy. An accrediting agency may require some small classes so students benefit from greater teacher contact.

Finally, Mr. Hall criticizes the ABA Interpretation requiring law schools to have facilities that are owned rather than leased. He points out that this may be a problem in areas where land and buildings are extremely expensive. In response, the Justice Department notes that the decree is tailored to the antitrust violations alleged in the Complaint. The ABA is not charged with violating the antitrust laws by virtue of all of its facilities standards, including its rules regarding leased facilities or their implementation.

3. Amrit Lal (Exhibit 40)

Amrit Lal wrote to congratulate the Justice Department on the consent decree. Dr. Lal believes that state bar examiners allegedly manipulate bar exam results to limit bar admissions. The Supreme Court, in *Hoover* v. *Ronwin,* 466 U.S. 558 (1984), held that the state action immunity doctrine protected one state supreme court's bar admissions restrictions from an antitrust claim that made similar allegations. Dr. Lal also alleges that the Pennsylvania Board of Law Examiners discriminate on the basis of age, ethnic identity, and national origin. These concerns do not relate to the matters alleged in the Complaint.

H. Massachusetts School of Law (Exhibit 41)

MSL has filed a massive 83-page comment with an Appendix and about 400 pages of Exhibits. MSL previously filed an Intervention Motion that both parties oppose. MSL was denied accreditation by the ABA in 1994 and has filed an antitrust case against the ABA in the Eastern District of Pennsylvania. Last month, MSL filed a second action against the ABA in a Massachusetts state court, alleging unfair competition, fraud, and other matters. MSL's comment recommends numerous changes in the proposed Final Judgment, the delay of its entry, and the vast production of documents and materials from the Justice Department's investigatory files. The Government opposes the requested modifications and recommends no delay in the entry of the Final Judgment. We also oppose MSL's ''discovery'' request, believing that it is particularly inappropriate to grant discovery collaterally in an APPA proceeding to a party whose discovery requests have been denied in its own litigation.

1. Capture

MSL does not believe that the proposed consent decree adequately remedies the ''capture'' of the ABA accreditation process by the group that benefited from it. MSL suggests, as more effective remedies, requiring the ABA to choose ''procompetitive'' nominees for the Council and Committee (MSL provides the names of 21 possible nominees), and banning any members of the ''insider'' group (MSL lists about 47 ''insiders'' and about 32 of their ''helpers'') from further participation in accreditation. It urges that the decree should ban ''the ABA from violating the Sherman Act through use of its other accreditation criteria to achieve anticompetitive purposes.'' Comment, p. 11. The Government believes that it is inappropriate for it or the Court to micromanage the defendant's accreditation activities to require that certain people be designated to participate in accreditation and others prohibited. Such relief would be extraordinary and unique among consent decrees. Enjoining the ABA from violating the Sherman Act in its application of its remaining accreditation criteria is at the other extreme—so vague as to add little effective relief. This is because such a provision requires a Rule of Reason trial just to enforce a contempt action. The consent decree's limits on law school faculty participation on governing committees, the required involvement of ''outsiders'' on site inspections, and the close involvement of the ABA's Board, itself undoubtedly independent from accreditation ''insider'' control, are reasonable measures to eliminate the capture of the accreditation process.[21]

MSL claims that the ABA has violated the consent decree by adding an extra academic to the Section of Legal Education's Nominating Committee and that the new data questionnaire circulated by the ABA to law schools requests data from which average and, possibly, individual salaries can be calculated is in violation of the decree. Our information, however, is that no additional academics have been added to the Nominating Committee since the decree was filed, and that the event that MSL describes took place last year. The 1995–96 Nominating Committee has one legal educator.[22] As to the data

[21] The ABA's Board, independent of consent decree requirements, has also required the Consultant of the Section of Legal Education to report to the ABA's Executive Director.

[22] The Nominating Committee members are a California practitioner, a law school librarian, a university president (who is a former law school dean), a Nebraska practitioner, and a non-lawyer

questionnaire, our understanding is that average salaries cannot be calculated, except in the most gross fashion, and that individual salaries cannot be calculated in any fashion from the data being collected. Moreover, the aggregated salary expense data the ABA collects is not given to the Accreditation Committee, the Council or members of site teams, and is not used in connection with law school accreditation. The Justice Department does not object to the collection of this data as long as it cannot be disaggregated.

2. Secrecy

MSL points out that the ABA's accreditation Standards and Interpretations are often quite general. Their content has been supplied by the enforcement process and by the policies followed by enforcement officials. MSL believes that a simple cure for monitoring the ABA's actual accreditation practices would be to require that all documents created during the accreditation process be made public.

The proposed Final Judgment does require the defendant to publish annually the names of those who participate in domestic and foreign site inspections and the schools inspected. Additionally, the Council must report to the Board all schools under accreditation review and the reason the law schools are still under review. The Council must also approve and the Board review all annual and site inspection data questionnaires sent to law schools. Our interviews indicated that some individuals thought that schools and site inspectors might be inhibited in some respects if their free exchange of views during the accreditation process were made public. Since this appears to be a matter implicating legitimate accreditation process concerns, the Government was reluctant to include total disclosure as required antitrust relief.

3. The Special Commission

MSL attacks the composition of the Special Commission, claiming that they were appointed by the two immediate past Chairmen of the Council and that at least 8 of the 15 commissioners ''are part of the heart and soul * * * or are closely tied to the capturing inside groups.'' [23] Comment, p. 20. While many of the members of the Special Commission have had close ties to the ABA and its accreditation activities, its membership is six legal academics (including one well-known critic of ABA accreditation), two judges, one university president (a past ABA president and Council Chair), five practitioners (including one critic of ABA accreditation), and one public member (the president of the League of Women Voters). The Special Commission had been established by the ABA, prior to settlement negotiations with the Government, to make a comprehensive review of the ABA's accreditation of law schools. The Government will closely examine its report. The proposed decree leaves matters that have legal educational policy implications to the Special Commission. The ABA had initiated the Special Commission in response to criticisms prior to the filing of the Department's case and it is reasonable to give the first opportunity to address these policy interests to the Commission. The Special Commission's recommendations are subject to the approval of the ABA's Board. The Government may challenge any proposal with respect to the six subjects enumerated in the proposed consent decree.[24] The Government expects that it and the defendant will resolve any differences that may develop so that court involvement in the process will be unnecessary.

MSL claims that this process involves lengthy delays, possibly 15–18 months, and requests that either the Court delay entry of the decree until the Special Commission's report is adopted and approved by the Board and Justice Department, or that the Court should allow third parties the opportunity to comment.

While we do not expect anything so lengthy as a 15–18-month delay, entry of the decree should occur now.[25] The decree has established a reasonable, defensible remedy to treating the allegations in the Complaint. Specific practices that clearly violate the antitrust laws and cannot be justified on educational policy ground have been immediately enjoined. The process that produced these and other accreditation rules is in the process of reformation, with the initial work being done by the ongoing Special Commission, subject to later approval by the ABA Board and Justice Department.

The public has had the opportunity to comment on the subject areas referred to the Special Commission and some, including MSL, have. Certainly, if third parties have comments or complaints about the Special Commission's report, which will be made public, the Justice Department welcomes and will consider those comments.[26] We have often initiated judgment enforcement proceedings based on information from third parties. Public comments will be valuable in forming our response and in our discussions with the defendant after the Special Commission's report.

MSL claims that use of the Special Commission circumvents the Tunney Act. The consent decree establishes a process rectifying the conduct alleged in the Complaint. The public has had the opportunity to comment on the process as well. The Department will welcome comments when the Special Commission's report is public. In the unlikely event the two parties cannot reconcile differences on the Special Commission's report, the proposed consent decree provides that the Court will resolve the Government's challenge, applying a Rule of Reason analysis.

MSL believes that such a challenge should be decided under a ''quick look'' analysis. In a recently decided case, however, the Third Circuit remanded for a Rule of Reason analysis a district court decision that had applied a ''quick look'' analysis where elite Northeastern universities fixed the *price* charged to commonly-admitted students who also received financial aid. *United States* v. *Brown University, et al.*, 5 F.3d 658 (3rd Cir. 1993). The subjects referred to the Special Commission do not directly restrain price and do not seem as appropriate for a ''quick look'' analysis.

MSL also comments on some of the topics on which the Special Commission will report. It notes that the student-faculty ratio standard has been applied by the ABA against law schools to require the employment of the capturing group—full-time legal theorists—and discourages the use of judges and practitioners.

The proposed consent decree left the initial recommendation regarding the correct use of student-faculty ratios to the Special Commission for several reasons. Student-faculty ratios are generally regarded as a useful legitimate accreditation tools, as is the requirement of a core full-time faculty. The Government expects that the Special Commission and the ABA Board will suitably assess the continuing utility of student-faculty ratios in a manner that

public member. The term of the individual mentioned by MSL expired last summer.

[23] Only two of the Commissioners are listed in MSL's enumeration of the 79 ''insiders'' and ''helpers'' group. Comment, p. 6 n.4.

[24] The six subjects are a small part of the Special Commission's entire report.

[25] The decree can be entered once the comments and the Response have been published in the Federal Register and the Government has certified to the Court compliance with the APPA.

[26] Only a few of the 41 comments discuss the Special Commission.

does not skew the outcome to promote guild interests.

MSL also criticizes the ABA's use of the vague facilities accreditation standards to micromanage law schools and to require the construction of what it terms ''Taj Mahal'' law school facilities. The use of this standard to enhance unnecessarily full-time faculty working conditions is an appropriate concern. Since adequate facilities can be clearly related to educational quality, but the construction of unnecessary facilities imposes costs on universities and state governments, the Special Commission should have the opportunity to recommend a standard and practice that will consist wholly of legitimate educational concerns.

4. ''Procedural'' Matters

MSL believes that the proposed relief is inadequate to eliminate the capture problem. MSL anticipates that the ABA will claim that it was not ''feasible'' to include practitioners to staff 6–7 person inspection teams and staff them with insiders.[27] The proposed consent decree does require that the composition of site teams be made public. This will make it easier for the public, and the Government, to see if the defendant is living up to its obligations under the decree. MSL raises the specter of other possible abuses by a Legal Consultant intent on evading, at a minimum, the spirit of the consent decree. The decree cannot address all possible outcomes but a systematic evasion of its mandate is cause for a contempt hearing. On balance, the decree makes a reasonable effort to eliminate capture of the accreditation process while preserving the ABA's ability to perform legitimate and important accreditation work. This case has also captured the attention of the ABA's leadership, which has personal and economic incentives to avoid a repetition of the conduct that caused the United States to bring this suit.

5. Reliance on ABA Leadership

MSL doubts that the ABA's leadership can be trusted to effect changes in the accreditation process, relying, in particular, on the ABA's outgoing president's statement denying antitrust liability. A value of the consent decree process is that it permits the Government to obtain effective and immediate relief that the defendant may accept in part because it does not require an admission that can be used collaterally. Whether the defendant believes it has violated the antitrust laws is not as important as whether it intends to comply with the decree. Further, unlike defendants in most antitrust cases, the ABA's leadership did not economically benefit from the conduct alleged in the Complaint, nor, perhaps, did the ABA itself. Benefit accrued to legal academics in the Section of Legal Education, not ABA leaders who have an economic incentive to avoid conduct that may be costly to their organization. The leadership adopted changes and entered this decree over the apparent opposition of the leadership of the Section of Legal Education.[28] MSL's recitation of ABA antitrust ''insensitivity,'' involving far different subjects several decades ago, is of little relevance.

6. ABA Antitrust Compliance Officer

MSL also objects to the provision of Section VIII of the proposed Final Judgment that requires an antitrust compliance program, including the appointment of an antitrust compliance officer. Compliance programs have been a fairly standard provision in civil antitrust cases brought by the Government and settled by consent decrees since the *Folding Carton* case in the late 1970s.[29] The compliance program is, if anything, somewhat more rigorous than in other consent decrees.

We expect that the ABA's General Counsel will be named as the compliance officer. This, too, typically occurs in Government antitrust consent decree proceedings. We know of no case in which the ''identity, professional background and views of the Compliance Officer'' was an issue in an APPA proceeding. Clearly, since the compliance officer may be required to provide advice to the defendant's officials, one cannot expect the compliance officer to be one chosen by MSL.

MSL claims that it is ''an incomprehensible lacuna'' for the proposed consent decree not to give the antitrust compliance officer ''supervisory responsibilities'' with respect to the Special Commission. But, we see no there, there. The Special Commission's charge is to reconcile the educational policy questions in the six subjects it is to report on. While it may be seeking antitrust advice, there is no reason why its work, which also includes a comprehensive review of law school accreditation, must be supervised by the antitrust compliance officer or why that should be required by the Court.

MSL also claims that the Department of Education's review of ABA accreditation ''has been wholly ineffective to date in assessing quality.'' It believes that Section VI(L) of the proposed consent decree may be related to that claimed failure by the Department of Education.[30] MSL concludes that ''it is perplexing that the Antitrust Division would now rely on the DOE as a vehicle for assuring quality or for precluding self-interested conduct.'' Comment, p. 58. The Justice Department disagrees with MSL's statement about the Department of Education and has no doubt that the Department of Education has carried out its mandate under the Higher Education Act. MSL's claims does not relate to whether entry of the proposed Final Judgment is within the reaches of the public interest, the issue now before the Court.

7. MSL Discovery Requests

MSL's comment restates the arguments made in its September 26 Intervention Motion for discovery of the Government's investigative files. As its first ground, MSL contends that it is entitled to discovery of a ''wide spectrum of documents, evidence, memoranda and other evidence that can be determinative'' under § 16(b) of the APPA. The APPA calls for the Government to file ''materials and documents *which the United States considered determinative in formulating* [the proposed consent decree]'' (emphasis added). Usually, there are no such documents and there were none in this proceeding.[31]

MSL again heavily relies on *United States v. Central Contracting Co.,* 537 F. Supp. 571 (E.D. Va. 1982). since *Central Contracting* was decided, however, two courts in this District have rejected requests for documents not identified by the United States as ''determinative.'' *United States v.* LTV Corp., 1984–2 Trade Cas. (CCH) ¶66,133 at 66,335 n.3, *appeal dismissed,* 746 F.2d 51, 52 (D.C. Cir. 1984); *United States v.* Airline

[27] There is no requirement that the size of inspection teams be that great. ABA inspection teams have doubled in size over the past 20 years.

[28] Within a month of the filing of the consent decree, the chairpersons of the Council and Accreditation Committee had resigned, sharply criticizing the settlement.

[29] *U.S. v. Alton Box Board Co.,* 1979–2 Trade Cas. (CCH) ¶62,992 (N.D. Ill. 1979). The then-Assistant Attorney General of the Antitrust Division described the antitrust compliance program as ''innovative provisions that add a new dimension to . . . [a] recent emphasis on preventive antitrust.'' P. 1, *Legal Times of Washington,* July 9, 1979.

[30] MSL's venturing into unrelated subjects and gratuitous attacks on a Cabinet agency is further reason why it should not have party or *amicus curiae* standing in this proceeding.

[31] The Government attached three documents as exhibits to its Memorandum Opposing Intervention that, while not ''determinative,'' were relevant to the proposed consent decree since they showed the ABA was reforming its accreditation of law schools before settling this case.

Tariff Pub. Co., 1993–1 Trade Cas. (CCH) ¶70,191 at 69,894. MSL attacks at great length the Government's certification in most APPA proceedings that there were no 16(b) ''determinative'' documents. All of the APPA proceedings were court-supervised and the courts entered the consent decrees. The Government previously briefed this issue and incorporates that brief by reference.[32]

As a second prong for discovering the Government's investigative files, MSL claims that 16(e) of the APPA provides for such discovery in the public interest when there is ''. . . a need to protect the interests of injured parties by making available to them documents and information gathered by the Government that will 'assist in the effective prosecution of their claim.''' Comment, p. 68. Of course, no court has ordered such discovery in the 20-year history of the Tunney Act and none of the other 40 comments in this proceeding requested such discovery. MSL's stated purpose for its request is improper—to intrude into the Government's deliberative process to second-guess its use of prosecutorial discretion. Nor should MSL be able to use the APPA proceeding here to obtain discovery it was denied in its pending case against the ABA in the Eastern District of Pennsylvania. The discovery sought by MSL goes far beyond the limited purpose of an APPA proceeding, which is the review of the decree itself, not a review of the actions or behavior of the Justice Department.

MSL's attempt to obtain discovery under 16(e) should be denied for a number of reasons. MSL should not use this proceeding to obtain discovery it was unable to gain in its two pending cases against the ABA. If anything, the APPA was designed to protect injured parties who are uninformed as to the source of their injury, not disappointed litigants. The purpose MSL states for its discovery request goes well beyond the limited purpose of an APPA proceeding and no court has required such production under § 16(e). Additionally, requiring the production of investigative files will harm the public interest by discouraging other antitrust defendants from entering into consent decrees, and will make more difficult compliance with CIDs during Antitrust Division investigations.

[32] At pages 11–20 of our October 10 Memorandum opposing intervention, we briefed the Court on the § 16(b) determinative documents requirement.

8. Non-Decree Matters

In its comment, MSL requests the Government to give further consideration to three subjects outside the Compliant and proposed Final Judgment. The subjects are the accreditation requirements that substantially all law school first-year courses be taught by full-time faculty, the prohibition against full-time law students working more than 20 hours per week, and the library facilities and core collection requirement. MSL correctly recognizes that these matters are outside the scope of this APPA proceeding. *Microsoft,* 56 F.3d at 1459–60.

Conclusion

For these reasons, the Court should enter the consent decree upon the Government's certification to the Court of compliance with the APPA.

Dated: October 27, 1995.

Respectfully submitted,

D. Bruce Pearson,

Jessica N. Cohen,

James J. Tierney,

Molly L. Debusschere,

Attorneys, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW., Room 9903, Washington, DC 20001, Tel: 202/307–0809, Fax: 202/616–5980.

Certificate of Service

On October 27, 1995, I caused a copy of ''United States' Response To Public Comments'' to be served by hand-delivery upon:

David L. Roll,
Richard L. Whiting,
Roger E. Warin,
Steptoe & Johnson, 1330 Connecticut Avenue, NW., Washington, DC 20036

and by Federal Express upon:

Ronald S. Flagg, Sidley & Austin, 1722 Eye Street, NW., Washington, DC 20006

David T. Pritikin, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603

Darryl L. DePriest, 541 N. Fairbanks Court, Chicago, Illinois 60611

D. Bruce Pearson

In the United States District Court for the District of Columbia

[Civil Action No. 95–1211 (CRR)]

United States of America v. American Bar Association.

United States' Response To Public Comments; Exhibits

Exhibits

Comment of Association of Specialized and Professional Accreditors (''ASPA'')
Comment of National Office for Arts Accreditation in Higher Education
Comment of Association of Collegiate Business Schools and Programs (''ACBSP''
Comment of American Library Association (''ALA'')
Comment of Bernard Fryshman
Comment of Accrediting Bureau of Health Schools, Accrediting Council of Continuing Education & Training, Accrediting Council for Independent Colleges and Schools, and National Accrediting Commission of Cosmetology Arts & Sciences (''Four Agencies'')
Comment of Clinical Legal Association (''CLEA'')
Comment of Howard B. Eisenberg
Comment of John S. Elson
Comment of Jeffrey L. Harrison
Comment of Gary H. Palm
Comment of Millard H. Ruud
Comment of Roy T. Stuckey
Comment of Lawrence A. Sullivan and Warren S. Grimes
Comment of Bardie C. Wolfe, Jr.
Comment of Marina Angel
Comment of Bernard J. Coughlin, S.J., Gonzaga University
Comment of University of La Verne
Comment of Reynaldo G. Garza School of Law (''Garza'')
Comment of Deborah Davy
Comment of Joel Hauser
Comment of Wendell Lochbiler
Comment of Larry Stern
Comment of Julie Anne Gianatassio
Comment of Robert Ted Pritchard
Comment of Donald H. Brandt
Comment of David White
Comment of Bill Newman
Comment of Russell R. Mirabile
Comment of an Author to remain Anonymous
Comment of Frank DeGiacomo
Comment of James B. Healy
Comment of William A. Stanmeyer
Comment of ''Four Concerned Lawyers''
Comment of Frederick L. Judd
Comment of Michael L. Coyne
Comment of Jackson Leeds
Comment of Robert Reilly
Comment of Robert W. Hall
Comment of Amrit Lal
Comment of Massachusetts School of Law (''MSL'')
Proposed modification to consent decree
December 5–6, 1994 Staff Analysis

Association of Specialized and Professional Accreditors

September 25, 1995.

John F. Greaney, Chief,
Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW.—Room 9903, Washington, DC 20001

Dear Chief Greaney: The Association of Specialized and Professional Accreditors (ASPA) appreciates the opportunity to provide comment on the issues and actions proposed to settle the antitrust suit of the United States of America against the American Bar Association, filed June 27, 1995, as Civil Action No. 95–1211(CR). A list of ASPA's 40 member specialized and professional accrediting agencies is enclosed.

ASPA does not presume legal expertise in this case, but does see and wishes to comment on the potential impact of the proposed settlement on accreditation theory and practice as it affects the education of students and the improvement of institutions and programs. ASPA does not take issue with prohibitions against the use of accreditation to establish specific dollar figures for compensation paid to faculty, administrators or other employees. ASPA has no comment regarding settlement terms associated with transfer of credit based on the profit or not-for-profit status of an institution.

ASPA supports the principle of a free and open market in the education arena and believes that educational quality should be pursued in ways that promote such a free market. After careful reading of the Competitive Impact Statement filed on July 27, 1995, ASPA concludes that the Department of Justice, in its interactions with the American Bar Association, has gone beyond the identification and remediation of specific problems and has created theories and potential precedents that could do serious damage to educational quality and to the practice of accreditation. ASPA's comments are intended, in part, to help reduce the unintended consequences that are likely to result if the proposed Final Judgment is not modified prior to being finalized.

1. The document, in its tone, equates the presence of expertise with the automatic capture of a field against the public interest, long service with conflict of interest, and confidentiality with collusion for sinister purposes.

We believe that in the vast majority of cases, expertise helps to build and maintain excellence and the kind of progress that creates and sustains a free market. Long service contributes to the development of expertise, wisdom and consistent application of standards and criteria in the accreditation process, as in other situations. Surely this is one reason that most judges are appointed for life. Likewise, appropriate confidentiality enables serious and honest reviews of institutions and programs by minimizing superficiality and the defensiveness that are often imposed by public relations considerations when deliberations are not confidential.

2. In a data-based society, it is excessive and inappropriate to prohibit the collection or dissemination of data by an accrediting agency or professional association.

The Justice Department has identified a problem with the particular uses of data. The identified problem does not focus on the existence of the data or the fact of its collection. Accrediting agencies and affiliated professional associations collect and publish data as a resource. That collection does not seem to be an antitrust issue, or if so, it extends beyond accreditation into other higher education arenas. The settlement, in our view, can appropriately focus on the appropriate use of data, while not focusing on or limiting its existence or generation.

3. To prohibit any use of compensation and similar data could create a chilling effect on self-assessment and other benign practices.

A truly comprehensive review of all elements involved in the work of a particular university or program can require the use of compensation and other similar data. There is a clear distinction between using statistics to set salary and similar requirements and using such statistics (along with other data) in local management decisions. Data facilitate comparisons of performance against a school or program's mission, goals and objectives. To restate, the focus of the Competitive Impact Statement should be to limit the inappropriate use of data, not any use.

4. The proposed final judgment inappropriately imposes specific numerical requirements on:

a. the composition of various decision-making bodies.

The specific numbers outlined in the Competitive Impact Statement will not in-and-of-themselves ensure either a free market or educational quality, nor will any other set of numbers. We are not aware of any validity and reliability study proving that the presence of professionals or public members in certain proportions changes the values of an accrediting agency, increases fairness or integrity, or brings about true representation of a profession or the public as a whole.

While we strongly favor the presence of professional expertise and public oversight in accreditation activities, we believe that the federal government should not dictate particular distributions, especially as this could be viewed as an attempt to use precedent to set national policies in these areas.

b. the length of terms of office.

When volunteers who serve on decision-making bodies or accrediting teams are prevented by stringent term-limits from developing sufficient experience or expertise, agency staff can have a disproportionate influence on the accreditation process. While we favor appropriate limits on terms, such limits are best set by the agencies themselves. There is no evidence that suggests that shorter terms promote the Department of Justice's antitrust and free-market objectives.

c. the size and composition of accrediting teams.

If extrapolated over the accreditation community as a whole, the effect of such stipulations on size and composition of site visit teams could increase the cost of accreditation site visits by as much as 200%-to-300% with little benefit except for the symbolic value of representation. An accrediting agency must have appropriate standards, well-trained volunteer personnel, and written policies and protocols that are consistent with free-market objectives. However, when an agency has such mechanisms in place, it is wasteful and unnecessary to require participation formulas that are based on place of work.

5. The specified appeal and reporting requirements between the ABA's Accreditation Committee, Council and Board of Governors appear to directly conflict with the U.S. Department of Education's requirement for increased separation and independence of the accrediting arm from the professional association.

Section 602.3(b)(1)–(3) of the USDoE's Procedures and Criteria for Recognition of Accrediting Agencies requires accrediting agencies with gatekeeping responsibilities to maintain an arm's length ''separate and independent'' distance from their professional associations (see enclosure). In addition, another section of the DoE Criteria requires that accrediting agencies must not report to their professional associations any accreditation information that is not also reported to the public. Thus, accreditors are faced with two different points of view and with conflicting requirements. It is our contention that oversight by a larger or parent body will neither automatically create nor prevent conflict of interest.

6. Annual publication of schools visited and their site visitors would bring accreditation personnel decisions into a public relations context, damage important conditions of confidentiality and overemphasize the role of site visitors in the final accreditation decision.

Settlement terms such as this publication requirement are likely to reduce volunteer participation in accreditation, especially by distinguished individuals from prestigious institutions. We see no linkage between this concept and the maintenance of a free market. We do see a number of harmful, probably unintended, side effects.

7. Taken together, the issues raised in 1–6 above will produce a climate and create doctrine and precedents that will offer incentives for fraudulent institutions and programs to use a kind of ''antitrust terrorism'' against accrediting agencies.

Under the consent decree proposed by the Department of Justice, an institution engaged in unfair or even illegal hiring and compensation practices could not be questioned by an accreditor, using data, without being threatened with an antitrust action.

In summary, ASPA believes that the Department of Justice, in its zeal to pursue perceived antitrust violations, has gone beyond what is necessary. In doing this, inappropriate indicators of compliance were designed. If accepted, these indicators could be extremely destructive to the legitimate efforts of accrediting agencies to consider the full range of available information and to work to deploy a wide range of expertise in the service of higher education and the public.

Accrediting agencies are expected to identify the problems an institution or program has in complying with the accreditation standards but are not expected to dictate how those problems should be addresses as that is the prerogative of the specific institution or program. In a similar way, ASPA asks that the Justice Department identify the problems of concern and ask the specific agency, in this case the ABA, to develop and defend a solution. The Justice Department should not dictate the solution, especially in light of the potentially harmful consequences that are likely to extend beyond this particular case to the broader arena of accreditation and higher education. For this reason, ASPA asks that prior to final filing the Final Judgment be shortened and focused to address only those practices that directly produce anticompetitive conditions.

We appreciate the opportunity to submit these comments and would also appreciate

any opportunity to discuss these matters with you more fully.

Sincerely,

Milton Blood,

Chair, ASPA, Director of Accreditation, American Assembly of Collegiate Schools of Business.

cc: Members, ASPA Board of Directors
ASPA-member Accrediting Agencies
Regional Accrediting Agencies
Cynthia A. Davenport, ASPA Executive Director

Enclosures:
ASPA-Member Accrediting Agencies
DoE *Criteria* § 602.3 re: Separate and Independent

MB/cd

ASPA Membership Roster

1. Acupuncture: National Accreditation Commission for Schools and Colleges of Acupuncture and Oriental Medicine (NACSAOM)
2. Allied Health: Commission on Accreditation of Allied Health Education Programs (CAAHEP)—CAAHEP serves as an umbrella agency for 17 separate allied health Committees on Accreditation (CoAs)
3. Architecture: National Architectural Accrediting Board, Inc.
4. Art & Design: National Association of Schools of Art and Design
5. Business: American Assembly of Collegiate Schools of Business (AACSB)
6. Chiropractic: Commission on Accreditation for the Council on Chiropractic Education
7. Clinical Laboratory Science: National Accrediting Agency for Clinical Laboratory Sciences (NAACLS)
8. Computing Sciences: Computing Sciences Accreditation Board, Inc.
9. Construction: American Council of Construction Education
10. Counseling: Council for Accreditation of Counseling and Related Education Programs (CACREP)
11. Dance: National Association of Schools of Dance (NASD)
12. Dentistry: Commission on Dental Accreditation, American Dental Association (CDA/ADA)
13. Dietetics: Commission on Accreditation/Approval, American Dietetic Association (CAADE/ADA)
14. Engineering: Accreditation Board for Engineering and Technology, Inc. (ABET)
15. Forestry: Society of American Foresters
16. Health Education: Accrediting Bureau of Health Education Schools (ABHES)
17. Home Economics: American Association of Family and Consumer Science
18. Interior Design: Foundation for Interior Design Education Research (FIDER)
19. Journalism: Accrediting Council—Journalism and Mass Communication (ACEJMC)
20. Landscape Architecture: American Society of Landscape Architects
21. Librarianship: American Library Association (ALA)
22. Music: National Association of Schools of Music (NASM)
23. Nuclear Medicine: Joint Review Committee (JRC) in Nuclear Medicine Technology
24. Nurse Anesthesia: Council on Accreditation of Nurse Anesthesia
25. Nursing: National League for Nursing, Inc. (NLN)
26. Occupational Therapy: American Occupational Therapy Association (AOTA)
27. Optometry: Council on Optometric Education, American Optometric Association
28. Pharmacy: American Council of Pharmaceutical Education (ACPE)
29. Physical Therapy: American Physical Therapy Association (APTA)
30. Planning (City & Regional): Planning Accreditation Board
31. Podiatry: Council on Podiatric Medical Education, American Podiatric Medical Association (APMA)
32. Psychology: American Psychological Association (APA)
33. Public Health: Council of Education for Public Health
34. Public Affairs: National Association of Schools of Public Affairs and Administration
35. Radiology: Joint Review Committee (JRC) in Education in Radiologic Technology
36. Recreation & Parks: Council on Accreditation, National Recreation and Park Association (NRPA/AALR)
37. Rehabilitation Counseling: Council on Rehabilitation Education (CORE)
38. Speech-Language-Hearing: American Speech-Language-Hearing Association (ASHA)
39. Teacher Education: National Council for Accreditation of Teacher Education (NCATE)
40. Theatre: National Association of Schools of Theatre (NAST)

DEPARTMENT OF EDUCATION

34 CFR Part 602

RIN 1840–AB82

Secretary's Procedures and Criteria for Recognition of Accrediting Agencies

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the Secretary's recognition of accrediting agencies in order to implement provisions added to the Higher Education Act of 1965 (HEA) by the Higher Education Amendments of 1992, and the Higher Education Technical Amendments of 1993. The purpose of the Secretary's recognition of accrediting agencies is to assure that those agencies are, for HEA and other Federal purposes, reliable authorities as to the quality of education or training offered by the institutions of higher education or higher education programs they accredit.

Note: ''Separate and Independent'' issues are addressed in Section 602.3 below. See the specific definition in subsection (b).

§ 602.3 *Organization and membership.*

(a) The Secretary recognizes only the following categories of accrediting agencies:

(1) A State agency that—

(i) Has as a principal purpose the accrediting of institutions of higher education, higher education programs, or both; and

(ii) Has been listed by the Secretary as a nationally recognized accrediting agency on or before October 1, 1991;

(2) An accrediting agency that—

(i) Has a voluntary membership of institutions of higher education;

(ii) Has as a principal purpose the accrediting of institutions of higher education and that accreditation is a required element in enabling those institutions to participate in programs authorized under this Act; and

(iii) Satisfies the ''separate and independent'' requirements contained in paragraph (b) of this section;

(3) An accrediting agency that—

(i) Has a voluntary membership; and

(ii) Has as its principal purpose the accrediting of higher education programs, or higher education programs and institutions of higher education, and that accreditation is a required element in enabling those institutions or programs, or both, to participate in Federal programs not authorized under this Act; and

(4) An accrediting agency that, for purposes of determining eligibility for Title IV, HEA programs—

(i)(A) Has a voluntary membership of individuals participating in a profession; or

(B) Has as its principal purpose the accrediting of programs within institutions that are accredited by another nationally recognized accrediting agency; and

(ii)(A) Satisfies the ''separate and independent'' requirements contained in paragraph (b) of this section; or

(B) Obtains a waiver from the Secretary under paragraph (d) of this section of the ''separate and independent'' requirements contained in paragraph (b) of this section.

(b) For purposes of this section, ''separate and independent'' means that—

(1) The members of the agency's decision-making body—who make its accrediting decisions, establish its accreditation policies, or both—are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

(2) At least one member of the agency's decision-making body is a representative of the public, with no less than one-seventh of the body consisting of representatives of the public;

(3) The agency has established and implemented guidelines for each member of the decision-making body to avoid conflicts of interest in making decisions;

(4) The agency's dues are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(5) The agency's budget is developed and determined by the agency without review by or consultation with any other entity or organization.

(c) The Secretary considers that any joint use of personnel, services, equipment, or facilities by an accrediting agency and a related, associated, or affiliated trade association or membership organization does

not violate the provisions of paragraph (b) of this section if—

(1) The agency pays the fair market value for its proportionate share of the joint use; and

(2) The joint use does not compromise the independence and confidentiality of the accreditation process.

National Office for Arts Accreditation in Higher Education

11250 Roger Bacon Drive, Suite 21, Reston, Virginia 22090, 703–437–0700

September 29, 1995.

John F. Greaney, Chief,
Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W.—Room 9903, Washington, DC 20001

Dear Mr. Greaney: I write on behalf of the National Association of Schools of Music, National Association of Schools of Art and Design, National Association of Schools of Theatre, and National Association of Schools of Dance. These organizations represent over 850 programs and institutions concerned with professional education and training in the arts. Each is recognized by the United States Secretary of Education, and each has a distinguished history of accreditation service.

We appreciate the opportunity to comment on the proposed settlement of the antitrust suit of the United States of America against the American Bar Association filed June 27, 1995, in Civil Action No. 95–1211(CR). The four associations wish to support and endorse positions and ideas contained in the letter about this action from the Association of Specialized and Professional Accreditors (ASPA) to you dated September 25, 1995.

Since each of the above arts accreditors has voluntary membership, and since there are no connections in the arts between accreditation and licensure, we are traditionally supportive of free market principles in higher education. We appreciate the role the Justice Department has played in raising antitrust policy issues for the accreditation community. We look forward to a positive and productive result from the continuation of your deliberations. However, without presuming to enter into legal questions beyond our expertise, we urge you and your colleagues to heed the warnings contained in the ASPA letter and to be especially sure that in pursuing issues and concerns with a particular accrediting body, the Justice Department does not set inappropriate precedents or provide loopholes that will preclude accrediting bodies from working effectively in their most difficult situations with problem institutions. By following the recommendations of the ASPA letter, the Justice Department should be able to create clarity on pure antitrust issues without unintended counterproductive results.

Please do not hesitate to contact us if we may provide any additional clarification or information.

With best regards, I remain

Sincerely yours,

Samuel Hope,

Executive Director.

SH:ck

cc: Cynthia Davenport, Executive Director, Association of Specialized and Professional Accreditors

Association of Collegiate Business Schools and Programs

July 27, 1995.

Anne K. Kingaman,
Assistant Attorney General, United States Department of Justice, Antitrust Division, 10th and Constitution Avenue NW., Washington, D.C. 20530

Dear Ms. Bingaman: I am writing this letter in reaction to the recent ruling by the U.S. Justice Department on the American Bar Association accreditation activities.

In the professional field of business there are two accrediting bodies: (1) The Association of Collegiate Business Schools and Programs (ACBSP) which is seven years old, and (2) The American Assembly of Collegiate Schools of Business (AACSB) which was established more than 70 years ago. For many years the AACSB accrediting body dominated the professional field of business in terms of accreditation with stringent requirements for faculty research and faculty release time to conduct research. Our association, ACBSP, was created to provide an opportunity to institutions with a primary mission of teaching to have an opportunity to become accredited without having a heavy research emphasis.

ACBSP has maintained, since its inception, that it should complement AACSB. The association would exist to address the unmet needs of institutions which were not served by AACSB. Thus, ACBSP views its market niche as business schools and programs offered by the mid-sized and small institutions, as well as the community and junior colleges.

There are approximately 2400 institutions that conduct business programs in American higher education. About ½ of these are two year colleges and the other half are four year colleges, some of which have graduate programs. Business education as a professional field of study is four times as large as the next largest professional field which is teacher education. AACSB does not allow the two year colleges to be members of its association and of its 657 members only 293 are accredited by AACSB. Our association, ACBSP, has approximately 500 members and 175 of these are accredited. In addition, our association allows two year colleges to be members as well as four year colleges. Take A and B summarize some of the differences between the two organizations.

TABLE A.—DIFFERENCES IN AACSB AND ACBSP

	AACSB	ACBSP
Mission	Fosters excellence in research	Advances excellence in teaching; stresses articulation/transfer policy statements and agreements.
Organization	657 U.S. Colleges and Universities, 293 accredited. Only accredited schools vote on standards.	475 U.S. Colleges, 9 Int'l. institutions, 175 accredited. All member schools vote on standards.
Accreditation Philosophy	Mission-based: (new) encourages diversity	Mission-based: encourages creativity and innovation.
Types of Accreditation	Bachelors, Masters, Doctorate	Associate, Bachelors, Masters.
Evaluation	Process of review and evaluation required	Outcomes assessment program with results used for improvement required.
Costs	See Table B	See Table B.

Table B presents a comparison of membership and accreditation expenses.

TABLE B.—A COMPARISON OF MEMBERSHIP AND ACCREDITATION EXPENSES

	AACSB	ACBSP
Annual Dues	*$2,000–$3,400	$800
Non-accredited Institutions	**800	
Initial Accreditation:		
Application	***3,000–5,000	1,350
Continuing Analysis	***3,000–5,000	100
Reaccreditation	***4,000–6,500	1,350

TABLE B.—A COMPARISON OF MEMBERSHIP AND ACCREDITATION EXPENSES—Continued

	AACSB	ACBSP
Candidacy:		
Application	***2,000–3,000	350
Maintenance	1,000–1,500	0
Total	15,000–24,400	3,600

* The annual dues of $2,100 are for business administration accreditation; the annual dues of an additional $1,300 are required for Accounting accreditation for a total of $3,400. ACBSP does not have a differential fee for accredited institutions.

** Non-accredited AACSB institutions pay an annual fee of $800.

*** Initial accreditation fee is $3,000 for Business or Accounting; $5,000 for Business and Accounting. Reaccreditation fee of $4,000 for Business or Accounting and $6,500 for Business and Accounting. Candidacy fee is $2,000 for Business or Accounting and $3,000 for Business and Accounting.

Some states have taken the position that their public institutions must obtain AACSB accreditation and these schools are prohibited from obtaining accreditation from our association. The reason for this is partly because AACSB as an organization and its membership (which represents the large doctoral granting universities) have been very jealous of our existence and they try numerous schemes to prevent us from obtaining additional membership. One scheme is to form a ''lock-out'' in state systems of higher education which forces the public institutions to seek accreditation from AACSB. Where licensing is involved, such as accountants sitting for the CPA exam, some states have used the ''lock-out'' system to require individuals that sit for the CPA exam to have attended an AACSB accredited institution.

We feel that the above practices represent restraint to trade and are in direct opposition to the antitrust laws of this country. To add to our dilemma, ACBSP is currently recognized by the U.S. Department of Education and the other association; AACSB is not. AACSB is recognized by a fairly new organization called the Commission on Recognition of Postsecondary Accreditation (CORPA).

The accreditation process of ACBSP is very rigorous and requires that institutions meet 26 standards of quality and integrity. Despite the fact that these standards are more rigorous than those imposed by AACSB, some states continue to give AACSB an unfair advantage by granting this organization a virtual monopoly in their jurisdiction.

We would like very much to have a ruling from you concerning the legality of states locking out our nationally recognized accrediting body from being used to accredit business programs in public institutions. With such a ruling we will be able to deal with states such as Louisiana, Tennessee, Maryland, Florida, etc.

Thank you for your assistance in this matter.

Sincerely,

Harold W. Lundy, Ph.D.,

Executive Director.

cc: ACBSP Board of Directors

American Library Association, Office for Accreditation

50 East Huron Street, Chicago, Illinois 60611–2795, U.S.A., 312–280–2432, 800–545–2433, Ext. 2432, Fax: 312–280–2433

September 29, 1995.

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW., Room 9903, Washington, D.C. 20001

Dear Mr. Greaney: On behalf of the Committee on Accreditation of the American Library Association, I would like to comment on the following issues related to Civil Action No. 95–1211(CR) against the American Bar Association. We do so from a desire to preserve the values inherent in the voluntary accreditation process now in place in American higher education, and to ensure that the practices undertaken by accrediting agencies are of the highest quality and benefit both to the American public and to the educational institutions themselves.

The integrity of accreditation rests in part on the values inherent in peer review; that is, each peer must take responsibility to ensure that others' behavior does not compromise the process. This is a self-regulatory process and each member must encourage the entire community to meet the standards and expectations for good practice. Thus, we welcome vigilance that results in improved practice.

We strongly endorse self-regulation and express our concern that the proposed settlement may promote a bureaucratic and regulatory environment that his antithetical to achieving excellence in higher education.

Specifically, we wish to comment on two points: directives relating to the size and composition of accrediting teams and the degree to which the competitive impact statement may unintentionally affect the ability of accrediting agencies to perform their function in a free and open environment.

The American Library Association recently revised its accreditation standards and practices. The revisions were prompted not by external pressures from outside regulators, but by a real desire for self-improvement. As a result of these revisions, we believe that our current procedures reflect best practices. Our procedures stipulate that size and composition of the external review panels who evaluate the programs may vary according to the complexity and focus of the program. Our panels consist of both visiting and non-visiting members, and have historically included both practicing professionals and faculty. Each member of a panel represents a financial investment on the part of the program, and an investment of time, energy and expertise on the part of the panelist. Most of our panel members have a broad range of experience and a single individual may be both a practitioner and a faculty member (adjunct faculty, for example, represent the practitioner and educator perspective) or they may be veterans of careers that have included both practice and teaching at various times. Setting quotas for certain types of individuals seems to us to set a dangerous precedent and introduce unnecessarily regulatory practices that serve the best interests of no one.

Similarly, the overall aim of accreditation as we see it is to produce a diagnostic accreditation report and to provide incentives to address the identified problems. We expect programs to comply with our standards, but we do not presume to dictate solutions. We believe the solutions must arise from the particular context of the program within its institution, its region, and its identified constituency. This is a fundamental principle and one that we believe applies to problems identified through the peer review of accrediting agencies themselves. Therefore, we cannot support prescriptive solutions such as the one proposed in the case of the American Bar Association.

We appreciate the opportunity to comment on these issues.

Sincerely yours,

Prudence W. Dairymple, Ph.D.,

Director, Office for Accreditation.

cc:

Brooke Sheldon, Ph.D. Chair, ALA Committee on Accreditation

Elizabeth Martinez, Executive Director,American Library Association

Bernard Fryshman, Ph.D.

1016 East Second Street. Brooklyn, N.Y. 11230, (718) 253–4857

October 2, 1995.

Re: Civil Action No. 95–1211 (CR) [United States of America vs. American Bar Association]

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, AntiTrust Division; Room 9903, 555 4th Street, NW., Washington, DC 20001

Dear Mr. Greaney: I have headed a nationally recognized accrediting body since 1973, and served for two terms on the National Advisory Committee on Accreditation and Institutional Eligibility (now the National Advisory Committee on Institutional Quality and Integrity). In addition, I have been teaching at the university level since 1962. I believe I have a perspective which you may find helpful in reviewing your personal Final Judgment in the above named case. I very much appreciate this opportunity to comment.

I. The Focus of My Comments

It would be presumptuous of me to enter into the debate between the Department of Justice and the ABA. Where I do address ABA issues, it is only to be able to react to Department of Justice contentions, which, by extrapolation, can be applied to other accrediting agencies.

II. Are Anti-Trust Considerations Relevant To Higher Education?

Higher education is characterized by a sense of mission against which all considerations of commerce and competition must be weighed. Higher education in America traces its antecedents to a culture of service which pervades Academe and influences day to day policy. Two examples will suffice to illustrate my point.

(I) Most colleges and universities survive on the basis of student tuition and research. Consider a student who is doing poorly in his studies and enrolls in the class of a professor who opens up the excitement of learning. At the end of the term, in consultation with this professor, the student concludes that his career would be better served by transferring to another institution.

The professor does everything possible to facilitator this move, including contacting colleagues, writing letters of recommendation and helping the student search for applicable scholarships and fellowships. The professor knows full well that her classes will be the poorer for the student having transferred, and the student's tuition dollars will now help pay someone else's salary. Yet, everyone associated with the school recognizes the welfare of the student and his ultimate contribution to knowledge as the true goals of the institution.

(II) A senior research professor at a university works with his graduate students in an area of current research, helps them attain their Ph.D.'s and then moves heaven and earth to try to place them in tenure track positions at other universities. Knowing full well that these students will now be competing with him for research dollars and for quality graduate students.

In a word, postsecondary institutions have a bottom line which is quite different from that of commercial enterprises.

III. Accreditation is an Integral Part of the Culture of Higher Education

Accreditation agencies emanate from the community of schools they sever, and are guided by the same sense of mission. Accrediting bodies have an uninterrupted record of opening their doors to ever increasing number of schools. Highly paid professionals give gladly of their time to serve on site visiting teams, on committees and commissions, for little or no recompense.

Accreditation professionals spend untold hours working with applicant institutions to help them meet standards. Visitors are encouraged to make helpful suggestions to institutions which they visit. The fact that so few institutions are turned down in petitions for renewal of recognition, even in this period of service competition for students, is inconsistent with accusations that accreditors have been stifling competition.

IV. Accreditation Involves the Application of Standards

Whenever standards are applied, there will be those who fail to meet those standards. Where judgement is involved, there will always be questions.

Scholarly journals publish only refereed papers. If I, a physicist, submit a research paper to a journal, it will be reviewed by someone working in the same field and therefore competing with me for recognition and research grants. If my paper is not accepted for publication, the outside observer might conclude that there was a desire to stifle competition. Yet, no one in the world of science, no matter how aggrieved, would come to this conclusion.

Accreditation, like all of higher education, is not an exact science. Judgement plays a large role in the decision making process, and disagreement is inevitable. But the honest application of standards is a far cry from an intent to stifle competition.

V. States Determine Eligibility for Bar Exams

ABA standards are universally recognized as establishing the quality of a law school; and any seeming restrictions on competition are a function of those who use the ABA list of accredited schools—not of the ABA itself! Thus, the fact that 40 states open the bar exams only to ABA graduates is not the fault of the ABA. Rather the states should be asked to open the bar exam process. Can an accrediting body be blamed for the misuse of its accreditation list?

VI. ''Capture of the Accreditation Process''

It is important to recognize that law schools educate students in the law, whereas the bar examination and the states create lawyers. The distinction is important since it is educators, not practitioners, who are best qualified to judge the functioning of a school. Whether a school creates effective attorneys is a question entirely distinct from its ability to educate students in the law. It is counterproductive for the Department of Justice to force accrediting bodies to include people who are not educators to judge an educational institution.

VII. Professional Staff Compensation

A high salary structure, together with an emphasis on full-time faculty, can ensure that faculty remain fully focused on their teaching and research responsibilities without the pressures of an outside job. For some students, faculty availability outside class is as important as the lecture itself. High salaries will also ensure that schools will attract high quality faculty. In any case, it is not clear to me why such a clause is anti-competitive. Schools not accredited by the ABA, and therefore not required to pay exceedingly high salaries, could charge a much lower tuition, thereby competing effectively for students.

VIII. Facilities

Proper facilities are integral to the educational process. It is inappropriate for government to determine how lectures are to be delivered, what books are to be read, and what facilities are appropriate for any given educational system.

IX. Public View

Bringing the public eye into deliberations involving standards can cripple the accreditation process and discourage site visitors from expressing true opinions and making difficult judgements.

X. Other Schools Can Compete

It would be extremely troubling were the Justice Department to force accrediting agencies to expand their scope to areas outside their competence. Well run non-ABA schools are able to attract students, and in many states their students can sit for the bar examination. Such schools can even organize their own (Department of Education Recognized) accrediting body. How is the ABA's unwillingness to accredit proprietary institutions a barrier to competition?

XI. An Alternative Approach

Recognized agencies must satisfy federal regulations which require, among others, that standards be reviewed regularly for reliability, validity and relevance. If there is any indication that standards are not relevant to quality education, the Department of Education can be very effective in ensuring change, particularly if a third party comment is properly structured.

XII. Conclusion

Higher education and accreditation have characteristics and a culture which may make certain anti-trust considerations irrelevant. Perhaps a reconsideration of the findings in this case, in light of the special nature of accreditation, is in order. Certainly a review of the proposed corrective actions should be made.

Thank you again for this opportunity to comment.

Respectfully,

Dr. Bernard Fryshman

Whiteford, Taylor & Preston,

1025 Connecticut Avenue, NW., Washington, D.C. 20036–5405, 202 659–6800, Fax 202 331–0573

October 2, 1995.

Via Hand Delivery

John F. Greaney,
Chief, Computers and Finance Section, Antitrust Division, Department of Justice, Room 9903, 555 4th Street NW., Washington, DC 20001

Re: U.S.A. v. American Bar Association, U.S. District of Columbia, Civil Action No. 95–1211 (CR), WTP No. 00732/00408

Dear Mr. Greaney: Pursuant to Section V of the Competitive Impact Statement filed in the above captioned action on July 14, 1995, we

submit herewith the Comments of the below listed nationally recognized accrediting agencies on the proposed Final Judgment against the American Bar Association.

Accrediting Bureau of Health Education Schools (ABHES)
Accrediting Council for Continuing Education & Training (ACCET)
Accrediting Council for Independent Colleges and Schools
National Accrediting Commission of Cosmetology Arts & Sciences

You will note that we have asked for a hearing before the Court. We would appreciate a copy of any response to our Comments that you may file with the Court.

Sincerely,

C. William Tayler

CWT:das
Enclosure

cc:
U.S. Department of Education (w/encl.)
Participating Accrediting Agencies (w/encl.)
William C. Clohan, Jr., Esq. (w/encl.)
David T. Pritken, Esq. (w/encl.)

United States District Court for the District of Columbia

United States of America, Plaintiff, v. American Bar Association, Defendant. Civil Action No.: 95–1211(CR), Judge Charles R. Richey, Deck Type: Antitrust.

Comments and Suggested Modification of Proposed Final Judgment and Request for Hearing

The undersigned recognized accrediting agencies (''the agencies''), by counsel, hereby submit the following Comments and Suggested Modification to the proposed final judgment in this manner. The agencies also respectfully request a hearing concerning modification and entry of the proposed final judgment in this matter.

Introduction

The agencies are all formally recognized by the United States Department of Education. They submit that the proposed final judgment is inconsistent with current antitrust law in this circuit with respect to the applicability of the antitrust laws in the field of accreditation and in those areas subject to oversight by Congress and other federal government agencies. In this connection, the proposed final judgment fails to recognize the significant role of the United States Department of Education in accreditation as mandated by the Congress in the Higher Education Act of 1965, as amended. 20 U.S.C. § 1099b. The agencies submit that this Court should ensure that the proposed final judgment not undermine or otherwise limit the important purposes of the Higher Education Act.[1]

Thus, the agencies respectfully submit that the proposed final judgment be modified by adding an additional sentence to Part XI(C) as follows: ''Nothing in this judgment shall be construed to modify any of the provisions of the Higher Education Act of 1965, as amended, or any of the regulations adopted pursuant thereto, or any existing law concerning the recognition of private accrediting agencies, or the activities of such agencies relating thereto.''

The Framework of Recognition of Private Accrediting Agencies

Private accrediting agencies are recognized by the Department of Education under the provisions of the Higher Education Act of 1965 (HEA), Pub. L. 89–329, 20 U.S.C. 1001, et seq. as amended, and are subject to a significant oversight by the Secretary of Education. Recognition is a process by which the Secretary of Education determines that an accrediting agency is a ''reliable authority as to the quality of education or training offered'' at the institutions accredited by the agency. 20 U.S.C. 1099b(a). Accreditation by a recognized accrediting agency is a prerequisite to the ability of students to obtain federal financial assistance. See 20 U.S.C. § 1085(c).

For an accrediting agency to be ''recognized,'' the Secretary must conduct a comprehensive review and evaluation of the accrediting agency to determine whether the agency meets the standards established by the law. 20 U.S.C. 1099b(n). An accrediting agency may be recognized for a period of no more than five years and must apply to be re-recognized by the Secretary. 20 U.S.C. 1099b(d).

An accrediting agency seeking recognition from the Department of Education must have accrediting standards which assess the following areas of activity of educational institutions:

1. Curricula
2. Faculty
3. Facilities, equipment and supplies
4. Fiscal and administrative capability
5. Student support services
6. Recruiting and admissions policies
7. Academic calendars, catalogues, publications, grading and advertising
8. Program length
9. Tuition and fees
10. Measures of program length
11. Course completion, State licensing examination and job placement rates
12. Default rates
13. Student complaints
14. Compliance with program responsibilities

20 U.S.C. 1099b(a). The Secretary of Education is required by the Congress to conduct oversight activities even during periods of recognition. 20 U.S.C. 1099b(n). Thus, it is clear that the oversight role of the Department of Education is, as required by Congress, extensive. In this connection, the Secretary has further authority to promulgate regulations concerning the recognition process. 20 U.S.C. 1099b(o).

Application of the Antitrust Laws to Accrediting Agencies

Since at least 1970, the courts have shown substantial deference to accrediting agencies in recognition of their expertise in the area of educational accreditation.[2] In the case of *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit specifically rejected an antitrust challenge to the actions of private accrediting agencies: ''We do not believe that Congress intended this concept [accreditation] to be molded by the policies underlying the Sherman Act.'' *Id.* at 655. As recently as 1993, federal courts have recognized the continuing viability of *Marjorie Webster,*[3] and it remains the law in this Circuit. The continued applicability of *Marjorie Webster* in the field of accreditation has never been questioned in court decisions.

Five years after *Marjorie Webster* was decided, the Supreme Court was called upon to address the applicability of the antitrust laws in circumstances where there is an inconsistency with federal agency activity. In *U.S.* v. *National Ass'n of Sec. Dealers*, 422, U.S. 694 (1975) and *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), the Supreme Court held that when there is an inconsistency between a federal regulatory scheme and the antitrust laws, there is an implied immunity from the antitrust laws for the conduct subject to the agency's scheme. This rule has been recognized and applied in the context of several federal statutory frameworks, including the Federal Communications Commission,[4] the Securities and Exchange Commission,[5] and the Interstate Commerce Commission.[6]

Ramifications of the Proposed Final Judgment

The Department of Justice is asking this Court to approve a broad, in-depth intrusion of the Sherman Act into the field of educational accreditation that will have a chilling effect on the entire accreditation process and conflict with the Higher Education Act of 1965, as amended. Nowhere in the proposed final judgment does the Department of Justice attempt to reconcile this intrusion in light of the existing precedent in this Circuit and the implied immunity doctrine relating to activities subject to federal agency oversight.

Arguably, many accrediting agency standards adopted in connection with 20 U.S.C. § 1099b(a)(5) could be the basis for claims of anticompetitive activity. Yet the Congress has clearly legislated that these

[1] By submitting these comments, the agencies are not taking a position on the merits of the current litigation.

[2] See *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970); *Wilfred Academy of Hair and Beauty Culture v. Southern Ass'n of Colleges and Schools*, 957 F.2d 210 (5th Cir. 1992); *Medical Inst. of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F.2d 1310 (8th Cir. 1987); *Peoria School of Business, Inc. v. ACCET*, 805 F. Supp. 579 (N.D. Ill. 1992); *Transport Careers, Inc. v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986): *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

[3] See *U.S. v. Brown University, et al.*, 5 F.3d 658 (3rd. Cir. 1993).

[4] See *Phonetelle, Inc.* v. *American Telephone and Telegraph Co.*, 664 F.2d 716 (1981).

[5] See *Finnegan* v. *Campeau Corp.*, 915 F.2d 824 (2nd. Cir 1990); *Shumate & Co., Inc.* v. *NYSE, Inc.*, 486 F. Supp. 1333 (N.D. Tex. 1980).

[6] See *Waldo* v. *North American Van Lines*, 669 F. Supp 722 (W.D.Pa. 1987).

standards, the purpose of which is to ensure a level of quality assurance in the area of educational accreditation, should be the subject of oversight by the Department of Education. It would be unfortunate if this Court's endorsement of the proposed final judgment were construed as a blank check to pursue antitrust claims against nonprofit, recognized accrediting agencies already subject to significant oversight by the Secretary of Education.

Accordingly, the agencies submit that the suggested modification to the proposed final judgment will protect the integrity of private accreditation and the important oversight activity of the Department of Education mandated by Congress in 20 U.S.C. § 1099b. The proposed modification is consistent with the precedent in this Circuit and the limited immunity doctrine set forth in *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975) and *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975).

Conclusion

For all the reasons set forth herein, the agencies respectfully request this Court modify the proposed final judgment in this matter to be consistent with existing law and the Higher Education Act of 1965, as amended.

Respectifully submitted,

Whiteford, Taylor & Preston, L.L.P.

C. William Tayler (Bar No. 012930)

Kenneth J. Ingram (Bar No. 145698)

1024 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036, (202) 659–6800.

Counsel for Accrediting Bureau of Health Education Schools (ABHES), Accrediting Council for Continuing Education & Training (ACCET), Accrediting Council for Independent Colleges and Schools (ACICS), National Accrediting Commission of Cosmetology Arts & Sciences (NACCAS)

Dated: October 2, 1995.

Exhibit A—The Organizations Filing Comments

ABHES. The Accrediting Bureau for Health Education Schools (ABHES) is a non-profit organization that accredits both institutions and programs. The institutions are private postsecondary institutions that primarily provide allied health programs. The programs are either medical assisting or medical laboratory assisting and can be provided by private institutions or public institutions. Its accredited membership consists of:

- 78 institutions providing allied health programs.
- 93 medical assisting and medical laboratory technician programs.

ABHES is located in Arlington, Virginia and has filed under the Virginia Nonstock Corporation Act to have its Indiana corporation merged with a new corporation in Virginia.

ABHES is currently recognized (approved) by both the U.S. Secretary of Education and the Commission on Recognition of Postsecondary Accreditation (CORPA), a nonprofit, nongovernmental organization that evaluates accrediting agencies for their ability to determine the quality of educational offerings and administrative capability at postsecondary institutions. Institutional accreditation by ABHES, under the Secretarial recognition, is often one of the prerequisites for students attending those institutions to be eligible for federal student assistance from programs authorized by the Higher Education Act of 1965, as amended.

ACICS. The Accrediting Council for Independent Colleges and Schools (ACICS) is an independent and autonomous body which accredits private, postsecondary career colleges and schools through a peer review evaluation process. Located in Washington, D.C. and incorporated under the Virginia Nonstock Corporation Act, ACICS is a nonprofit corporation organized and operated exclusively for education purposes, holding 501 (c)(3) Federal tax exempt status. The Council is composed of a Board of Directors and two commissions—the Commission on Postsecondary School Accreditation (COPSA) and the Commission on College Accreditation (COCA). Council members include representatives from institutions, education-related government agencies or other sectors of higher education, and the general public. Public members come from business, industry, or other professions. COPSA accredits noncollegiate, postsecondary institutions that offer programs of two years or less. COCA accredits collegiate institutions (i.e., junior and senior colleges). Its accredited membership consists of:

♦ 338 noncollegiate, postsecondary institutions at 338 main campuses with 129 branch campuses and 59 learning sites.

♦ 81 collegiate institutions at 81 main campuses with 55 branch campuses and 14 learning sites.

Since 1956, the U.S. Secretary of Education and his predecessor, the Commissioner of Education, have officially recognized ACICS as a nationally recognized accrediting body of postsecondary institutions offering primarily business and business-related programs of study. ACICS is also recognized by the Commission on Recognition of Postsecondary Accreditation (CORPA), a non-governmental organization dedicated to promoting and insuring the quality and diversity of American postsecondary education.

ACCET. The Accrediting Council for Continuing Education & Training (ACCET) was established in 1974 as a private, non-profit corporation for the purpose of establishing standards for accreditation and a peer-review-based evaluation process by which institutions providing continuing education and training programs could seek accredited status. Since 1978, ACCET has been officially recognized by the United States Department of Education under the criteria and procedures established by the U.S. Secretary of Education to identify accrediting agencies determined to be reliable authorities as to the quality of education or training provided by the institutions they accredit. Under the Higher Education Act of 1965, Pub. L. 89–329, 20 U.S.C. Section 1001 et seq., as amended, ACCET accreditation serves as one element of eligibility for its members to participate in HEA Title IV programs of federal financial assistance for their students.

Under the ACCET Bylaws, an Accrediting Commission, consisting of not more than 15 nor fewer than 11 Commissioners, 5 of which must be public members, are empowered to promulgate policies and procedures required to operationalize the standards for accreditation, and to determine whether institutions seeking accreditation meet those standards. With offices in Arlington, Virginia, an Executive Director, with a full-time staff of 10, administers the day-to-day operation subject to the policies, procedures and directives of the Commission. Currently, ACCET member institutions consist of both for-profit and non-profit institutions totaling 245 main campus operations with a combined total of approximately 800 training sites across the United States.

NACCAS. The National Accrediting Commission of Cosmetology Arts and Sciences (NACCAS) is an autonomous, independent accrediting commission constituted as a non-profit [501(c)(3)] Delaware corporation, with its main offices located in Arlington, Virginia. The Commission's origins date back to 1969, when two accrediting agencies in the field merged to form the Cosmetology Accrediting Commission (CAC), which became NACCAS in 1981.

NACCAS is directed by a Board of Commissioners. Between 1996 and 1998 the size of the Commission shall be reduced from 17 to 13 members. Seven will represent accredited schools; three will represent the salon industry, and three will be educators who represent the public interest. Currently it is 9, 4 and 4 respectively. The Commission comes together twice a year to review school files and holds two conference call meetings for school file review. It holds one meeting a year dedicated to reviewing quality standards, policies and operations.

Committees carry out preliminary policy review and make recommendations to the full Commission. Several interim committees have the authority to take action on complaints, applications for changes such as changes of ownership, and to review interim visit reports and annual reports.

Since 1969, NACCAS has become recognized by the U.S. Department of Education as a national agency for the institutional accreditation of postsecondary schools and departments of cosmetology arts and sciences, including specialized schools.

NACCAS currently accredits 1,300 private postsecondary institutions which educate and train cosmetologists, barbers, estheticians, manicurists and other professionals in the cosmetology field.

Clinical Legal Education Association

6020 South University Avenue, Chicago, Illinois 60637–2786, Phone 312/702–9611, Fax 312/702–2063

October 1, 1995.

John F. Greaney

Chief, Computers and Finance Section, U.S. Department of Justice—Antitrust Division, 555 4th Street, N.W., Washington, D.C. 20001

Re: *U.S.A. v. American Bar Association,* No. 95–1211.

Dear Mr. Greaney: Enclosed please find the comments of the Clinical Legal Education Association on the proposed Consent Decree to be entered in the above case. CLEA is very concerned that the proposed decree will exacerbate the very problems it identifies by further entrenching the power of legal academics, and, more importantly, may not fully serve the public interest by interfering with the ability of accreditation to improve the quality of lawyers.

There are two ways in which this ''final'' judgment will not really be final. First, many of its most important terms await the outcome of recommendations to be made by the ''special commission'' and reviewed by the United States. Second, the United States retains the authority to review all changes in accreditation standards, interpretations and rules. CLEA would greatly appreciate the opportunity to participate in these ongoing processes. We believe that we can be a useful voice in insuring that accreditation serves the needs of students to learn how to practice law and the needs of their future clients for competent lawyers. Additionally, we would be happy to meet with you at any time to discuss the concerns expressed in the attached comments.

Sincerely,

Mark J. Heyrman,

Secretary-Treasurer.

Enclosure.

Comments of the Clinical Legal Education Association on the Proposed Consent Decree Between the United States of America and the American Bar Association

The Clinical Legal Education Association (CLEA) is an organization of more than 400 clinical teachers affiliated with more than 125 law schools. It is the only independent organization of clinical teachers. Because clinical teachers have a dual identity as law teachers and practicing lawyers, we believe that we are in a unique position to address issues concerning the relationship between law schools and the bar and to evaluate the competing demands upon law schools which make the accreditation process so difficult.

1. Law schools have two major purposes: (1) to prepare students for the competent, ethical and effective practice of law; and (2) to conduct research designed to increase our understanding of law and legal institutions with the ultimate aim of improving our system of justice. Any system of accreditation must be designed to increase the likelihood of achieving these purposes. It must also recognize that law is a diverse and complex field and that a sound legal education system will include law schools that are diverse in their methods and practices and in the balance they chose to strike between these sometimes competing goals.

2. Because of law's complexity, few non-lawyers are able adequately to assess the ability of lawyers to perform on their behalf. Additionally, few prospective law students are able to assess the skills and qualities of mind that they will need to practice law effectively. Thus, the ordinary market mechanisms are insufficient to insure either that law students demand an appropriate legal education or that clients, the ultimate consumers of legal education, can with confidence locate lawyers who are capable of competently assisting them. On the other hand, most law faculty derive the largest share of their prestige within the legal education community from their scholarly output. Consequently, while the accreditation process should enhance the ability of law schools to produce scholarship, there is far less need for outside pressure to insure that this important goal will be met. Thus, the consent decree must be designed to insure that its efforts to eliminate anti-competitive practices do not interfere with the most important goal of accreditation: the need to improve the quality of lawyers. (See ¶33 of the Complaint, describing the legitimate goals of accreditation.)

3. Because, as alleged in the Complaint (¶¶9–14), the accreditation process has been dominated by academics and deans, it has not been able to serve the function of insuring that students are adequately prepared to practice law. The failure of law schools to prepare students to practice law competently and ethically has been documented repeatedly, most recently in *Legal Education and Professional Development: An Educational Continuum,* the 1992 Report of the ABA Task Force on Law Schools and the Profession: Closing the Gap (this Report is commonly referred to as the MacCrate Report after the Task Force's chairman, Robert MacCrate). Thus, CLEA supports those aspects of the proposed decree which will improve the likelihood that accreditation serves students and clients, not deans and academics.

4. Unfortunately, the proposed consent decree will not necessarily further that goal. Indeed, it may weaken an accreditation process which is already quite weak. One of the ways in which the decree may weaken the accreditation process is its insistence that each site visit team include ''one university administrator who is not a law school dean or faculty member'' (Decree, p. 4). This requirement is apt to increase the likelihood that law school resources are expended on research rather than on education. University administrators have neither an ethical obligation to, nor a highly developed interest in, insuring that the quality of lawyering be improved. Indeed, the principle tension between law schools and the universities with which they are affiliated is the concern the law schools are not sufficiently academic. Since the prestige of most universities is most commonly measured by the scholarly output of its faculty, these administrators are apt to pursue the goal of improving scholarly output as their highest priority. Finally, if the Complaint is correct in alleging that accreditation has been taken over by a ''guild'' of academics, then it seems odd to add to the accreditation process persons so completely identified as running the guild.

5. The requirement that site visit teams include a university administrator, when coupled with the new requirement that the majority of each team not be full-time faculty members, is also apt to reduce the likelihood that these teams contain clinical teachers. Since clinical teachers are the only full-time members of most faculties who practice law, this result may exacerbate the imbalance between research and the education of lawyers which already exists.

6. More importantly, the Proposed Consent Decree does little to change or challenge existing standards and practices which enhance the power of academics at the expense of the needs of students and their future clients. For example, the existing standards mandate that legal academics be granted tenure, but do not provide this protection to many clinical teachers who are involved in preparing students to practice law. Standard 405(d), (e). The standards also require law schools to permit legal academics to participate in the governance of the law school, but have not been interpreted to mandate that clinical teachers be allowed to partake in governance. Standard 304. This differential treatment serves to preserve the status quo in which the research and other needs of academics are given priority over the needs of students and their future clients. That is because clinical teachers and adjuncts, who often are the only members of law faculties with substantial interest in how law is practiced, are often denied a voice in governance.

7. As set forth in the Complaint (¶ 21), the current accreditation standards specify student-faculty ratios. Standard 402. However, under this standard, many clinical teachers and adjunct faculty primarily engaged in preparing students for the competent and ethical practice of law are not included in the faculty component of the ratios. (Complaint, ¶ 21). This omission discourages law schools from employing many persons whose primary role in the law school is to prepare students to practice law. CLEA supports the provision in the proposed consent decree which requires the ABA to reconsider its standards concerning faculty-student ratios. (Decree, p. 8)

8. The proposed Consent Decree also does nothing to change the fact that the current accreditation standards do not even require law schools to provide students with any experience in the practice of the law. Indeed, the self-interested nature of the standards is demonstrated by the fact that they are virtually silent concerning curriculum. This silence permits academics to pursue their own teaching interests without concern for the effect on students or their future clients. Thus, while the superiority of clinical methodology for preparing professionals is well documented (see, for example, D. Schon, *The Reflective Practitioner* (1983)), the accreditation standards do not require law schools to provide any clinical experience for students and many law schools do not so provide. The Consent Decree should prohibit the ABA accreditation process from being used to protest the interests of academics by mandating standards that, at a minimum, treat the obligation of law schools to prepare students to practice law as being of equal importance to their obligation to conduct research.

9. CLEA supports the continued role of the American Bar Association in accreditation. However, the current process has failed, not because the standards are too vigorously enforced, but because they are misdirected. Given the interests of legal academics and

law school administrations, accreditation standards can serve to heighten competition and serve consumers only if they are focussed primarily on curriculum and are designed to insure that curricula reflect the needs of consumers in addition to those of the academy.

10. In order to improve consumer choice, the accreditation process should require law schools to provide information to applicants to improve their ability to make informed choices among schools. (Complaint, ¶ 33.) This information should reveal the actual availability of courses and programs and the extent to which each school is able to prepare students for the practice of law. The Consent Decree should require the special commission provided for in Section VII of the proposed decree (pp. 7–8) to review the standards relating to disclosures to prospective students.

Marquette University Law School, Office of the Dean

September 20, 1995.

Mr. John F. Greaney, Chief,

Computer and Finance Sections, Antitrust Division, United States Dept. of Justice, Room 9903, 555 Fourth Street, N.W., Washington, D.C. 20001

Re: United States v. American Bar Association, Case No. 95–1211 (D.C.D.C.)

Dear Mr. Greaney: I am writing to express my substantial concern with the terms of the Consent Decree proposed by the American Bar Association and the Government in the above entitled matter.

I am troubled that this litigation was commenced and settled without input from legal educators or consumers of legal education and legal services. Still, I could live with most of the provisions of the settlement, but I cannot live with the provisions of Section VII.

Section VII leaves open for future determination five issues of extraordinary importance to legal educators, including, faculty teaching hours; leaves of absence for faculty; calculation of faculty component of the student/faculty ratio; physical facilities; and the allocation of resources of the law school by the law school or its parent university. Frankly, these five issues are of much greater importance to me and to most legal educators than anything actually resolved in the settlement. These issues strike at the heart of the fiscal integrity of law schools, as well as the basic structure of law school faculties. I cannot conceive of a reason why the Government and the ABA would want to leave these five matters on the table for further resolution. I strongly oppose such action. Allowing these matters to officially remain open and unresolved strikes me as a guarantee that the Court will be involved in protracted and difficult litigation in the future over these matters. Until and unless these matters are definitively resolved, I think any settlement is premature, unwarranted, and not in the public interest or in the interest of this Court.

Thus, while I generally oppose the settlement before the Court, I particularly urge the Court to reject the provisions of Section VII of the proposed judgment and direct the parties to either delete entirely these six issues or to propose a settlement of the issue before the matter is approved by the Court.

The Court's consideration of my views on this matter is greatly appreciated.

Yours respectfully,

Howard B. Eisenberg,

Dean and Professor of Law.

Northwestern University School of Law

357 East Chicago Avenue, Chicago, Illinois 60611–3069, (312) 503–8573, (312) 503–8977 Fax

September 13, 1995.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Room 9903, Washington, D.C. 20001

Re: Comments on modifications of proposed Final Judgment in *U.S.A. v. American Bar Assoc.*, (D.Ct. D.C.; C.A. No. 95–1211).

The proposed Final Judgment offers a unique opportunity to restore ABA accreditation to its original and only proper purpose of safeguarding the public interest in the adequate preparation of law students for competent and ethical law practice. Unless, however, the proposed Judgment is modified to make the accomplishment of this purpose an explicit requirement of the planned reconstruction of the accreditation process, the Judgment will become an instrument for the degradation of both legal education and the practice of law.

I, therefore, propose that the Judgment be modified to add the following language to Section IV, which defines prohibited ABA conduct:

The ABA is enjoined and restrained from:

(E) adopting or enforcing any standard, interpretation, rule or policy that is not needed in order to prepare law students to participate effectively in the legal profession.

As the case law interpreting the Sherman Act makes clear, a professional society's regulations that raise cost barriers to market entry must be justified by their role in protecting the public interest in competent professional services. *See e.g., National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 696 (1978); *Wilk v AMA*, 719 F.2d 207, 226 (7th Cir. 1983). The ABA House of Delegates recently recognized the importance of this public protection role of accreditation when it amended Standard 301 to require that law schools maintain educational programs designed to prepare students for effective participation in the legal profession as well as for admission to the bar.

Nevertheless, the proposed Judgment's plan for reforming law school accreditation leaves the ABA free to establish an accreditation process that has little regard for law schools' duty to prepare students for their professional roles. As a result of the Judgment's laissez-faire approach toward the substantive ends of the accreditation process, the legal academics, who will inevitably continue to control that process, will naturally seek to maintain a system of accreditation that reinforces their notions of ''quality'' legal education. Those are the notions that have elevated the production of scholarship as the highest law school priority and relegated students' professional preparation as an obligatory burden that should not interfere with academics' higher intellectual calling. Under the proposed Judgment, therefore, the conduct of accreditation will be the conduct of business as usual.

The very fact of the ABA's consent to the Judgment, however, guarantees that a credible accreditation process cannot be carried on as business as usual. The significance of the ABA's now well-publicized willingness to settle over the fervent opposition of those who administer the accreditation process will not be lost on university and law school administrators, who will appreciate that lawsuits, or the threat thereof, can be more economical than compliance with unwanted accreditation requirements. Unless the reformed accreditation process can be justified by its manifest promotion of the public interest in adequately prepared law graduates, it will remain as vulnerable to attack as the present system has been. A toothless or timid accreditation process would obviously undermine the public's reliance on law degrees as an assurance of minimal competence.

The proposed Judgment does seek to avoid legal academics' conduct of accreditation business as usual and, thereby, assure both anti-trust compliance and an effective accreditation process by changing the composition of the groups that will make accreditation decisions. Concluding that legal academics have ''captured'' the accreditation process for their own and their cohort's economic self-interest, the Judgment would dissipate academicians' influence by increasing the representation of practitioners and non-law school university administrators on the Section of Legal Education's Council and Accreditation and Standard Review Committees. The Judgment would also involve the ABA Board of Governors more actively in the current reformation and ongoing administration of accreditation.

For the reasons discussed below, this strategy will neither avoid the continuing ''capture'' of the accreditation process by the legal academics nor rationalize the often conflicting goals of open market competition and professionally adequate legal education. I base this conclusion primarily on my experience as a member during the last year on the ABA Accreditation Committee, on my participation on 15 ABA or AALS (American Association of Law Schools) site inspection teams, on my 23 years of laws school teaching primarily in a clinical setting and my years of graduate school training in education.

First, with rare exception, practitioners both on site inspection teams and at accreditation committee meetings defer on questions of educational policy to the legal academics, whose expertise on such matters they quite understandably respect. Although nonacademics' outside perspective on accreditation issues is important to the process, they generally do not have sufficient time, interest, confidence in their own educational expertise and, most important, the will to become an effective counter-force

to the academic administrators' dominance of the accreditation process.

Second, non-law school university administrators will also likely defer to their law school colleagues' educational judgments, except in one area of special concern to central university administrations. University administrators will undoubtedly challenge legal academics' use of accreditation to limit the percent of law school revenues a central administration can divert for its own discretionary use. There is a serious public policy question as to whether the important cause of general higher education justifies a university's confiscation of the high law school revenues that are made possible by legal education's current relatively low cost and high tuitions. Although the public ultimately pays for such high tuitions through higher legal costs, universities' appropriation of much of that tuition deprives the public of the benefit such tuition would otherwise derive through improved legal education. However these conflicting interests can be best accommodated, there is no question that elevating the role of university administrators in the accreditation process is likely to decrease the quality of legal education without any corresponding increase in competitiveness.

The personnel changes contemplated by the proposed Judgment will, thus, not significantly diminish legal educators' dominance of the accreditation process. There is, in sum, nothing in the Judgment that would cause the law school deans who have dominated, and will continue to dominate, ABA accreditation, to change their priorities so that the preparation of law students for competent, ethical practice would become accreditations' primary mission. As indicated by the ABA's much heralded Wahl Commission Report's affirmation of the basic elements of the present accreditation process and its explicit rejection of proposals that would make preparation for practice a far more significant goal of accreditation, the ABA appears incapable of generating by itself any systemic alteration of the existing priorities of law school accreditation.

The Wahl Commission Report did make some largely hortatory concessions to the recent concerns expressed in the MacCrate Task Force Report and in the ABA House of Delegates for greater attention to the preparation of students for practice. Far more significant, however, was the Commission's ringing endorsement of an accreditation process that has reinforced a system of legal education in which scholarship production is the most rewarded faculty activity and teaching for practice competence the least rewarded. Concrete curricular reforms that would make available to all students the opportunity to become professionally competent through supervised practical learning experiences taught by skilled teachers would impose unacceptable economic burdens on law schools, according to the Wahl Commission. The Commission would, thus, do virtually nothing to change the priorities of an educational system in which students' limited opportunities for experiential learning would continue to be relegated to a so-called special interest group of second-class citizens—mainly non-faculty adjuncts, legal writing instructors and, very often, clinical teachers.

The language I propose for addition to the Final Judgment would not run afoul of the Wahl Commission's strictures against imposing on law schools either uniform programs or prohibitive expenditures. What such a mandate would do, however, would be to assure that whatever cost barriers to entry into the legal education market the ABA decides to impose would have a clear relation to promoting the public interest in the adequate preparation of law graduates for practice.

Such a mandate will, of course, not be a panacea and will undoubtedly be vigorously opposed by most legal academics who will see it as an intrusion on their prerogative to determine ''quality'' legal education. This objection should be rejected. As noted above, most legal academics presume that the highest quality legal education takes place in law schools with the most prestigious legal scholars, regardless of those scholars' interest in or aptitude for preparing students for practice. It is legal academia's inverse correlation between ''quality'' education and the attention a faculty pays to preparing students for practice that has resulted in the Government's present accusations of antitrust conspiracy. ABA accreditation will not be reformed if the proposed Judgment allows this mentality to continue to hold sway.

Furthermore, the academics' warning against using ABA accreditation to suppress educational diversity sounds a false alarm. An accreditation process narrowly tailored to achieve its public protection purposes will not prevent legal academics from implementing their own visions of a ''quality'' or scholarly legal education in their own schools and through their own membership organizations. It will, however, prevent them from using the quasi-governmental power of ABA accreditation to deny market entry to those who do not share or cannot afford the more prestigious academics' vision of whatever they think a ''quality'' legal education should be.

In sum, enforceable restrictions on entry to the legal education market are necessary, but they can be justified only to the extent they protect the public interest in assuring that law students are receiving the education necessary for initial readiness to practice law both competently and ethically. Failure to incorporate this insight as an explicit mandate in the Final Judgment would forfeit a unique opportunity to develop an accreditation process that will fairly and effectively protect the public interest in adequately prepared law graduates without denying market entry to those who can satisfy that public interest.

Sincerely,

John S. Elson,

Professor of Law.

University of Florida, College of Law, Offices of the Faculty

PO Box 117625, Gainesville, FL 32611–7625, (904) 392–2211, Fax (904) 392–3005

August 29, 1995.

Dear Mr. Greaney: Please excuse all the confusion. The comment I mailed on the 24th had many typographical errors. Yesterday, the 28th, I mailed a corrected copy by first class mail. After sleeping on it, though, I realized I would feel more comfortable sending the corrected copy by express mail so that you will have it tomorrow. Please regard the enclosed comment as my ''official'' comment.

Thank You,

Jeffrey L. Harrison

University of Florida, College of Law, Offices of the Faculty

PO Box 117625, Gainesville, FL 32611–7625, (904) 392–2211, Fax (904) 392–3005

August 29, 1995.

Mr. John Greaney,

Chief, Computers and Finance Section, Antitrust Division, Department of Justice, Room 9901, JCB Building, 555 4th St. N.W., Washington D.C. 20001

Re: United States of America v. American Bar Association

Dear Mr. Greaney: I am writing to comment on the pending consent degree with respect to the above referenced case. Although I oppose certain elements of the proposed consent decree, my more pressing hope is that the Antitrust Division will devote further study to the issue of the proper market definition, competitive harms and the appropriate remedy. This is all in the context of whether the changes in the accreditation process will further the public interest in having low cost and high quality legal services available to all Americans.

Let me begin by noting that there appear to be three possible markets involved here. One market is the market for post graduate study. Law schools operate as sellers in this market and concerns in this market would be on the buyers. Another market is for individuals selling services as law teachers (full time or adjuncts) or administrators. The antitrust concern would be that law schools may have market power as buyers of the services of these individuals (monopsony power). Please note that monopsony power is used by buyers to force prices below competitive levels Antitrust Law and Economics (1993).

The third market is the market for legal services. Obviously, law schools provide the educational opportunities that are combined with other inputs by individuals who want to become attorneys. If the input is too expensive, legal services would become scarce and expensive. My view and, I am confident, the view of the great majority of Americans is that this is the only relevant market. Any intermediate market—like the sale of legal training by laws schools—is only relevant to the extent it bears on the primary market. In this regard it is important to note that the most costly aspect of attending law school is probably not tuition. Whether the student can afford to give up the income forgone while in law school is likely to be a more critical factor. My point is that one

cannot fully assess the importance of the accreditation standards and tuition costs outside the context of a more comprehensive examination of the costs of legal education and the rate of return to that investment.

If I understand he main thrust of the Complaint, it focuses on the market for selling legal training with the theory being that the A.B.A. Section of Legal Education has attempted to raise the cost of new entrants into this ''business.'' My concern about this theory is that the incumbent law school can only raise the costs of potential rivals by raising their own costs. In other words, I do not understand the Complaint to be saying that the costs are raised for new entrants only. Instead, the possible salary floor, faculty-student teaching ratios, sabbatical requirements and the like are also costs the incumbent law schools must incur.

This strikes me as a possibly illogical strategy that would if undertaken, ultimately backfire. Every college student makes a decision about a post graduate activity. A great number of them choose no post graduate study and this is an opportunity that competes heavily with a decision to study law. In addition, many students do choose to pursue other forms of post graduate education. My point is simply this: In a world in which law school applicants have declined from 93,800 in 1990–91 to 78,200 in 1994–1995 (or put more technically, in which the demand for legal education, at least in the short run, is falling) and in which there is competition among sellers of post graduate study, it may make little sense for law schools to embark on a strategy that would raise their own costs and decrease the attractiveness of a legal education generally.

The critical matter is one of defining the relevant market. If the market is only ''legal education,'' such a strategy may work. If the market includes other post graduate opportunities including employment, the strategy will fail. In short, the foundation of the theory of the Justice Department is the market definition which can only be ascertained through an empirical investigation.

As for the second market—law faulty and administrators, I think it would more likely that any price fixing by law schools would be in the hiring market with the goal of using monopsony power to keep salaries low with respect to entry level hiring or the hiring of adjunct professors. Of course, there is no suggestion of this in the Complaint and ultimately law schools as buyers probably have insufficient market power to lower faculty or administrator salaries. Still, law schools are both buyers and sellers and concern for the public interest requires attention to both sides of the market.

The third market here is the market for legal services. Typically, one would expect a professional association to limit opportunities to enter the profession. In fact, as I recall, the American Medical Association pursued a policy of ''professional birth control'' for some years. The A.B.A. has generally taken a different course. The number of accredited law schools has increased from 135 to 176 over the past 30 years. Enrollment has increased from 46,666 to 128,989 over the same time period. Finally, bar admissions have increased from 10,788 to 39,710. See American Bar Association, A Review of Legal Education in the United States 67 (1995).

By involving legal educators—those whose welfare depends on *supplying* legal education—the A.B.A. has probably only encouraged the increased availability of legal education and legal services. For this reason, I find the assertion that ''Legal Educators Have Captured the ABA's Law School Accreditation Process'' (Complaint, p. 4) rather odd. If there has been any ''capture'' it certainly does not appear to be one that has benefitted the individual A.B.A. member. That interest would best be served by a far more restrictive accreditation process—one that would effectively slow down the explosion in the number of law school graduates.

Summary

1. The question of whether law schools can further their competitive interests by raising their own costs of operation in a market in which there is competition for students and a recently decreasing demand for legal education is a pivotal empirical question. The key to the answer lies on proper market definition.

2. If there is an inconsistency between the aims of the A.B.A. and the Section of Legal Education, it is an inconsistency that works in favor of greater competition in the market for attorneys' services.

Proposals

1. Other than prohibiting price fixing as described in section IV.A. of the proposed consent decree, the Justice Department should abandon all of its recommendations at least until there is data indicating that the accreditation process has unreasonably restricted entry into the legal profession. This would require careful attention to the relevant market.

2. Failing this reconsideration I propose the following two steps:

a. Modify item IV.(B) of the consent decree so that it reads as follows: ''collecting from or disseminating to any law school data concerning compensation paid to deans, administrators, faculty, librarians, or other employees.'' The purpose of this change would be to permit the exchange of information about *past* compensation. The exchange of past information in a market that is not concentrated is unlikely to result in competitive harm. On the other hand, this information can be critical in diagnosing the problems of a law school that has fallen below acceptable qualitative standards.

b. Delete items VI.(C)(3); VI.(D)(3); VI.(E)(3); and VI.(F). These requirements suggest that the interest of legal educators is to stem the supply of legal services. This is counterintuitive and is not supported by available data.

I hope these comments are of use. I am ready to consult or comment further if necessary.

Respectfully,

Jeffrey L. Harrison,

Chesterfield Smith Professor of Law.

The University of Chicago—The Law School 111 East 60th Street, Chicago, Illinois 60637, Telephone (312) 702–9611, FAX: (312) 702–2063

October 2, 1995.

Via Facsimile Number: (202) 616–5980

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW., Room 9903, Washington, D.C. 20001

Re: Comments as to modifications of proposed Final Judgment in *U.S.A. v. American Bar Assoc.,* (D. Ct. D.C. C.A. No. 95–1211)

Dear Mr. Greaney: I have decided to file comments about the proposed consent decree because (i) it does not recognize that the real conspiracy was of academics and deans and not all faculty to control the accreditation process and (ii) the proposed reforms will likely result in a lessening of vigorous enforcement of accreditation standards. Both results are not in the public interest of providing dramatically different and better legal education so that lawyers of the future can redeem the reputation of the profession by providing better representation to their clients and improving our system of justice.

I. My Involvement in the ABA Section of Legal Education and its Accreditation Process

After serving for many years on the American Bar Association's (hereinafter ''ABA'') Section of Legal Education and Admission to the Bar's (hereinafter ''Section of Legal Education'') Clinical Education and Skills Training Committees, I was appointed by the Chair of the Section to the Accreditation Committee in 1987 and was re-appointed in 1990. I served on the Accreditation Committee for a total of seven years (1987–1994). In 1994, the Nominating Committee of the Section on Legal Education nominated me to one of the twelve-at-large positions on the Council of the Section. I was unanimously elected by the Section to a three-year term of office in 1994. I participated in all the decisions at issue in this case with the exception of when I recused. I spent anywhere from 30–40 hours preparing for each of the 2–3-day long meetings each year. I did not receive any compensation for the 200 hours I spent on the Accreditation Committee's work (I spent another 100–200 hours each year on domestic and foreign site visits). (Contrary to the supposed embarrassment of receiving one round-trip plane ticket to Europe each year to inspect one or two foreign programs which took 20–30 hours each, I feel it was an earned ''perk''.) Of course, the ABA could have paid my customary hourly rate.

I have also been part of a political movement of clinical teachers to drastically reform legal education so that issues relating to serving the client, instruction in lawyering skills, and knowledge about the legal rights and needs of the poor would begin to be covered in law schools. I have seen meritorious proposals submitted by clinical teachers and recommended by the Skills Training Committee repeatedly rejected by the Council of the Section of Legal Education. I believe that the Council, the

officers and the Section itself have been controlled by academic faculty and Deans and lawyers and judges who had been deans and academics. Many on the Council and the Accreditation Committee have served previously in leadership positions in the Association of American Law Schools, (''AALS'') the trade association of law schools. Indeed the AALS has been routinely allocated one position on each site evaluation team.

I believe that persons representing other aspects of legal education have been excluded from leadership in the Section or are grudgingly accepted into the Section's Committees and the Council only after making major political demands and efforts. For example, in the early 1980's clinical and professional skills teachers sought to be involved in the Section of Legal Education but were repeatedly rebuffed. Finally, out of desperation, a group of these teachers ran an alternative slate for election to the Council and for the officer positions. Only then were these groups invited to participate.

Even then, only a handful of accreditation site visit teams included a skills teacher or a clinical teacher. After many efforts to urge the increased use of persons knowledgeable in these areas and several resolutions from the Skills Training Committee did the Section of Legal Education begin to send out skills and clinical teachers on a regular basis. Recently the Section has assigned a clinical teacher to nearly every team. The Section's Wahl Commission has also recognized the importance of including skills and teachers on the teams. I urge the Justice Department to strengthen the consent decree by assuring that there is truly outside regulation apart from the academic faculty and deans. Maybe a different Section of the ABA or a new entity should conduct the accreditation of legal education.

But whoever does accreditation should be much more vigorous than the ABA has been. Yet the Justice Department seems to take the position that there has been over-enforcement. The reality is that the ABA has been a ''paper tiger'' and has not sufficiently pushed to improve legal education to train our students to be prepared to practice. The ABA has been a ''paper tiger'' by not adopting and enforcing Accreditation Standards which relate to providing adequate education in skills and values needed by lawyers. Indeed only after a concerted initiative by certain members of the House of Delegates did the Section agree to amend the Accreditation Standards to require that each Law School ''shall maintain an educational program that is designed to * * * prepare them [students] to participate effectively in the legal profession.'' Before this change, the ABA only required that schools have a program designed ''to qualify its graduates for admission to the bar.'' Many aspects of law schools that do not directly relate to teaching such as scholarly, theoretical research have been the basis for strong action, but the quality and type of teaching has not been as carefully and thoroughly addressed in the accreditation process.

In my areas of concern and interest, the official action taken by the Council and the Accreditation Committee has been grossly inadequate to improve the legal education of American law students. Although clinical education has been the most significant change in law school teaching methods in the last 30 years, it is not even mentioned once in the Accreditation Standards. The Justice Department seems satisfied with the current state of legal education. Apparently it has not examined the many reports and studies which show a widespread dissatisfaction about the lack of training for practice. Such reports include the Cranton Report and the Report on the Future of the In-House Clinic. If an evidentiary hearing were held, the Justice Department would find that legal education is still mired in the past with large lecture classes, a bar examination orientation or esoteric theoretical courses of interest only to the faculty. The schools have been slow to change. The ABA has been responsible for what little progress toward teaching more about lawyering skills, using live client representation, preparing students to do *pro bono* to serve the poor and offering well-supervised externships have come through the ABA's House of Delegates and grudgingly from the Section of Legal Education.

Years ago, Chief Justice Burger summarized the conclusion earlier reached by many knowledgeable persons, that the trial bar was ''incompetent.'' Yet still many schools limit the number of courses a student can take in litigation skills, including interviewing, counseling, pre-trial, trial and post-trial, trial and post-trial skills (sometimes to as few or six credits on a quarter system). Some schools still do not provide a live client clinic even though educational literature shows that this method of close supervision and collaboration with a law professor in serving a real client is the best way to teach students in a service profession and to teach adult learners. Yet many schools still do not provide credit for clinical instruction or severely limit the amount of credit that can be earned for clinical work.

II. My Appeal Within the American Bar Association

When the possibility of a consent decree was raised, I opposed it because I did not believe it was in the public interest. I was allowed to attend the Board of Governors meeting when it was considered, but was not given the privilege of the floor. Upon the advice of the legal counsel of the ABA that I could challenge the actions of the Board of Governors by appealing to the Secretary of the ABA, I filed two appeals with the Secretary. President Bushnell ruled that the appeals were mooted by the agreement to enter into the Consent Decree. I have decided not to pursue these appeals further, not because they are moot as indicated in president Bushnell's letter, but because I have sadly and regretfully concluded that the Board of Governors' decisions were justified in part.

I challenged the Board's actions because (i) they were taken in violation of proper procedures required by the controlling ABA governing documents and due process of law and (ii) the actions including the consent decree were not in the public interest of effective accreditation of law schools—the responsibility assigned to the American Bar Association by the highest courts of the states; and (iii) were not in the best interest of the ABA. Based on the positions taken by the Council and officers of the Section of Legal Education this spring and summer, I have reluctantly concluded that the Board of Governors was justified in deviating from the normally required procedures because of the emergency nature of the matters under consideration.

Recent decisions by the officers and the Council of the Section show that the Board of Governor's decision to enter into the consent decree was correct. The Council has acknowledged that the consent decree is justified by its failure to present a theory of the case or otherwise defend its accreditation practices (within the ABA or publicly) from the Justice Department's accusations. As far as I am aware, I have never been a party to any effort to raise salaries of faculty and Deans for any reason other than to improve the quality of legal education.

I now also believe that the reforms adopted were partially justified but do not go nearly far enough. Through the years, the Council of the Section of Legal Education has failed to include enough ''outsiders,'' (such as adjuncts, legal writing instructors, clinical teachers, practicing lawyers, younger lawyers, judges and public members) and has unduly relied on full-time *academic* faculty and deans and those allied with them. I urge the Justice Department to recognize that the process needs substantial additional diversification to include more clinical teachers, adjunct faculty, externship supervisors, writing instructors, younger lawyers, law students and judges and practicing lawyers who have not been full-time *academics* or deans previously. I agree with the conclusion in the competitive impact statement that the accreditation process has been captured by the deans and faculty of American law schools. I disagree though that it was captured by all types of full-time faculty. Rather the ''guild'' is composed of the academics and deans and those aligned with the academics.

III. Student/Faculty Ratio

The Justice Department is correct that the student-faculty ratio did not allow adequate consideration of the importance of many at the institution who teach and hold lesser status than full-time tenured faculty. Thus, as noted in the impact statement, the groups excluded from the count, included many important teachers in the skills area:

(1) Adjunct professors who often provide all or nearly all the teaching staff for skills courses;

(2) Clinical teachers who hold short-term contracts or are not accorded security of position similar to tenure; and

(3) Legal research and writing instructors who are nearly all employed on one-year contracts.

The purpose of the ratio, though, has been well-intended—to move towards smaller classes and increased student-faculty contact. Other circumstances have undercut accomplishing those purposes, such as the imposition of very low teaching load limits on academics by the schools and by the ABA and the increasingly extensive outside

practice of many of our most distinguished and effective full-time tenured faculty. Indeed what is particularly shocking is that while Congress provided $14 million dollars a year through the U.S. Department of Education for clinical education (until the recent election of 1994), much of that money was only used for temporary hires. At the same, time, the law schools used their increased revenues from raises in tuition to increase the size of the academic faculty and increase scholarly production without adding equally to the permanent, full-time faculty committed to clinical and skills instruction with security of position equivalent to tenure under Standard 405(e).

IV. Physical Facilities

In the portion of the Competitive Impact Statement about facilities, the Justice Department makes some flaws of logic. The Statement indicates that one-third of all ABA approved law schools were ''put'' on report for inadequate facilities by the Accreditation Committee in 1994. It takes many years to build new buildings so schools are on report for inadequate buildings for maybe a decade or more. Schools with prior violations are in the process of correcting them by building additions or adding heating and ventilation and the like. So the one-third must have been put on report over a seven-year sabbatical period.

But the more troubling aspect of the facility portion is that the Justice Department apparently wants one rule for ''law schools of recognized distinction'' and another rule for those schools that it would not recognize as ''law schools of recognized distinction.'' The problem is one of equal treatment and the public interest. Those who teach at ''schools of recognized distinction'' know how much room they have to improve in terms of the quality of legal education provided their students. Some of those schools have been particularly reluctant about entering into clinical education and skills instruction and have slowly, and in some cases, only recently increased their commitment in this regard. The need for assuring that even students who go to law schools of ''recognized distinction'' are prepared to represent individuals in major criminal cases and civil cases of significance after graduation upon passing the Bar is just as great as it is for other law schools. To apply one standard at schools of ''recognized distinction'' and a substantially higher standard to others would be wrong. Hopefully, the Justice Department will indicate that it did not intend this result and will correct the impression left on Page 8.

If the Justice Department is concerned about improving the process to have more equal treatment, it should require the ABA to provide more funding to add staff to improve the evenness of the decisionmaking. The overreliance on volunteers at every stage of the process has resulted in some unintended differences in treatment. But, by and large the volunteers have done very well at implementing the Standards established by those in control of the process.

V. Resources

The problem of in adequate resources is not only with the total resources available to the law school but also more importantly, the prioritization of its use. Since schools are required by ABA Standards to be controlled by the full-time academic faculty, they naturally tend to favor adding additional academic faculty over full-time skills and writing instructors and full-time clinical teachers. The public interest demands a change in priorities and an improvement in the methods of instruction for all students at *all* schools. The ABA has not done enough in this regard. It has not required that law schools provide instruction in the core professional skills to all students who want this instruction, let alone to all students. Clinical education is not even mentioned once in the Accreditation Standards.

More money is needed to reduce the teaching ratios to something more appropriate to professional education or graduate education—where ratios are set as low as 3 to 1. Increased sums are needed and if the Justice Department does not recognize the importance of increases in resources for legal education, then it really is not aware of the realities of funding for different parts of the university and the needs of legal education. The failure to require additional resources for law schools may be the result of an effort, which is apparent throughout the decree, to respond to the complaints of the regulated—the presidents of universities. Indeed, overall the decree seems to be more a response to individual constituent complaints than legitimate anti-trust concerns.

VI. Remedies

The requirement that no more than 50 percent of the Council members should be law school deans or faculty, should provide that at least one of those should be a clinical teacher or else the Committee will be controlled exclusively by academics. Likewise, the provision that 40 percent of the members of the Nominating Committee shall be law school deans or faculty, should be changed to require that at least one of those be a full-time clinical or skills teacher. Again, with respect to the Accreditation Committee, one of the members of the Accreditation Committee should be a clinical teacher, or else up to 50 percent of the Accreditation Committee may be academics or deans. Likewise, with the Standards Review Committee, a clinical or skills teacher must be included. Each site team should include one clinical teacher. The AALS should no longer be allocated one position on each site team. It should be noted that the Justice Department is seeking to include one non-law school university administrator. It may be that this addition will replace the clinical teacher, who has been on nearly all teams recently, a practice of which the Wahl Commission approves. This would be a most disastrous result.

I am particularly concerned that the non-law school university administrator, who will most likely reflect the views of the regulated entity that is refusing to provide the resources necessary to improve the quality of legal education, will be siding with the University in the face of demonstrable needs for legal education. But, if the Justice Department is intent upon putting the regulated entity into the process, then certainly the decree should provide that that person not displace the one non-academic full-time teacher on the team.

VI. Over-Enforcement

With respect to the consent decree, it should be noted that the Justice Department has agreed that the ABA can continue to adopt reasonable standards, interpretations and rules and that it can enforce its standards and interpretations even with respect to the ability of a law school to attract and retain a competent faculty. This ratification of the accreditation process is a good sign. Yet, in many places in the competitive impact statement the Justice Department undercuts that recognition and seems to indicate that it believes there has been over-enforcement of the accreditation standards. Even though American legal education needs great improvement, the Justice Department does not want the accreditation process to play a significant role in assuring that future law students are actively prepared to practice law.

VII. Discrimination Against Clinical and Skills Teachers

Some Deans and academic faculty have alleged that clinical teachers, including extern faculty supervisors and other skills teachers have ''captured'' the Section on Legal Education's accreditation apparatus. To my knowledge, no active clinical teacher has chaired a site evaluation team. No more than one clinical teacher has served on the Accreditation Committee at one time. Likewise, only one clinician serves on the Council. Only recently has a clinical teacher been included on nearly all site evaluation teams.

The following shows the kind of discriminatory treatment accorded clinical and skills instructors by the ABA:

Differential Treatment Between Academics and Skills in the Standards and Interpretations

Skills

1. Skills Curriculum

(a) Schools need only ''offer instruction in professional skills. There is no requirement that all students who want to take ''core skills courses'' must be accommodated. For example, trial practice courses at many schools are overbooked and students are turned away. Likewise, many students who want courses in interviewing, counseling, negotiation, alternative dispute resolution, pre-trial practice, problem solving, representing organizations and other skills courses are turned away.

(b) Schools are not required to offer clinics to all, nor even to those students who want this training. Indeed the ABA has not been chosen to recommend that schools offer clinics by using a ''*should offer*'' standard.

2. Status

(a) School are *not required* to give tenure or any job security to full-time faculty members whose primary responsibilities are in its professional skills program.

(b) The requirements of tying faculty salaries to the prevailing compensation of

comparably qualified private practitioners and government attorneys led to the anomaly where the Accreditation Committee and the Council would not require schools to raise the salaries for clinical and skills teachers if they were close to the salary levels of legal aid lawyers and government lawyers (prosecutors and public defenders) at the state and local level. This stifled any effort to diversify the faculty teaching in clinical programs by attracting persons in private practice at large and small firms and with qualifications more like those hired to the academic faculty. Many schools argued that 405(a) allowed them to keep clinical salaries very low and the leadership of the ABA has agreed. The Accreditation Committee has not required comparable salaries for skills faculty because the Committee has concluded time and time again, over objections by some Committee members, that compensation is not a *''perquisite''* of the position under 405(e).

(c) Most often those on the clinical professional track are not allowed to vote on appointments to the academic faculty and in many instances are not allowed to vote at all. In some schools, professors holding clinical ranks are not even allowed to attend faculty meetings. Short-term contract clinicians are afforded no involvement whatsoever in governance at most schools. They cannot attend faculty meetings, do not serve on committees, and sometimes are not even listed in the catalogue. The ABA does not require that clinical and skills teachers be allowed to participate in governance.

3. Physical Facilities

The Accreditation Committee has ruled that the absence of space for a clinical program or professional skills instruction does not violate Standard 702. The Standard 701 requires that the physical plant is adequate for both its current program and for such growth in program should be anticipated in the immediate future. Many schools will report in their self-studies that they would very much like to have a clinical program in house, but do not have the facilities or lack the resources.

4. Adequacy of Financial Resources

(a) Standard 201(b) has been repeatedly applied so that schools do not have to provide skills instruction or clinical education if they plead that they lack adequate resources to do so.

Differential Treatment Between Academics and Skills in the Standards and Interpretations

Non-Skills

1. Academic Curriculum

(a) ''Shall offer to *all students* instructions in those subjects generally regarded as the core curriculum.'' Standard 302(a)(i).

(b) ''Shall offer to *all students* at least one rigorous writing experience.'' Standard 302(a)(ii).

2. Status

(a) Schools are required to provide eligibility for tenure status for academic faculty under Standard 405(d).

(b) Until recently Standard 405(a) the academic faculty were required to be provided conditions adequate to attract and retain a competent faculty. The standard included that the compensation should be sufficient to attract and retain persons of high ability and should be reasonably related to the prevailing compensation of comparably qualified practitioners and government attorneys and of the judiciary. This standard of course has been eliminated in the consent decree. It was applied in the past in a way to increase academic salaries while putting a lid on clinical and skills salaries.

(c) Under Section 405, professors on the academic faculty are usually allowed to vote on all matters, including appointments and tenure on the selection on the Dean and, often, on budgetary matters as well.

3. Physical Facilities

Standard 702 requires ''classrooms and seminar rooms to permit reasonable rescheduling of all courses.''

4. Adequacy of Financial Resources

(a) There must be adequate resources to accomplish the objectives of its educational program.

The ABA uses a *''should''* standard to recommend that schools ''should afford to full-time faculty members whose primary responsibilities are in its professional skills program, a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members'' Standard 405(e). This standard originally was a ''shall'' standard that was mandatory with respect to a predominant number of the full-time skills faculty. However, when the deans of some schools (the Justice Department would call them ''schools of recognized distinction'') organized to defeat this standard and the Association of American Law Schools came out in opposition, the Council of the Section of Legal Education reversed its previous recommendation that there be a ''shall'' standard and changed it to a ''should'' standard. The clinical teachers then organized a campaign to support a resolution introduced before the House of Delegates by the Section on Criminal Justice, that the ''should'' standard be changed back to a ''shall'' standard. The Council of the Section on Legal Education opposed this. The proposal was then defeated in a close vote on the floor of the House of Delegates. Likewise, the efforts by the deans of the elite schools to eliminate even a ''should'' standard was resoundingly defeated by the House of Delegates with the Section opposing it. Recent practice of the Accreditation Committee is only to express a concern about lack of compliance with Standard 405(e) and not to find a violation. (The medical accrediting authorities would find a violation when a school lacks a good justification for not following a ''should'' standard). The short-term contract clinicians have absolutely no security of contract even under the ''should'' provisions of Standard 405(e).

VIII. Procedural Difficulties With the Incomplete Decree

Another problem is that the Justice Department and the ABA did not resolve several matters. Six years were left for later determination. The result of this approach could be to deprive the public of a chance to comment on those actions. This approach may also preclude review and approval by the Court. The ABA has until February 29, 1996 to act. The Justice Department will either agree with the actions taken or it can challenge them within 90 days. But the public apparently will not be given an opportunity to express its views about the public interest. Essentially, there will either be a trial or a second consent decree as to these six areas.

Since the Justice Department has made crystal clear its conclusion that tough standards and tough enforcement to improve legal education are inappropriate for the ABA, the likely result of this process will be to come up with watered-down new standards that will get by Justice Department scrutiny. It is very strange for the Justice Department, which is supposed to be protecting the public interest, to take the position that it wants less vigorous enforcement to improve legal education. Even worse, is its use of an approach that will preclude effective public involvement. Therefore, I request either that (i) when the Justice Department decides on its response to the ABA's recommendations, the public be given a new chance to take part and submit its response and comments or (ii) that the consent decree be held open and not be deemed a final judgment and that the court continue the matter until the completion of the Wahl Commission and ABA process and Justice Department's decision on whether to agree or oppose the ABA's recommendations.

Indeed, given the reluctance of the Justice Department to support strong, vigorous, tough accreditation of American law schools for the improvement of legal education, the Court should go further and appoint an *amicus curiae* to represent the public interest in improved legal education. Surely the performance of the legal profession has never been held in lower regard by the public than it is today. The next generation of lawyers needs a different end better education in skills and values to improve the profession. The Justice Department seems too much concerned with satisfying different discrete constituents and not really bringing about major reforms in legal education. The American Bar Association on the other hand has been too concerned with the costs of litigation, the loss of its effectiveness with the Justice Department and others in Washington and perhaps the disclosure of embarrassing details that might surface. Much more is at stake and the Court should act to protect the public interest in improving legal education even if the Justice Department and the ABA will not.

Respectfully submitted,

Gary H. Palm

The University of Texas at Austin, School of Law

727 East 26th Street, Austin, Texas 78705–3299, (512) 471–5151, Telecopier Number (512) 471–6988

September 28, 1995.

John F. Greaney, Esq.,

Chief, Computers and Finance Section, Department of Justice, 555 Fourth Street, N.W., Room 9903, Washington, D.C. 20001

Re: United States of America v. American Bar Association Civil Action No. 95–1211 (CR), U.S. District Court for D.C.

Dear Mr. Greaney: *My Interest.* I became involved in the national accreditation of law schools in September 1968 when I became the first Consultant on Legal Education to the American Bar Association (ABA). I became the Executive Director of the Association of American Law Schools (AALS) in September 1973 and served in that role for 11 years. AALS accredits law schools by admission to membership—the historic method. After retiring from the AALS in 1987, in 1989 I became a member of the ABA Council's Standards Review Committee. While with the AALS, I was active in the Council on Postsecondary Accreditation Committee on Professional and Specialized Accreditation. In these capacities and as a law teacher, I have inspected many laws schools and long dealt with accreditation issues.

My experience and knowledge of the history of legal education and accreditation compels me to help the court understand what the Department of Justice () has done and the court is asked to do. The proposed Final Judgment manifests a gross misunderstanding of legal education and accreditation. Its understanding is not enlightened by knowledge of the history of legal education.

Legal Educators' Guild and Capture. DOJ uses the pejorative ''guild'' to describe the law teachers and deans involved in the ABA accreditation process. This defames the hundreds of law teachers and deans who have given faithfully of their time to the process without compensation or other reward and in the public interest. It also defames the judges, practitioners, and bar examiners who served the process faithfully, especially those who have for years been the majority members of the Council. The implication of the charge is that these lawyers have been dupes, fools, or co-conspirators.

Before the DOJ issued its command, the 19 officers and members of the 1994–1995 Council were three members of state supreme courts, six practitioners, one bar admission administrator, six law school deans, one law school librarian, and two professors, one of whom is retired and formerly was a college president and law school dean. If the purpose of the conspiracy was to ''ratchet up'' the salaries of law teachers, there was only one individual with a direct interest in the purported conspiracy.

DOJ apparently assumes that the interest of law teachers and deans are identical. If it had a realistic understanding of law school budgeting, it would understand that they are not; while attracting and retaining highly qualified and valued law teachers is obviously an objective of the dean. There are other important objectives of expenditure, such as scholarships, library collection, adequate admissions and placement programs, and student co-curricular activities. Deans of inspected schools certainly do not want unreasonable requirements imposed on them, especially unreasonably high salary requirements for full-time faculty. They want to meet the competition set by market forces but not pay unnecessarily high salaries. DOJ gives as evidence that legal educators dominate the law school accreditation process the fact that 90 percent of the members of the Section are legal educators. It neglects to note that the Section plays little or no role in the accreditation of law schools. The role of Section members is largely to elect the officers and members of the Council. Like many other ABA Sections and nonprofit organizations, the electoral process largely affirms the decisions made by the nominating committee.

ABA ''Monopoly'' of Accreditation. The ABA did not acquire by its action the ''monopoly'' to accredit law schools and have its approval exclusively relied upon by most bar admission authorities. State supreme courts and bar admission authorities gave that authority to the ABA. These authorities have confidence in the Standards defining quality and in the process evaluating adequately the schools.

In *La Bossiere* v. *Florida Board of Bar Examiners,* 279 So. 2d 288 (FL 1973) the Florida Supreme Court observed: ''We were persuaded to follow the American Bar Association Standards relating to accreditation of law schools because we sought to provide an objective method of determining the quality of the educational environment of prospective attorney. * * * (W)e were unequipped to make such a determination ourselves because of financial limitations and press of judicial business. * * * (I)t is * * * patently obvious that judicial bodies are singularly ill-equipped to bring to bear the resources and expertise necessary to conduct a case-by-case evaluation.''

Cognizant of the trust placed upon it by bar admission authorities, the ABA Council has for many years involved members of state supreme courts in its work—as members of the Council, site evaluation teams, and other committees of the Council. It also sends to all supreme courts and other bar admission authorities, among others, all proposed amendments to the Standards. Officers and the Consultant from time to time attended meetings of the National Conference of Chief Justices to discuss the Council's accreditation activities.

The Department of Education (D.Ed.) now recognizes the Council of the ABA Section of Legal Education and Admissions to the Bar as the sole accreditation agency for law schools. While the AALS has been accrediting law schools by admission to membership since 1900, the Department of Education recognizes only one accrediting organization for law. It is the Council.

The United States' recognition of accreditation agencies who admit as members or approve educational institutions assures the federal government that the students who attend the accredited institutions are receiving a quality of postsecondary education that justifies the government student loan and grant programs to those students.

It is these two organizations that grant to the ABA Council what ''monopoly'' the Council has with respect to legal education. It is not any action by the Council of the ABA that gives it activity this monopoly. It is their ''fault'' that the ABA Council plays the critical role.

Basic Characteristics of Accreditation. Historically accreditation of educational institutions served two purposes. First, it informs prospective students and their parents that the education provided by an accredited institution at least meets the basic requirements of quality. Secondly, it informs other educational institutions that the credit or a degree earned by a student at an accredited institution is entitled to be recognized by other educational institutions. Later accreditation has been used to assure professional licensing institutions, such as legal and medical profession admission authorities, that the degree earned at an accredited institution represented an adequate professional education.

Accreditation is a peer review process. Professional educators evaluate educational institutions' conformance to quality standards. It is understandable therefore that legal educators are involved in evaluating programs of legal education.

In 1970 the Council decided that site evaluation teams should contain, in addition to legal educators, practitioners, judges, bar admission administrators and the like. This practice has been followed since then.

In the mid-1970's the Bureau of Competition, Federal Trade Commission questioned the involvement of the American Medical Association in the accreditation of medical schools through its partnership with the Association of American Medical Colleges in the Liaison Committee on Medical Education. The concern was about any role for the practitioners of medicine in professional education for the profession. The concern was that doctors would use accreditation to serve the economic interests of those in the profession. In the mid-1990's DOJ is taking an opposite position concerning the accreditation of law schools. Curious?

On the other hand, it is clear that the profession has not used ABA accreditation to hold down law school enrollment or the increase in the number of approved law schools. Responding to the great growth in demand for legal education and interest in establishing new law schools, the 1971 ABA presidential Commission on Professional Utilization noted the large unserved need for legal services and welcomed this growth.

Relevance of Faculty Compensation. The proposed Final Judgment prohibits the ABA from considering compensation paid full-time faculty in its accreditation of law schools. Whatever is the alleged conduct that forms the basis for the DOJ prohibition, it is beyond dispute that a law school's compensation structure directly affects the quality of those whom it can recruit and retain. Is it mere coincidence that the law schools that compensate its faculty best are also those that have the most highly regarded programs of legal education?

Law schools are not immune from market forces. Other law schools and law firms are a school's principal competitors. Major law firms and law schools compete for the same

group of graduates of well regarded law schools. This group is composed of those who were officers or members of a law review, and graduated with honors, including Order of the Coif. Matters other than compensation are factors, but compensation remains a significant factor.

The ABA understandably has chosen to reduce its large litigation costs by entering a consent decree and so has not contested this DOJ charge. But the fact remains that the charge has a weak foundation in fact.

Competitive Disadvantage of Unapproved Law Schools. If accreditation has any meaning, it means that some law schools will not have the established quality standards and so not earn approval. The approved law schools have an obvious advantage in recruiting quality students and faculty. The ''market'' informs potential students and faculty of the quality advantages of the approved law schools. Is accreditation an unreasonable ''restraint of trade''? It would be shocking if DOJ said it was.

The evidence is clear that law schools in their initial period of approval experience a very significant increase in applications by better qualified students. A number of law schools during my experience as Consultant found that one-half of the students admitted in the previous year would not have been admitted had they applied after the school received approval. Approval, in other words, improved the competitive position of the school.

During my five years as Consultant, I dealt with a number of established unapproved law schools that wanted to become ABA approved. My assigned role was to help the schools to redesign their programs to comply with the ABA standards. The present consultant has the same responsibility. I never lost an applicant. Except for a for-profit law school unwilling to use the resources needed and a current applicant, this has been the current consultant's experience, too. If the Council's program of accreditation has been aimed at reducing competition for the approved law schools, it has done a very poor job. Many new law schools have been approved since the explosion of demand for legal education began in 1968.

There are two additional badges of quality a law school may earn—membership in the AALS and having a chapter of the Order of the Coif. To some extent the schools who have one or both of these have a competitive advantage over the approved law schools that do not. A ''restraint of trade''?

State Accredited Law Schools. The Final Judgment enjoins the ABA from adopting or enforcing any Standard, Interpretation, or Rule prohibiting an approved law school from ''enrolling a member of the bar or graduate of *a state-accredited law school*'' in a post-J.D. program or from offering transfer credits for any course successfully completed at a *state-accredited law school.*''

If DOJ used the term ''accredited'' with care and precision and with knowledge of accreditation in the United States, this prohibition applies to very few unapproved law schools.

''Accreditation is the process by which educational institutions work together and with others to establish standards, evaluate and improve educational quality, and provide public evidence of this quality.'' Elaine El-Khawas, Accreditation: Self Regulation p. 555 in UNDERSTANDING ACCREDITATION (Kenneth E. Young, ed.) Jossey-Bass Publishers (1993).

''Accreditation means the status of public recognition that an accrediting agency grants to an educational institution or program that meets the agency's established standards and requirements.'' Section 602.2, Department of Education, Procedures and Criteria for Recognition of Accrediting Agencies, 34 CFR Part 602.

The foregoing establishes that the essential elements of accreditation are (i) established standards concerning quality of the educational institution or program, (ii) site evaluation to determine whether the educational institution or program complies with the standards, and (iii) periodic re-evaluation of the institution or program's conformance to the Standards.

Some state supreme courts authorize graduates of unapproved law schools within their state to take their bar examination. In some states, such as Texas, authorization has been given on an ad hoc basis for graduates of unapproved law schools that failed to get ABA provisional approval before its first class graduates. A major consideration was concern for the grave situation in which the school's failure placed its graduates. Accordingly, this recognition of the unapproved law school's degrees is generally for a short time. It is often based on the time needed by the school to get provisional approval. A few states, on the other hand, accept a state's unapproved law school's degree as satisfying the legal education requirement for eligibility to take the bar examination. This recognition cannot accurately be called accreditation.

The proposed Final Judgment prohibits only the ABA from directing approved law schools not to recognize credit or degrees earned at unapproved law schools. Approved law schools will make their own quality educational judgments. Credits or degrees earned at unapproved schools are unlikely to pass the individual law schools' quality test.

University Administrator on Site Evaluation Team. The proposed Final Judgment requires that each site evaluation team include ''one university administrator who is not a law school dean or faculty member.''

It is present practice to involve university administrators who do not have a law school connection on many evaluations of law schools that are parts of a university, especially a major university. The role of a university administrator in the evaluation of a law school that is not part of a university seems uncertain. Does DOJ require their appointment in those evaluations? Why?

It is unusual for an individual to be at the same time a university administrator and law school dean or professor. The individual might be on leave from her law school position, but rarely from a deanship. Just what does DOJ mean? Is this another example of DOJ's ignorance of legal education and its administration?

Excessive Intrusion Into ABA Governance and Issues of Legal Education. The legitimate jurisdiction of DOJ is confined to its allegation that the ABA has violated the Sherman Act. It is the U.S. Department of Education (D. Ed.) that has jurisdiction over the ABA Standards and accreditation process' evaluation of the quality of legal education offered by approved law schools.

Many aspects of the proposed Final Judgment address matters not within its limited jurisdiction. The requirement of a university administrator on a site evaluation team is clearly only a question of quality and not unreasonable restraint of trade. The requirement of validation of the Standards and Interpretation by an outside consultant is clearly a matter for D. Ed. The anti-trust relevance of most of what the Special Commission is to study under VII(A) of the Proposed Final Judgment seems remote; they are concerned with quality of legal education.

DOJ seems intent on reforming legal education. That is not its business. To a limited extent it is the business of D. Ed.

DOJ's very doubtful conclusion that the ABA has violated the antitrust laws raise serious questions about its justification for the excessive intrusion into the ABA's operation of its accreditation program. For example, the proposed Final Judgment specifies three-year terms for members of the Council, Accreditation Committee, and Standards Review Committee. Those serving on the Council and Accreditation A committee may serve a second term but those on the Standards Review Committee may not.

While three-year terms may be a good idea, it should be up to the Section to decide that. Who should be eligible to serve should also be a policy left to the Section or the ABA. It is curious that the Standards Review Committee is mentioned at all. It has only the power of recommendation to the Council. It is the Council that decides. Members of the Standards Review Committee must know institutional history. Under the DOJ mandate it is the group that must rely most on others.

Sincerely yours,

Millard H. Ruud

MHR:cer

P.S.: These comments, of course, represent my views and not those of The University of Texas or its School of Law or officer or staff member, or of any committee of the ABA Section of Legal Education and Admission to the Bar.

University of South Carolina, Department of Clinical Legal Studies School of Law

September 29, 1995.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, Room 9903, 555 4th Street, N.W., Washington, D.C. 20001

Re: Comments on proposed Final Judgment in *U.S.A. v. American Bar Association,* (D.Ct. D.C., C.A. No. 95–1211).

Dear Mr. Greaney: Two provisions of the proposed Consent Decree should be modified: 1) the absolute prohibition against the collection or use of compensation data in the accreditation process; and 2) the limitation of three years service on the Standards Review Committee. These

conditions are unnecessary to accomplish the objectives on the Consent Decree, and they are likely to affect negatively the quality of legal education and the accreditation process.

I am a professor at the University of South Carolina School of Law. I served two successive three year terms on the Council of the ABA Section of Legal Education and Admissions to the Bar (1988–1994), and I served on the Standards Review Committee for five years (1990–1995).

Compensation

My understanding is that the Justice Department had two primary concerns about the ABA's practices with respect to compensation:

1. The ABA asked each law school being inspected to identify other law schools which it considered to be its peer institutions. The ABA then compared the salaries of the respective faculties and criticized the law school if its salary scale was below the median. I agree this practice was inappropriate, whether or not it violated any antitrust laws.

2. ABA Accreditation Standard 405 also suggested that law faculty salaries should be ''reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and the judiciary.'' It is my understanding that the ABA had stopped using this as a factor related to accreditation well before the Justice Department began its investigation. The Standards Review Committee had drafted a revised version of the relevant provision before the investigation began, and it further revised the language on advice of counsel for the ABA after counsel had discussed the problem with attorneys for the Justice Department. The proposed language would have allowed the ABA to consider compensation only as one factor in determining whether a law school was maintaining conditions sufficient to attract and retain a competent faculty. This should have alleviated the Justice Department's primary concerns.

The proposed Final Judgment has two key provisions related to compensation. The first condition would ''eliminate the adoption or enforcement of any Standard, Interpretation or Rule or the taking of any action that imposes requirements as to the base salary, stipends, fringe benefits, or other compensation paid to law school faculty, administrators or other law school employees.''

It is the second condition which is unnecessary and inappropriate. It would ''eliminate the collection or dissemination of compensation data for deans, administrators, faculty, librarians, or other employees, and the use of compensation data in connection with the accreditation of any law school.''

I cannot see any rationale for this language. Surely, the Justice Department cannot believe compensation is unrelated to the quality of a faculty or to the quality of legal education. There is no data showing that the ABA has driven faculty salaries to such a high level that members of law faculties are paid disproportionately to similarly qualified lawyers who are in private practice, or even the judiciary. At most schools they are paid significantly less.

I am not suggesting that the ABA should be allowed to use information about compensation to drive salaries upward, generally. However, the ABA should be allowed to consider compensation of faculty as one factor in measuring the quality of a law school's educational program. It makes no sense to prohibit the ABA from mentioning compensation, even if the ABA discovers that inadequate compensation is clearly contributing to high faculty turnover and making it difficult for a particular school to attract and retain competent faculty. This restriction is unwarranted and harmful to legal education.

The ABA should also be allowed to continue collecting data about salaries. If it visits a school at which the faculty is complaining that low salaries are harming the educational program, the ABA needs reliable data to be able to determine whether the salaries are really out of line or if the faculty is whining unjustifiably. Prohibiting the ABA from collecting salary data will not make it less available, just less reliable. Salary data will continue to be collected and shared whether or not the ABA continues doing it. Several other organizations already collect salary data or plan to do so if the ABA cannot. The ABA's data collection system has proven its reliability, the others' have not.

To conclude my discussion of compensation, it is important to understand that the goals of legal education and the interests of consumers are not served by encouraging a complete free market economy. Many lawyers would rather teach than practice, regardless of the salary offered, especially those lawyers who are not finding success in law practice. Many of the law schools at the lower end of the quality scale face significant economic pressures which could lead them to offer salaries which are insufficient to attract successful lawyers and judges into the academic world. Without a highly qualified faculty, law schools cannot prepare law students adequately for the practice of law. Ultimately, public consumers, i.e., clients, will suffer the consequences.

Standards Review Committee

The Consent Decree imposes a three year limit for service on the Standards Review Committee. This is unwarranted and will have a detrimental impact on the accreditation of law schools.

The Consent Decree incorporates the preexisting six year limit for service on the Council and Accreditation Committee. Before the Consent Decree, there was no limit on the length of service on the Standards Review Committee. I have been unable to unearth any explanation for this provision of the Decree. Unlike the Council and the Accreditation Committee, the Standards Review Committee has no rule-making or decision-making power. Its function is to consider proposed amendments to the Standards and make recommendations for consideration by the Council. The Council is free to accept, reject, or modify such advice.

If any limit is to be imposed, it should be a longer, not a shorter, term than for the Council or Accreditation Committee.

As a former member of the Council and the Standards Review Committee, I can attest that it takes longer to become acclimated to the work of the Standards Review Committee than to that of the Council and that there is a greater need for longevity of service. It is not uncommon to take longer than three years to process a proposed amendment to the Standards. For example, Standard 405(e) took six years from initiation to fruition; and Interpretation 2 of Standard 306 took over three years. The recodification project, the first stage of which is expected to be completed in August, 1996, will have taken much longer than three years to process.

It is important to the quality of the finished product that some people be allowed to remain on the Standards Review Committee from start to finish of proposed modifications to the Standards. The proposed three year limit will not permit this.

For the reasons stated above, I object to the proposed Final Judgment unless it is modified as follows: 1) to allow the ABA to continue gathering data about faculty compensation; 2) to allow the ABA to continue considering compensation as one factor in determining the quality of a law school's program of education; and 3) to allow the ABA to permit some people to serve at least six years on the Standards Review Committee.

Respectfully submitted,

Roy T. Stuckey

Southwestern University School of Law

September 29, 1995.

Mr. John Greaney,

Chief, Computers and Finance Section, Antitrust Division, U.S. Department of Justice, JCB Building, 555 4th St., NW., Washington, DC 20530

United States v. American Bar Association Civil Action No. 95–1211 (CR)

Dear Mr. Greaney: We write to express our concerns about the impact of the above-captioned consent decree, with particular reference to legal education in the State of California (Part I), and to indicate our concern with a particular provision concerning the collection and dissemination of salary data (Part II).

Part I (The Impact of the Decree on Legal Education in California)

The self-regulatory mechanism for American legal education is an unlikely target for antitrust enforcement. It is true, as Lord Acton warns us, that power corrupts—the greater the more absolutely. Reviewing the publicly available materials on this case, it is apparent that law schools and those who regulate them are not free of the venial sins common to all human endeavors. It may well be that some of this activity contravenes the Sherman Act (and we have no objection to the decree insofar as it is narrowly drawn to address any such violations).

We are concerned, however, about more intrusive aspects of the decree which seem motivated by a deregulatory animus. Current ABA regulation of accreditation standards has been targeted by some within the law school community who see it as stifling creativity, innovation and, perhaps, efficiency in legal education. Some, or even a great deal, of this criticism may have merit.

But, aside from the bureaucratic momentum that stifles change in any self-regulatory mechanism, there is no evidence that the traditional antitrust concern, market power, underlies this resistance to change. And, as we suggest below, there is legitimate controversy within the law school community about the wisdom of wholesale changes in accreditation standards.

The vast majority of men and women who have chosen to teach in American law schools do so because they believe in, and truly enjoy, the teaching and writing that is the core of the profession. For the most part, individuals who make this choice could have opted for higher paying jobs in the private bar or, perhaps, in government. The deans and administrators of law schools come from the ranks of these academics. They share with their colleagues strong commitments to the profession that they serve, the students that they teach, and the institutions that they lead.

The decisions of those who have led American legal education have not prevented development of a fiercely competitive market. Among the 178 ABA accredited law schools (there have been roughly 40 additions to this number over the past three decades) are a great range of institutions in all parts of the nation. The programs, the teaching methods, the tuition rates, and the reputations of these institutions vary widely. One example of this diversity, and the kind of program innovation it generates, is found at our own law school, which offers an ABA approved 24-month program leading to a J.D. degree.[1] The program discards traditional law school courses in favor of instructional units that stress concepts common to many subjects of the law. The existence of such programs tends to refute claims that ABA accreditation requirements stifle experimentation and creativity.

For reasons that we explain below, our fear is that the decree may result in relaxation of ABA accreditation standards, thereby heightening information problems for matriculating law students and distorting the allocation of legal educational services. Although the impact of the consent decree will be felt in all states, it is helpful to focus on the decree's potential impact in California. Aside from being the most populous State, California also has the most open system of legal education of any of the fifty states.

There are three categories of law schools now operating in California:

(1) ABA accredited law schools (16 schools);

(2) law schools certified by the State Bar (19 schools);

(3) law schools lacking certification from the State Bar (24 schools and an additional 13 correspondence schools).

Tuition demanded by these schools varies widely, as do the teaching methods, faculty student ratios, the percentage of full time instructors, library facilities, and other student support services. Unaccredited and uncertified schools may have no library facilities, few if any full time instructors, and few support services for students or faculty. Schools falling in the second category (certified by the State Bar) tend to offer some of these advantages but not to the extent of ABA accredited schools. Although accreditation standards are stiff, seven of the sixteen ABA accredited schools have achieved that status since 1960.[2]

Students attending the various categories of schools do not perform equally on the State Bar examination. The chart below compares the 1994 passage rate for first time takers from each of the three categories of law schools.

CALIFORNIA STATE BAR EXAMINATION PASSAGE RATE FOR FIRST-TIME TAKERS

[Calendar Year 1994][3]

	Took	Pass	Pass (percent)
California ABA Accredited Law Schools	3555	3048	85.7
State Certified Law Schools	1090	572	52.5
Unaccredited Law Schools (including correspondence schools)	159	59	37.1

The figures are skewed because the most gifted students tend to select among the ABA accredited schools. Indeed, students do not treat all ABA accredited schools as equivalent, discriminating among these schools based upon reputation, location, and tuition. Whatever the reason, the low bar-passage rates for many of the schools raise troubling consumer protection questions. There is ongoing debate about whether schools should be allowed to recruit students to pay out thousands of dollars of tuition and dedicate three or four years of their lives to obtain a legal education, only to find that their chances of passing the bar are quite low. The California Legislature has seen fit to require a ''baby bar examination'' for all students attending unaccredited and uncertified law schools.[4] Students are required to pass this examination before commencing their second year of studies at these unaccredited or uncertified institutions.

Even if students pass the bar examination, the market for jobs is skewed against those who attend unaccredited or state certified schools. The reputation of the school (and its status as an accredited, certified, or unaccredited institution) are considered by employers, making job prospects bleak indeed for those who have attended unaccredited schools.

These realities about bar passage rates and job prospects are probably understood by most matriculating law students. Students are aided in their understanding by the clear distinctions among the three categories. It is our sense that most applicants who have a choice will choose among ABA accredited schools, further refining their choice by assessing the reputation of an individual school. Indeed, some students who fail to gain admission to an ABA accredited school may decide not to pursue a legal education. We doubt that anything suggested in the decree will alter these fundamental market realities. On the other hand, the direction in which the decree appears to push ABA law school—toward relaxation of accreditation requirements such as faculty-student ratios and library facilities—will blur distinctions between ABA and non-ABA accredited schools, and make it easier for schools that lack that advantages now needed for ABA accreditation to obtain it. For reasons that we explore below, this may create greater information problems for applicants and pressure second-level, currently accredited law schools[5] to relax quality standards.

We digress at this point to offer an overview of such second-level law schools. At present, each of the ABA-accredited law schools in California operates as a non-profit, educational institution. Most have excellent law libraries, highly respected full-time

[1] Southwestern's Conceptual Approach to Legal Education, or ''SCALE'' as it is commonly known.

[2] California law schools that have gained ABA accreditation since 1960 are: University of San Diego (1961); California Western (1962); University of California-Davis (1968); University of the Pacific (McGeorge) (1969); southwestern University (1970); Pepperdine University (1972); and Whittier College (1978).

[3] This data is compiled from figures provided by the State Bar for the February and August 1994 administrations of the examination.

It is also significant that there is little overlap in the results among the various categories. For example, in the August 1994 administration of the bar examination, the passage rate for first-time-takers, calculated for individual ABA accredited schools, ranged from 77.9% to 94.4%. For State Certified schools, the rates for individual schools range from 16.7% to 76.3%.

[4] State Bar Act, § 6060(g). We understand that a bill has been introduced in the legislature to repeal this requirement. Its changes of success are unclear.

[5] We use the term ''second-level'' law schools to describe those ABA accredited schools that tend not to compete for the top five or ten percent of law school applicants, but will generally deny admission to those not meeting minimum objective qualifications. Our rough definition probably includes about twelve of the sixteen ABA accredited schools in California.

professors, and a solid commitment to both teaching and scholarship. Our own school, for example, has one of the finest law libraries in the State and a reputation for being a ''teaching'' law school.[6] The school also operates an academic support program for interested first year students. And, as is the case with most second-level law schools, it has for some years aggressively recruited and supported minority law students.

Although the primary mission of the second-level law school is teaching, these schools serve the community in other ways. Law libraries are generally open to practicing attorneys and students from other law schools. These schools also contribute substantially to scholarship on cutting edge issues. And full-time faculty and staff contribute to the community through membership in, and pro bono work for, various bar groups and community organizations.

Relaxed ABA accreditation standards probably would not affect second-level law schools if information flow and comprehension among law school applicants were optimal. Our school, for example, would chose to continue emphasizing its role as a teaching law school (maintaining its high full-time faculty to student ratio), as a leader in the recruitment and support of a large pool of minority applicants, as a promoter of legal scholarship, and as a provider of a first-class law library for the benefit of students, faculty and the surrounding legal community. Under optimal conditions, these features of the school would be valued by the community and the student applicant pool, ensuring the school's success in recruiting students.

We claim no prescience as to what the future may hold. But the very existence of accreditation standards (and other regulatory steps such as California's Baby Bar Examination) suggests that substantial information problems are inherent in running a system of legal education. Further evidence of these information problems is the heavy emphasis most law schools place on achieving a favorable rating from private surveys that rank law schools. Many legal educators regard these ratings as superficial and perhaps even misleading.[7] But because matriculating law students pay attention to these surveys in making their choices, law schools are very sensitive to the resultant rankings.

Although we have conducted no cost benefit analysis of the ABA's current accreditation requirements (and doubt whether a reliable one could be conducted), we believe that standards such as those governing the ratio of full-time faculty to students and the library collection are important to a quality legal education and to providing other community values that law schools serve. To the extent that such requirements are relaxed, currently non-accredited schools, with relatively few sunk costs in library and physical facilities, and fewer full-time faculty, will be in a position to obtain accreditation. Their status as ''accredited schools'' will not affect elite schools such as Stanford, which will doubtless continue to attract the most gifted law students. But the newcomers may, because of their substantially lower costs, be in a position to siphon away students from second-level accredited schools.

These consumer protection concerns are real. Schools, particularly those operated on a for profit basis, will have an incentive to avoid building libraries and hiring full-time faculty with teaching loads that permit non-classroom contact hours. Such schools certainly will be able to reduce their costs and their prices. If they can also present themselves to the market place with full accreditation credentials, currently accredited second-level schools will be forced to compromise important standards currently protected by ABA accreditation. Lower tuition costs would be a welcome development, but only if they can be achieved without injury to the important education and community values.

To summarize, we believe that to the extent that the consent decree pushes the nation's law schools toward relaxation of quality standards that bear on the education, research, and related community goals served by law schools, the decree will be counterproductive. As the system of legal education in California suggests, creating well-defined categories of law schools can serve an important consumer-information function, making it easier for matriculating law students to make wise choices about whether and where to pursue a legal education. To the extent that these distinctions are blurred, information problems for incoming students could be exacerbated and the market allocation mechanism for legal education services distorted.

Part II (The Collection and Dissemination of Salary Data)

Part IV(B) of the consent decree enjoins the ABA from ''collecting from or disseminating to any law school data concerning compensation paid or to be paid to deans, administrators, faculty, librarians, or other employees.''

Because we believe that the collection and dissemination of salary data serves a number of legitimate and important functions, we urge that this provision be removed from the decree.

Information about salary and benefit levels is a useful market indicator. Indeed, as a general matter, and especially where as here the structure of the market is plainly competitive, markets function better when players on all sides of a transaction are knowledgeable about market conditions. Although the exchange of information has sometimes been prohibited in oligopolistic markets, as when a trade association uses information exchange as a step in achieving uniformity in prices for a standardized product, there is no history of ABA accredited law schools attempting or achieving such uniformity in salaries or benefits. Nor do applicants regard legal education among law schools to be a standardized product.

Moreover, withholding market information about salary levels increases the possibility of exploitation of those with less knowledge and power. In the law school context, such salary information might be used by employees or faculty to gauge their market value based on what others in comparable positions receive. Those most likely to be underpaid are generally those with the most limited ability to obtain market information. Another way in which such information could be useful is in negotiations between a law school dean and a university president concerning the amount to be budgeted for law school salaries. Market information about salary and benefit levels would be helpful in budget discussions that ensure that the law school remains competitive.

We do not object to provisions of the decree that prohibit the ABA from setting salary or benefit standards, or making compensation levels a condition of accreditation. Our concern is rather that data collection and dissemination, which serve an important function by making the market more visible and less susceptible to exploitation, not be hampered by the decree.

Because there is a legitimate need for salary and benefit data, it is likely that other organizations (such as the American Association of Law Schools) would seek to collect and disseminate it even if the ABA cannot do so. These groups should be allowed to do so. But there is no reason for forcing this data collection out of the ABA's domain, with the attendant transactional costs involved in shifting this responsibility.

Sincerely,

Lawrence A. Sullivan,

Professor.

Warren S. Grimes,

Professor.

St. Thomas University School of Law

July 7, 1995

Roger Jacobs,

Director of Library, Member of Council, Notre Dame Law School, Kresge Library, Notre Dame, IN 46556

Dear Roger: I am not able to come to the AALL meeting in Pittsburgh to attend and to make a presentation about the proposed Library Standards. In addition, I have not seen the June final draft of the Library Standards. Thus, the following comments are subject to change and clarification based upon what is in the final draft of the proposed Library Standards.

Although not separately stated in either the Department of Education's regulations or the June 27, 1995, *Final Judgment of U.S.* vs. *ABA*, I interpret both documents to include law libraries and their operations under the category, ''physical facilities''. If law library

[6] According to a survey that the school commissioned, our graduates, and the graduates of one other California school (McGeorge), performed better on the State Bar examination than students with equivalent LSAT scores graduating from other California ABA accredited law schools. The widely held view among our colleagues is that the accessibility of the full-time faculty, the emphasis on attendance and class preparation, and the school's strict grading policy contribute to our students' success on the bar examination.

[7] By contrast, the ABA accreditation process, upon which students also rely, makes threshold judgements about whether schools meet relatively objective standards, but does not attempt to rank the various accredited schools. An ABA publication encourages students to ''consider a variety of factors in making their choice among approved schools.'' ABA, A Review of Legal Education in the United States, 2 (Fall 1991).

operations are included within the grasp and meaning of the term, I contend that the proposed Standards (I am referring to the January 11, 1995, proposed revision) do not comply with the DOE regulations as to the required documentation to justify the changes in the Standards or the *Final Judgment* of June 27, 1995, requiring the proposed Standards be submitted to the Board for review, followed by the Board filing its report with the United States District Court for the District of Columbia and the Justice Department for their review to determine whether to challenge any of the proposals. In Addition, under the *Final Judgment,* there is an antitrust compliance program that may not be in place. With these restrictions, (especially the *Final Judgment*), I contend that the proposed Standards (the January 11, 1995, revision or either the June 1995 or July 1995 revision) are not ripe for Council to submit its recommendation for action of the ABA House of Delegates at the August, 1995 Meeting. Within the time frames indicated in the June 27, 1995, *Final Judgment,* August 1996 would appear to me to be the earliest time under which the ABA House of Delegates could take any action relating to the proposed Library Standards. I do note that a *Final Judgment* has not been entered, but note in the *Stipulation* that the ABA agrees to be bound by the provisions of the *Final Judgment.* I view the agreement to be in force as of June 27, 1995.

As you may be aware, I have received ABA comprehensive library statistics and special statistics for selected schools for over ten years, including statistics based on Fall 1994 information. These statistics have been used to assess St. Thomas' growth and development, its operations and the Law Library plan of action, which is required under the 1986 Standards. Based on my assessments of these statistics, I have serious and considerable concern with the present methods of (a) collecting statistical information, (b) categories used in the collection document or vehicle (annual questionnaire), and (c) publishing and using the statistics in this present form.

As presently designed, the statistical information creates a very significant economic impact to the disadvantage of newer as well as smaller schools with less than 700 FTE students. There are approximately 63 schools with 700 FTE students or more and 115 schools with less than 700 FTE students. Note, however, the ABA does not include graduate students and special students in identifying the FTE student count used for analysis of library operations only full time and part time JD students are used. There are over 100 schools with graduate students, that are excluded from the analysis of library statistics. Important comparisons of book dollars per student and retrieval usage per student are *overstated* when graduate students are excluded; thus, in several instances, statistical information is somewhat, if not totally, skewed with misleading and incorrect information.

The elimination of students from the student side of the formula created in several instances a higher expense of book dollars per FTE student and higher retrieval usage per student, resulting in a higher mean and median. The constant and continuing pressure through the accreditating process for schools to reach and exceed the mean or median of information for all schools is based upon an incorrect foundation of statistical information.

The 1986 Standards, as part of the core collection requirements, specifically recognized and added online services (and probably the CD–ROM and other electronic resources) as a basic category of collection and information resources which schools have to use to support the academic program. Other changes were made in the 1986 revision, which can be interpreted to reinforce this conclusion—the elimination of some of the Shepard's Citations requirements and state statutes requirements, existing in pre-1986 Standards. These changes and others would, I contend, lead to the conclusion that the Standards did eliminate the ownership/warehouse concept for all ABA approved libraries to support academic programs. The Accreditation Committee and Council have provided no written ground rules or other information relating to the use of electronic information as part of the core collection requirements, and, specifically, whether these electronic resources could be used in place of hard copy or microform resources. While the January 1995 revision of the Standards appears to provide some way to incorporate electronic sources as an integrated part of total collection resources, the language in the entire document is fuzzy and leads to considerable interpretation, resulting in little or no guidance for library operations or what should be in the written plan. This would lead to subjective fact finding through onsite inspections and written reports. (As earlier noted, I have not seen or reviewed the June or July revision of the Standards)

Even the ABA document provided to onsite inspectors to use as part of the questioning for and collecting of information from libraries has not been updated with the 1986 ABA Standards. I contend that the financial form which a library is required to complete as part of the inspection questionnaire, is based on pre-1986 Standards.

The ABA through its Accreditation Committee and Council has not accepted electronic resources as part of the basic and *only* foundation upon which the ABA statistics are collected, developed, made available to directors and others as well as published (selective information only) in the *Law Library Journal.* The ABA uses only hard copy and microform equivalents to identify the grouping and the size of the collection in terms of volume count.

Since 1986, the ABA has not provided any way to determine equivalent volumes of electronic resources. The formula used by the ABA to determine collection size specifically excludes electronic resources of any type, the very source of information the ABA added to the Standards in 1986. Thus, reliance and use of the existing ABA library statistics are totally off base, being unreliable and useless for comparative purposes for any reason.

The ABA continues this omission through publishing only hard copy and microform equivalent counts in its *Review of Legal Education;* electronic resources, as best as I can determine from a review of the publication, are not included in any manner. The economic impact of the exclusion of electronic resources from statistical analysis of ABA information has adversely affected most, if not all, schools by resulting in increased costs to continue and maintain hard copy collections through publisher dominated lists of titles libraries must maintain to satisfy accreditation requirements.

The attempt of the June 1994 revision of the Standards was to, for all practical purposes, eliminate the consideration of electronic resources as part of the core information resources a library must use—the January 1995 revision, apparently, attempted to weaken this dark age approach for collection support of academic programs for accreditation purposes. I have not seen the June 1995 revision, which is to be discussed in Pittsburgh.

I am not sure, but would assume that work by the Standards Review Committee or others has not been done on the collection vehicle, the annual questionnaire, or the statistical format used to provide statistical analysis of the information collected through the annual questionnaire. The statistics are used in preparing on-site reports. The existing problems with the annual questionnaire and the statistical information produced there from would, I contend, lead to the conclusion that these have to be revised at the same time the Standards are revised. These, in most instances, were not updated and revised as a result of the revisions in the Standards made in 1986, resulting in subjective fact finding through the inspection process and procedure as well as faculty analysis by the Accreditation Committee and Council based upon the inspection reports. On this ground, I register a protest and complaint that the proposed Standards do not comply with the DOE regulations, (effective July 1994) and specifically contend that the attempt (at least as I presently understand the procedure) to obtain Council's recommendation for action by the August ABA House of Delegates violates the *Final Judgment* requirements, identified June 27, 1995.

I have not seen any documentation by the Standards Review Committee or others specifically relating to the proposed Standards, and especially relating to collection resource requirements. Choices have been made in setting accreditation requirements, but written documentation to justify the choices is lacking. On this ground, I register a protest and complaint that the proposed Standards do not comply with the DOE regulations (effective July 1994), and specifically contend that the proposed Standards have not satisfied the requirements of the *Final Judgment* of June 27, 1995, for Council action for a final recommendation for action by the August ABA House of Delegates.

The annual questionnaire and the ABA produced statistical information requite urgent and mandatory revision. Unless and until volume equivalences are determined for electronic sources and information, volume counts have to be eliminated from the

questionnaire and statistics. The reliance and dependence on volume counts as the only measuring device in the statistics have to be eliminated. Some means have to be established to eliminate the wrong or incorrect information in the statistics. As an example, in the recently produced comprehensive tables, Column 65c–3, several schools provided information that they are open more hours that there are hours in a seven day week; for some schools, information is column 44 and 46 appears to be crossed and included in the wrong column. There are probably others errors.

The continued use of gross information for volume added counts requires a revisit. A total revamp is required for the use of this information in statistical analysis. I have read speeches that have provided statistical comparison using the gross volumes added without indicating that the net is what produces the collection growth. This net information is provided to the ABA, but the statistics specifically exclude the information in volumes added columns.

Information relating to technology-driven formats, such as on-line, CD–ROM, INTERNET, etc., has to be developed to a greater extent for the annual questionnaire and statistics. As examples, equipment and other costs directly associated with technology-driven formats should be, I contend, part of the total acquisition expenses, just as postage and handling and insurance charges (of 8 to 20% for many titles) are added to serials and book or other information expenses reported. Users can not obtain access and use these sources without the proper equipment. At present, expenses for LEXIS and WESTLAW are considered part of acquisitions and information expenses per student, column 14–6 of the tables. I further contend that costs associated with bibliographical systems or in-house computerized public catalogs should be a basic and integral part of information expenses to reflect that these resources are part of the information resources provided to students and faculty.

With electronic resources increasing in importance in all libraries, the existing Standards, the proposed Standards, the annual and on-site questionnaire, and library statistics need to reflect an ''open environment'' and atmosphere'' for libraries to respond to their direct goal of supporting the law school education program, including the training of students in a number of different research skills. I view the proposed Standards, the annual and on-site questionnaires and the statistics as major hurdles, which are preventing libraries from maximizing the use of technology for the benefit of faculty and students as part of the education program. I can not see or determine any difference in using OCLC or other systems to locate title information for a variety of purposes and using CD–ROM or WESTLAW to locate title information for ordering purposes, verification or ILL. In one case, expenses are part of information resources, and in the other case, expenses are excluded from information resources and treated in a totally different manner.

This area must be revisited by the ABA. The Standards, the annual and on-site questionnaires, and library statistics must represent the present and future aspirations and goals of legal education. In several instances, at least through the January 1995 revision of the Standards (Note, I have not seen or assessed the June 1995 revision), several of the Standards and Interpretations clearly represent the mandated requirements of hard copy holdings from a limited number of publishers, even though the same basic legal information (excluding copyright material) is available through electronic sources at less cost in many instances that the hard copy costs. The basic difference is that a different publisher or vendor provides the electronic sources. On this ground, I register a protest and complaint that the proposed Standards do not comply with the DOE regulations of documentation justifying the mandated accreditation requirements, and specifically contend that the proposed Standards have not satisfied the requirements of the *Final Judgment* of June 27, 1995, for Council action for a final recommendation for action by the 1995 August ABA House of Delegates.

I am aware of the salary collection issues being discussed on INTERNET. As I read the June 27, 1995, *Final Judgment* in *U.S.* vs. *ABA*, the ABA, including the accreditation committee and Council (and I would also include the on-site inspectors), is prohibited from *any* consideration of salary or other compensation as a fact or factor in the accreditation or review of any law school program. This would preclude and prohibit the inclusion of this information as part of any accreditation or review process, even to discussions with on-site inspectors of any comparative salary information regardless of source used to obtain the comparative information. At least for the period of time in which the *Final Judgment* remains in place or is modified, salary issues are not an issue upon which the ABA can report. The language of the *Final Judgment* is absolutely clear in this matter. I would further contend that libraries, groups of libraries, and any association not involved in accreditation, and private vendors could collect the salary and compensation statistics, assuming the school's policy would permit the disclosure. Since salary is not an accreditation issue under the *Final Judgment*, many schools may prohibit or limit the release of salary information. The salary statistics collection issue is not part of the Standards or proposed Standards and must not detract from the issues and problems with the proposed Standards, and annual and on-site questionnaires and statistics.

There are several other problems and issues within the proposed Standards, the 2 questionnaires and statistics to be addressed. For one, I seriously question the process of including interpretations of the proposed Standards along with the Standards for Council action for the ABA House of Delegates action. If approved in this format, the interpretations will take the form of Standards that will require a more complex procedure to change or amend rather than the less cumbersome procedure for adopting interpretations. The *Final Judgment* makes changes in the procedure for this matter. I oppose this part of the approach by the Standards Review Committee. In some instances, the interpretations limit and completely restrict choices of libraries to do things differently, especially with the changes technology has brought and will bring to library operations. In some instances, the interpretations appear to be new statements, not even interpreting the existing Standards. On this ground, I register a protest and complaint that the proposed Standards and Interpretations do not comply with the DOE regulations of documentation justifying the mandated accreditation requirements, and specifically contend that the proposed Standards and Interpretations have not satisfied the requirements of the *Final Judgment* of June 27, 1995, for Council action for a final recommendation for action by the 1995 August ABA House of Delegates.

The ''rush to judgment'' to seek approval of the proposed Standards and Interpretations within the next 30 days or less flies directly in the face of the requirements of the *Final Judgment* of the *U.S.* v. *ABA* of June 27, 1995. I contend much more has to be done before approval is sought. I am aware of Internet comments regarding the upcoming Pittsburgh meeting on the Standards and Interpretations to the effect that there is an appearance and perception of a ''farce'' regarding the meeting and comments made. I sincerely hope this is not the case, and that the report has not yet been written for Council's action.

I have attempted to provide some information on some issues I am concerned with as these relate to the Standards, the proposed Standards and Interpretations, the questionnaires and statistics. I regret very much not being able to attend the AALL meeting in Pittsburgh for the comment portion. However, I do look forward to receiving any information about the meeting and comments made. As soon as I am back to work in a couple of weeks, I hope to be able to address and assess the June 1995 proposed Standards and Interpretations.

Roger, I would appreciate this document being added to the comments for the AALL Pittsburgh meeting. Thanks.

Sincerely yours,

Prof. Bardie C. Wolfe, Jr.,

Professor of Law and Law Library Director.

cc: Anne Bingaman, Dept. of Justice
Darryl Depriest, General Counsel—ABA
Dean Rudolph Hasl, St. John's
Dean Steven Smith, CSU
Jim White, ABA—Consultant
Dean Dan Morrissey, St. Thomas
Prof. Roy Mersky, Texas
Prof. Pat Kehoe, American University
Prof. Larry Wenger, Virginia
Florida Academic Law Library Directors

St. Thomas University School of Law

July 7, 1995.

Roger Jacobs,

Director of Library, Member of Council, Notre Dame Law School, Kresge Library, Notre Dame, IN 46556

Dear Roger: I write to inform you of several concerns I have with the ABA Library Standards as adopted in August 1995, including the Interpretations. In addition, I also write about concern with current Fall

1995 Annual Questionnaire—Part III Law Library. Among the concerns are the following:

A. Annual Questionnaire

1. While I view the Annual Questionnaire as tracking the ABA Standards and Interpretations, the continued exclusion from published reports of recognizing computer—technology driven resources enables the ABA to publish in its *Review of Legal Education* and the AALL *Law Library Journal* (Statistics) misleading, inadequate and incomplete data about Law Library operations and their support of academic programs—see questions 8–14 in the Annual Questionnaire. I am in the process of updating my 1991 report on the economic impact of the reported ABA library statistics. See separate report attached. From the Fall 1994 statistics, total expenses in 93/94 of 176 schools are $282,843,440 (2 schools not reporting) with 99 or 56.3% of the schools (those over 300,000 columns) having 69.2% of total expenses and 61 schools (those with 200,000 to 300,000 volumes) or 34.7% of the schools having 26.2% of the total expenses. This imbalance creates significant problems.

2. There appears to be substantial activities regarding Internet, legal resources and law library activities—see recent article September 95, *ABA Journal.* As best as I can determine, the Annual Questionnaire does not include questions about Internet usage, but does include questions about CD–ROMS. I view the August 1995 Standards and Interpretations as eliminating the warehouse concept and ownership requirements of library resources—see various interpretations under the August 1995 Standards. The Annual Questionnaire, in my view, continues and emphasizes, as the ABA questionnaire has included in the past, the warehouse and ownership requirements of resources. The Standards do not support this.

Because of a variety of changes in how OCLC—RLIN and other bibliographical systems are being used to provide reference assistance, I urge the inclusion of these expenses as part of Collection Development Resources and the elimination of separate lines for the other categories included—Serials, online services, other, binding and preservation. In addition, consideration should be given to including in Collection Development Resources the cost of computers both hardware and software and microform readers and reader printers and cabinets as Collection Development resources. I do not see any difference of including postage and handling, service charges, etc,. as part of regular acquisition and excluding the above. Perhaps the inclusion of these costs as Collection Development resources will encourage law libraries to update equipment as part of Collection Development.

Although the Questionnaire asks for LEXIS and WESTLAW usage, there are other usages of computer resources including library networks, law school networks, Internet, CD–ROMS. This usage can be metered and the Questionnaire should reflect this usage.

5. In terms of comparative information, the ABA continues to publish comparative law library information based on JD students only. While there are apparently over 100 schools with graduate programs, graduate students are excluded by the ABA in publishing library statistics. Thus, the information about libraries in terms of usage per student and expenses per student is inaccurate and overstated.

Since the Annual Questionnaire is used as part of the inspection and accreditation process as well as its data being published by the ABA and by other publishers, the questionnaire should collect the appropriate data as reflected by the Standards. I do not think this is the case with the 1995 Questionnaire.

B. Standards

My primary concerns relate to Standards 606 and its Interpretations and to Interpretation of 602. Regarding 606 (a) if followed to its logical sequence, Interpretation 5 of Standards 606(a) relating to sharing information resources completely inhibits and reduces the possibilities of sharing of electronic resources by several libraries thru wide area networks and Internet. At the same time existing resource sharing programs by a state or regional consortium may not be in compliance. Interpretation 5 of 606(a) read in conjunction with interpretation 1 of 606(b) significantly reduces the possibilities of libraries sharing expensive but little used titles. I view the Standards and Interpretations at setting minimum Standards for compliance. To indicate as minimum requirements that all schools have to have all published regulations for the federal government and the reported decisions of the highest appellate court for each state is in my opinion, a substantial addition to earlier ABA Library Standards. I disagree that these are minimum requirements for accreditation purposes. In addition, I do have concern about the requirement of an annotated code from each state. Annotated code is a descriptive word or phrase of paper products. This term could be constructed to include only paper editions while electronic resources can and do include statutory, administrative, and case law. Thus, this term, annotated code, could be interpreted by the ABA to exclude the electronic resources simply because the term, annotated code, is used.

Regarding Interpretation of 602, the operational system for implementation of electronic resources could involve other University components beside the Main Library. The Interpretation is too restrictive and should be expanded to include the supervision of electronic resources as well.

As experience is gained with the new Standards and Interpretations, I will write to keep you informed of my concerns. In the case of the Annual Questionnaire, Fall 1995, time is very important since libraries are presently completing it. This Fall 1995 Data could be used for upcoming Accreditation reports. Regarding the concerns about the Standards and Interpretations, I would request a continuing review. As financial resources for legal education become tight, the Standards and Interpretations must provide great flexibility for law libraries to support their academic programs within the means available. The sharing of resources, including electronic resources, will become important in the near future. I simply do not view the present Standards and Interpretations as encouraging and supporting this flexibility. In regards to the Questionnaire, I would not publish the number of volumes until the ABA has decided the equivalent for electronic resources.

Sincerely yours,

Prof. Bardie C. Wolfe, Jr.,

Professor of Law and Law Library Director.

cc: Anne Bingaman, Dept. of Justice
Darryl Depriest, General Counsel—ABA
Dean Rudolph Hasl, St. John's
Dean Steven Smith, CSU
Jim White, ABA—Consultant
Dean Dan Morrissey, St. Thomas
Prof. Roy Mersky, Texas
Prof. Pat Kehoe, American University
Prof. Larry Wenger, Virginia
Florida Academic Law Library Directors

St. Thomas University School of Law

April 1, 1991.

To: Dean Jacqueline Allee
From: Bardie C. Wolfe, Jr.

Re: Economic Impact of Large Schools on National Mean and Median—Law Library Comparative Information Based on the ABA Law Library Statistics.

The ABA collects statistics from all ABA libraries and publishes the data. From this data, national mean and median, such as size of collection, budgets, salaries, etc., are established. The national mean and median of various categories of law library statistics are used for a variety of purposes.

The large schools, that is, schools with a FTE student body above 650 FTE and/or a collection of over 300,000 volumes, have a major and substantial economic impact on driving upward the national mean and median of most, if not all, measurable law library statistical categories. This process would, apparently, be normal and of little concern. However, the magnitude of the differences between the schools at the top and the schools at the bottom is great. The unbalanced differences do impact very significantly the establishment of the national mean and median for all schools.

Of the 176 schools, 109 or 62 percent have a collection of less than 300,000 volumes; of the 109 school, 35 schools or 20 percent of the total 176 schools have a collection of less than 200,000 volumes. The remaining 67 schools or 38 percent of the total have a collection of more than 300,000 volumes. Of the 176 schools, there are 96 schools or 55 percent with a student body of less than 650 FTE, and the remaining 80 schools or 45 percent have a student body of more than 650 FTE.

The duplication of materials, graduate programs and international and foreign law collections are basic factors in many schools. These factors are not measured or taken into account by the existing ABA statistics or identified separately when national mean and median in categories are developed from all the statistics from the 176 schools. The inclusion of the resources in, including staff, salaries, etc., and the economic impact of these resources on the establishment of national mean and median are unknown.

They may be overlooked when national mean and median are used for statistical comparisons.

The size of the collection, that is, the number of hard copy and microform volumes, has been the ABA measuring tool. All comparative information available from the ABA statistics is based on the size of collection. There are five broad categories: Collection size from 0 to 100,000 volumes; 100,000 to 200,000 volumes; 200,000 to 300,000 volumes; 300,000 volumes and over; and collection size 0 to all volumes. These categories were established many years ago when few libraries had over 300,000 volumes. At present, there are 67 libraries which contain over 300,000 volumes. In fact, there are approximately 16 libraries with more than 500,000 volumes, and approximately 34 libraries with more than 400,000 volumes, including the 16 above.

This report is an attempt to provide information about the establishment of the national mean and median of law library statistical categories. Please note that the new technologies, including on-line services, CD–ROM, video, etc., have not been built into the measuring tool used by the ABA, that is the size of collection. In addition, microform statistics for titles added or held are not reliable to provide this information to add to the hard copy title added or held categories. The number of students, specialized programs in some schools, or their missions also have not been built into the measuring tool, except in two areas, information resources per student and computer retrieval per student per year. In these two areas, the ABA mixes two years of information, and this use may not be a correct assessment of a library's program.

Thus, for the above reasons, and with exceptions, the report is an analysis of traditional academic law libraries, and the measuring tool for the analysis is what the ABA uses, the size of collection.

The following tables provide an overview of the economic impact of the inclusion of the data from large schools on the establishment of national means and medians for various law library statistical categories. The information has been taken from the Fall 1990 ABA Law Library Comprehensive Statistical Table Data. The law library has enhanced the basic information to create the tables, comparisons and characteristics indicated. All tables use COLLECTION SIZE RANGE OF VOLUMES for the comparison with the exception of two tables which were created by the law library and are based on FTE size of student body with range. Without reinputting all data from all schools, there is no possibility of creating the same tables for the other comparisons used in the report. The two tables created by the law library do support the conclusion that the large schools have a major and substantial economic impact on driving upward the national mean and median of all schools, simply because of size and the resources needed to sustain the academic program because of size.

The tables are as follows:

TABLE 1.—TOTAL LAW LIBRARY BUDGETS FOR 1990–91

Collection size range of volumes	Mean budget for 1990–91	Number of schools	Total budget of all schools	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$804,634	34	$27,357,556	12
200,000 to 300,000	1,127,992	73	82,343,416	36
300,000 and Over	1,824,354	65	118,583,010	52
All schools reported mean	1,327,232	172	228,283,909	

Note—Federal Work Study funds are not included. Of the 176 law schools only 172 reported 1990–91 budgets.

TABLE 2.—TOTAL LAW LIBRARY EXPENSES FOR 1989–90

Collection size range of volumes	Mean expenses for 1989–90	Number of schools	Total expenses of all schools	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	$782,072	34	$26,590,448	12
200,000 to 300,000	1,080,107	73	78,847,811	36
300,000 and Over	1,744,301	66	115,123,866	52
All schools reported mean	1,274,925	173	220,562,025	

Note—Federal Work Study funds are not included. Of the 176 law schools only 173 reported 1989–90 expenses.

TABLE 3.—TOTAL INFORMATION RESOURCES EXPENSES FOR 1989–90

Collection size range of volumes	Mean expenses for 1989–90	Median expenses for 1989–90	Total expenses all schools	Percent total
0–100,000	0	0	0	0
100,000 to 200,000	$372,223	$356,105	$12,655,582 (34)	13
200,000 to 300,000	502,535	484,102	36,685,055 (73)	38
300,000 and Over	732,289	700,033	48,331,074 (66)	50
All schools reported mean and median	564,576	525,415	97,671,648 (173)	

Note—Total information resources expenses include expenses for all forms of information, including serials, monographs, microforms, binding, computer-based services, others such as video and audio. Of the 176 law schools only 173 reported 1989–90 expenses for information resources.

TABLE 4.—INFORMATIONAL RESOURCES EXPENSES PER STUDENT (SEE NOTE)

Collection size range of volumes	Books dollars per student—mean—	Mean FTE number of students	Book dollars per student—median—
0–100,000	0	0	0
100,000 to 200,000	$851.89	475 (34)	$823.80
200,000 to 300,000	885.17	625 (74)	807.70

TABLE 4.—INFORMATIONAL RESOURCES EXPENSES PER STUDENT (SEE NOTE)—Continued

Collection size range of volumes	Books dollars per student—mean—	Mean FTE number of students	Book dollars per student—median—
300,000 and Over	912.53	865 (67)	902.20
All schools reported mean and median	889.07	688 (175)	855.10

Note—Book dollars per student are determined by the FTE student count as of October 1990 and the total information resources' expenses for 1989–90. ABA tables do not identify this category as either 1990–91 or 1989–90. The mix of the two year information may not be a correct assessment of this information. SEE TABLE 5, 6, and 7 for additional analysis.

TABLE 5.—COLLECTION SIZE ANALYSIS OF INFORMATIONAL RESOURCES EXPENSES PER STUDENT (SEE NOTE)

Collection size range of volumes	Mean expenses for 1989–90	Mean FTE number of students—89	Book dollars per student—Mean
0 to 100,000	0	0	0
100,000 to 200,000	$372,223 (34)	466 (45)	$798.76
200,000 to 300,000	502,535 (73)	636 (73)	790.15
300,000 and Over	732,289 (66)	875 (57)	836.90
All Schools	564,576 (173)	668 (176)	845.17

Note—This table developed by law library from both the 1989 and 1990 ABA law library comprehensive statistical table data. This table is NOT an accurate indication of book dollars per student, since there were shifts in the number of students in the two categories for the two years. The ABA Fall data for 1989 indicates 45 schools with a collection count of 100,000 to 200,000 and 57 schools with a collection count of 300,000 volumes or more; this compares to the ABA Fall data for 1990 in which the ABA reports 34 schools with a collection count of 100,000 to 200,000 and 66 schools with a collection count of 300,000 volumes or more. The number of schools with a collection count of between 200,000 and 300,000 volumes stayed the same, although the data for Fall 1990 would, apparently, indicate that the schools at the high end of approaching 300,000 volumes in 1988–89 moved into the 300,000 volumes or more category by the end of 1989–90. The same would be true of the number of schools in the 100,000 to 200,000 volume category in 1988–89 moving into the next category of 200,000 to 300,000 volumes. This shift of 10 or more schools into the next and higher category would impact any assessment using the two years of information, Fall 1989 and Fall 1990, when the collection size range of volumes category is used as the ABA has used them. See next two tables, developed by the Law Library and based on FTE students and not on collection size.

TABLE 6.—FTE ANALYSIS OF INFORMATIONAL RESOURCES EXPENSES PER STUDENT (SEE NOTE)

FTE size of school—range with 1990 FTE and 1989–90 expenses	Mean expenses for 1989–90	Median expenses for 1989–90	Per student mean expenses	Per Student median expenses
0 to 450 students	$382,795	$373,824	$1,149.49	$1,072.20
451 and 650 students	512,122	477,332	966.04	957.80
651 to 875 students	584,010	585,301	784.57	768.10
876 to 1,100 students	666,873	638,239	671.18	626.40
1,101 and Over	862,503	742,222	641.64	619.00
All Schools	564,576	525,415	889.17	855.10

Note—In October 1990, there were 32 schools in the 0–450 category with an average of 341 FTE (1 school did not report expenses). There were 64 schools in the 451–650 category with an average of 532 FTE (4 schools at low end included 437 FTE −443 FTE). There were 45 schools included in the 651–875 category with an average of 749 FTE. There were 18 schools in the 876–1,100 category with an average of 988 FTE. There were 20 schools in the 1,101 and over category with an average of 1,319 FTE.

TABLE 7.—FTE ANALYSIS OF INFORMATION RESOURCES EXPENSES PER STUDENT (SEE NOTE)

FTE size of school—range with 1989 FTE and 1989–90 expenses	Mean expenses for 1989–90	Median expenses for 1989–90	Per student mean expenses	Per student median expenses
0 to 450 students	$384,199	$386,579	$1,184.22	$1,112.99
451 to 650 students	529,607	513,127	991.63	954.80
651 to 875 students	581,536	585,301	791.81	778.44
876 to 1,100 students	581,536	585,301	678.85	695.01
1,101 and Over	881,627	742,222	670.02	610.61
All Schools	564,576	525,415	845.17	868.45

Note—In October 1989, there were 37 schools in the 0–450 category with an average FTE of 338 (1 school did not report expenses). There were 59 schools in the 451 to 650 category with an average of 535 FTE. There were 43 schools in the 651 to 875 category with an average of 742 FTE (1 school did not report expenses). There were 17 schools in the 876 to 1,100 category with an average of 990 FTE. There were 19 schools in the 1,101 and over category with an average of 1,301 FTE.

This table developed by the Law Library. The ABA does not use FTE size as a measuring factor; the ABA uses collection size.

TABLE 8.—TOTAL COLLECTION SIZE ANALYSIS

Collection size range of volumes	Mean size at start of 90–91	Median size at start of 90–91	Total size at start of 90–91	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	165.333 (35)	167,591	5,786,665	11
200,000 to 300,000	245,613 (74)	250,839	18,175,362	33
300,000 and Over	455,320 (67)	395,672	30,506,440	56
All Schools	309,480 (176)	267,945	54,468,480	.....

Note—Volumes include hard copy and microform volume equivalency.

TABLE 9.—VOLUMES ADDED ANALYSIS FOR 1989–90

Collection size range of volumes	Mean volumes added 89/90	Median volumes added 89/90	Total volumes added 89/90	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	11,588 (35)	7,378	405,580	16
200,000 to 300,000	11,555 (74)	10,442	855,070	33
300,000 and Over	19,790 (67)	16,569	1,325,930	51
All Schools	14,696 (176)	11,368	2,586,496	.....

Note—Volumes added included hard copy and microform volume equivalency.

TABLE 10.—TITLES ADDED ANALYSIS FOR 1989–90

Collection size range of volumes	Mean titles added—89/90	Median titles added—89/90	Total titles added—89/90	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	1,198 (35)	1,166	41,930	11
200,000 to 300,000	1,633 (73)	1,620	119,209	32
300,000 and Over	3,100 (67)	2,665	207,700	56
All Schools	2,108 (175)	1,692	368,900	.....

Note—Only hard copy titles are included in this table. The count of microform titles either added or held is not reliable to produce statistical comparisons.

TABLE 11.—TITLES HELD ANALYSIS AT START OF 1990–91

Collection size range of volumes	Mean titles held	Median titles held	Total titles held	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	21,328 (34)	21,341	725,152	7
200,000 to 300,000	37,782 (74)	34,724	2,795,868	27
300,000 and Over	102,151 (66)	76,276	6,741,966	66
All Schools	58,983 (174)	38,710	10,263,042	.....

Note—Only hard copy titles are included in this table. The count of microform titles held is not reliable to produce statistical comparisons.

TABLE 12.—SERIAL SUBSCRIPTIONS ANALYSIS AT START OF 1990–91

Collection size range of volumes	Mean serial subscriptions	Median serial subscriptions	Total serial subscriptions	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	2,367 (35)	2,444	82,845	12
200,000 to 300,000	3,587 (73)	3,487	233,629	32
300,000 and Over	5,600 (67)	5,364	375,200	52
All Schools	4,114 (175)	3,760	719,950	.....

TABLE 13.—SERIAL SUBSCRIPTIONS EXPENSES ANALYSIS FOR 1989–90

Collection size range of volumes	Mean expenses subscriptions	Median expenses subscriptions	Total expenses subscriptions	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	$278,132 (34)	$268,284	$9,456,488	13
200,000 to 300,000	381,289 (73)	376,149	27,834,097	38
300,000 and Over	544,141 (66)	514,715	35,913,306	49
All Schools	423,144 (173)	401,846	73,203,912	

TABLE 14.—SERIAL TITLES ANALYSIS AT START OF 1990–91

Collection size range of volumes	Mean titles active subs.	Median titles active subs.	Total titles active subs.	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	2,238 (35)	2,210	78,330	12
200,000 to 300,000	3,267 (72)	3,366	235,224	37
300,000 and Over	4,916 (67)	4,622	329,372	51
All Schools	3,695 (174)	3,446	642,930	

TABLE 15.—DUPLICATIONS OF SUBSCRIPTIONS ANALYSIS FOR 1990–91

Collection range of volumes	Mean serial subscriptions	Mean serial titles	Estimated projection of duplication of serial subscriptions		Percent of total
			Difference	Percent of mean subs	
0 to 100,000	0	0	0	0	0.
100,000 to 200,000	2,367	2,238	130	5	31.
200,000 to 300,000	3,587	3,267	320	9	76.
300,000 and Over	5,600	4,916	684	12	Off sc. and above.
All Schools	4,114	3,695	419	10	63.

Note—This table provides an overview of the extent of duplication of serial subscriptions; as an example, more than 1 copy of the Federal Reporter 2d, the ALR series, etc. *This table should be used in conjunction with the serial subscription expenses' table on this page.*

TABLE 16.—COMPUTER RETRIEVAL EXPENSES FOR 1989–90

Collection size range of volumes	Mean expenses retrieval	Median expenses retrieval	Total expenses retrieval	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$33,341 (34)	$31,067	$1,133,594	16
200,000 to 300,000	39,713 (73)	36,494	2,890,049	40
300,000 and Over	48,533 (66)	41,023	3,203,178	44
All Schools	41,826 (173)	36,286	7,235,898	.....

TABLE 17.—COMPUTER RETRIEVAL TO TOTAL INFORMATIONAL RESOURCES EXPENSES FOR 1939–90

Collection size range of volumes	Mean expenses all information	Mean expenses only retrieval	Percent
0 to 100,000	.....	.....	.....
100,000 to 200,000	$372,223	$33,341	9
200,000 to 300,000	502,535	39,713	8
300,000 and Over	732,289	48,533	7
All Schools	564,576	41,826	7

TABLE 18.—FTE STUDENTS FOR 1990–91

Collection size range of volumes	Mean number students FTE	Median number students FTE	Total number students FTE	Percent of total
0 to 100,000	0	0	0	0

TABLE 18.—FTE STUDENTS FOR 1990–91—Continued

Collection size range of volumes	Mean number students FTE	Median number students FTE	Total number students FTE	Percent of total
100,000 to 200,000	475 (34)	471	16,150	14
200,000 to 300,000	625 (74)	614	46,250	39
300,000 and over	865 (67)	783	57,955	49
All Schools	688 (173)	629	119,024	

TABLE 19.—RETRIEVAL USAGE FOR 1989–90

Collection size range of volumes	Mean retrieval usage 89/90	Median retrieval usage 89/90	Total retrieval usage 89/90	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	2,733 (35)	2,449	95,655	11
200,000 to 300,000	4,319 (74)	3,866	319,606	38
300,000 and Over	6,342 (66)	6,097	418,572	50
All Schools	4,765 (175)	4,048	833,875	

TABLE 20.—RETRIEVAL USAGE PER STUDENT PER YEAR COMPARISON (SEE NOTE)

Collection size range of volumes	Mean retrieval 1990 FTE students	Mean retrieval 1989 FTE students
0 to 100,000	0	0
100,000 to 200,000	6.0 (34)	5.9 (45)
200,000 to 300,000	7.1 (74)	6.8 (73)
300,000 and Over	7.7 (66)	7.3 (57)
All Schools	7.1 (174)	7.1 (176)

Note—The ABA uses the 1989–90 retrieval hours with the October Fall FTE 1990 student count to determine retrieval usage per student per year. The law library has, for this table, used in the first column the exact figures from the Fall 1990 ABA Law Library Comprehensive Statistical Table Data. For the second column, the law library used the 1989–90 retrieval hours but also used the FTE student count from the 1989 ABA Law Library Comprehensive Statistical Table Data. As noted above the number of schools in the categories has shifted because of the base of collection size.

TABLE 21.—OTHER INFORMATIONAL RESOURCES' EXPENSES FOR 1989–90

[Note—Serial and Retrieval Expenses and Binding Not Included]

Collection size range of volumes	Mean expenses 1989–90	Median expenses 1989–90	Total expenses 1989–90	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$53,357 (34)	$36,030	$1,814,138	12
200,000 to 300,000	72,992 (72)	57,170	5,255,424	35
300,000 and Over	120,224 (66)	107,989	7,934,478	53
All Schools	87,234 (172)	65,617	15,004,248	

TABLE 22.—STAFF SIZE COMPARISON—1990–91 STAFF FTE

[Note—All Staff Except Students]

Collection size range of volumes	Mean of staff size	Median of staff size	Total of staff	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	12.5 (35)	11.0	437.5	13
200,000 to 300,000	15.1 (74)	15.2	1,117.4	33
300,000 and Over	27.5 (67)	21.3	1,842.5	54
All Schools	19.3 (176)	16.6	3,396.8	

TABLE 23.—PROFESSIONAL STAFF SIZE COMPARISON—1990–91 FTE

[Note—includes only professional staff]

Collection size range of volumes	Mean of staff size	Median of staff size	Total of staff	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	5.7 (35)	5.0	199.5	14
200,000 to 300,000	6.8 (74)	6.5	503.2	34
300,000 and Over	11.3 (67)	9.8	757.10	52
All Schools	8.3 (176)	7.0	1,460.8	

TABLE 24.—PROFESSIONAL STAFF SALARY COMPARISON—1990–91 SALARIES

Collection size range of volumes	Mean of staff size	Median of staff size	Total of staff	Percent of total
0 to 100,000	0	0		
100,000 to 200,000	$29,876 (35)	$28,690		
200,000 to 300,000	32,669 (72)	31,525		
300,000 and Over	36,378 (65)	34,783		
All Schools	33,502 (172)	32,179		

TABLE 25.—STUDENT STAFF—NUMBER OF HOURS AND PAY—COMPARISON 1989–90

Collection size range of volumes	Mean of number hours per year	Mean of wage per hour
0 to 100,000	0	0
100,000 to 200,000	7,255 (35)	$4.79 (34)
200,000 to 300,000	10,832 (73)	5.05 (72)
300,000 and Over	14,531 (67)	5.51 (66)
All Schools	11,364 (175)	5.18 (172)

TABLE 26.—SALARY ANALYSIS FOR ALL FTE STAFF FOR 1989–90 EXPENSES

[Note—Does not include student wages, Work Study federal share, or temporary part time]

Collection size range of volumes	Mean salary expenses for 1989–90	Median salary expenses for 1989–90	Total salary expenses for 1989–90	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	$257,330 (34)	$233,527	$8,749,220	11
200,000 to 300,000	355,654 (73)	339,584	25,962,742	34
300,000 and Over	638,385 (65)	519,361	41,495,025	54
All Schools Mean	443,064 (172)	375,493	76,207,008	.....

TABLE 27.—FRINGE BENEFITS' EXPENSES ANALYSIS FOR 1989–90

Collection size range of volumes	Mean salary expenses for 1989–90	Median salary expenses for 1989–90	Total salary expenses for 1989–90	Percent of total
0–100,000	0	0	0	0
100,000 to 200,000	$54,623 (34)	$49,408	$1,857,182	10
200,000 to 300,000	84,537 (71)	85,616	6,002,127	34
300,000 and Over	155,540 (64)	130,780	9,954,560	56
All Schools Mean	105,408 (169)	93,520	17,813,952	.....

TABLE 28.—WAGE EXPENSES ANALYSIS FOR 1989–90

[Note—Includes student wages, not federal work study portion, temporary part time]

Collection size range of volumes	Mean wages for 1989–90	Median wages for 1989–90	Total wages for 1989–90	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$22,006 (31)	$19,679	$682,186	8

TABLE 28.—WAGE EXPENSES ANALYSIS FOR 1989–90—Continued

[Note—Includes student wages, not federal work study portion, temporary part time]

Collection size range of volumes	Mean wages for 1989–90	Median wages for 1989–90	Total wages for 1989–90	Percent of total
200,000 to 300,000	43,173 (73)	33,595	3,151,629	39
300,000 and Over	66,821 (65)	60,324	4,343,365	53
All Schools	48,386 (169)	34,459	8,177,234	.....

TABLE 29.—GRAND TOTAL—ALL SALARIES, WAGES AND FRINGE BENEFITS—EXPENSES FOR 1989–90

[NOTE.—Does Not Include Federal Work Study Funds, Federal Share]

Collection size range of volumes	Mean salary expenses for 1989–90	Median salary expenses for 1989–90	Total salary expenses for 1989–90	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$332,017 (34)	$301,528	$11,288,578	11
200,000 to 300,000	481,047 (73)	451,329	35,116,431	34
300,000 and Over	858,353 (65)	696,258	55,792,945	55
All schools	594,174 (172)	521,210	102,197,928	

TABLE 30.—FEDERAL WORK STUDY CONTRIBUTION ANALYSIS EXPENSES FOR 1989–90

Collection size range of volumes	Mean share for 1989–90	Median share for 1989–90	Total share for 1989–90	Percent of total
0 to 100,000	0	0	0	0
100,000 to 200,000	$15,630 (29)	$11,392	$453,270	12
200,000 to 300,000	13,368 (55)	10,472	735,240	20
300,000 and Over	52,034 (49)	13,759	2,549,666	68
All schools	28,107 (133)	11,342	3,738,231	

TABLE 31.—NUMBER OF HOURS OF PROFESSIONAL ON DUTY ANALYSIS FOR 1990–91

[NOTE.—Number of Hours per Week—Regular Semester Schedule]

Collection size range of volumes	Mean hours library has on duty	Mean hours reference available
0 to 100,000	0	0
100,000 to 200,000	62 (35)	62 (35)
200,000 to 300,000	69 (74)	72 (73)
300,000 and Over	70 (67)	70 (67)
All schools	68 (176)	70 (175)

TABLE 32.—SPECIAL COMPARISON—INFORMATION RESOURCE AND SALARIES TO TOTAL EXPENSES—1989–90

[NOTE—Federal Work Study Funds are not Included In This Table Comparison]

Collection size range of volumes	Mean total all library expenses 1989–90	Total information expenses 1989–90	Percent	Total salaries expenses 1989–90	Percent
0 to 100,000	0	0	0	0	0
100,000 to 200,000	$782,072	$372,223	48	332,017	42
200,000 to 300,000	1,080,107	502,535	47	481,047	45
300,000 and Over	1,744,301	732,289	42	858,353	49
All Schools	1,274,925	564,576	44	594,174	47

Note: Salary expenses includes all salaries, wages and fringe benefits except for federal work study portion of student wages. Remainder of expenses not included are expenses of operaitons, such as supplies, computer-bibliographic systems, automation, conferences and travel, etc.

TABLE 33.—SPECIAL COMPARISON—LIBRARY BUDGET FOR 1990–91 AND LIBRARY EXPENSES FOR 1989–90 PER STUDENT ANALYSIS.

Collection size range of volumes	Mean budget for 1990–91	FTE students October 90	1990–91 estimated budget per student for library program
0 to 100,000	0	0	0
100,000 to 200,000	$804,634	475	$1,693.97
200,000 to 300,000	1,127,992	625	1,804.79
300,000 and Over	1,824,354	865	2,109.08
All Schools	1,327,232	688	1,929.12

Collection size range of volumes	Mean expenses for 1989–90	FTE students October 89	1989–90 estimated expenses per student for library program
0 to 100,000	0	0	0
100,000 to 200,000	$782,072	466	$1,678.27
200,000 to 300,000	1,080,107	636	1,698.28
300,000 and Over	1,744.301	875	1,993.49
All Schools	1,274,925	668	1,908.57

Note: Table 33 does not include federal work funds, either in 1990–91 budget or 1989–90 expenses.

TABLE 34.—SPECIAL COMPARISON OF PER STUDENT EXPENSES

Collection size range of volumes	1989–90 Estimated expenses per student for library program	1989–90 Estimated salary expenses per student for library program	1989–90 Estimated information expenses per 89 FTE student for library program
0 to 100,000	0	0	0
100,000 to 200,000	$1,678.27	$746.02	$798.76
200,000 to 300,000	1,698.28	777.38	790.15
300,000 and over	1,933.49	1,040.44	836.90
All schools	1,908.57	931.56	845.17

Note.—Information taken from TABLE 33, TABLES 29 and 30 COMBINED, AND TABLE 5. In these tables, several schools did not report data and special comparison may be off. Salary information does include federal work study funds. However, it is believed that the characteristics of this table are true—that is that the libraries, generally, with less than 300,000 volumes spend more for information resources than for salaries and fringes while libraries, generally, with more than 300,000 volumes spend more for salaries and fringes than for information resources.

These tables are an attempt to document the economic impact of the schools with more than 300,000 volumes on the establishment of the national mean and median of various law library statistical categories of all 176 schools. Based on the Fall 1990 ABA statistics, there are 67 schools or 38 percent of all schools with more than 300,000 volumes.

In summary, the ABA uses SIZE OF COLLECTION as the basic measuring tool to determine the national mean and median of all law library statistical categories. The direct consequence of this use is that the schools with more than 300,000 volumes exert a very significant and substantial economic impact on driving upward the national mean and median in various statistical categories for all schools with less than 300,000 volumes. For schools with less than 200,000 volumes, the economic impact has major consequences for them to comply with the national mean and median.

In important categories of statistical analysis in comparing law libraries, the total resources, based on the mean of all schools with less than 300,000 volumes, do not equal the total resources of the schools with more than 300,000 volumes. From the tables, the information reveals.

Category	Total resources all schools with less than 300,000 volumes (109 schools)	Total resources all schools with more than 300,000 volumes (67 schools)
1. Table 1—Budget for 1990–91	$109,700,972	$118,583,010
2. Table 2—Expenses for 89–90	$105,438,259	$115,123,866
3. Table 3—Information Expenses for 1989–90	$48,340,637	$48,331,074
4. Table 8—Total Collection in Number of Volumes	23,962,027	30,506,440
5. Table 9—Volumes added 89–90	1,260,650	1,325,930
6. Table 10—Titles added 89–90	160,839	207,700
7. Table 11—Titles held at start of 1990–91 (Hard Copy Only)	3,521,020	7,741,966
8. Table 12—Serial Subscriptions	316,474	375,200
9. Table 13—Serial Expenses	$37,290,585	$35,913,306
10. Table 14—Serial Titles	313,554	329,371
11. Table 15—Duplication of Serial Subscriptions	450	684
12. Table 16—Retrieval Expenses	$4,023,643	$3,203,178
13. Table 18—FTE students '90	62,400	57,955

Category	Total resources all schools with less than 300,000 volumes (109 schools)	Total resources all schools with more than 300,000 volumes (67 schools)
14. Table 19—Retrieval use 89–90	415,261	418,572
15. Table 21—Other Information Resources (Treatises) Expenses for 89–90	$7,069,562	$7,934,478
16. Table 22—Total Number of FTE Staff	1,554.9	1,842.5
17. Table 23—Total Number FTE Librarians	702.7	757.1
18. Table 26—Salaries paid 89–90	$34,711,962	$41,495,025
19. Table 27—Fringe Benefits paid 89–90	$7,859,309	$9,954,560
20. Table 28—Wages paid 89–90	3,833,815	$4,343,365
21. Table 29—All Salary, Wages, and Fringes paid 89–90	$46,405,009	$55,792,945
22. Table 30—Federal Work Study Funds, paid 89–90	$1,188,510	$2,549,231

As noted, the basic measuring tool is *size of collection*. However, when FTE students rather than size of collection is the measuring tool, the economic impact is that larger schools are driving downward the per student analysis of all schools. Table 6 and 7 reveal the following:

For libraries with less than 200,000 volumes, the economic impact of the use of libraries with 300,000 or more volumes to establish the national mean of certain categories is major. The tables reveal the following:

Category	Mean of schools with less than 200,000 vols.	Mean of schools with more than 300,000 vols.	National mean of all schools	Percent schools less than 200,000 vols. are to schools with more than 300,000 vols.	Percent schools less than 200,000 vols. are to National mean
1. Table 1, Budget 90–91	$804,634	$1,824,354	$1,327,232	44	61
2. Table 2, Expenses 89–90	$782,072	$1,744,301	$1,274,925	45	61
3. Table 3, Information Expenses 89–90	$372,223	$732,289	$564,576	51	66
4. Table 8, Collection Size	165,333	455,320	309,480	36	53
5. Table 9, Volumes added 89–90	11,588	19,790	14,696	59	75
6. Table 10, Titles added, 89–90 Hard	1,198	3,100	2,108	39	57
7. Table 11, Titles held Hard only	21,328	102,151	58,983	21	36
8. Table 12, Serial Subscriptions	2,367	5,600	4,114	36	58
9. Table 13, Serial Expenses	$278,132	$544,141	$423,144	51	66
10. Table l4, Serial Titles	2,238	4,916	3,695	46	61
11. Table 15, Duplication-Serials	130	684	419	19	31
12. Table l6, Retrieval Expenses	$33,341	$48,533	$41,826	69	80
13. Table 18, FTE Students 90	475	865	688	55	69
14. Table 19, Retrieval use	2,733	6,342	4,765	43	57
15. Table 21, Other information Expenses (Treatises)	$53,357	$120,224	$87,234	44	61
16. Table 22, Total Staff, FTE	12.5	27.5	19.3	45	65
17. Table 23, Total Librarians—FTE	5.7	11.3	8.3	50	69
18. Table 26, Total Salaries Paid	$257,330	$638,385	443,064	40	58
19. Table 27, Total Fringes Paid	$54,623	$155,540	$105,408	35	52
20. Table 28, Wages Paid	$22,006	$66,821	$48,386	33	55
21. Table 29, All Salary, wages fringes paid	$332,017	$858,353	$594,174	39	56
22. Table 30, Federal Work Study paid	$15,630	52,034	28,107	30	56

As noted, the basic measuring tool is size of collection. Large schools; that is, schools with a collection of more than 300,000 volumes, do have a very significant economic impact on the establishment of the national mean (as well as median) for law library statistical categories. For schools with less than 200,000 volumes, the economic impact indicates very significant problems in being able to meet the national mean of all schools.

This report provides detailed information about the establishment of the national mean and median of 176 law schools based on size of collection as the measuring tool. Thirty-four different tables have been used and twenty-two measuring characteristics based on size of collection summarize the information.

Temple University, School of Law

1719 N. Broad Street (055–00), Philadelphia, Pennsylvania 19122, (215) 204–7861, Fax: (215) 204–1185

October 16, 1995.

Mr. John Greaney,

Chief, Computers and Finance Section, Antitrust Division, U.S. Department of Justice, JCB Building, 555 4th Street NW., Washington, D.C. 20530, FAX 202 616–8544

Dear Mr. Greaney: I was shocked to learn that your interpretation of the proposed Consent Decree between the American Bar Association and the U.S. Department of Justice prohibits review of race and/or gender discrimination in salary and/or fringe benefits.

Both the ABA and the U.S. government have been on record for a long period of time in opposing discrimination on the basis of race and/or gender. Specifically, it is the job of the Department of Justice to fight discrimination on the basis of race and/or gender. I therefore do not understand your interpretation.

Section IV, Prohibited Conduct, of the proposed consent decree enjoins the ABA from,

''(B) collecting from or disseminating to any law school data concerning compensation paid or to be paid to deans, administrators, faculty, librarians, or other employees;

(C) using law school compensation data in connection with the accreditation or review of any law school;''

Section V, Permitted Conduct, states,

''Nothing herein shall be construed to prohibit the ABA from: . . . (2) investigating or reporting on whether a law school is in compliance with such Standards, Interpretations or Rules, or the cause of non-compliance; or (3) requiring that a law school take remedial action to comply with such Standards, Interpretations or Rules as a condition of obtaining or maintaining ABA approval.''

Since ABA Accreditation Standards 211 to 213 prohibit discrimination, Section V of the proposed Consent Decree clearly allows review and use of salary and fringe data for the purpose of determining whether the school is discriminating when a colorable claim of discrimination has been raised.

It is an outrage that the Clinton Administration has taken a position against the enforcement of anti-discrimination provisions. I suggest strongly that you change your interpretation of the proposed Consent Decree.

Sincerely,

Marina Angel,

Professor of Law.

Gonzaga University

Office of the President

September 5, 1995.

Dear Mr. Greaney: On August 11, 1995, I received the enclosed memorandum from the General Counsel of the ABA advising that the proposed final Judgment in the ABA anti-trust matter is subject to public comment through the end of September. The notice did not indicate to whom comments should be sent but through other sources I was advised that you were the proper person to receive those comments.

Enclosed are my comments which hopefully will be given consideration. If I have forwarded these to the wrong office, please advise.

Sincerely,

Bernard J. Coughlin, S.J.,

President.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Anti-Trust Division, 555 Fourth St., NW., Room 9903, Washington, DC 20001.

Enclosures

c: John E. Clute, Dean of the School of Law

Darryl L. DePriest

General Counsel

American Bar Association, 541 North Fairbanks Court, Chicago, Illinois 60611–3314, (312) 988–5215

Memorandum

To: Presidents of Universities with ABA Approved Law Schools

From: Darryl L. DePriest

Date: August 3, 1995

Re: Law School Accreditation Process

As you may have read or heard, the American Bar Association and the Department of Justice have entered into a settlement agreement concerning the Department's investigation of the ABA's law school accreditation process.

Enclosed is a copy of the proposed Final Judgment. This proposal will be subject to public comment through the end of September, after which we anticipate the Court's approval.

Allow me to suggest that you review the proposed Final Judgment in concert with the letter, dated June 14, 1995, from President Bushnell and President-Elect Ramo. I believe you will find that the ABA either had done or had already decided to do everything that will be required pursuant to the proposed Final Judgment. For your further information, I am including a copy of President Bushnell's statement explaining why the American Bar Association decided to enter into the settlement agreement.

If you have any questions about this matter, please do not hesitate to contact me.

DLD:md

Enclosures

Comments as to Proposed Final Judgment in United States of America v. American Bar Association, U.S. District Court, District of Columbia, Civil Action No. 95 1211

1. *Site Evaluation Team:* Paragraph VI, subparagraph (G) of the proposed Final Judgment should be amended to provide that at least forty (40%) percent of the members of the evaluation team be other than law school deans or faculty members. The proposal as written is satisfactory for a five (5) person team; however, if the site evaluation team includes more than five members, the proposal provides inadequate assurances as to representation.

2. *Control of Resources:* The proposed Final Judgment should be amended to state that the responsibility of the Special Commission referenced in § 7(A) of the proposed Final Judgment also includes the subject of ''Control of resources.''

Control of financial resources gives effective control of salaries, compensation, fringe benefits, stipends, and working conditions of law school faculty and personnel. The proposed Final Judgment does not directly address the matter of ''control of resources'' in § IV—Prohibited Conduct or in § VII—Special Commission.

Control and domination by legal educators of the ABA's ''law school accreditation standard-setting and enforcement process'' is a principal theme of the Complaint (see Complaint at § 9). Complaint §§ 28–33 allege that that control has been used for inappropriate purposes. For example, see Complaint § 28: ''* * * site inspection teams * * * have at times been unduly concerned with the salaries, perquisites and working conditions of their colleagues, among other things. Site inspection teams on occasion have incorporated law faculty demands and complaints into their site inspection reports.'' By imposing requirements going beyond the matter of compliance with the Standards, ''the ABA Accreditation Committee demands that the school exceed the Standard's minimum requirements or meet the law school's stated aspirational goals'' (Complaint § 29) which aspirational goals typically are set by law school faculty and personnel.

The ABA Standards and Interpretations are designed and enforced to give the law school dean and faculty effective control over resources contributed to or generated by the law school. For example, see the ABA's Interpretation of Standards 201, 209, and 210 (coupled with 105). Additionally, Standard 702 requires physical facilities to be under the ''exclusive control'' of the law school.

Unlike the Law School deans and faculty, the governing board of the University (of which the Law School is a part) is safely-distant and removed from the accreditation process. Control over resources should be the ultimate responsibility of the University and its governing board. However, the present ABA Standards, Interpretations and enforcement serve to remove control of law school resources from the University's governing board.

3. *Adequacy of Notice:* The notification from the ABA of the opportunity to comment on proposed Final Judgment did not include identification of the office to whom such comments should be sent. Though possibly not intended, that omission likely will reduce the number of public responses.

University of La Verne

September 28, 1995.

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

Dear Mr. Greaney: The University of La Verne submits the following regarding the proposed Final Judgment in *United States* v. *American Bar Association,* and requests that they be given consideration.

The proposed Final Judgment (the ''Judgment'') does not adequately address the findings of the Department of Justice, nor does it deal with certain other anti-competitive aspects of the American Bar Association accreditation process. In the Competitive Impact Statement, the DOJ discussed the ABA's policies with regard to Student-Faculty ratios, teaching loads, resources and facilities, among other things. Despite the ABA's record in these matters, the Judgment fails to deal strongly enough with many of them.

1. RESTRICTION ON NON-ABA GRADUATES: Although the Judgment deals with the question of ABA schools accepting students and graduates from state-accredited institutions, it fails to address the full consequences of the ABA's ''capture of the accreditation process.''

Specifically, the Judgment does not restrain the ABA's support of ABA-only graduation requirements for admission or employment. The ABA states in its Standard 102 ''that every candidate for admission to the bar should have graduated from a law school approved by the American Bar Association.'' It has on at least one occasion filed an *amicus* brief in a suit by a graduate of a state-accredited school seeking admission in Nevada, a state with no ABA law school of its own. In recent years several states have abandoned admission rules which permitted non-ABA graduates to sit

for the Bar, and the Judge Advocate General branches of the armed forces have enforced an ABA-only rule. Given the DOJ findings, these states and agencies in effect require adherence to standards which are the product of anti-competitive actions by the ABA.

The Law School Admission Council, which is responsible for producing and administering the LSAT, restricts membership to ABA schools, despite the use of the LSAT by non-ABA institutions. As a result, non-ABA schools are denied access to important seminars and information about the LSAT.

The DOJ should examine the ABA's possible role in seeking ABA-accreditation exclusivity, and deal with it by enjoining such activities or by requiring remedial action.

2. FACILITIES: The ABA standards on physical facilities, and the interpretation thereof, raise serious concerns. The Competitive Impact Statement implies that the standard on physical facilities has been improperly applied, pointing out that a substantial percentage of schools have been criticized by Site Visitation Teams despite new or renovated facilities. The Judgment leaves this and other topics to a Special Commission previously formed by the ABA. That Commission (the Wahl Commission) has generated a lengthy report which rewords the physical facility standards but leaves the mechanism of interpretive abuses unchecked.

It is through the Interpretations that the Standards become reality for an institution seeking accreditation. For instance, the Interpretation to Standard 701 states that leased facilities are not in compliance. There may be a number of reasons a developing school may wish to occupy leased facilities in either the short or long term, including the economy, regional growth patterns and institutional needs. The only rational basis for the ABA's blanket restriction would seem to be the promotion of locational stability, which may itself have anti-competition ramifications. Ownership offers no guarantee that a school will not change locations. Indeed, selling a building in order to relocate may well be less difficult than early termination of a lease. In any event, the decision of whether to lease or own should be left to the institution. Students are well-taught in either kind of facility. If non-owned facilities meet the reasonable needs of the educational program, and taken together with the school's history promise reasonable locational stability, they should not be the subject of a blanket prohibition.

The cost of facilities meeting the ABA's ever-evolving and ever more expensive demands is one of the factors putting ABA accreditation out of the reach of institutions willing and able to meet reasonable educational standards but unable to afford the millions needed for state-of-the-art buildings.

3. LIBRARY: Another Interpretation, dealing with library facilities, requires seating capacity for half the school's largest division. In an era when computers allow students to access WESTLAW, LEXIS and the informational world of on-line services and the Internet from their homes, the ABA requires the allocation of precious fiscal and physical resources for empty seating. In fact, most students are provided with WESTLAW access from their personal computers as part of the school's subscription with West. Although the library provides a study hub for a law school, the facts of life for today's adult student, particularly a working adult attending school part-time, increase the likelihood of more home study than when the Interpretation was written, and decrease the need for added seats in the library.

The facts of modern electronic research also impact the ABA standards on library holdings, which generally increase the need for larger library staffs and hardcover holdings, and thereby the cost of education to students.

4. FACULTY: The Judgment leaves the calculation of the faculty component of student-faculty ratios to the Special Commission. The Wahl Commission Report acknowledges the role of teachers with administrative posts and adjunct faculty in the academic program of a law school, and this is an important development. It remains to be seen what effect this, and the DOJ action, will have on the resulting Standards and particularly on the Interpretations. The DOJ and the court should carefully review the final form and application of new standards and interpretations to assure compliance with the spirit of the Judgment.

A further concern is raised by the Judgment's language concerning the use of salary and benefits data as part of the accreditation process. Such data is gathered by organizations and subject to the Judgment, such as SALT and AALL, and is therefore available to inspection teams. The Judgment should more clearly and forcefully forbid the use of such data whatever the source.

5. OUTCOME MEASUREMENT: Ultimately, the quality of a law school's program is measured by the results it obtains with its students. The ABA Standards and the Judgment do not address outcome measurement. Although it may be difficult to measure academic outcomes, law schools have the Bar passage rate as one indicator. A high passage rate may perhaps be obtained by ''teaching to the Bar,'' and such a practice would be rightly criticized. But some state-accredited institutions in California, clearly *not* engaging in such a practice, have on occasion attained higher Bar passage rates than some ABA-accredited schools. At least with regard to that one measurement, the lack of relationship between the Standards and educational outcomes is apparent. The alumni of state-accredited schools who daily demonstrate the quality of their education on the bench, in their work in Bar Associations and in law practice, further prove the point.

The success of a law school in producing competent practitioners should be a critical component of the accreditation process. New measurement methods need to be developed and utilized as part of the accreditation process.

We are thankful for the opportunity to present these points.

Sincerely,

Kenneth Held,

Dean.

Normal Daniel Frank II

Attorney and Counselor at Law

1605 East Expressway 83, Mission, Texas 78572, 210 585–2764

September 11, 1995.

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

RE: United States of America, Plaintiff v. American Bar Association, Defendant, Civil Action No. 95–1211 (CR), Filed: June 27, 1995

Dear Mr. Greaney: Enclosed are the comments of the Reynaldo G. Garza School of Law concerning the above referenced antitrust suit. I understand that you are the proper person to send these comments to in order for them to be filed with the U.S. District Court and published in the Federal Register.

Should you wish to contact me please do so at my above address or phone number.

We are very grateful that the Department of Justice has taken this course of action. This was something that was sorely needed.

Sincerely,

Norman Daniel Frank, II,

President, Reynaldo G. Garza School of Law.

Reynaldo G. Garza School of Law

905 North Shore Drive, San Benito, Texas 78586, (210) 399–1800

September 11, 1995

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

RE: United States of America, Plaintiff v. American Bar Association, Defendant, Civil Action No. 95–1211 (CR), Filed: June 27, 1995

The Reynaldo G. Garza School of Law, hereinafter also called Garza Law School, is a Texas non profit corporation incorporated under the laws of the State of Texas. The Garza Law School would like to submit the following comments believing that the above referenced civil action final judgment should be modified to more satisfactorily cover the following issues:

(1) The proposed final judgment does not go far enough to rectify the great injustice that the American Bar Association (ABA) has perpetrated on victims of its illegal policies. The victims are not only the law Schools, including the Garza Law School, who have had to deal with the ABA abuse of the accreditation process they are the students who have been denied access to take bar exams and become licensed as attorneys. These students have been denied student loans, have had to make unfair sacrifices, and are to this day denied an opportunity to earn a living practicing law.

(2) The proposed final judgment does not specifically address the issue of Library collections. This is an important issue due to ABA Standard 602 which requires an ABA approved core collection. The interpretation of this requirement in the past has meant that law schools must have physical possession of paper books printed and published by a

select few printers and publishers and waste valuable financial resources warehousing these books and materials. The interpretation of ABA Standard 602 also meant that a law school could not *fully* take advantage of the latest technology in CD ROM and computer modem access to large data bases.

(3) The proposed final judgment does not specifically address the issue of ABA Standard 605 which requires a full time librarian to administer a law library. Just as the United States recognized the ABA's abuses in setting standards that require only full time faculty to teach students so too the court should consider that a law library can be equally well managed by part time librarians.

(4) The final judgment does nothing to correct any of the additional injustices done as exhibited by the Texas Supreme Court in their letter, signed by Justice John Cornyn, and attached hereto as exhibit ''A''. The Texas Supreme Court zealously supports and punitively enforces all the illegal standards created by the ABA. The letter from the Texas Supreme Court documents the following:

(a) the Texas Supreme Court, the Deans of all eight Texas ABA accredited law schools, and the chairman of the Board of Law Examiners stood in opposition to bills that would have allowed Garza Law School Students to sit for the Texas Bar Exam. Their stalwart opposition to the bills was to force the Garza Law School to comply with the illegal ABA standards. This action caused damage to the Garza Law School and its students and students who would have liked to attend the Garza Law School.

(b) the Texas Supreme Court does not want the Garza Law School and unaccredited law schools to ''get rich from the tuition dollars of their students to the damage of accredited law schools and educational standards generally.'' This statement of the Texas Supreme Court is obviously in support of the illegal guild standards as created by the ABA and unfairly gives preference to Law Schools accredited by the ABA.

I hope the United States District Court will consider the actions of the Texas Supreme Court as documented in their letter to the Texas Senate dated April 7, 1993 and enclosed herein as exhibit ''A''. It was in the hands of the Texas Supreme Court that the Garza Law School had to place itself for justice and relief from the illegal guild standards created by the ABA. The Texas Supreme Court ignored its duty and responsibilities to the people of Texas and instead zealously supported the illegal guild standards enacted by the ABA. Because of the above reasons the U.S. District Court should be able to understand that adequate relief is not in the proposed final judgment. Stronger measures and procedures that include State level enforcement are necessary in order to insure proper compliance. These measures and procedures need to be included in the final order. Please see that justice is done and that proper and adequate relief is granted.

Respectfully submitted,

Norman Daniel Frank II,

President, Reynaldo G. Garza School of Law.

The Supreme Court of Texas

Post Office Box 12248

Austin, Texas 78711, Tel: (512) 463–1312, FAX: (512) 463–1365

April 7, 1993.

The Honorable Eddie Lucio,

Texas Senate, 402 One Capitol Square, Austin, TX 78701

Re: H.B. 850 (Rep. Rodriguez), S.B. 296 (Sen. Lucio)

Dear Senator Lucio: I am writing to ask for your support in defeating H.B. 850 by Representative Rodriguez, which has passed the House with amendments, and its companion, S.B. 296 by Senator Lucio. Both of these bills would allow the graduates of the Reynaldo Garza Law School to take the bar examination even though the Rules Governing Admission to the Texas Bar promulgated by the Supreme Court require graduation from a law school accredited by the American Bar Association.

Although the court previously granted to that school's graduates a limited waiver from its rules, that waiver expired and was not renewed because of the court's waning expectation that the Garza Law School would ever become accredited by the ABA. The school then directed its attention to the legislature, which granted another limited waiver of this requirement. But instead of trying to improve the school to meet the ABA standards, even after the court granted a waiver, the school withdrew its application for ABA accreditation.

House Bill 850 has now passed out of the House and will be referred to the Senate Jurisprudence Committee, where it may be substituted for S.B. 296. As the Supreme Court liaison to the Board of Law Examiners I have already expressed concern about these bills to Senator Henderson, chairman of the Senate Jurisprudence Committee. Numerous witnesses, including myself, the chairman of the Board of Law Examiners, and the deans of all eight Texas ABA accredited law schools stand ready to testify about our opposition to these bills, but the following summarizes our concerns.

Our concerns are twofold: (1) the future of the requirement of graduation from an ABA accredited law school in Texas and what its demise may mean to the public and the legal profession on our state; and (2) the patently inadequate educational preparation being given to Garza's graduates.

None of the five Garza graduates who took the most recent bar exam passed on the first try. Compare this result with an average passage rate of 88.5% for graduates of Texas' eight ABA accredited schools. Since July 1988, the cumulative bar passage rate was 22% for Garza graduates and 82.9% for graduates of ABA accredited Texas law schools. I am personally concerned that the state of Texas would officially encourage or even condone this situation: Garza students pay tuition and work their way through the rigors and difficulties of law school, only to be thoroughly unprepared to take the bar exam. These statistics raise serious concerns about the quality of legal education afforded these students in spite of their best efforts. There can be little doubt that law students are better prepared for the bar examination and the practice of law when they graduate from a law school required to meet or exceed ABA accreditation standards.

There is also the issue of whether special treatment for graduates of Garza can be defended when graduates of out-of-state unaccredited law schools seek the same privilege. Questions of fundamental fairness, not to mention equal protection, are presented. The exemptions contained in H.B. 850 and S.B. 296 are limited to an unapproved law school within the boundaries of Texas; however, there is a serious legal question whether a state can discriminate in the bar admission process in favor of residents of its state. The Board has already been informed by graduates of out-of-state non-ABA-approved law schools that if the exemption for Garza is renewed, we can expect a court challenge of the Supreme Court rules on the basis that they discriminate against individuals who are not residents of Texas.

We must also consider whether Texas will eventually become like California, where unaccredited law schools get rich from the tuition dollars of their students to the damage of accredited schools and educational standards generally. Will Texas eventually open its bar exam to everyone, whether they graduate from an unaccredited law school—or even receive degrees for correspondence courses—or if they do not graduate from a law school at all?

The main reason for this lengthy letter is to provide you with accurate information regarding the context in which I hope you will consider these bills. At my request, representatives of the Board of Law Examiners attended the public hearing before the House Committee on Judicial Affairs and were present in the gallery during floor debate when H.B. 850 was considered on second reading; I fear that many members of the Legislature have been misled about the facts and so I offer the following background information.

Some of the proponents of the Garza bill have suggested that the issue is accreditation by the *Coordinating Board*; however, the real issue is accreditation by the American Bar Association. The first deals with the right granted by the State for a school to grant a degree; the second deals with a law school's certification as meeting a set of standards and criteria set by the American Bar Association's Section on Legal Education and Admission to the Bar.

The exemption from the law study requirment for Garza law students which is the backbone of H.B. 850 is an exemption from the Supreme Court's rule requiring that an applicant for the Texas Bar hold a Doctor of Jurisprudence degree from a ABA-approved law school. In other words, the Supreme Court has determined both under its rulemaking authority and by its inherent power under the Texas Constitution to regulate the practice of law that to be eligible to take the Texas Bar Examination, an individual must have a J.D. degree awarded by a law school which is approved or accredited by the American Bar Association. The Supreme Court does not have a rule requiring that an applicant hold a degree from a school accredited by the Coordinating Board.

However, most of the floor debate and, indeed, most of the comments made by the proponents of the bill at the public hearing in the Judicial Affairs Committee centered on Garza's inability to become accredited by the Coordinating Board, allegedly due to the Coordinating board's discriminatory policies. The rules of the Supreme Court which H.B. 850 will override have nothing to do with the Coordinating Board's accreditation or certification.

In both the committee hearing and the House floor debate on April 6th, statements were made that Garza had an application for accreditation on file, and that additional years were needed to process that application. I do not know whether Garza has an application on file with the Coordinating Board. However, I can assure you that Garza School of Law does not have an application on file for approval by the American Bar Association.

I offer the following background information:

1. Reynaldo G. Garza School of Law was incorporated in October 1983, and began conducting classes in August 1984.

2. In December 1984, Garza asked the Supreme Court of Texas to exempt its graduates from the ABA-approval requirement; the request was denied in January 1985.

3. In January 1987, Garza filed an application with the American Bar Association seeking provisional approval.

4. An ABA site inspection was scheduled for March 7–10, 1987, but was cancelled by Garza, resulting in its application fee being returned, leaving no application for approval pending.

5. In June 1987k Garza again requested exemption from the ABA=approval requirement; the Supreme Court denied the request in July 1987.

6. In November 1987, Garza filed a formal petition with the Supreme Court requesting exemption from the ABA-approval requirement. In this petition Garza stated that it has ''filed its application for initial inspection by the American Bar Association in March, 1986, and is currently pending.'' This statement was not true.

7. On January 8, 1988, after filing the petition containing the statement in item 6 above, Garza filed a second application with the ABA seeking provisional approval.

8. Based on Garza's representation that it was actively seeking ABA-approval, the Supreme Court signed an order on January 14, 1988, granting an exemption of the ABA-approval requirement to those Garza students awarded a J.D. degree from Garza between May 1988 and June 1989, allowing them to take the Texas Bar Examination in July 1988, and February and July 1989. The order specifically stated that no extension of the order would be granted.

9. On April 5, 1988, Garza School of Law withdraw its second application for ABA approval.

10. In December 1989, after the expiration of the exemption granted the school in the January 1988 order, Garza filed another petition with the Supreme Court, requesting an exemption from the ABA-approval requirement. This petition stated that Garza ''has no plans for continu[ing its existence] beyond December 31, 1989.'' The petition states that Garza students who have not completed their degree requirements upon the school's closing would do so through another institution.

11. In February 1989, the Supreme Court denied Garza's request for an extension of the exemption from the ABA-approval requirement.

12. In June 1991, the 72nd Legislature enacted a temporary legislative exemption for Garza graduates by amending Sec. 82.0241, Texas Government Code, thereby allowing Garza students who has enrolled before June 1, 1989, and wh9o received a J.D. degree by June 1, 1993, to take the Texas Bar Examination. The exemption specially expired on June 1, 1993, and thereafter, according to the 1991 legislation, all matters relating to eligibility of students at unaccredited law schools would remain in the sole jurisdiction of the Supreme Count of Texas.

13. The Raynaldo G. Garza School of Law does not have a pending application for approval by the American Bar Association. The ABA informed the Board of Law Examiners on April 7, 1993, that Garza has not filed any application for approval since the school's voluntary withdrawal of its 1988 application.

14. Representatives of the Raynoldo G. Garza School of Law visited with James P. White, the ABA Consultant on Legal Education (the executive officer of the ABA's section in charge of law school accreditation) on November 24, 1992, and told Mr. White that they would not be seeking ABA approval for at least three years from that date.

15. The accreditation process takes approximately nine months, rather than four years as represented by some Garza proponents.

Both the Board of Law Examiners and this Court believe that these facts demonstrate that the Reynaldo G. Garza School of Law has been given every reasonable opportunity to obtain the required approval by the American Bar Association for its graduates to sit for the bar exam. I am especially concerned that representatives of the school have, inadvertently or otherwise, misrepresented their efforts to seek ABA-approval. I am equally concerned that the Legislature is being misled by the repeated references to the Coordinating Board accreditation dispute which is not an issue in this controversy.

I urge you to vote against H.B. 850 or S.B. 296. I believe it would be a grave mistake to weaken the educational standards that must be met before an individual is entitled to be licensed to practice law in Texas. Thank you for your consideration.

Sincerely,

John Cornyn,

Justice.

cc: Warlick Carr, Chairman, Board of Law Examiners, Deans of ABA-Accredited Texas Law Schools

September 27, 1995.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, D.C. 20001

Dear Mr. Greaney: This comment is written in support of the United States civil antitrust suit alleging that the American Bar Association (hereinafter ''ABA'') violated Section 1 of the Sherman Act in the accreditation of law schools. The complaint alleges that the ABA restrained competition among personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. In order to comply with the Antitrust Procedures and Penalties Act (15 U.S.C. Section 16) this comment proposes two essential modifications before the approval of the Final Judgment.

First, all individuals holding a Juris Doctor degree from a state-accredited law school should be allowed to take the bar examination in any state of their choice. Currently, bar admission rules in over forty states require graduation from an ABA-approved law school in order to satisfy the legal education requirement for taking the bar examination. Allowing state-accredited law school graduates to take the bar examination is consistent with the ABA's high standards requiring law schools to maintain an educational program designed to qualify its students for admission to the bar.

This proposal suggests treating state-accredited non-ABA-approved law school graduates similarly to ABA-approved law school graduates. A state-accredited law school graduate must comply with rigorous state requirements and procedures, passing the bar examination demonstrates that individual's qualifications to practice law in the applicable state.

Additionally, the ABA is the only agency recognized by the United States Department of Education as a law school accrediting agency. The ABA Standard which requires an individual graduate from an ABA-approved law school before admission to the bar gives the ABA power to influence where an individual can or cannot practice his or her livelihood. This flies in the face of the United States Constitution's commerce clause and is an unreasonable restraint on interstate commerce for prohibiting graduates from a non-ABA-approved school to freely move from one state to another.

This total ban on non-ABA-approved schools by the ABA has prevented my taking the Massachusetts Bar Examination. I attended Western State University College of Law, in San Diego, California, a state-accredited law school but a non-ABA-approved school. I was awarded the position of Editor-in-Chief of Law Review, participated in the regional for the Phillip C. Jessup International Moot Court Competition, and attained a certificate in the International Certificate Process. I am currently awaiting the results of the July California Bar Examination. Lifting this prohibition will allow me to take the bar examination in an additional state of my choice.

Second, all individuals holding a Juris Doctor degree should be eligible for admission in LL.M or post-Juris Doctorate programs based on the student's academic achievements and according to the admission standards of the law school. While the ABA prohibits an ABA-approved law school from

matriculating graduates of state-accredited or unaccredited law schools, it permits, under certain circumstances, the matriculation of graduates of foreign law schools (Interpretation 3 of Standard 307). The ABA only allows a law school to apply for a waiver of Interpretation 3 of Standard 307 and does not allow the affected individual to apply for a waiver on their own behalf. This rule extends too much authority to the ABA over decisions best suited to the academic institution. Additionally, allowing foreign student enrollment in advance law programs but not allowing state-accredited law students the opportunity to enroll is clearly discriminatory.

I graduated from Wells College in 1978 and continually have taken graduate classes at the Harvard Extension School and also attended the College for Financial Planning. The pursuit of higher education has always been a personal and professional goal for self improvement and one which I hope to continue in the future. The interpretation of this Standard prevents graduates from state-accredited law schools such as myself and members of the bar who have practiced with distinction from furthering their professional careers by obtaining advanced law degrees. Once again, this is fundamentally unjust and substantially affects the flow of interstate commerce.

The proposed Final Judgment should include modifications made in this comment. Such modifications will prohibit the recurrence of conduct that is plainly anticompetitive and which bars the free flow of graduates from moving interstate.

Based on the foregoing, the United States request for a permanent injunctive relief should be granted, enjoining the ABA from engaging in further violations of Section 1 of the Sherman Act.

Respectfully submitted,

Deborah B. Davy,

3814 Arnold Ave., Apt. 6, San Diego, CA 92104.

Joel Hauser

Attorney at Law, 234 Kenwood Ave., Delmar, NY 12054, 518 475–0446

September 21, 1995

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Anti Trust Division, 555 4th Street NW., Room 9903, Washington, D.C. 20001

RE: Proposed Final Judgment, *U.S.* v. *ABA*

Dear Mr. Greaney: Pursuant to the Antitrust Procedures and Penalties Act, I would like to submit these comments regarding the Proposed Final Judgment and Consent Decree in the above referenced case.

While I am generally satisfied with the settlement your office has proposed, I am disappointed that you have not gone farther towards breaking the stranglehold the ABA has maintained over our profession. Unfortunately, even if the ABA fully complies with the terms and conditions described in the Settlement, enough of the old practices are maintained to thwart any chance for real change and progress. In particular, the Settlement fails to resolve the issues of part time faculty and student/faculty ratios, both of which were prominent and central to Justice's Complaint against the ABA. Nor does the settlement recognize the value and contribution of non-ABA accredited schools. I believe that the settlement should go on record as acknowledging that these schools may be a viable and practical alternative to the ABA schools.

As noted in Justice's Complaint, while the ABA has insisted on a high student/faculty ratio, it has never considered actual student/faculty contact or actual class size when considering accreditation. Consequently, the high ratio policy has had no significant impact on the quality of a law school education. It has, however, had a significant impact on the cost of a law school education. The high ratio does not come cheap. Similarly, denying a law school the opportunity to count part time faculty towards this ratio does little towards achieving academic excellence. It merely serves to maintain an artificially high operating cost by requiring schools to continue to hire a large number of full time faculty who devote remarkably little time to actual teaching. This high cost makes it all but impossible for new law schools to gain accreditation. And without accreditation, these new schools can't compete.

People's College of Law, which I attended, had few full time faculty members. Our instructors were, for the most part, full time attorneys actively engaged in the practice of law. They taught those subjects which they specialized in as attorneys. Our Criminal Law professors were often lawyers from the Public Defender Service. Our Constitutional Law Professors came from the ACLU. Because our professors were experts in the practice of their respective fields, they were able to teach not only the history and theory of the law, they were also able to illustrate the application of the law through their personal experience and practice. Students at PCL didn't just learn the law, we learned how to practice law. That is something which only a part time faculty can convey. It is something which all law schools should strive for. It is something which serves the profession and the public at large. Yet the ABA has, and will continue to resist such an academic goal. Your settlement should insist that the ABA abandon it's full-time faculty Standards and Interpretations. Furthermore, law schools must be permitted to count part-time faculty members when considering student/faculty ratios.

I should note that I have personally suffered great hardship as a result of the ABA's tight control over the profession. I am a graduate of People's College of Law, a California law school which is not accredited by the ABA. I was admitted to practice law in California in 1981, after taking and passing the California Bar Exam. In 1989 I waived into the Washington, D.C. Bar by motion to the Court. In 1995, I was admitted to practice in New York State, after taking and passing the New York Bar exam.

I have been admitted to practice law for more than fourteen years, devoting my career to public interest work. As a counselor and attorney with the Center for Veterans' Rights and G.I. Forum, I represented hundreds of military veterans' in discharge upgrade hearings, Veteran's Administration reviews, and Social Security proceedings. As a lawyer with California Rural Legal Assistance, I represented countless poor farm workers in a wide variety of legal matters including housing, working conditions, and public benefits. As a lawyer with Neighborhood Legal Services Program in Washington, D.C. I represented poor people faced with eviction, termination or denial of crucially needed public benefits and services, and general consumer complaints. I am extremely proud of my work as a lawyer and the good that I have done for so many people. I am equally proud of the education and training which I received at People's College of Law.

Yet, despite my accomplishments as a lawyer, I was for three years denied the opportunity to take the New York Bar Exam simply because PCL was not accredited by the ABA. Up until last year, New York State's Rules for Admission provided that only graduates of ABA approved schools could be admitted to practice. On three occasions I Petitioned the New York State Court of Appeals for a waiver of the ABA accreditation rule. Each petition was denied, without any consideration given to my practice experience or my law school education, due to the Court of Appeals' blind adherence to the ABA accreditation rule.

Fortunately for me, in 1994 an Act of the New York State Legislature modified the laws governing the admission of attorneys. Effective the winter of 1994, lawyers who had graduated from a non-ABA law school, and who subsequently practiced law for at least five years after gaining admission in their home state, could sit for the New York Bar Exam. With the passage of this legislation, I was able to take the February 1995 bar exam. I passed the exam and was admitted to practice in New York in June, 1995.

However, as a graduate of a non-ABA approved law school my right to practice in most states remains in doubt. Only a handful of States are willing to look beyond ABA accreditation. I would urge Justice to include in this settlement an acknowledgment by the ABA that its ''seal of approval'' is only one factor which the States may consider when evaluating a particular lawyer or law school graduate's application for admission. As an alternative to an education at an ABA-approved school, States should be encouraged to consider a candidate's overall work and life experiences, in conjunction with his or her training and education at a non-ABA accredited school. Only then will the stranglehold which the ABA has maintained over our profession begin to be loosened. And only then will law school tuition start to come down.

Thank you for the opportunity to comment on your settlement. If you have any questions please give me a call.

Sincerely,

Joel Hauser

Wendell A. Lochbiler III

704 Wolverine Drive, Wolverine Lake, MI 48390

September 28, 1995.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

RE: United States of America v. American Bar Association, Civil Action 95–1211

Dear Mr. Greaney, I am writing to comment on the proposed Final Judgment in the above captioned case and to relate the devastating effect the discriminatory practices of the American Bar Association (ABA) has had upon my life. I will keep my comments brief since I only recently learned about the Competitive Impact Statement and I want to meet the October 1, 1995, deadline. However, I would be happy to provide you with more details upon request.

I attended the University of West Los Angeles School of Law (UWLA), located in California, from 1985 through 1988. The University of West Los Angeles is a state accredited school, but it is not accredited by the ABA. At the time I decided to attend UWLA, I planned to practice law and remain in California for I strongly believe that I received an excellent legal education at UWLA. I worked very hard, did well in school, and graduated in the top third of my class.

I passed the California Bar Examination, on my first attempt. (The California Bar Exam is widely recognized as being one of the most difficult in the country). I was admitted to the California Bar on December 7, 1988. In addition I was admitted to the United States District Court for the Central District of California on May 7, 1990. I practiced law for five (5) years in California. I have an impeccable record and excellent references from all my employers.

In October, 1993, I returned to Michigan for personal reasons, my father and my wife's father each underwent two heart operations. I applied for admission to the Michigan Bar. My application was summarily denied, and the *only* reason given was the fact that I did not graduate from an ABA accredited law school. The people I contacted at the Michigan Bar indicated my application was not even considered because I could not meet that threshold requirement.

I subsequently wrote to the Michigan Bar with three alternative requests: (1) I requested a waiver of the rule which requires applicants to have a degree from an ABA accredited institution; (2) In the alternative, I asked for an opportunity to take the Michigan Bar Examination; (3) I requested a hearing on the matter before the Board of Examiners. Again, the Board denied my request, and again the only reason given was my failure to attend an ABA accredited law school. Furthermore, they would not even hold a hearing on the matter, as per their guidelines. I have attached a copy of my letter to the Board and their response.

Having no other alternative, I contacted a local ABA accredited law school and inquired about admission to their LLM program. I was informed by the program director that I would not be considered for admission, even though I may be a qualified candidate, because I did not have a degree from an ABA accredited law school. He further indicated that the school's LLM program could lose its accreditation by accepting graduates of non-ABA accredited law schools.

I then contacted virtually every other ABA accredited law school in the state of Michigan regarding admission as a transfer student. I was uniformly informed that I would not be accepted as a transfer student since I did not have a degree from an ABA accredited law school. Moreover, I was told that I would have to retake the LSAT, since my previous LSAT score was over five (5) years old.

The above events transpired over the course of approximately two years. During this time I remained unemployed. I could not work in the field of my chosen profession since I was not admitted to the Michigan Bar. In addition, I was overlooked for several non-legal positions because potential employers considered me overqualified, or were concerned by the fact that I could not practice law. I have recently found employment in a position that pays far less (nearly 50% less) than I earned as an attorney. I know for a fact at least two firms would have been interested in hiring me, if I had been admitted to the Michigan Bar.

In conclusion, I am concerned that even though, I passed the California Bar examination on my first attempt, and I am qualified to practice in California and Federal Courts, and I would be considered a worthy candidate for employment by the FBI, or the Justice Department, which accept graduates of State accredited law schools; that I am not eligible for admission to the Michigan Bar, or allowed to take the Bar Examination, or even to be admitted to another law school. I believe the proposed Final Judgment is an admirable first step toward correcting the egregious conduct of the ABA. However, I would like to see some action taken to lessen the ABA's control over the admission of attorneys in the vast majority of States. In fact, I believe that eliminating the States requirement that candidates graduate from only ABA accredited schools, would be the singe most effective measure toward preventing control over the legal profession by the ABA. I also am afraid that enforcement of the Final Judgment will be lax because it appears it will be left in the hands of people who are somehow connected to the ABA. Thank you for your diligent work.

Respectfully Submitted,

Wendell A. Lochbiler III

Wendell A. Lochbiler III

704 Wolverine Drive, Wolverine Lake, Michigan 48390, (810) 624–4286

September 21, 1994.

Mr. Dennis Donohue,

State Board of Law Examiners, 200 Washington Square North, P.O. Box 30104, Lansing, Michigan 48909

Dear Mr. Donohue: I am writing in response to your letter of August 23, 1994 and our subsequent telephone conversation concerning my request for admission to practice in Michigan without examination.

You returned my application indicating that I was ineligible since I did not graduate from a law school approved by the American Bar Association (hereinafter ABA). During our telephone conversation I requested a hearing before the board under Rule 5(C) which states:

''An applicant not satisfying Rule 5(A) will be notified and given an opportunity to appear before the Board. The applicant may use the Boards subpoena power.''

The reason I have requested such a hearing is to seek a waiver from the Board under Rule 7 which states:

''An applicant may ask the board to waive *any requirement* except the payment of fees. The applicant must demonstrate why the request should be granted.''

You suggested that I submit my request in writing which I am now doing. In addition, I have outlined a number of factors which I believe warrant consideration by the Board with regard to my request for a waiver. In the alternative, I would like to discuss the possibility of being allowed to take the Bar Exam.

Factors in Favor of Waiving Rule 5(A) in the Case of Wendell A. Lochbiler III

1. Professional Experience

I have five years of professional experience as an attorney. I was admitted to the California Bar on December 7, 1988. I passed the California bar exam on my first attempt. The California Bar exam is recognized as being one of the most difficult of all 50 states.

I have experience in managing hundreds of cases from their initial inception to their final conclusion. I have also made hundreds of court appearances in the majority of the courts located in Southern California. I have been involved in a large variety of cases ranging from: complex construction defect, professional liability, and real estate errors and omissions cases, to typical personal injury lawsuits.

I have experience as a partner of my own law firm. I have also served as the acting managing attorney of an 11 member law firm, during absences of the managing attorney.

I have excellent references. My last employers, Paul Coony and Bernhard Bihr of Coony and Bihr in Beverly Hills, California, will attest to my professionalism and qualifications to practice law. I have also listed numerous other references in my application ranging from former partners to law school professors. I am confident they will provide excellent references.

Prior to my admission to the California Bar, I was employed as a law clerk in several different positions including one of the Los Angeles County Superior Courts.

I have been a member of several different Bar Associations, including the *American Bar Association.*

I was admitted and qualified to practice law in the United States District Court for the Central District of California (Federal Court) on May 7, 1990.

2. Educational Background

I graduated from the University of West Los Angeles School of Law (hereinafter UWLA) in 1988. UWLA was chartered in February 1966, under the laws of the state of California as a non-profit institution. The law school was fully accredited by the State Bar of California in April 1978. The University was also accredited by the Western Association of Schools and Colleges in June 1983.

I completed 84 Semester Units prior to graduation. I ranked number 16 out of a class of 48. I was on the Dean's list during the 1985–86 term. I received an award for my law review article on Tender Offer Regulations: printed in UWLA Review Volume 19. While in law school I participated in the legal aid clinic, which provided free legal services to indigent people.

Although UWLA is not accredited by the ABA, it has a solid reputation within the legal community of the State of California. A large number of respected Judges and attorneys have graduated from our law school. In addition, our law school has established a good track record in preparing candidates for the bar exam. UWLA generally ranks near the top when its bar passing rate is compared to other institutions of its type. I believe UWLA's bar passing rate has occasionally exceeded the rate of some ABA accredited schools. Personally, I felt I was well prepared as evidenced by the fact that I passed the Bar exam on my *first* attempt and I would point out that many graduates of ABA accredited schools do not.

I received my Bachelor of Arts Degree from Wayne State University in 1984.

3. Other Factors

I am a native of Michigan, born in Detroit in 1961. My wife Susan is also a Michigan native. Susan is an engineer, employed by Hughes Information Technology Company, a subsidiary of General Motors. We both have large families long established in southeastern Michigan. One of the primary considerations influencing our decision to move back to Michigan was our desire to be close to our families and help provide care for our parents. The opportunity to return to Michigan arose when Susan was offered a transfer to the Hughes facility located in Troy, Michigan.

Susan and I are hard working, productive people. We have a two year old child named Thomas. We have purchased a home in Michigan and would like to remain here. We both feel that with our professional experience and educational background we have a lot to offer our local community and the state of Michigan.

Addressing the ABA Accreditation Requirement

Rule 5(A) requires that an applicant for admission to the Michigan Bar obtain a law degree from a law school which is approved by the ABA. However, Rule 7 allows the applicant to request a waiver of *any requirement* except the payment of fees.

In order to determine whether to waive the requirement that an applicant graduate from an ABA accredited School, the board must take into consideration the purpose of the rule. Obviously the purpose of the rule is to ensure that the applicant is qualified and competent to practice law. I agree that the rule works in a limited manner to fulfill its purpose. However, it appears that the rule is one of a number of factors used to establish a persons qualifications to practice law.

As practicing attorneys, we know that there are a number of qualities which make a person qualified to practice law. These include intelligence, honesty, knowledge of the law, strong communication skills, and professionalism to name a few. I believe that I have all of these qualities as demonstrated by my five years of professional experience and which can be confirmed by contacting my references. Furthermore, I find it ironic that even though I was allowed to become a *member* of the ABA after I was admitted to the California Bar, I am not eligible for the Michigan Bar because I did not attend an ABA approved law school.

As for the argument that my admission would be unfair to those who have met this requirement, I say that each application should be judged on its individual merits. Obviously, the legal profession can only be enhanced, not diminished by the admission of another well qualified candidate. If no exceptions were to be allowed under these circumstances, the drafters of the rules would have stated so explicitly in Rule 7, as they did regarding the fee requirements.

A Brief Comparison of the Arguments

By way of demonstration, I have prepared a chart comparing the factors in favor of granting admission to the Michigan Bar versus the factors against granting admission. As you can see, the factors in favor far out weigh those against.

Factors in Favor of Admission of Applicant

1. Five years of professional experience.
2. Passed California Bar Exam on first attempt.
3. Admitted and qualified to practice in Federal Court.
4. Member California Bar since 1988.
5. Member American Bar Association 1989–1992.
6. Member Los Angeles County Bar Association 1989–1991.
7. Member South Bay Bar Association 1989, 1992–1993.
8. UWLA is approved by the State of California and has an excellent reputation.

UWLA is accredited by the Western Association of Schools and Colleges.

10. Excellent References.
11. Future employment prospects are excellent.
12. Native of Michigan with strong family ties.
13. Both spouses are professional, productive members of community.
14. Applicant has excellent character.

Factors Against Granting Admission

1. Law school not accredited by ABA.

Conclusion

Based upon the foregoing, I believe I have established a solid basis for the Board to grant my admission to the Michigan Bar. Rule 7 provides an exception to the general requirement that an applicant must graduate from an ABA approved law school. My years of professional experience coupled with my demonstrated intellectual ability and numerous other factors in my favor outweigh the ABA requirement.

I am resubmitting my original application and fees of $600.00, to avoid any further delay. I am also willing to submit any addition information or references requested by the Board. I look forward to hearing from you soon regarding a hearing date.

Respectfully Submitted,

Wendel A. Lochbiler III

Larry Stern

Phone (301) 320–2693 Fax (301) 320–2694

John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice, Anti Trust Division, 555 4th St., NW., Room 9903, Washington, DC 20001

Re: Proposed Final Judgment, *Civil Action #95–1211, U.S.* v. *ABA*, 6/27/95.

09/26/95.

Dear Mr. Greaney: Pursuant to section 2.b. of the Antitrust Procedures and Penalties Act, I would like to object to entering the above referenced Proposed Final Judgment and Consent decree in its present form.

While the settlement your office has proposed considerably improves on the current rules, it does not go nearly far enough in breaking the stranglehold the ABA has so arbitrarily exercised over the legal profession.

First, the settlement does not right the discrimination and injury visited upon graduates of State accredited law schools. For the past two decades they were discriminated against and restricted through the efforts of the ABA. To permit this to remain unchanged is to invite the ABA to find more subtle forms of abuse. The only conscionable remedy is to grandfather in similar Bar examination rights for State accredited law school graduates, as ABA graduates enjoyed to date. Any settlement terms and Wahl Commission issues should apply from the settlement date forward.

Full compliance of the ABA with the terms and conditions of your proposed Settlement maintains enough of the old practices to thwart any incentive for real change and progress. In particular the settlement even at this late date does not acknowledge the value and contribution of non-ABA accredited schools. The ABA cannot, must not remain the sole accreditation authority to the denigration of the rights of the States.

As noted in Justice's complaint, the ABA's insistence on low student/faculty ratios was applied so as to be divorced from rational connection to the quality of education. In particular denying the schools the opportunity to count part time faculty toward these ratios eliminated the benefits of a faculty with practical experience, while at the same time raising the cost of a legal education. The results are of dubious if not outright negative effect on the quality of the graduates.

The Glendale University College of Law (GUCL) which I attended had, in addition to full time staff, a number of part time faculty. The part time faculty belonged to a number of firms specializing in the legal fields their attorneys taught at the school. We learned Intellectual Property from the head of that department for 20th Century Fox. Criminal law was taught in part by members of the District Attorney's staff. These professors were able to bring to life dry legal theory by relating to us their personal experiences in actual practice. Students at GUCL did not just learn the law, they learned how to practice law.

I have personally suffered hardship as a result of the ABA's tight control over the

profession. After graduation from Law School I chose, for a variety of reasons, to continue my former profession as an engineer. After a number of years and significant accomplishments I was awarded, on a competitive basis, a national Fellowship to Congress. I performed my duties as a legislative aide with distinction and renewed my interest in certain technology related legal fields, such as FCC and Patent law. Despite high accomplishment, despite the fact that laws I helped create and place on the books will be interpreted by attorneys without a technology background, despite the scarcity of knowledgeable attorneys in these specialized fields, I found the door to further legal education –LLM– as well as to practice effectively blocked. No ABA approved school can consider my application without putting its own accreditation at risk. I no longer reside in California, the state which would allow me the privilege of sitting for the Bar Examination. The ABA would have me start all over again, except that most law schools would be foreclosed from admitting me because of my prior—State accredited—legal education. I submit the nation is not best served by such a policy. The least Justice can do is level the playing ground for everyone.

I would urge Justice to include in this settlement an acknowledgment by the ABA that it's ''seal of approval'' is but one measure which the States *may* consider in prescribing the basic qualifications for admission to each State's Bar Examination. Full faith and credit to the rules governing admission to the Bar in the state where the candidate studied law should be a mandatory alternative to an education at an ABA approved school. Also a State should be allowed the latitude to consider the candidate's overall work and life experience, in conjunction with his or her training and education at a non-ABA accredited school. Only if these alternatives are mandated and implemented will the stranglehold of the ABA over the profession begin to be loosened.

Thank you for the opportunity to comment on your settlement. I'd be glad to answer any questions you may have.

Sincerely,

Larry Stern

Julie Anne Gianatassio, *Esq.*,
7008 Stafford Avenue, Huntington Park, CA 90255

August 30, 1995

Mr. John F. Greaney,
Chief, Computers and Finance Section, United States Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

Dear Mr. Greaney: After reading the proposed Final Judgment between the United States of America and the American Bar Association [ABA], I decided to write this letter to you because I have been personally affected by the ABA accreditation process. In my opinion, for the reasons which I will state herein, the accreditation process followed by the ABA is unreasonable and discriminatory. Further, I believe it is important for you, as a representative of the United States Department of Justice, to know that the practices of the ABA have had an impact on ordinary citizens like myself.

Last year I graduated from Western State University College of Law in Fullerton, California. Although I lived in Massachusetts all of my life, attended public school there, and received my undergraduate degree from Boston University, I decided to attend Western State for my juris doctor.

Western State is a fine institution and has produced thousands of successful and competent California attorneys since its foundation thirty years ago. The law school is accredited by the state of California and by the Western Association of Schools and Colleges. However, several years before I enrolled, the ABA denied accreditation to Western State University College of Law primarily because Western State is a proprietary institution.

The ABA's accreditation process is unreasonable because it emphasizes factors beyond academics when judging a law school's ability to produce competent graduates. The accreditation process should deal solely with the quality of education. Emphasis in other 'business' areas, such as how much money the faculty is paid or whether the school makes a profit, have nothing to do with basic educational standards. Unquestionably, Western State has produced many prominent California attorneys. The quality of the education I received there was outstanding and my education more than prepared me to take any bar exam. Proof that I was competently prepared by Western State is the fact that I passed the California Bar Exam [one of the most difficult bar exams in the nation].

Since the ABA has sole discretion to accredit law schools in the United States, any misuse of its discretion results in discrimination to thousands of individuals. Most states equate ABA accreditation with competency of law school graduates and permit only graduates from ABA approved schools to take the bar exam. In fact, the overwhelming majority of states, forty-two out of fifty, prohibit non-ABA law school graduates from sitting for the bar exam. No other profession faces such discrimination for thousands of its members. I have experienced this discrimination personally.

My greatest desire is to return home to Massachusetts to be with my family and establish a law practice there. However, graduating from a non-ABA accredited law school, I am prohibited from taking the bar exam in Massachusetts. Despite the fact that I have proven my competency by passing the California Bar Exam and have skillfully represented my own clients, I have been denied the opportunity to take the Massachusetts Bar Exam. Thus, I have been discriminated upon by the Massachusetts Board of Bar Examiners solely because I attended a non-ABA approved law school.

In my opinion, the Antitrust Division of the Department of Justice should step in to closely scrutinize the accreditation process of the ABA and, in the best interest of the public, should critically evaluate whether the ABA be allowed to continue accrediting law schools. Since there are many competent attorneys like myself from non-ABA approved law schools, the ABA's accreditation process fails to serve its intended purpose—to judge the quality of legal education. Because of the ABA's unfair practices, my professional opportunities as well as those of many thousands of attorneys from non-ABA accredited schools have been severely limited. Most important, however, is that the ABA accreditation process has greatly disadvantaged the public in general because it deprives the public of zealous representation by thousands of competent, concerned attorneys.

Before agreeing to the proposed Final Judgment, I urge you to closely examine the adverse effects that will be suffered by the American people if the ABA is permitted to continue misusing its discretion to accredit law schools. Evidence of the ABA's prior misuse of discretion justifies immediate government intervention and infliction of harsh penalties.

If you have any questions about my comments or if I can be of further assistance to you regarding this matter, please feel free to contact me.

Sincerely,

Julie Anne Gianatassio, Esq.

Robert Ted Pritchard
10116 Firmona Ave., Inglewood, California 90304, Ph 310–673–7007

September 2, 1995.

John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, DC 20001

In reference: United States of America vs. American Bar Association

Dear Mr. Greaney: I have been made aware of the antitrust suit brought against the A.B.A. for reasons ranging from salary fixing to admissions of students transferring from non-A.B.A school to A.B.A. accredited with the credits earned at the non-A.B.A. school be transferable. One comment on the Justice Department's consent decree with the A.B.A.

On Friday, September 1, 1995, I visited the Law School Director of Admission office at the University of Southern California, University Park Campus at Los Angeles, California 90089 and had a conversation with an admission representative by the name of Melanie Macleod. I inquired if the law school will accept the credit students earn from non-A.B.A. accredited law schools. Her remark was, ''certainly no.'' Then I asked if she was speaking for the admissions committee including the director; her response was, ''Yes certainly I am.'' I then advised her of the consent decree along with its content which did not change her response nor did it appear that the conversation had an impact. I then left bewildered thinking this situation through where I then came to one conclusion that the consent decree by the A.B.A. relating to transferable credit from non-accredited law schools will not materialize or will be a sham.

The law schools are the A.B.A's co-conspirators as mentioned in the content of the government's complaint against the A.B.A. In order to ensure the consent decree will materialize is to require every A.B.A. accredited law school to sign the consent decree.

Unless the A.B.A. will require by newly established standards that all A.B.A.

accredited schools will accept transfer course credit from non-A.B.A. accredited law schools.

Thus in making the initial application for admission to law school by those who desire to pursue the profession of law, it would be justified for all law schools that are accredited by their state Bar of Law Examiners be automatically provisionally A.B.A. accredited, therefore, a requirement to continually meet their state's requirements for ongoing A.B.A. accreditation be the rule.

The A.B.A. requires all its law schools to maintain a quality student body meaning a declining L.S.A.T. and G.P.A. is grounds for dismissal from being an accredited law school or a denial for expansion. Therefore, open admissions policy by A.B.A. law schools is frowned upon when a declining L.S.A.T. and G.P.A. is present.

The Justice Department acknowledges in their complaint that most state's requirement to practice law that one be a graduate of an A.B.A. accredited school. The statistics are that four out of five applicants for admission to an A.B.A. accredited law school are denied. Therefore, in order to further pursue the profession of law by the applicant is forced to enter a non-A.B.A. law school. In return, after graduation be restricted to a territorial location to practice the profession of law. The A.B.A. has systematically boycotted non-A.B.A. accredited schools and its graduates. Although, I can reasonably see where employers are allowed as a perquisite for employment one to be an A.B.A. graduate. But not a state to require the same when the passing of a rigorous bar exam is required. After all, the bar exam is to ensure competency. Therefore, I see no need for graduates of state accredited schools be excluded in the states that allow only A.B.A. accredited graduates take the bar.

For your information I am presently enrolled in a non-A.B.A. accredited law school where the attorney that represented Rosa Lopez in the O.J. Simpson trial is a graduate, included in the school's list of graduates, a member of the State Supreme Court and several members of the Superior court. I applied to twenty A.B.A. accredited law schools and was denied.

I believe it is a necessity for the court or you to visit an A.B.A. accredited law school and a non-A.B.A. accredited law school, then contrast and compare. Please let me make some recommendations for the schools.

First the District of Columbia school of law and Duquesne school of law for the A.B.A then LaVerne school of law, Western University School of law, University of West Los Angles school of law all California state accredited schools and more important visit the Massachusetts School of Law.

I recently read a case on loss of consortium where I found a quote on reason to change law or rule and that is the following:

''The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it ''the instrument of injustice.'' Whenever an old rule is found unsuited to prevent conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets ''the demands of justice.'' (15 Am Jur 3rd Common Law, Section 2 page 797)

In the Fall of 1994 I attended an open house at Duquesne School of Law where Dean Ricci made the following announcement: ''We are not rejecting students because they are not capable of successfully pursuing the career of law. But, we look to your L.S.A.T and G.P.A.'' I also attended an open house at the District of Columbia School of law in the fall of 1994 and I was stunned by the filthy appearance of the school. I filed a Discrimination compliant with the A.B.A. of the office of Mr. William Powers assistant consultant on legal education to the American Bar Association in the Spring of 1995 and have yet received any results of response. Although, I have had conversations recently with Mr. Powers that produced endless results. It is to say that I doubt that if the District of Columbia school of law were to be located in California it would fail to be state accredited.

Therefore, I submit to you that the A.B.A.'s ''Standards of Rules'' have become an ''instrument of injustice'' thus ''the demands of justice'' is calling for a change.

The question I want you to ponder is how many Abraham Lincoln's, Clearance Darrells or Thurgood Marshalls been denied admission to A.B.A law schools?

Sincerely,

Robert Ted Pritchard

Donald H. Brandt, Jr.

Attorney and Counselor at Law, Donald H. Brandt, Jr., P.C., 9550 Skillman road; Suite 300; Lock Box 110, Dallas, Texas 75243

September 28, 1995.

Mr. John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington, D.C. 20001

Subject: comment—Proposed Final Judgment, 95–1211 (CR): United States of America v. American Bar Association

Dear Sir: My comment on the proposed Final Judgment in United States of America v. American Bar Association follows:

In 1990, I began my legal education at the then Dallas/Forth Worth School of Law. In 1992, Texas Wesleyan University (''TWU'') acquired the Dallas/Fort Worth School of Law. In August 1994, the American Bar Association (''ABA'') granted provisional accreditation of TWU's law school. As a condition precedent to that provisional accreditation, TWU was required to graduate the three hundred (300) students who were responsible for the creation and existence of the TWU's law school before that accreditation. I was one of the students affected.

Because of the arbitrary and capricious acts of TWU and the ABA, I have been personally harmed. I am denied the opportunity to be licensed to practice law in both Colorado and Florida. My employment opportunities have been limited. My continued educational options have, also, been limited. Considering the actions of TWU, its administration, and the ABA, I brought suit against those involved.

According to the Competitive Impact Statement, the proposed Final Judgment prohibits the recurrence of conduct that is plainly anticompetitive. Based upon its past conduct, the ABA should be precluded from accrediting any law school. While they is a need to accredit law schools, the ABA has shown that it has abused that responsibility. Consequently, the ABA should be denied the ability to accredit any law school. While each State has the responsibility for accrediting law schools, it appears that a vast number (including Texas) have delegated that responsibility to the ABA. By denying the ABA the ability to accredit any law school, each State will be required to re-establish its accrediting standards and procedures. This will foster an environment for improved competition and innovation.

In summary, the proposed Final Judgment merely changes faces. A fundamental change in the method and manner in which law schools are accredited is required to cure the past anticompetitive practices of the ABA.

Very truly yours,

Donald H. Brandt, Jr.,

Donald H. Brandt, Jr., P.C.

David White

3547 N.W. 35th St., Coconut Creek, FLA 33066

September 13, 1995.

Mr. John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street NW., Room 9903, Washington D.C. 20001

Dear Mr. Greaney, I am writing to you to give you my opinion of the Consent Decree entered into between the American Bar Association and the Department of Justice, which arose from the case against the ABA brought by the Massachusetts School of Law.

In May of 1995, I graduated from Western State University College of Law in San Diego. Western State (WSU) is a state accredited law school that has been in existence for over twenty five years. In addition, WSU has three campuses in Southern California, that fact makes it the largest law school in the United States.

At the current time I am living in Florida and because of the ABA's discriminatory practices which have prevented my school from not becoming accredited I will not be granted permission to sit for the Florida Bar exam, even though I have taken the California Bar exam and I am waiting for those results.

I will enclose a copy of a petition that I had sent to the Florida Board of Bar Examiners asking for a waiver of the ABA school graduation requirement which will fill you in more on my situation. Also enclosed will be their denial of that petition.

My primary reason for this letter is the following, approximately two weeks ago I contacted the law school at the University of Miami regarding their LL.M. program. The usual practice is to require that candidates for the program be graduates of an ABA accredited law school.

During a discussion with Tina Portuando, who to my understanding is either the director of admissions or holds a similar

position, I had mentioned the Consent Decree and the section dealing with allowing state accredited graduates into an ABA LL.M. program. Even after mentioning the Consent Decree, I was under the impression that she had no idea what she was talking about. Finally she told me that I would not be admitted to the LL.M. program regardless of any other credentials or qualifications that I may have. Her reason was that I did not graduate from an ABA school, and I was then told that was the policy at Miami and there was not now, nor would there be any intention or attempt to change that policy, Consent Decree or not. I believe that this is in direct contrast with the Decree that your department (DOJ) has worked so hard to achieve. I believe that this merits further investigation.

One final point; the reason I had to return to Florida from California is that as a graduate of a Non-ABA school there were no government or private lending programs available to me from the time of my graduation in May to the Bar Exam in late July. However several friends of mine at ABA schools were offered and had accepted this type of loan. Without this added financial support, my credit and ability to pay my bills was ruined and I had to return to Florida to live with my in-laws.

Now a resident of Florida, I will never be eligible to practice law (because of my being declared not eligible to sit for the Bar exam) and my three years in law school and the eighty-thousand dollars of debt to pay for it have been wasted. This is the greatest hardship of all, that is, not letting the Bar exam determine my competence to practice law, but letting that be determined by a group of individuals in the ABA who were not acting in the best interests of the legal profession, but rather for their own self-interests.

Respectfully submitted,

David White

David William White

3547 N.W. 35th Street, Coconut Creek, Florida 33066

August 18, 1995.

Executive Director,

Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahassee, FL 32301–8051

Dear Board of Bar Examiners: I hereby petition for a waiver of the application of the Florida rule denying graduates from a non-ABA law school eligibility to sit for the Florida Bar Examination unless they have practiced law in another jurisdiction for ten years. I respectfully request permission to sit for the February 1996 Florida Bar examination.

After doing research on this rule and its application to graduates from non-ABA law schools, I am aware of its effect and its interpretation. In this letter I will present only the non-legal issues involved, saving the legal aspects of the application of the rule for judicial proceedings if necessary.

As you are well aware, the recent litigation and resulting consent decree arising from the Sherman Act/Anti-Trust action against the American Bar Association brought by the Massachusetts School of Law, has shed light on a problem that directly affects myself, and my ability to practice law in Florida.

I graduated from Western State University, College of Law in San Diego in May of this year, with a grade point average placing me in the top twenty-five percent of my graduating class. I have taken the California Bar Examination in July of this year and I am waiting for the results which are due in late November.

Some important facts about the school are as follows:

Western State University is not an ABA accredited law school.

Western State University (WSU) has been in existence since 1969.

WSU has been approved by the State of California since 1973.

WSU is a for-profit institution, one of the reasons that its application was recommended it be withdrawn when it applied for ABA approval in 1986. As part of the consent decree, this factor, a school's non-profit or for-profit status is now considered not proper in determining a schools' approval by the ABA.

A majority of the faculty of WSU are adjunct professors. Prior to the consent decree, this factor negatively affected the student teacher ratio as far as the ABA was concerned. As part of the consent decree, this factor, the full time or part time status of professors is no longer relevant for the basic computation of a student to faculty ratio.

WSU's three campuses in Southern California make it the largest law school in the United States. The fact that WSU has more than one campus also led to the belief that it would not receive ABA accreditation.

Results regarding the passage rate of the February 1994 California Bar Examination showed that graduates of WSU as first time bar examination takers had passage rate higher than that of every other California accredited school and a higher pass rate than several ABA accredited schools in California.

During the time that I was enrolled at WSU, the ABA did not allow ABA accredited schools to accept credits from a student who wanted to transfer from a non-ABA school to an ABA accredited school. As a result of the consent decree, this bar against transfer of credits is no longer permitted. Had this option been available to me at the time of my attendance at WSU, I would have, or at least could have had the opportunity to transfer to an ABA approved school in Florida.

Both the Dean and assistant Dean of WSU are Harvard Law school graduates and many of the full time faculty are nationally known scholars in their area of practice and teaching.

Based on the factors that the American Bar Association must now use, Western State University would now be in compliance for the guidelines regarding accreditation.

I understand that if I had practiced law in any jurisdiction for ten years I would be able to apply for permission to sit for the Florida Bar examination.

Unfortunately, after graduating law school, there were no lending institutions that would lend me money during my studies for the California Bar Examination, due to the non-ABA status of WSU. Given the high cost of living, stagnant economy of California, and facing bankruptcy, my wife and I had to return to Florida and live with her parents, where we now presently reside. Returning to California to practice law for ten years is not an option. Applying to an AB approved law school in Florida, transferring credits and incurring both more loans and spending more time in law school, in light of the fact that I have already graduated, is not an option.

Application of this rule will render my successful three years of quality legal education, eighty thousand dollars indebtedness to pay for it and my choice to be a lawyer absolutely null and void. As a tax paying American citizen and current resident of Florida, I stand firm in not allowing this outdated and arbitrary method of discrimination to ruin my life, professionally or financially.

With the ABA's settlement of the case against them and the involvement of the Department of Justice in their accreditation procedures and requirements, it is obvious to me that the time has come where a student of a non-ABA school that was directly and adversely affected by the ABA's discriminatory practices to have the opportunity to prove that the education they received was similar to that of an ABA school. This I can and will do at your request.

What I request is to be allowed to prove myself eligible and/or be declared eligible to take the Florida Bar Examination, it is the examination itself that determines an individuals' competency to practice law.

That is exactly what a bar examination is designed to test; an individuals' knowledge of the law, legal theory and their ability to apply it. What is most offensive, is the irrebuttable presumption that I am not competent to practice law. I request the same opportunity as an ABA student, being allowed to sit for the exam.

I also fully understand the states' interest in regulating who is allowed to practice law, but that interest can not be perceived as legitimate when a state chooses to continue to follow the ABA's past actions that were not in compliance with Federal law. As you can see, WSU is not the ''Fly-by-night'' operation that the ABA is so concerned about.

Notwithstanding the fact that twelve years have passed since the Florida Supreme Court issued their opinion in the *Hale* case, recent developments may or may not influence the court in re-examining their grant of authority to the ABA.

However, the Board of Bar examiners does have the authority to grant a waiver to the rule. In this letter I have attempted to show that the ABA's consent decree eliminated all of the irrelevant and irrational requirements of accreditation. It was those very requirements which prevented my school from ''achieving'' ABA status, which in turn rendered me a non-ABA graduate, giving rise to the need for this letter. I hope that the Board will be sympathetic to my cause, because they do have the power to rectify this unfortunate situation.

The purpose of this letter is not to advocate the repeal of the rule, or to challenge its'

constitutionally. I intended to show that due to the facts and circumstances beyond my control that my situation is unique, and I hope that the Board will consider the issues that it raises.

My sole ambition is to become a respected and contributing member of the Florida legal community.

To you this is a petition, to me, this represents the future of myself and my family.

Enclosed please find a letter from the Dean of Western State University regarding the school.

If you would kindly respond to this request as soon as possible so arrangements might be made for the formal application for the exam, or petition for review by the Florida Supreme Court.

Respectfully submitted,

David William White

Western State University College of Law

2121 San Diego Avenue, San Diego, CA 92110, (619) 297–9700

January 27, 1995.

To Whom It May Concern: I have been asked to provide information concerning the quality of the academic program at Western State University—San Diego and, in particular, to compare the program with that at ABA accredited law schools.

Western State University College of Law at San Diego boasts a young and dynamic faculty. The full-time faculty includes 21 men and women, two-thirds of whom have joined the faculty within the last four years. All are graduates of ABA approved law schools, including Harvard, Columbia, Michigan, Boalt Hall, New York University, Pennsylvania, Virginia, UCLA and Duke. The full-time faculty is supplemented by a pool of adjunct faculty, which includes a number of sitting state and federal judges, local federal and state prosecutors, and practitioners drawn from San Diego's leading law firms.

The curriculum is rigorous and diverse. So that students are actively involved, class sizes are limited to 60 students in required courses, 40 students in electives and about 20 students in skills courses. The average class has 27 students. In the fall 1994 semester, course offerings included 28 electives, such as comparative law, jurisprudence, international business transactions, federal income tax, civil rights law, mediation theory, negotiation skills, advanced criminal procedure and advanced trial advocacy.

To ensure that the faculty has adequate time to prepare for class, counsel students and engage in research, teaching loads are set at 6–9 hours per semester. Faculty promotion and pay are based on teaching effectiveness and scholarly productivity. Although most members of the faculty are relatively new to teaching, they have produced in the last four years a casebook on civil procedure and another on international law (both published by West Publishing Company, the nation's largest law publisher), a treatise on international investment law published by a major Dutch international law publisher, and a book on the nature of legal reasoning, published as part of a series on the relationship between law and modern thought edited by two Stanford law professors. They also have produced more than 40 law review articles on a variety of topics, many of which have been cited in leading casebooks or in judicial opinions.

Although the school does not currently have an application for ABA accreditation pending, it easily satisfies the few quantifiable indicators of academic quality used by the ABA. Our library has more than 90,000 volumes, which is about equal to the number held by the most recent law school to receive ABA provisional accreditation. Our student-faculty ratio of about 26–1 is well within ABA guidelines. The median LSAT of our entering class is equal to or higher than that of several ABA approved law schools around the nation.

The quality of education is demonstrated by the success of the school's alumni. The alumni have included judges on the superior and municipal courts, members of the state legislature and city council, and, currently, a member of the U.S. House of Representatives. On the February 1994 bar exam, about 60% of WSU's graduates passed the California bar exam on the first attempt. This was the highest bar pass rate of any of the California accredited law schools and was higher than that of several ABA approved law schools in California, including UCLA.

On the July 1994 bar exam, the pass rate was approximately 64%.

I hope this information is helpful. If you have any questions, please do not hesitate to contact me.

Sincerely,

Kenneth J. Vandevelde,

Acting Dean.

Florida Board of Bar Examiners

Administrative Board of The Supreme Court of Florida

September 8, 1995.

Mr. David William White,

3547 N.W. 35th Street, Coconut Creek, FL 33066

Dear Mr. White: This will acknowledge the receipt of your letter dated August 18, 1995, with enclosures.

As you know, a 1983 ruling of the Supreme Court of Florida styled: *In Re Kevin Charles Hale* (433 So. 2d 969) states in part, ''This court will no longer favorably consider petitions for waiver of Section 1.b. currently 1.a. of the Rule. We voice our opinion that the Rule, while conceivably a hardship to some, is in the best interest of the legal profession in our state.''

As the Supreme Court of Florida has ruled not to consider petitions to waive the legal educational requirements, the Board will not accept petitions for waiver of Article III, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar. Until such time as the Supreme Court of Florida modifies its position, the Board will continue to adhere to that policy.

Thank you for your cooperation.

Sincerely yours,

Kathryn E. Ressel,

Executive Director.

June 29, 1995.

Ms. Anne K. Bingaman,

Assistant Attorney General, Antitrust Division, Room 3109, Tenth & Constitution Avenue NW., Washington, D.C. 20530

Dear Madame Assistant Attorney General Bingaman: I read the June 28, 1995 article that appeared in the New York Times and just want to take a moment of your time to applaud your efforts for investigating the American Bar Association.

I am a former resident of the State of Nevada and the only way in which to be licensed as an attorney in that state is to have graduated from an ABA accredited school.

In 1988, I was admitted to an ABA law school and after two years was academically disqualified by .5 of a point. With this disqualification, I would no longer be able to receive a J.D. degree from an ABA school. I did finish my studies at an unaccredited school here in California and am taking the General Bar Examination.

Because I graduated from a law school not approved by the ABA, I will never get the chance to take the Nevada Bar Examination. Last year I petitioned the Nevada Supreme Court for a waiver of the ABA requirement and it was denied. I think that this is so unfair. In effect, I have been banished to California, which even with all of our problems, is not too bad of a place.

The State of Nevada has precluded me from pursuing my chosen career within its borders. A life long resident of the state, graduated from local schools and degrees from three out of the four colleges within the state and I won't even be allowed to take their bar examination because of the powerful ABA cartel.

I tried to stay in school, like all of the government sponsored advertisements suggest, but I was disqualified and am now forever banned from returning home. It just doesn't make sense to me.

Thank you for your time. Keep after the ABA. If you ever need an antitrust lawyer out here in California, please look me up.

Sincerely,

Bill Newman,

3756 Cardiff Ave. #315, Los Angeles, CA. 90034–7201.

7932 Oakdale Avenue, Baltimore, Maryland 21237.

September 29, 1995.

D. Bruce Pearson, Esquire,

U.S. Department of Justice, Antitrust Division, 555 Fourth Street, NW., Room 9901, Washington, D.C. 20001, Fax: 202–616–5980

Re: Case number 1:95CV01211

Dear Mr. Pearson: Please be advised that the first response faxed to you on Thursday evening was my rough draft. The attached response should replace the previously faxed copy.

I express my apologies as I become more skilled in working with this computer.

Very truly yours,

Russell R. Mirabile

7932 Oakdale Avenue, Baltimore, Maryland 21237.

September 23, 1995.

D. Bruce Pearson, *Esquire*

U.S. Department of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 9901, Washington, D.C. 20001, Fax: 202–616–5980, Revised Response

Re: Case number 1:95CV01211

Dear Mr. Pearson: In response to and as input to MSL vs. ABA Anti Trust Action, and corresponding as a victim of this over twenty-year scheming by the ABA to prevent people from education and practicing law, I hope the following would be implemented.

No person, no group, no government or agency can give back a life, a livelihood as a result of the calculated law school genocide by the ABA. However, to make amends and prepare a preventive program will be a beginning against future open-handed injustices.

These vicious actions taken by the ABA to minimize one's liberties and freedom should be dealt with in a very severe manner. The ABA has produced a million dollar business by making a selective discrimination process.

First: The time limit for responses to this action should be extended. *Notice* to all offended person(s) has *not* been accomplished nor been effective.

Most graduates of non-ABA schools that were discriminated against or victims of this monopolistic scheme are in other walks of life and may not be associated with the practice of law to receive the Law Journal. Thus, these victims have no way of becoming aware of a welcomed response by the State Department.

Non-ABA schools that fell victim to those monopolistic schemes should present student enrollment lists to the ABA and the ABA should send notices to all affected students so that responses are possible. There should be a full scale effort upon the ABA; they have made millions of dollars from these victims. The price of a letter and stamp is minimal in comparison.

Second: Remuneration should be awarded to those non-ABA schools, students, etc. who were injured due to the intentional starvation of these victims.

Third: Those persons, either directly or indirectly involved with these ABA monopoly practices, should be disbarred and never allowed to practice again in any state or territory. Their licenses to practice law should be suspended until proper hearings are held, then forever be banished from practicing law.

Fourth: The ABA should be monitored for years to come for their intrusive, intentional improprieties. The group should be independent with severe sanctions and penalties attached to those millions of dollars that have been gathered from the victims' backs. *Or*, the ABA should be disbanded

Fifth: The ABA should be completely severed form any administering of education or testing of LSAT and all testing for multi-state examinations. The multi-state courses that have made millions of dollars for the ABA should be independent with no leadership or influencing input from the ABA. The ABA should not be involved in any testing or correcting of Multi-State Test scores or examinations. If contamination has not be declared or thought of, then there is plenty of room for irresponsibility and mistrust. There should be complete removal from testing by the ABA.

Sixth: Students who have graduated from non-ABA Law Schools should be waived into states or territories affected by these over twenty-year practices of the ABA.

Seventh: The non-ABA graduates that were affected by this law school genocide of the ABA should be allowed to take undergraduate courses at ABA law schools for credit for any reason.

There should be a complete acknowledgment and credit for past work, accomplishments and performances at non-ABA schools.

Eighth: Liability should be broadened and a time table should be prepared for punishment for these ABA leaders who had the intent to deprive people from the liberty and right to achieve an education and practice law as a livelihood, or for any reason.

In conclusion, if the defendants, members of the ABA and defendants that were engaged in these violations of the Sherman Act, graduate from ABA schools, then these violators are a product of an ABA education. But, the ultimate question is, ''Were they educated in Anti Trust Law, or is the ABA above the law?'' I would hope this government will protect the citizens and punish severely those involved in this ABA scandal and correct a twenty-year wrong.

The bottom line is what is the difference which law school, place and manner that one learns the laws as long as a person passes the bar exam in reference the knowledge of the law. I would hope that this government will protect the citizens.

Very truly yours,

Russell R. Mirabile

September 21, 1995.

Mr. John F. Greaney,

Chief Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street NW., Room 9903, Washington, D.C. 20001

Dear Mr. Greaney: I am writing in response to United States vs. American Bar Association, No. 951211. I have a profound concern that this order will be futile unless needed changes are made.

I graduated from a state-accredited law school in Alabama that lacks ABA accreditation, and I am fully licensed to practice law in both federal and state court in Alabama. I recently applied to an ABA accredited law school in another state in order to obtain a law license in that state. The dean of the law school was aware of the United States vs. ABA case and even had a copy of the final order on his desk. However, when I inquired about which classes would receive transfer credit, he responded that the law school was not in a position to accept any of my credits.

It appears as if either collusion exists between the ABA and the accredited law schools not to accept any credits pursuant to Section four, Part two of the order or that the law school was reluctant to act due to potential repercussions from the ABA. Furthermore, I have been advised by fellow attorneys that this same scenario has occurred at other ABA accredited law schools in different states.

I strongly believe that modifications or changes need to be considered before a final order is entered. The rule as it stands lacks any meaning because ABA accredited law schools remain free to ignore the order and continue the exact restraints on trade and competition as alleged in the lawsuit.

Due to the fact that I have an application pending with a law school in this state, I would please request that my name and address be withheld from this comment. Thank you.

Justice Department: I am writing to propose that the *Final Judgement* regarding *US* v. *ABA* (Civil Action No. 95–1211 (CR), filed 7/14/95) be modified.

Under Section IV, subsection D(2), I propose that the phrase, ''except that the ABA may require that two-thirds of the credits required for graduation must be successfully completed at an ABA-approved law school'', be dropped entirely from the *Final Judgement.*

The restrictions on offering transfer credits for coursework completed at non-ABA-approved schools is still an unreasonable restraint of grade aimed at deterring effective competition from law schools that are likely to pay less in salaries and benefits to their professional staffs.

The number of seats available to transfer students is very low compared to the number of applicants for those seats (see Barron's Guide to Law Schools), and even lower in comparison with the untold numbers who would apply if seats were more copious in number.

On top of the great statistical challenge already at hand for the transfer applicant, the difficulty of transferring becomes compounded when the applicants are from non-ABA-approved schools. They are competing against applicants from ABA-approved schools who will be looked at in a more favorable light because of the perception that they gained greater academic achievement. In fact, I suspect that many of the ABA-schools will take it upon themselves not to consider non-ABA applicants, or consider their credits transferable, thereby lessening the total number of available transfer seats. The number of potential seats for non-ABA-applicants will dwindle further when potential mid-second year and third year seats are made unavailable due to the daunting prospect of spending an additional ten to twenty thousand dollars on one's legal education because their second or third year courses won't transfer. This rings especially true to the socio-economically deprived students who benefit most from the lower costs of non-ABA-approved schools.

The bottom line will be that very few, if any, transfers will occur because the non-ABA-applicants will face a monumental statistical probability that they will not be able to successfully transfer; and a monumental financial hurdle for many who won't be able to afford to transfer. Section IV,

subsection D(2) starts to ring hollow in reality unless no limits are set on the number of credits that can transfer from non-ABA approved schools, or better yet the ABA is actually required to take affirmative action to insist schools accept *all* non-ABA-transfer credits (and accept non-ABA applicants).

Another argument for allowing unlimited transfer credits from non-ABA approved schools is that ABA approved law schools' trade is restrained unfairly when they can accept all of the credits from an applicant transferring from a foreign law school, but can't accept all the credits from a non-ABA-applicant. Furthermore, that still constitutes the remnants of a boycott of non-ABA-schools applicants.

Lastly, learning disabled applicants from non-ABA-approved schools who were forced into attending non-ABA-approved schools, and who did not properly diagnose their learning disability until late their first year of law school or later, will be unfairly discriminated against, and unlawfully discriminated against under the ADA (American's With Disabilities Act) because they will not be able to transfer their credits. This also holds true for those with other types of disabilities.

Frank DeGiacomo,

P.O. Box 79170, North Darmouth, MA 02747.

James B. Healy

519 Bloomfield Avenue, Caldwell, New Jersey 07006, (201) 228–0860

July 3, 1995

Honorable Joel I. Klein,
Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Constitution Avenue & 10th Street NW., Washington, DC 20530

Dear Mr. Klein: I read with interest in *The Chronicle of Higher Education* about your role in reforming the A.B.A. accreditation process and laud your success in settling the controversy.

As one of four adult students victimized by the unyielding A.B.A. standards, I draw your attention to the enclosed *Background Brief* as it relates to our dilemma.

We applied to approximately 15 law schools requesting admission as advanced students. Five responded negatively and the remained ignored our petitions.

Given the background and circumstances, is there recourse for us to complete our law school degree program as advanced standing students?

On behalf of my colleagues, whatever you may be in a position to do on our behalf will be greatly appreciated.

Thank you.

Sincerely,

James B. Healy

Enclosure

Background Brief: The Dilemma of Minority Students of Commonwealth School of Law Massachusetts

January 15, 1990.

Table of Contents

Statement of Facts
Questions Presented
Applicable Statutes
Discussion
Remedies
Appendices

Statement of Facts

On December 14, 1987, the undersigned (Hereinafter referred to as the students) were accepted by the then unaccredited Commonwealth School of Law, Lowell, Massachusetts, as part time students. All transferred from St. Matthew School of Law in Philadelphia, an institution established primarily for the needs of minority students, and each received various transfer credits from Commonwealth School of Law for law courses taken at St. Matthew, in which two completed approximately sixty-eight (68) credits and two completed forty-five (45) credits.

Each week, for two years the students journeyed over two hundred and fifty miles each way, at times twice a week, from New Jersey and New York to attend classes in Lowell. Because of family responsibilities, employment and other exigencies, the students were unable to attend conventional law school programs. Further, these students for the most part are minority students attempting to improve their station in life and sought a program which allowed them to continue full time employment during their period of studies.

While Commonwealth School of Law was not accredited at the time the students began classes in January, 1988, the administration appeared to be making favorable progress towards State accreditation and ABA approval of the School. A full time dean was appointed, full time faculty brought on board and a distinguished roster of part time faculty were hired, (See Appendix A). The instruction throughout was qualitatively excellent.

The Students became aware of internal political problems during the first semester. A splinter group, including the dean, faculty and students, severed relationships with Commonwealth School of Law and formed the Massachusetts School of Law at Andover during the spring semester, 1988. Commonwealth School of Law was left with approximately ninety students, including the minority students petitioning herein, a new dean appointed and full time faculty hired in September, 1988.

A preliminary state accreditation inspection visit was made in December of 1986 to Commonwealth School of Law by a Board of Regent's Visiting Team. A number of recommendations were made by the team, which were apparently corrected before the official evaluation. The second and official Visiting Committee completed the accreditation inspection in November, 1988. On December 5, 1988, the president of Commonwealth School of Law, Michael Boland, made the following memorandum announcement:

We have received the report from the Board of Regents Visiting Team and the news is good! The conclusion of the report was that ''Commonwealth School of Law has worked hard to address deficiencies of concern to the prior visiting committee * * *'' and the visiting committee recommends that the Board of Regents approve the school's application * * *''

(See Appendix B & C)

It appears that extensive hierarchal political power plays were taking place between April, 1988 and into the spring of 1989. The former Dean of Seton Hall Law School, John F. X. Irving, was seated with Donald H. Berman and three other candidates on the Board of Trustees, announced by memorandum to law students, on March 25, 1988, (See Appendix D). Students were advised by memorandum on June 16, 1988 that the former Law Professor Irving was elected Chairman of the Accreditation Committee and that he was also named Chairman of the Board of Trustees, effective June 1, 1988, (See Appendix E).

On April 8, 1988, by way of a memorandum to students from President Boland, an announcement issued advising that an agreement was entered into to lease a new law school facility in downtown Lowell, with an expected occupancy scheduled for June, 1989, (See Appendix F).

A memorandum to the law students, dated October 21, 1988, announced that former Senator Paul E. Tsongas was seated on the Accreditation Advisory Board ''* * * to help guide the School in its mission to serve the community as well as the legal community.'' In the same memorandum, Ms. Regina Faticanti was appointed as Student Representative to the Board of Trustees, (See Appendix G).

During this organizational juxtapositioning, the Commonwealth SBA (Student Bar Association) students began lobbying the merits of Commonwealth School of Law with the Board of Regents. Students met with Dr. Weston, Vice Chancellor of the Commonwealth of Massachusetts Board of Regents on March 10, 1988. The dialog of the meeting seems to indicate that Dr. Weston could find no reason to deny accreditation to the Commonwealth School of Law as long as the December, 1986 inspection recommendations were remediated, (See Appendix H).

Following the favorable recommendations of the Visiting Committee on Accreditation, which was conducted in November, 1988, it appeared that the administration was committed to resolving the perceived minor deficiencies, in-house turmoil notwithstanding. There was a move afoot to oust the founding president, Michael Boland, by some members of the Board of Trustees, some faculty and some students. Persisting local newspaper articles appeared questioning the moral conduct of Mr. Boland. In early spring, 1989, the Chairman of the Board of Trustees, John F. X. Irving suspiciously resigned. It was announced that former Senator Paul E. Tsongas became the Chairman. President Michael Boland was apparently discharged or resigned, and Ms. Margaret Talkington, Vice President, became President of the School, (See Appendix I).

The bases for these changes were not made clear nor were the changes documented for distribution to the students. The general consensus was that it was likely initiated by a number of issues: the newspaper articles; conflict between Boland and the Lowell Planning and Economic Development

entities; bad blood arising from the unfavorable comments made by the dean, some faculty and some students providing wrongful and distorted information and impressions to the Visiting Team, evident from the analysis of their report, (See Appendix J). At this juncture, it appears that the Commonwealth School of Law was divided by power factions. In order to quell the apprehensions of the students, Senator Paul E. Tsongas, (as Chairman of the Board), appeared before the student body sometime during the early part of the spring, 1989 semester. Mr. Tsongas informed the students that the School would be accredited and personally assured the graduating seniors that they would receive their Juris Doctor degrees and qualify to take the Massachusetts Bar examination. Twelve members of the senior class (Two of the four here) were to complete their studies by the end of May, 1989.

It seems that with the unseating of President Boland went the financial resources to sustain the cost of required remediation necessary for accreditation. Students became aware that Mr. Tsongas and the Board of Trustees were negotiating with Emerson College, who expressed an interest in absorbing the Commonwealth School of Law, driven by the Lowell financial package earlier negotiated by Boland and continued by the new executives. According to information transmitted by Regina Faticanti, student member of the Board of Trustees, to the students in the months following, the new Board of Trustees was concluding the negotiations of the financial plan with both developers and officials of the City of Lowell and Emerson College.

While this process was proceeding, former Senator Tsongas was appointed by Governor Michael Dukakis as President/Chairman of the Board of Regents. Nothing was documented relative to the resignation of Mr. Tsongas from the Board of Trustees of Commonwealth School of Law. Shortly thereafter a memorandum to Commonwealth students, dated May 16, 1989, was received from Allen E. Koenig, President of Emerson College, announcing the opening of Emerson School of Law, (See Appendix K).

The senior class did not receive the appropriate Juris Doctor degree in May of 1989 as Mr. Tsongas earlier promised so encouragingly. Whether the Senator's intentions may have been sublimated to the negotiations with Emerson College is unknown.

Emerson Law School published a catalog, which was provided to all Commonwealth School of Law students, together with an admission's application. All four of the students applied, remitting the prescribed $40 application fee and subsequently an acceptance fee of $400. Emerson acknowledged acceptance of each, both by letter and through endorsing and cashing the respective checks, (See Appendix L for specimen letter, receipts and refunds).

While the transition from Commonwealth School of Law to Emerson was in progress, announcements were made appointing Donald Berman, ex Commonwealth School of Law Trustee, as Dean of Emerson Law School, Regina Faticanti as an administrative executive, the former Commonwealth Dean Judy Jackson as Associate Dean and all full-time and numerous part-time faculty were absorbed by Emerson, (See catalog exerpt Appendix M).

On August 31, 1989, the Dean of Emerson Law School, Donald Berman, sent a letter to each of the students advising that Emerson Law School would not open. While there was an expectation among the students that some form of intervention might evolve to place the students at another law school, the letter from Dean Berman was the last official statement, (See Appendix N).

The students wrote to Mr. Tsongas as Chairman/President of the Board of Regents on September 8, 1989 and again on November 21, 1989. Mr. Tsongas did not respond, (See Appendix O for specimen letters).

Questions Presented

1. *Is the Commonwealth of Massachusetts a party to the harm and injurious consequences suffered by the students?*

It would seem that in legislating an educational policy, the Commonwealth of Massachusetts designated and empowered a Board of Regents to ''* * * develop, foster, and advocate a comprehensive system of public higher education of high quality, flexibility, responsiveness, and accountability,'' (Title II, Chapter 15A, *Annotated Laws of Massachusetts*), clearly assumed a responsibility to be accountable for the educational welfare of students attending institutions, whether public or private, within the Commonwealth of Massachusetts. That the Board of Regents, as a group and, through its members, individually, provided encouragement to Commonwealth School of Law students (upon which they relied), sanctioned visiting Commonwealth School of Law accreditation teams' evaluations, approved of the merger of Commonwealth School of Law into Emerson College and the creation of Emerson Law School (a Commonwealth of Massachusetts accredited school of higher education over which the Board of Regents exercised jurisdiction), and permitted the closure of Emerson Law School by its oversight, negligence, malfeasance, misrepresentation, concealment, and denial of due process inflicted grave and irrevocable harm to the students herein.

Beyond the Board's negligence and suspected mala in se by its failure to protect the welfare of Commonwealth School of Law students transferred and accepted by the State-approved Emerson College, it seems the Board was negligent in its statutory responsibility under Title II, Chapter 15A, Section 5, *Annotated Laws of Massachusetts.*

Emerson College, as an accredited state educational institution, as seen by its action to absorb/merge Commonwealth School of Law into its educational institution, was acting with the approval and full knowledge of the Commonwealth of Massachusetts Board of Regents of Higher Education, through its members and its agent Paul E. Tsongas, who knowingly permitted and encouraged Emerson College to expand its educational offerings through the Commonwealth School of Law takeover, placing the students welfare under the Board's jurisdiction.

The students are presumed to be protected by the Laws of Massachusetts as promulgated to the Board of Regents of Higher Education under Chapter 15A, *Annotated Laws of Massachusetts,* in that, Emerson College was under the jurisdiction of the Board of Regents at the time Emerson accepted the students and acquired the resources of the Commonwealth School of Law.

The negligence and inaction of the Board of Regents to protect the interests of the students suggests discrimination against them, wherein, the Board of Regents, by its mandate, ordinarily does act to protect the interests of students within the Commonwealth of Massachusetts. It is untenable that minority students should not be protected as other students in the Commonwealth of Massachusetts.

2. *Did the Emerson College Board of Trustees have a statutory or other responsibility to the students harmed by its failure to act an in a responsible manner and was there a duty to protect the academic credentials and make provisions to insure that the Juris Doctor degree be made available for which the students contracted and made good faith reliances thereon?*

The individual members of and the Board of Trustees of Emerson College are seen as subject to the provisions of Sections 9 & 10, Chapters 15A, *Annotated Laws of Massachusetts.* By the decision of the Board of Trustees of Emerson College, (Including Emerson Law School Division), to close Emerson Law School, thus abandoning the students and depriving them of educational opportunity, rights of appeal and due process, it would seem that the statute was violated. The Board of Regents, for its failure to oversee and protect the rights of the students, would appear similarly in violation of the statute for its failure to exercise regulatory fiduciary responsibility to the students harmed by the actions of the Emerson College Board of Trustees.

3. *The students relied on the promise of former Senator Paul E. Tsongas, by which he assured the graduating class that each would receive the Juris Doctor degree and that those other Commonwealth School of Law students would be continued in a law program, does Mr. Tsongas, in his role as an agent, and as President/Chairman of the Massachusetts Board of Regents, became liable?*

It seems clear that Mr. Tsongas, individually and as an agent for the Board of Regents for the Commonwealth of Massachusetts, is liable for breach of contract, for failing to provide Juris Doctor degrees promised and continuing legal education, misrepresentation and conflict of interest in his function with Lowell economic development, concealment, negligence, and in circumventing the rightful due process to the students.

The evidence seems to support the notion that the reason Mr. Tsongas became involved was due essentially to his wish to enhance economic development in Lowell, (See Appendix P). That bodies were scattered as a consequence of this venture is not seen as part of the plan. That many students, administrators, and faculty were harmed

seems to have evolved from likely poor judgment, and self-serving motivations. The telltale trail grew out of an economic development plan, to control of the Commonwealth School of Law Board of Trustees, to the Board of Regents of the Commonwealth of Massachusetts. The welfare of the individual students appeared incidental and did not seem to place high on the roster of priorities, thus the students' rights were neglected and abandoned.

It would appear that Mr. Tsongas has a statutory and fiduciary obligation and responsibility to the students as a member of the Board of Regents and a civil professional responsibility in contract due to gross negligence in which the students were harmed by reliance on his promises, resulting in loss of their property interests.

4. *Are there other responsible persons who may have interfered with contract performance, been contributorily negligent, and caused the denial of due process rights to the detriment of the students and against whom action may be taken?*

Yes, the following played a role for which they may have liability:

Honorable Michael Dukakis—In appointing Paul Tsongas to the Board of Regents, was undoubtedly aware of the Commonwealth School of Law accreditation agenda and Mr. Tsongas' role therein.

Dr. Allen E. Koenig, former president of Emerson College, for gross negligence, breach of contract, and denying due process rights to the students because of his representations that led to the absorption of Commonwealth School of Law, the closing of Emerson Law School, and denial of educational opportunity earlier guaranteed and Juris Doctor degree conferral expected by the students.

Mr. Michael Boland, former president of Commonwealth School of Law, for innocent misrepresentation, nondisclosure, and breach of contract for abandoning his contractual responsibility to provide the legal education promised.

Ms. Margaret Talkington, former president of Commonwealth School of Law, for innocent misrepresentation, nondisclosure, and breach of contract for abandoning her contractual responsibility to provide the legal education promised.

Mr. Donald Berman, Acting Dean, Emerson Law School and member of the Board of Trustees of Commonwealth School of Law, for negligent misrepresentation, conflict of interest, concealment, breach of contract, contract performance interference and denial of due process rights to the students because of the events and his positions previously stated.

Ms. Judy Jackson, Commonwealth School of Law Dean and Associate Dean of Emerson Law School, for misrepresentation, conflict of interest, concealment, contract performance interference and denial of due process rights to the students because of opportunism and likely self-serving motivations.

Ms. Regina Faticanti, student representative to the Board of Trustees, Commonwealth School of Law, and agent for Emerson Law School, for negligent misrepresentation, conflict of interest, concealment, and contract performance interference. Ms. Faticanti, because of perceived self-interest and personal ambitions, is seen as not having fulfilled her responsibilities in adequately representing the students.

Mr. Roland Hughes, president of the Student Bar Association of Commonwealth School of Law for innocent misrepresentation, concealment and contract performance interference for failing to properly apprise the students of important information and events affecting Commonwealth School of Law and abandoning responsibility as an elected student representative.

Mr. Stephen Moses, president of the Senior Graduating Class of Commonwealth School of Law for innocent misrepresentation, concealment and contract performance interference for failing to properly apprise the students of important events and information affecting their status and abandoning responsibility as an elected student representative.

Applicable Statutes

U.S. Const. amend. 1
U.S. Const. amend. 14 Section 1
42 U.S.C. Section 1983 (1976)

Annotated Laws of Massachusetts

Chapter 15A, ''Board of Regents of Higher Education.''
Section 1. Board of Regents; Purpose and Responsibility.
Section 3. Institutions under Board of Regents.
Section 4. Officers and Employees.
Section 5. Powers and Duties.
Section 9. Boards of Trustees of Individual Institutions.
Section 10. Powers and Duties of Boards of Trustees.
Chapter 93A, ''Consumer Law.''
Chapter 151A, ''Fair Educational Practices.''
Section 3. Petition Alleging Unfair Practice.

Discussion

Students at institutions of higher education were not afforded meaningful legal protection until *Frank* v. *Marquette University, 245 N.W. 125, (1932),* (one of the first cases to hold that a private university could not act arbitrarily or unreasonably with regard to its students). Two leading cases removing immunity and allowing students to take action against schools are *Dixon* v. *Alabama, 294 F.2d 150, (1961) Healy* v. *James, 408 U.S. 169, (1972).* In the latter *Healy* case, the Supreme Court, in a commentary by Justice Powell proffered ''At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.'' Justice Douglas, in support of the same opinion, advocated the students' need for first amendment protection. Both decisions, *Dixon* and *Healy,* indicate that school authorities no longer have unilateral authority to take arbitrary actions against students, especially when these actions violate the constitutional or legal rights of the students. In *Baldwin* v. *Zoradi, 123 Cal. App.3d 175, (1981),* a California court removed the perceived legal assumption that colleges and universities exercises power over student's rights.

1. *Mandatory legal precedents have been established recognizing that students are protected by contract theory as consumers of educational services.*

Courts have held that because of their expenditure of time and money, students are entitled to the same protection afforded in other consumer situations, such as consumers of commercial products. See Cahn, ''Law in the Consumer Perspective,'' *122 U.L. Rev. 1 (1963),* and Chapter 93A, *Massachusetts General Laws Annotated.* Students expect to be treated reasonably: when these expectations are not met, they seek protection from the judicial and legislative systems. See ''Consumer Protection and Higher Education—Student Suits Against Schools,'' *37 Ohio St. L.J. 608, (1976).* Students bringing actions are seen as relying upon contract theory, which the courts seem to favor when finding for students. This contract theory suggests an express or implied contract exists between the students and the school. In *Anderson* v. *Regents of Univ. of Cal., 22 Cal. App. 3d 1, (1972),* the court ruled that by the act of matriculation and payment of fees, a contract between the student and the state is created. While *Anderson* may have limited the ruling for state schools, *Zumbrin* v. *Univ. of So. Cal., 25 Cal. App. 3d 1, (1972),* held that a private university was contractually liable to students. Oral representations of school agents become terms of the contract and were held binding on the school in *Healy and Blank* v. *Board of Higher Education, 273 N.Y.S.2d 796, (1966)* and see generally Calamari & Perillo, ''Law of Contracts,'' 16–1 to –6, at 581–88 showing specific enforcement of the contract will be permitted where a student can show that damages resulting from the breach are inadequate to compensate for the loss and what was bargained for was unique. [Where this is shown] courts have required that degrees be awarded to students.

In *Zumbrun, supra,* and *Lowenthal* v. *Vanderbilt Univ., 7 J. Coll. & U.L. 191, (1981),* the obligations of a higher educational institution is seen as contractual to provide the curriculum promised and that the essence of the implied contract is good faith and reasonableness, see also *Olsson* v. *Board of Higher Education, 402 N.E.2d 1150, (1980).*

Students, in some cases and in order to prevent a school from withholding degrees, have used the estoppel theory, see *Olsson,*

Healy, and *Blank, supra.* The basis for applying the estoppel theory is that the promise [contract] is a representation from the school that, if the student follows a prescribed course of conduct, he will be given a degree evidencing his academic accomplishments. If the student receives such representation from a qualified school official, the student will rely upon it. Lastly, a student's reliance upon such representation from a school, is clear by his expenditure of money for fees, the pursuit of a prescribed curriculum, the foregoing of other opportunities, and the commitment to complete that school's program. See Calamari & Perillo, Section 6–1, at 202.

Financial exigency of a school is not a wholly viable defense of impossibility to perform as may likely be evoked. In *Peretti* v. *Montana, 464 F.Supp. 786, (1979),* the court held that financial exigency alleged was not sufficient to show impossibility of performance and increased costs of performance are not sufficient to excuse performance.

Where unsconscionability may surface, particularly seen in education cases, a contract of adhesion exists where there is gross overall one-sidedness of gross one-sidedness of a term disclaiming a warranty, limiting damages or granting procedural advantages. If the clause places a great hardship or risk upon the party in the weaker bargaining position, it must be shown the provision was explained to the weaker party and came to his knowledge. A real and voluntary ''meeting of the minds,'' not merely an objective meeting, must be proved. See Calamari, Section 9–40, at 325 and *Weaver* v. *American Oil Co., 276 N.E.2d 144, (1971).*

In *Peretti, supra.,* the court prohibited a public school from terminating a program due to insufficient funding from the state, ruling that the program was unique and to terminate would interfere with the completion of an ongoing . . . program. In *Eden* v. *Board of Trustees, 374 N.Y.S.2d 686, (1975),* SUNY terminated a program because of financial problems. The court held that the state could not show sufficient immediate monetary savings to justify abrogating its existing contracts with potential students. A private college was denied the right to terminate a program in *Galton v. College of Pharmaceutical Science, 322 N.Y.S.2d 909, (1972),* where the court held that students in the program had a contractual right to continue their studies until graduation.

Any defenses if impossibility to perform would likely turn on the educational institution. Many court decisions hold that a party may not, by this own conduct, create the event causing impossibility or impracticability of performance. Rather, the promisor must make all reasonable efforts to avoid the ''impossibility.'' See Johnson, ''The Problems of Contraction: Legal Considerations in University Retrenchment,'' *10 J.L. & Educ. 269, (1980).* In *Behrend v. State, 379 N.E.2d 617, (1977),* the court put schools on notice by its decision requiring performance that, where it is difficult if not impossible for students to transfer to another college or university with credit for work completed elsewhere, the court would view close scrutiny the obligation of schools to provide students with an opportunity to complete their education, and to provide the education at the level which was reasonably expected.

2. *Negligence and misrepresentation are two tort actions which students may use against higher educational institutions to seek recovery.*

The tort doctrine of negligence has been used by students to hold a school, through its agents, negligent for failing to act reasonably in accord with its duty do adequately provide services associated with such institution. See *Zumbrun* and *Behrend, supra.* W. Prosser, in ''Handbook of the Law of Torts,'' Section 92, at 613–22, notes that the duties imposed in tort are those imposed by the law, based primarily on social policy, and not necessary upon the will or intention of the parties; they are owed to all those within the range of harm. The damages in tort require that the damages be proximately caused by the defendant's act and damages are available. Prosser, Section 31, at 145, also indicates that a school has a duty to protect its students from unreasonable risks.

Massachusetts Educational Statutes require private schools to meet certain minimum requirements to operate. Consumer protection in higher education services is covered by Massachusetts Consumer Statutes for the purpose of avoiding abusive practices.

3. *Violation of students' civil rights and property interest may be the bases for actions used against a public or private educational institution.*

Rights guaranteed by the first and fourteenth amendments to the U.S. Constitution which are denied by institutions of higher education may be challenged at law where civil liberties regarding free speech and procedural due process are concerned. See Olswang, Cole & Wilson, ''Program Elimination, Financial Emergency and Student Rights,'' *9 J. Coll. & U.L. 170, (1982).*

In *Peretti, supra.,* the court found that an implied contract existed within the fourteenth amendment's protection if there was a violation of a right protected by the Constitution. The court held that where an administrative body's act making the exercise of a legal right impossible, a federal question existed. Olswang notes that property interest cannot be denied without due process.

Again, in *Peretti, supra.,* and *Hall v. University of Minnesota, 530 F. Supp. 104, (1982),* the courts held that students must be provided with process commensurate with the rights affected. Students have a private interest at stake in their continuing education. The education is necessary for careers they plan to pursue upon graduation. The student is deprived of that interest * * * if programs are terminated, * * * Robert R. DeKoven, ''Challenging Educational Fee Increases, Program Termination and Deterioration, and Misrepresentation of Program Quality: The Legal Rights and Remedies of Students,'' *19 Cal. Western L. Rev.,* 467–506, *(Summer, 1983).*

4. *Boards of trustees of Institutions of higher education within the Commonwealth of Massachusetts are delegated fiduciary responsibility by the Massachusetts Board of Regents and, by virtue of their charter, have power to delegate to the chief executive officer of the institution.*

The courts in *Behrend* and *Peretti* supra., on termination cases, etc., found that state educational requirements to qualify the student to take a state examination established a duty on the part of the schools to provide that level of education. As here, the students in cases examined showed that the schools acted unreasonably, and, as a result of misconduct, caused undue risk of harm to the student and the injury was proximately caused by the acts of the schools. Thus, with the powers of authority vested in schools by a state indult, so also the responsibility issues to those officials to protect the rights of students.

Institutional responsibility for educational policy is statutorily derived from the authority given the Massachusetts Board of Regents under the provisions of Sections 1 & 5, Chapter 15A, ''Board of Regents of Higher Education,'' *Annotated Laws of Massachusetts.* The power to delegate policy and fiduciary responsibility to Boards of Trustees of individual institutions is mandated by Section 9, of Chapter 15A, and Section 10 promulgates the powers and duties of individual Board of Trustees. Section 1 reads in part:

* * * to advocate a comprehensive system of * * * education of high quality, flexibility, responsiveness, and accountability. * * * To achieve these goals it shall be the responsibility of the board of regents to preserve and promote * * * the highest level of academic quality to community services activity.

5. *The Board of Regents of the Commonwealth of Massachusetts exercises regulatory powers over colleges and universities within Massachusetts.*

Section 3, Chapter 15A, ''Board of Regents of Higher Education,'' *Annotated Laws of Massachusetts,* specifically states, ''The board of regents of higher education shall be the governing authority of the system.''

Court decisions supporting this governing power may be found in *Hamilton v. Regents of the University of Cal., 293 U.S. 245, (1934), Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967),* and *Blank, Galton,* and *Zumbrun* supra., which establish standing, authority to regulate state educational statutes, and provides a source of remedy for students seeking relief from state (private and public) institutions of higher education.

6. *The Board of Regents of the Commonwealth of Massachusetts has the authority and duty to grant degrees and transfer students to other institutions where a controversy exists.*

Among the ''Powers and Duties'' of the Board of Regents of the Commonwealth of Massachusetts, (Section 5, Chapter 15A, ''Board of Regents of Higher Education,'' *Annotated Laws of Massachusetts*), are:

5.(a). to confer upon the boards of trustees the power to award certain degrees to persons who have satisfactorily completed degree requirements.

5.(b). in addition to the degrees authorized to be awarded under clause (a), the board of regents may approve the awarding of certain other degrees and may define and authorize

new functions or new programs; or consolidate, discontinue or transfer existing functions, educational activities and programs; and may, after public hearing and submission of a written report to the clerks of the house of representatives and the senate, by a two-thirds vote of the full membership of the board, consolidate, discontinue, or transfer divisions, schools, stations, colleges, branches or institutions as it deems advisable.

5.(t). develop and implement a transfer compact for the purpose of facilitating and fostering the transfer of students without the loss of academic credit or standing from one * * * institution to another.

5.(u). shall establish an affirmative action policy and implement a program necessary to assure conformance with such policy throughout the system.

Remedies

First Option for Remediation

1. A Commonwealth of Massachusetts Legislative Act designed to: (Following St. George's Medical School (Grenada) model).

a. Award Juris Doctor degrees to the eligible Commonwealth School of Law seniors who completed the eighty-four (84) credit hour requirements for graduation and certify the class to take the Massachusetts Bar examination.

b. Arrange to place all other students in a Commonwealth of Massachusetts accredited law school, such as Southern New England School of Law, allowing credits earned to be protected, transferred, and remain intact.

2. Legislative action authorizing the judiciary to allow bona fide graduates of Commonwealth School of Law and/or Southern New England School of Law to apply for admission to the Massachusetts Bar.

Second Option for Remediation

1. Enroll all Commonwealth School of Law students in a Commonwealth of Massachusetts accredited law school, such as Southern New England School of Law:

a. Require those Commonwealth School of Law students who completed in excess of eighty-four (84) credits to complete no more than six (6) additional credits at a cost not to exceed $3,000 and be awarded the Juris Doctor degree at the end of the study semester.

b. Enroll all other Commonwealth School of Law students in the same institution without loss of credits earned.

2. Legislative action authorizing the judiciary to allow bona fide graduates of Commonwealth School of Law and/or Southern New England School of Law to apply for admission to the Massachusetts Bar.

Cora Anderson
James B. Healy
Melvin Clark
Keith Wilson

William A. Stanmeyer, Attorney at Law, (703) 759–3432, 759–5227 VMail

P.O. Box 15, Great Falls VA 22066

July 10, 1995.

Hon. Joel Klein, Esq.,
Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, D.C.

Dear Mr. Klein: This letter is prompted by the article, ''ABA Settles Antitrust Case Over Certifying Law Schools,'' THE WASHINGTON POST (June 28, 1995), page A2.

I wish to commend you and the Department for your action in this matter. As a former law professor (Georgetown, Indiana; see enclosed resume) who, during the period 1974–1984, was actively engaged in an attempt to start a new law school, I was very familiar with the American Bar Association's ''standards'' of accreditation and the persons they used to enforce them.

Based on personal experience, as well as conversations with other legal educators who dealt with the ABA during those years, I can confidently state that the Justice Department's position is entirely correct. In my opinion, many of the ''standards'' were irrelevant to quality legal education; they were in some cases vague; and often they were applied arbitrarily.

Had resources been available, others would have brought the antitrust suit before Dean Lawrence Velvel finally did. What concerns me, however, is the quote from George Bushnell not admitting even a molehill of fault when the record, if properly built, should be a mountain of evidence that Dean Velvel is entirely correct. My hunch is that ABA being dragged ''kicking and screaming'' into admitting the abuse, will resist real change.

I could provide some additional insight, if you wish it, into the mentality of the ABA accreditation people during the period mentioned. If you would like to have a short meeting, just give me a call.

Very truly yours,

William A. Stanmeyer

Curriculum Vitae: WILLIAM A. STANMEYER, ESQ.

Education:
- A.B., 1956, *magna cum laude;* M.A., Philosophy, 1962; Graduate Study, Northwestern University, 1962; J.D., DePaul University College of Law, 1966.

Legal Activities and Associations:
- Admitted, Illinois Bar, 1966; Virginia Bar, 1980
- Private Practice of Law, Illinois, 1966–68
- Associate Professor of Law, Georgetown University Law Center, 1968–72
- Arbitrator, American Arbitration Association, 1972–1995
- Associate Professor of Law [tenured], Indiana University School of Law, 1974–80
- President, Lincoln Center for Legal Studies, 1980–85
- Private Practice of Law, Virginia, 1985 to present, Wills, Trusts, Family Partnerships

Civic and Other Professional Activities:
- American Bar Association: Member, Special Committee on Youth Education for Citizenship, 1970–73; Consultant, Criminal Law Section, 1970–72
- Public Lectures: at major universities, including Harvard, Univ. of Cincinnati, Notre Dame
- Virginia Bar Association: Member since 1980
- Consultant, fields of Business Development, Financial Analysis, Income Diversification

Administrative, Fund-Raising Experience:
- Managed numerous Institutes and educational projects raised over $1,000,000 for various education programs

Publications:
- Two Books
- Over twenty scholarly articles, in the Law Reviews of such law schools as: George Washington, Indiana University, and Hastings College of Law
- Numerous serious ''op ed'' pieces, in such newspapers as: the Miami Herald, the Chicago Tribune

Family and Personal:
- Married to the former Judith Ann Heitzmann of Chicago
- Five children, ages 15 to 26
- Residence: 325 Club View Drive, Great Falls VA 22066
- Office: P.O. Box 15, Great Falls VA 22066
- Phone: Office (703) 790–5400; direct line (703) 759–3432; voice mail (703) 759–5227

August 26.

Mr. Klein: Congratulations on the ABA Consent Degree! It has been long overdue. Two points, however, need to be made: (1)—The reporting requirement for Jim White to Bob Stein is ineffective * * * simply because Stein & White are *close* friends and there will, thus, be little real supervision of White * * * he will do what he wants to. (2). You should take a special look at White's relationship with Indiana University. Here is a real conflict of interest * * * he is listed as a Professor of Law—supposedly with half of his salary coming from the Law School * * * but he has not taught in over 20 years and, his whole salary, came from the Law School budget until the then-Dean, William Harvey, put his foot down and stopped this. It is speculated that the Law school now pays for White's University salary totally. Doesn't is seem odd that an educational unit that profits from the accrediting agency is running the show? Why not let the ABA, itself, pay for all of White's salary?? Jerry Bepko, the IU-Indianapolis Chancellor, has had a sweet-heart arrangement with White for years! Please investigate these two points and maybe amend the Consent Degree * * *

Thanks

4 Concerned Lawyers

Frederick L. Judd, Attorney at Law, (714) 852–1000 X257, (714) 261–5481 (fax)

2181 Dupont Drive, Irvine, CA 92715

September 5, 1995.

Mr. John Greaney,
Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street N.W., Room 9903, Washington, DC 20001

Response to proposed Final Judgment in United States of America v. American Bar Association

Dear Mr. Greaney: The purpose of this letter is to provide the Department of Justice with written comments with respect to the proposed final judgment in the USA v. American Bar Association, Civil Action No. 95–1211 (CR).

While the final judgment appears to deal with some issues, I strongly believe that the Final Judgment does not adequately resolve certain other practices that result in very anticompetitive and discriminatory consequences. I do not know if these issues have been reviewed by the Department, but the final judgment should take them into account.

I refer primarily to the accreditation standards of the ABA which appear to require that law schools set schedules in such a way as to minimize the amount of time that all students can work while attending law school, and even more, nearly make impossible outside work during a student's first year. I do not understand any rational basis for this practice, and believe its primary effect is to minimize the entrance into the profession of those who would have to or choose to ''work their way through'' their legal education.

While testimonial evidence is not necessarily as relevant as would be statistical verification of my claims, I will tell you that in 1982, BYU Law School refused to allow me to work into a schedule that would allow me, a CPA, a reasonable (i.e. three hour or greater) block of time during every school day in which I could complete outside work for clients. I remember discussing the situation with the Assistant Dean, who admitted that such a schedule could have been completed, but that the American Bar Association would consider it a negative factor in BYU's accreditation process if they were to accommodate my schedule.

I understood the reason for the scheduling difficulty was an ABA proclamation that first-year students needed to concentrate on studies, and not on outside work, and that scheduling classes at 8:00 am, 11:00 am, 2:00 pm and a study group at 6:00 pm would cause students to focus on the law, avoiding the certain distractions inherent in earning a living. However, the groups that congregated around study carrels seldom (until ''finals'' weeks) discussed the recent contracts, torts or property law concepts, but instead, their conversations inevitably rotated toward movies, television, sports, BYU policies, and the national championship football team.

The effect of the ABA policy was obvious: I could not learn because carrel conversations were usually not about the law, and I could not earn because I could not find appreciable blocks of time in which to make money. Ironically, my grades probably suffered because I would miss a class when I felt it financially necessary to service a client, or when I would work late at night, which some expert at the ABA would probably admit was not helpful for my class attentiveness during the daytime sessions.

I was able to make it through law school, but I believe the effect of the baseless ABA regulation is to exclude others without the right combination of sufficient means, earning capacity or desire to get through law school, and I am sure that the practice arbitrarily reduces entrance into the profession, of students generally (anticompetitive) and especially economically disadvantaged classes (discriminatory).

I believe the number of hours of outside work had little to do with my ability to study or learn. Law schools should be able to determine compliance with assignments and deadlines, and to appropriately measure class learning if they administer fair and comprehensive examinations. In my case, I worked more than the allowed number of hours, but still graduated in the top 10% of my class, while presumably those who knew the names and achievements of the football players did not. I did not lose the opportunity for the quality education BYU Law School offered.

The Department of Justice's lawsuit discusses the effects of the ''capture'' of the accreditation process by the accredited. In my situation, I thought it very unfair that by following the ABA accreditation standards, BYU actually reduced my ability to pay my own way through law school, and I was required to borrow, and the primary source of those funds was the BYU Student Loan Program. This appears to me to be a highly anticompetitive process, and those who are not selected by that process (although admittedly I was) find themselves at another distinct disadvantage where the opportunity for unfair discrimination can arise, especially where a law school may have additional criteria for the availability of those loans (i.e. compliance with church regulations or other goals).

I hope that the Justice Department will not simply stop its review of the accreditation policies of the ABA with the final judgment, and will not enter into the final judgment prior to examining this practice. The rules relating to barring students from working more than 20 hours a week or scheduling classes to prohibit outside work during the first year and minimized work in years two and three need to be examined and then discarded as what they are: Rationally baseless policies designed to prevent entrance into the profession which operate to discriminate against those who need the protections of antitrust and antidiscrimination laws the most.

I hope this material is helpful. If you wish more information about the matters in this letter, please feel free to call me.

Sincerely,

Frederick Judd.

Coyne and Condurelli, Attorneys at Law,

Professional Center, 198 Massachusetts Avenue, North Andover, Massachusetts 01845 (508) 794–1906

October 2, 1995.

Mr. John F. Greaney, Esq.,
Computers and Finance Section, U.S. Department of Justice, Antitrust Division, 555 4th Street N.W., Room 9903, Washington, DC 20001

Dear Mr. Greaney: I am writing this letter of public comments not on behalf of the Massachusetts School of Law but as an attorney and officer of the court. For some time, I have been very concerned about the American Bar Association and its agents confusing effective advocacy with a reckless disregard for the truth in their efforts to continue to control law school accreditation at all costs.

Various pages from the depositions of the ABA Consultant, James P. White, and ABA Section of Legal Education officer, Claude Sowle, conducted during the preliminary discovery phase of Massachusetts School of Law's antitrust suit are enclosed. As you can see, Mr. Sowle's deposition (page 206, lines 22–25 and page 207, lines 1–2) and Mr. White's deposition (page 58, lines 23–25 and Page 59, lines 1–24) are at odds with paragraphs 15 and 16 of the Government's complaint. They are likewise at odds with the enclosed April, 1995 exchange of correspondence between counsel for the ABA and its Consultant.

In view of statements in the government's complaint, Mr. Sowle's testimony that the salary standard was not applied to MSL in June, 1993 because the ABA's ''actual practice for some time was not to pay attention to the geographical or competitive comparability of salary levels in its evaluation,'' is necessarily contrary to the information that the Justice Department must have in its possession. If Sowle's testimony is contrary to documentary information possessed by the Division, the testimony is plainly false and as officers of the Court must be exposed as such.

Additional pages from these two depositions are enclosed which show that when MSL attempted to impeach this testimony with contrary evidence from various schools, its efforts were blocked by the ABA. It is incumbent on the Government to clarify this matter since counsel for the ABA has yet to bring this false testimony to the Court's attention. Canon 7 of the Canons of Ethics and the relevant Disciplinary rules, specifically DR 7–102(B)(2), and District of Columbia Model Rule 3.3 require the Government's action at this time. I appreciate your efforts to improve American legal education and concomitantly the American justice system.

Sincerely,

Michael L. Coyne

MLC:cm

cc:
D. Bruce Pearson, Esq.

Darryl L. DePriest, General Counsel

Privileged and Confidential

April 27, 1995.

Dean James P. White,
Consultant on Legal Education, American Bar Association, 550 W. North St., Indianapolis, IN 46202

Dear Jim: Reflecting upon our conversation yesterday, I though that it might be useful to you and the Accreditation Committee if I put in writing my recommendations concerning the Committee's meeting this weekend.

As we discussed, there are a number of schools that are scheduled to appear on Friday and Saturday. I understand that some of the schools that are appearing are responding to concerns raised about faculty and staff compensation. In that respect, I propose that the Committee Chair make the

following statement prior to hearing from the law school:

As you may know, Standard 405(a) was amended by the House of Delegates in February. As a result, we will no longer be considering compensation as a part of the accreditation process. Therefore, you need not address that issue as part of your presentation as we will not be making any findings on that issue.

Committee members should not, of course, ask questions concerning compensation during the appearance.

In addition, findings implicating compensation should be deleted from any Action Letters that are forthcoming as a result of the meeting. I also suggest that we continue the practice of having the Action Letters reviewed by counsel prior to their issuance.

Finally, I advise the Committee to be cautious about raising compensation issues in conjunction with Standards 201, 209 or 210, which deal with adequacy of resources. Also, the Committee should examine whether, given the amendment to Standard 405(a), it should discontinue its practice of examining library staff compensation under the library Standards.

I hope this letter is helpful to you and the Accreditation Committee. As I may have mentioned, I am planning to be in Washington, D.C. this weekend attending the Diversity Summit sponsored by the Commission on Minorities. I will change those plans, however, if you feel it would be useful for me to attend all or part of the meeting in Indianapolis.

Very truly yours,

Darryl L. DePriest

DLD:mc

cc:

David T. Pritikin
David R. Stewart
Allison Breslauer
Donna C. Willard-Jones

American Bar Association, Section of Legal Education and Admissions to the Bar, Office of the Consultant on Legal Education to the American Bar Association

Indiana University, 550 West North Street Suite 350, Indianapolis, Indiana 46202–3162, (317) 264–8340, FAX (317) 264–8355, ABA/net:ABA411

Transmitted Via Facsimile and U.S. Mail

April 28, 1995.

Darryl DePriest, *Esq.*,
American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611

Dear Darryl: I am responding to your letter of April 27, 1995. As you have requested, I have given a copy of your letter to the Chairperson and Vice-Chairperson of the Accreditation Committee. I will also include your letter with materials on this subject to be considered by the Council of the Section at its meeting on June 2–3, 1995.

In your letter you ''suggest that we continue the practice of having the action letters reviewed by counsel prior to their issuance,'' Ms. Schneider and Professor Sowle have asked me to convey to you that the Committee has not observed such a practice in the past. To the extent that you are prepared to recommend such a change of procedure, perhaps you should direct a communication on the subject to the Council for its consideration in June. The Committee has made a determination not to depart from its established procedures prior to receiving advice and direction from the Section Council on this matter.

Sincerely,

James P. White,

Consultant on Legal Education to the American Bar Association.

cc:

David T. Pritikin, Esq.
David R. Stewart, Esq.
Alison Breslauer, Esq.
Donna C. Willard-Jones, Esq.

United States District Court for the Eastern District of Pennsylvania

Massachusetts School of Law at Andover, Inc., Plaintiff, vs. American Bar Association, et al., Defendants. Civil Action No. 93–CV–6206.

Volume I—Deposition of Dean James P. White, September 27, 1994, 9:30 a.m.

Reported by: James M. Trapskin, RPR, CM, Calif. CSR No. 8407.

Joseph Albanese & Associates, Certified Shorthand Reporters, 218 Main Street, Toms River, N.J. 08753, (908) 244–6100.

By Mr. Hart.

Q. I will ask you to turn to Page 43 of White Deposition Exhibit Number 1, the part in there that refers to ''Proposed Amendment of Standard 405 and Interpretations Thereto.''

A. Yes.

Q. And it refers to a proposed revision——

A. Yes.

Q——to 405? Could you tell us, sir, the, the reason for undertaking such a revision?

A. This suggestion came from the Standards Review Committee that, looking at current practices of, and, and from the Accreditation Committee looking at current practices of the Accreditation Committee, the procedure that is followed is whether a law school has conditions adequate to attract and retain a competent faculty.

And the suggestion was that the standard should be amended to conform with current practice.

Q. Is it your testimony that the second sentence of Standard 405(a) has not been literally applied on evaluations of law schools?

Mr. Pritikin. Which sentence are you referring to?

Mr. Hart. The one that says, quote, ''The compensation paid faculty members at a school seeking approval should be comparable with the paid faculty members at similar approved law schools in the same general geographical area.''

By Mr. Hart.

Q. Do you see that, sir?

A. I see that. My view would be why information might be reported by a team. The Accreditation Committee, itself, is concerned, does not consider the, whether the compensation is comparable to that at similar approved schools in the same geographic area.

Q. And that is a, quote, current practice——

A. That is correct.

Q. of the Accreditation Committee?

A. Yes.

Q. How long has that been the practice of the Accreditation Committee?

Mr. Pritikin. Again, we've allowed you some latitude here, but I don't see what relevance this has to this lawsuit, and I'm going to instruct him not to answer.

United States District Court for the Eastern District of Pennsylvania

Massachusetts School of Law at Andover, Inc., Plaintiff, vs. American Bar Association, et al., Defendants. Civil Action No. 93–CV–6206.

Volume II—Deposition of Dean James P. White, September 28, 1994, 9:00 a.m.

Reported By: James M. Trapskin, RPR, CM, Calif. CSR No. 8407.

Joseph Albanese & Associates, Certified Shorthand Reporters, 218 Main Street, Toms River, N.J. 08753, (908) 244–6100.

Mr. Hart. I would ask the reporter to mark as White Deposition Exhibit Number 37, a July 26th, 1984 document from James P. White to Dr. William Birenbaum, president of Antioch University and Dean Issac Hunt of Antioch School of Law.

(Whereupon, White Deposition Exhibit 37 was marked for identification.)

By Mr. Hart.

Q. Are you familiar with that action letter that you sent to Dr. Birenbaum and Dean Hunt?

Mr. Pritikin. I note, Mr. Hart, that this document does not bear production numbers.

Do you know where it came from?

Mr. Hart. I recall we had a conversation along these lines in another deposition, and you wrote me a letter that you didn't have to disclose such things, Mr. Pritikin.

Mr. Pritikin. We produced documents to you that were used in deposition in advance of using them.

Mr. Hart. Yes.

Mr. Pritikin. Has this document previously been produced by the Massachusetts School of Law in this litigation?

Mr. Hart. Well, I, I don't know. You can look it up.

Mr. Pritikin. It is highly improper for you to use documents in a deposition that have not been produced. I object strenuously to that practice.

By Mr. Hart.

Q. Well, can you identify this?

Mr. Pritikin. Do you have other documents that you're going to use this morning that have not been produced in the litigation?

Mr. Hart. I do not know, Mr. Pritikin. I have not sat down and gone through all these exhibits. And as I understand, you know, 40 or 50,000 documents produced, and I have not checked them, no I have not.

Mr. Pritikin. Well, the documents, my understanding is the documents that have been produced by the school have Bates numbers on them.

Mr. Hart. Well, a, a good number of the documents I used today don't have Bates numbers on them.

Let's get on with the deposition, Mr. Pritikin. If you have some quarrel with, to

find with the production of documents by the Massachusetts School of Law, we can take that up at an appropriate time.

Mr. Pritikin. No, I have a problem with your pulling out documents that haven't been produced; I do have a problem with that.

Mr. Hart. All right, well, let's proceed.

Mr. Pritikin. If you want the witness to identify the document, he can do that. But if you're going to ask substantive questions on a document that has not previously been produced——

Mr. Hart. I know of no such rule in litigation.

Mr. Pritikin. What's the pending question?

(Whereupon, the record was read by the court reporter.)

Mr. Pritikin. Can you answer that question?

The Witness. This appears to be an action letter went by me to, in 1984 to the president and dean of Antioch University and its School of Law.

By Mr. Hart.

Q. And it sets forth, does it not, conclusions by the Accreditation Committee with respect to the Antioch School of Law?

Mr. Pritikin. I'm going to instruct the witness not to answer any further questions about the document.

It does not pertain to the Massachusetts School of Law. Apparently it pertains to Antioch University. It says—I don't know where you got the document, it says ''Strictly Confidential'' on it, and the witness is not going to answer questions about this.

Mr. Hart. Let, will you please cite me some provision of the Federal Rules or some order or whatever that forecloses me to ask this witness questions about some document.

Mr. Pritikin. Judge Ditter has already ruled that matters pertaining to other law schools are not relevant to these proceedings. This has nothing to do with this case.

Mr. Hart. Well, this witness has already testified that the act, the actions and practices by the Accreditation Committee with respect to salaries are, are not in accordance with the literal letters of the second sentence of 405(a) of the Standards and they have followed a different practice over the years. And I need, bases that as far as a decision with respect to the Massachusetts School of Law, and think I'm entitled to get into what, in fact, the practice of the American Bar Association's Accreditation Committee has been with respect to faculty salaries.

There's an old legal saying that you can't have your cake and eat it too.

Mr. Pritikin. We disagree. In fact, any salaries are not part of this case. The Antioch University School of Law is not part of the case. This is not going to——

Mr. Hart. We've made allegations in this case about a conspiracy. We've alleged a conspiracy relating to salaries, and I think that I'm entitled to get into that. I don't know of any rule that forecloses me from getting facts from this witness.

And this document is chockablock full of references to the salary levels of the Antioch School of, of Law and how low they are, and is a basis for the decisions that are made with respect to that school.

Mr. Pritikin. The witness——

Mr. Hart. It's totally inconsistent with this witness's testimony and Claude Sowle's testimony with respect to the practice of the Council with respect to faculty salaries.

Mr. Pritikin. Well, my instruction stands. You might as well move on.

By Mr. Hart.

Q. If I had asked 15 other questions with respect to this document, Dean White, would you have refused to answer those?

A. I would.

Q. If I had asked 25 questions with respect to this document, would you have refused to answer those questions?

Mr. Pritikin. Based on the description of relevance that you have given us, the instruction will be the same, and I'll stipulate to that.

The Witness. Yes.

By Mr. Hart.

Q. And if I had 15 other action letters with respect to 15 other schools that contained information with respect to the practice of the Council with respect to, under 405(a) concerning salaries, you would have refused to answer those questions too.

A. Based upon——

Mr. Pritikin. I would give him that instruction, and I assume he would follow it.

The Witness. Based upon relevance to this case, I would not answer the questions.

Mr. Hart. Well, I guess we won't use these, Mike, today.

I have no further questions at this time.

Mr. Pritikin. I, why don't we take a——

Mr. Hart. Could I just say one other thing?

Mr. Pritikin. Sure.

Ms. Paxton. On the record?

Mr. Pritikin. On the record?

Mr. Hart. Yes.

Mr. Pritikin. Sure, absolutely.

Mr. Hart. We are going to pursue, and with bulldog tenacity, our efforts to obtain from the American Bar Association action reports relating to other schools, and we would be hopeful to obtain those. And we would also obtain discovery of documents relating to faculty salaries.

And to the extent that that might be helpful in my examination of this witness or with Mr. Sowle concerning their testimony on what the practice of the Accreditation Committee and the Council was under, in applying 405(a), I surely would want to continue that with Dean White and other witnesses.

Mr. Pritikin. Well, that doesn't surprise me, since you file another motion to reconsider that point every three or four weeks with some regularity.

Mr. Hart. Never give up.

Mr. Pritikin. Our positions have been made clear on that point and it will be for the Court to resolve.

Let's go off the record.

Mr. Cullen. Off the video record at 11:49:23.

(Whereupon, the noon recess was taken.)

Afternoon Session, 1:00 p.m.

Mr. Cullen. Back on the video record at 13:22:45.

Mr. Hart. I'd like to try to respond to an inquiry that Mr. Pritikin went to, asked with respect to White Deposition Exhibit Number 37 which I tried to use to question Dean White with before the break, break for lunch. And I was unable to ascertain whether or not we had produced that document in discovery because the people who would handle that were not available.

I also was unable to check on whether or not it was responsive, the document was responsive to any Discovery Requests. However, I'd be very surprised if it was because it relates to, ''A,'' another law school, and ''B,'' to salaries and I didn't think the ABA was interested in such documents.

And furthermore, I would guess the Judge's Order with respect to discovery relating to other law schools and also salaries suggests that that was not the proper subject of discovery. However, in view of the witness's testimony about the practice under 405(a) and Mr. Sowel's testimony in the same regard, I do think, it is relevant for cross-examination of those purposes. That's all I can say about the document at this time, Mr. Pritikin.

United States District Court for the Eastern District of Pennsylvania

Massachusetts School of Law at Andover, Inc., Plaintiff, vs. American Bar Association, et al., Defendants. Civil Action No. 93–CV–6202.

Deposition Under Oral Examination of Claude R. Sowle, Volume II

Transcript of the deposition of Claude R. Sowle, called for Oral Examination in the above-captioned matter, said deposition being taken pursuant to the Federal Rules of Civil Procedure, by and before Suzanne Boulos, a Certified Shorthand Reporter and Notary Public, at the offices of Spencer & Klein, 801 Brickell Avenue, Suite 1901, Miami, Florida, on Wednesday, September 15, 1994, commencing at 10:00 o'clock a.m.

Joseph Albanese & Associates, Certified Shorthand Reporters, 218 Main Street, Toms River, New Jersey 08753, Telephone (908) 244–6100.

Mr. Stewart. Object to form.

A. Did I personally?

Q. That's the question, yes.

A. That thought never entered my mind.

Q. Prior to this time did the American Bar Association seek legal advice on whether Standard 405A might present problems under the antitrust laws?

A. I don't know the answer to that.

Q. Prior to this time had the American Bar Association sought legal advice as to whether the gathering and distribution of salary levels among law schools might present problems under the antitrust laws?

A. If that occurred, I'm not aware of it.

Q. Referring to some of the testimony you gave yesterday, Professor Sowle, you testified as I recall that in preparing the action letter on the Massachusetts School of Law application for accreditation you did not apply the letter of 405A with respect to the requirement that, quote, the compensation paid faculty members at a school seeking approval should be comparable with that paid faculty members at similar approved schools in the same general geographical area, end quote. The reason you gave for not so applying the letter 405A was that the American Bar Association's actual practice for sometime was not to pay attention to the geographical or competitive comparability of salary levels in its evaluations; is that correct?

A. That's correct.

Mr. Stewart. Object as to form. Object. Asked and answered.

By Mr. Hart.

Q. In the numerous evaluations in which you have been involved, was it the practice not to pay attention to the geographical or competitive comparability of the salary levels in the law schools being evaluated?

Mr. Stewart. Object as to form.

By Mr. Hart.

Q. You may answer.

A. You are speaking now of my role as a site evaluator, not as a member of the Accreditation Committee?

Q. Of both.

A. I'll bifurcate my answer. With respect to site evaluations in which I have participated, my general recollection is and it's certainly a correct recollection in recent years. My recollection going back 10 years is not as good. But certainly my recollection is that I would pay attention as a site evaluator to the peer schools selected by the school being evaluated in terms of comparing or looking, at least, salaries, etc., and often would include in the report relevant data in that respect. Similarly I would as a member of the Accreditation Committee or as a monitor pay attention to the data provided in the site evaluation report regarding how the school took up as against those schools that it considers its peers in various areas, library expenditure, salary, etc. and I think much of that would appear in the transcript from yesterday.

Q. And when you, acting as a site evaluator, put together the information with respect to competitive or geographical comparable school salary levels, you did that, did you not, because you thought that was relevant and required by 405A?

Mr. Stewart. Object as to form.

A. Did I hear the word geographical in your question?

Q. Yes, you did.

A. Could I hear the question again, then, please.

Q. Surely.

(Whereupon, the following question is read back by the reporter):

''Question. And when you, acting as a site evaluator, put together the information with respect to competitive or geographical comparable school salary levels, you did that, did you not, because you thought that was relevant and required by 405A?''

Mr. Stewart. Objection as to form. This does not go to the issue of whether 405A served as a basis for the denial of Massachusetts School of Law application for provisional approval, so I'll instruct you not to answer on grounds of relevance.

The Witness. What is my—I need advice.

Mr. Hart. You are not going to get it from me.

The Witness. I understand not answering on the grounds of privilege but I don't understand what my status is with respect to——

Mr. Hart. Would you like to take a brief recess to discuss this with your attorney so you are not influenced by my views?

Let's take a five minute recess.

(Whereupon, there is a brief recess.)

(The deposition resumes and the following question is read back by the reporter:

''Question. And when you, acting as a site evaluator, put together the information with respect to competitive or geographical comparable school salary levels, you did that, did you not, because you thought that was relevant and required by 405A?''

A. With respect to the question just repeated, on the advice of counsel, I respectfully decline to respond on grounds of relevancy.

Q. When you were involved in the evaluation of the Thomas M. Cooley Law School in 1984 did you gather together and set forth a comparative salary data for the faculty at Cooley Law School?

A. When you say I, do you mean I personally?

Q. Or when you were on the team. You were on that team, weren't you?

A. Correct.

Mr. Stewart. I'll repeat my instruction.

A. I'm going to be disobedient for a moment and say I don't have the faintest recollection for the moment what that report contained with respect to salary information comparative or otherwise. That was 10 years ago and 16 sabbatical site evaluations ago and I simply would have to look at the report to be able to answer that.

Q. And you if looked at the report, do you think that would refresh your recollection?

A. I'm sure it would. President Brennan has provided you with a copy of the report.

Q. I have a copy of report on Thomas M. Cooley Law School November 7, 1984 in which you were listed on its face as one of the evaluators and I would ask you, sir, to turn to Page 23.

Mr. Stewart. Are you going to mark this as an exhibit, Ken?

Mr. Hart. I hadn't planned to.

Mr. Stewart. How come? I'm just curious.

Mr. Hart. Mainly I was trying to be merciful, if you will, about reproduction costs and burdening the record unnecessarily. I'm just using this for purpose of refreshing his recollection and see if it can refresh his recollection, which I don't think there's any requirement that I mark it as an exhibit or put it on the flagpole or do anything.

Mr. Stewart. If you are showing it to the witness and questioning him, it's appropriate to mark it as an exhibit but you proceed as you think appropriate.

Mr. Stewart. I will point out that it is marked as Deposition Exhibit Number 12 in the Brennan deposition of July 16, 1994.

By Mr. Hart.

Q. I will ask you, sir , to look at that and see if that refreshes your recollection whether the site report on Cooley Law School in 1984 sets forth comparative salary data?

A. Page 23 of the report does compile comparative information on what I assume are the approved law schools located in the State of Michigan.

Q. With respect to salaries?

A. That's correct.

Q. And as a member of the team at that time you consider that to be a relevant fact on the evaluation of the Cooley Law School?

Mr. Stewart. I object as to relevance and further, as we have with other witnesses, instruct Professor Sowle not to in your answers divulge any of the substantive issue concerning specific schools and the ABA consideration of their accreditation status. Furthermore, this goes beyond the bounds of the principles laid down in the Court's July 20 order and I'll instruct you not to answer to those grounds.

By Mr. Hart.

Q. Sir, are you going to answer the question?

A. On the advice of Counsel, I respectfully decline to answer on grounds of relevance.

Q. I will ask you to turn to Page 39 of the site report on Cooley Law School in 1984 and ask you if it does not refer to the library staff salaries being competitive with the regional norms?

Mr. Stewart. I object as lack of foundation. I'll object as to form and I'll object—I don't see how this leads to the potential discovery of admissible evidence as far as him saying what a document says or doesn't say.

By Mr. Hart.

Q. You may answer.

A. Yes, the report states with salaries of the junior librarian of professional staff range from $18,000 to $29,000. Cooley librarian compensation appears to be competitive with regional and law library norms.

Q. And at the time you as a member of the site inspection team for the American Bar Association understood that to be relevant facts to meeting the American Bar Association Standards?

Mr. Stewart. I object. I instruct you not to answer on the grounds stated earlier.

A. I respectfully decline on advice of Counsel to respond on grounds of relevance.

Q. When you were involved in the inspection team for the American Bar Association on Oral Roberts back in 1986 did you make any findings with respect to competitive or comparable salaries of the faculty at Oral Roberts compared to other law schools in the area?

Mr. Stewart. I'll object as to form and instruct you not to answer on the two grounds previously described relating to relevance, both in terms of outside the bounds the Court's July 20 order and relevance and confidentiality concerns regarding the substantive issues on relating to specific identified schools other than Massachusetts School of Law in their accreditation.

A. On the advice of Counsel, I respectfully decline to answer for the reasons stated just now by Counsel.

Q. Which you incorporate in your refusal?

A. Incorporate by reference.

Q. Same question with respect to Loyola Law School.

Mr. Stewart. Same instruction.

A. Same answer.

Q. Same question with respect to Seton Hall Evaluation 1987, which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to the College of Law at Christian Broadcasting Network School 1987.

Mr. Stewart. Same instruction.

A. And same response.

Q. Same question with respect to the School of Law at the InterAmerican University, San Juan in 1988 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Mr. Stewart. We have attained a certain level of efficiency here.

Q. Same question with respect to Paul M. Hebert Law Center, Louisiana State University 1988 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same answer.

Q. Same question with respect to the University of Puerto Rico Law School 1988 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same answer.

Q. Same question with respect to the Boston University School of Law, my alma mater, in which you were the Chair in 1988

Mr. Stewart. With all due respect to your alma mater, same instruction.

A. With great respect, same response.

Q. Same question with respect to the University of Hawaii in 1989.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to the University of Virginia Law School in 1989 in which you were the Chair.

Mr. Stewart. Same instruction.

A. And same response.

Q. Same question with respect to Saint John's Law School in 1990 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to the Cleveland-Marshall College of Law in 1992.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to Southern California Law Center 1993 which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to the School of Law at Regent University formerly the Christian Broadcasting Network University in 1993 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to Stanford Law School in 1994 in which you were the Chair.

Mr. Stewart. Same instruction.

A. Same response.

Q. And same question with respect to George Washington Law School 1994 in which you were the Chair.

Mr. Stewart. Same instruction.

A. And same response.

Q. I will direct your attention now to when you were a member of the Accreditation Committee of the American Bar Association section on legal education reviewing the District of Columbia School of Law's evaluation. In that evaluation did you take into account comparable or competitive salary levels of the fact of that school as compared with salary levels at other comparable institutions?

Mr. Stewart. I'll object as to form and I'll instruct the witness not to answer the question on the grounds that it is outside the discovery specifically identified as being appropriate in its July 20th order and furthermore instruct you not to answer on relevance and confidentiality grounds because it goes into the substantive issues that were involved in the accreditation of schools other than Massachusetts School of Law specifically identically identified school?

A. On the advice of Counsel, I respectfully decline to answer the question for the reasons stated by Counsel which I hereby incorporate in this nonresponse.

Q. Same question with respect to the Bridgeport School of Law at Quinnipiac College.

Mr. Stewart. Same instruction.

A. Same response.

Q. Same question with respect to Texas Wesleyan 1994.

Mr. Stewart. Same instruction.

A. And same response.

Mr. Hart. I will ask the reporter to mark as Sowle Deposition Exhibit Number 8 a 9-page document on the stationery of the American Bar Association from James P. White to the Very Reverend Donald J. Harrington, president of St. John's University and acting dean Edward T. Fagan of St. John's University with copies shown to Claude R. Sowle and others marked 8.

(Sowle Deposition Exhibit 8 marked for identification by the reporter.)

Mr. Stewart. Ken, is this a Bate Stamp from this litigation or from some other proceeding?

Mr. Hart. I don't think I have to tell you those things.

Mr. Stewart. Just asking.

Mr. Hart. I asked your good colleague Mr. Pritikin similar information and he told me in effect that he did not have to disclose where he got documents or what marks were on them.

Mr. Stewart. I was asking one of the Bate stamp or whether it's indicate it's been produced in this litigation. I certainly respect your decision not to respond.

By Mr. Hart.

Q. I will ask you, sir, if you can identify that document as a copy of a so-called action letter sent on or about November 5, 1990 to Saint John's Law school as a result of American Bar Association proceedings in which you had been involved earlier as chairman of the site evaluation?

Mr. Stewart. Objection to form.

A. I did chair the Saint John's site evaluation in that capacity. I did receive a copy of the action letter as shown on Page 9 of the letter and nothing would cause me to believe that this is anything other than the official action letter that was sent.

142–24 61st Road, Flushing, NY 13367–1202, (718) 461–1209, July 6, 1995

U.S. Dep't of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 9901, Washington, D.C. 20001, (202) 307–0809, (202) 616–5980 (FAX)

David T. Pritikin, Esq., Sidley & Austin, One First National Plaza, Chicago, IL 60603, (312) 853–7036 (FAX)

Hon. Charles R. Richey, U.S. Dist. Ct. for the District of Columbia, U.S. Court house, 333 Constitution Avenue, N.W., Washington, D.C. 20001

15 USC 16 Comment, U.S. v. ABA, 95 CV 1211 (D.D.C.) (CRR)

The Proposed Final Judgement will allow the state judges/justices, conspirators [1] with the ABA,[2] to continue to violate federal law. The highest court of each state regulates [3] legal education and admission to the bar.[4] New York's Court of Appeals is illustrative.

Hon. Joseph W. Bellacosa [5] and his colleagues discharge their responsibilities imposed by the Legislature pursuant to N.Y. Jud. Law §§ 53, 56, 460; See *Matter of Shiakh* v. *Appellate Div.,* 1976, 39 N.Y.2d 676, 385 N.Y.S.2d 514, 350 N.E.2d 902 (1976); *Matter of Cooper,* 22 N.Y. 67 (1860); Court of Appeals Rules Part 520.

The Dep't of Justice and 95 CV 1211 have not addressed the state prerogative, if any, to violate the antitrust laws. Despite *Hoover* v. *Ronwin,* 466 U.S. 558 (1984) and the antitrust immunity test set forth in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), it is unclear whether the NY Court of Appeals has antitrust immunity. The quality of a law school's educational program and the provision of consumer information are not antitrust concerns.

The Court's Rules defined ''Approved Law School'' in Rule 520.3(b):

(b) Approved Law School Defined. An approved law school for purposes of these rules is one:

(1) whose program and course of study meets the requirements of this section, as shown by the law school's bulletin or catalogue, which shall be filed annually with the Court of Appeals; and

(2) which is approved by the American Bar Association; or

(3) which is a member of the American Association of Law Schools [6];

(4) which is registered and approved by the NY State Department of Education.

The Court of Appeals own rules the Court of Appeals sets forth an explicit policy

---

[1] *Rohan* v. *ABA,* -F.Supp.-, 93 CV 1338, 1995 WL 347035 (E.D.N.Y.)). Rejects argument of former law school Dean that ABA accreditors are state agents for purpose of stating 42 USC § 1983 cause of action.

[2] ''5. Various others, not named as defendants, have participated as conspirators with the ABA in the violations alleged in this Complaint, and have performed acts and made statements to further the conspiracy.'' Complaint 95 CV 1211 (DDC).

[3] See Proposed Final Judgement at p.6, lines 6–7, & 10 ''(g) require that each site evaluation team include, to the extent reasonably feasible, at least: (2).* * *judge (state or federal, active or retired)* * *''

[4] See paragraph 7, Complaint 95 CV 1211 (DDC).

[5] ''Let me [Joseph W. Bellacosa] express my personal view that the Section's Accreditation decisions and process are and have been supportable, honorable, forthright, and upright.'' *Initial Report of the Chairperson of the ABA Section on Legal Education and Admissions to the Bar* at p. 6, lines 13–15 (Aug. 30, 1994). Page 1 Court of Appeals Stationary is marked ''*Personal and Unofficial.*''

[6] ''. . . [o]f the 1976 ABA-approved J.D. granting law schools. 159 are AALS members.* * *The AALS is recognized as one of the two national accrediting agencies for law by the Council on Postsecondary Accreditation the other is the Section of Legal Education and Admission to the Bar of the American Bar Association.'' at p.1, *1994 Handbook of Ass'n of American Law Schools.*

articulating a clear intent to displace unfettered competition with regulated market activity. The Court, its members and agents (The Board of Law Examiners) are actively involved in the operative anticompetitive decisions in restraint of trade. The history of the City University of New York (CUNY) School of Law at Queens College shows that if CUNY was not accredited by the ABA, despite Rule 520.3(b)(4), it would cease to exist.[7]

The ABA coerces Law School Deans, state actors, into violating state law.

Dean Haywood Burns based his refusal to supply Leeds with the requested documents upon an American Bar Association Report on ''The City University of New York Law School at Queens College'' regarding the February 10–13, 1991 visit made by a Committee of the Section of Legal Education. The foreward [sic] to the report stated:

'Important:' This report was prepared by the members of the visitation team named therein * * * It is intended for the exclusive use and information of those persons authorized by the Council to receive it. Any copying or distribution of a part or whole of this report is subject to this restriction.

What Dean Burns failed to note was that the American Bar Association is a private organization, and he works for a public agency, bound by all states law that affect public agencies in New York State. *Leeds* v. *Burns*, Index No. 1201/92, N.Y. State Sup. Ct. Queens Cty. Posner J., 208 *NYLJ* No. 18, p. 1, (col. 1), cont. p. 27, (col. 5) (Mon. July 27, 1992).

The ABA and AALS subvert state laws (e.g. N.Y. Pub. Off. Law § 84 *et seq.*) giving citizens access to government records.

As you may know, ABA Rule 36 on confidentiality of site visitation reports currently permits broader release of those reports than AALS Executive Committee Regulation 5.6. There are also a number of states which have public records laws that could conceivably be applied to site visitation reports. Carl C. Monk AALS Exec. VP & Exec. Dir., Memorandum 93–9 to Deans of Member and Fee-Paid Schools; Subject: Attached Survey on Confidentiality of Site Visitation Reports; Feb. 9, 1993.

The ABA's accrediting activities have not focussed on assuring the quality of the educational program and providing consumers with information regarding the quality of the educational program.

The ABA did not find jurisdiction pursuant to ABA Rule 34 regarding CUNY Law School's failure to comply with the Family Education Rights and Privacy Act (20 USC § 1232g; ''FERPA''). The federal court (42 USC § 1983 & 20 USC § 1232g) shall hear (94 CV 2367 (EDNY)) and decide.

As we discussed in our phone conversation last week, the federal financial aid program regulations require that an institution publish its academic standards used in determining satisfactory progress towards a degree. Most colleges, including CUNY campuses, meet this requirement by publishing their requirements in the college catalog. Martha Martin Program Compliance Officer to Dave Fields[8] Associate Dean, April 6, 1993. Exhibit One attached hereto and incorporated herein.

Despite numerous ABA Site Visits CUNY Law School's Catalog[9] continuously fails to provide required information to students and prospective students.

CYNY Law School admits students with low ''traditional indicators'' (undergraduate cum GPA & LSAT) based upon impermissible criteria. See *Davis* v. *Halpern*, 768 F. Supp. 968 (EDNY 1991 Glasser J.). CUNY's active recruitment of these students and its failure to discharge its obligations, act in good faith,[10] and help CUNY students pass the NY Bar Examination (ABA S301) constitutes the inculcation of false hopes and economic exploitation (ABA S304). Repeated ABA Site Visits have not influenced CUNY's deceptive practices. Potential remedies are provided for by N.Y. Gen. Bus. Law § 349 and RICO. See *Rosario* v. *Livaditis*, 963 F.2d 1013 (7th Cir., 1992).

Despite ABA S305(c) the law school has not adopted and enforced policies relating to class attendance. Chairman of the Black and Puerto Rican Caucus, NY State Assemblyman Larry B. Seabrook[11] (D-Bronx), concurrently served as an Assemblyman and attended CUNY Law School. The ABA has received a complaint pursuant to ABA Rule 34 and Standard[12] 305 & 305(c).

This Comment has been promulgated without my having had the opportunity to journey to the Washington, DC or otherwise obtain copies of the material[13] available to the public[14] in Washington, DC pursuant to 15 USC § 16(b). I request that the court make said materials available in the EDNY (225 Cadman Plaza East, Brooklyn, NY 11201) and/or SDNY (500 Pearl Street, NY, NY).

The Complaint in 95 CV 1211 (DDC) publicly slaps the ABA on the wrist and does not assert federal power to its full and proper extent. State Judges may agree themselves[15] or through their ''state'' agents (e.g. state board of law examiners) as they have previously agreed through the ABA.[16]

Conclusion

The proposed Final Judgment in 95 CV 1211 (DDC) should be rejected.

Respectfully submitted,

Jackson Leeds,

142–24 61st Road, Flushing, NY 11367–1202, (718) 461–1209.

July 6, 1995, Flushing, Queens NY

Attachments:
(1) Exhibit 1 (1 page)
Memorandum From Martha Martin
Program Compliance Officer
Re: Academic Standards, April 6, 1993.

Exhibit One

The City University of New York, Office of Student Financial Assistance

101 West 31st Street, 7th Floor, New York, N.Y. 10001–3503, (212) 947–6000. Ext.

April 6, 1993.

To: Dave Fields, Associate Dean
From: Martha Martin, Program Compliance Officer
Subject: Academic Standards

As we discussed in our phone conversation last week, the federal financial aid program regulations require that an institution publish it's academic standards used in determining satisfactory progress towards a degree. Most colleges, including CUNY campuses, meet this requirement by publishing their requirements in the college catalog. Enclosed is a copy of the satisfactory progress section from the *Encyclopedia of Student Financial Aid* complied by the National Association of Student Financial Aid Administrators and copies of the following federal regulations:

34 CFR 668.43(c)(2)(i) and (ii) indicate that standards must be included in consumer information available to all enrolled students and to prospective students upon request;

34 CFR 668.14(e) indicates that establishing, publishing and applying academic standards is part of the criteria used by the Department of Education to demonstrate an institution's administrative capability;

34 CFR 668.23(f)(1)(iii) indicates that student recipients' records used to determine satisfactory progress are subject to audit.

In addition, New York State regulations require that students be in good academic standing to receive state funds, including TAP. I am enclosing the applicable sections of policy and procedures published by this office.

If you need any further information, please let me know.

[7] See Paragraph 7, Complaint 95 CV 1211 (DDC).

[8] Fields is also Special Counsel to CUNY Chancellor W. Ann Reynolds and Records Access Officer for the CUNY Law School and the Central Administration located at 535 East 80th Street, NY, NY 10021. Martin refers to him as Associate Dean, but his full title is Associate Dean for Administration and Finance.

[9] The Catalog which contains the application for admission does not refer to the Student Handbook. Applicants requesting information are sent the Catalog and application and not the Student Handbook.

[10] See *Branum* v. *Clark*, 927 F.2d 68 (2d Cir. 1991).

[11] Listed in the ''unofficial list'' May 27, 1993 CUNY Law School Commencement Program.

[12] 305(c) A full-time student, to satisfy residence study requirements, shall devote substantially all working hours to the study of law and shall not engage in remunerative employment for more than 20 hours per week, whether outside or inside the law school. Regular and punctual class attendance is necessary to satisfy residence and class hour requirements. The law school has the burden to show it has adopted and enforces policies relating to class attendance.'' *Standards for Approval of Law Schools and Interpretations*, October 1994.

[13] 15 USC § 16(b) . . . Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct . . .

[14] CUNY Law School students and alumni may be particularly interested in any records pertaining to their school.

[15] See U.S. Const. Art. I, § 10 ''[n]o State shall without the Consent of Congress, . . . enter into any Agreement or Compact with another state . . .''

[16] The ABA Accreditation Committee includes at least one federal judge and one state judge of a state's highest court.

cc: George Chin

Robert A. Reilly

P.O. Box 309, Phoenix, AZ 85003–0309

July 4, 1995.

Mr. Joel Klein,
Deputy Assistant Attorney General, U.S. Department of Justice, Washington, DC.

Re: U.S. Justice Department/American Bar Association

Dear Mr. Klein: I wish to make a few comments on the Justice Department's proposed settlement with the American Bar Association (ABA) regarding the accreditation standards of the nation's law schools.

Although many of the recommendations are excellent and long overdue the tentative agreement, as reported in The Wall Street Journal on June 28, 1995, did not go far enough.

State Supreme Courts and State Legislatures should not be permitted to deny an attorney with good moral character who passed a bar exam in another state from taking its bar exam, a situation that currently exists in 42 or 43 states.

This ABA accrediting rule requirement is Jim Crowism at its worst, a throwback to a time when the ABA was a racist professional organization. A person who passes the bar exam in a state is a licensed attorney and should be allowed the opportunity to take the bar exam in other states unless there is a compelling reason backed by sufficient evidence that the applicant is unfit to practice law. Law schools, whether they are accredited by the ABA or not, have basically the same curriculum. Furthermore, the practice of law is learned on the job, particularly since most collegiate law programs decry the ''trade school'' approach.

Second, the main reason Arizona and other states with a similar rule prohibit non-ABA graduates from taking its bar exam is to limit competition. It's that simple.

In addition, denying bar certified attorneys from taking the bar exam in another state may be an impeachable offense by the public body that enforces the rule.

Public entities such as the various State Supreme Courts and State Legislatures are required to act in the public's interest. By limiting competition, denying qualified individuals from earning a living, by unjustly preventing individuals from practicing their profession in a place they want to live, simply defies the principles of freedom and justice our public officials are bound by office to uphold.

Frankly, the State Supreme Courts and State Legislators do not understand what accreditation is all about and what it is suppose to accomplish. If you don't believe this have some members of your staff check around. I did. The responses were ludicrous. Accreditation is not a Good Housekeeping Seal of Approval. It shouldn't imply non-accredited schools are diploma mills. Accreditation isn't mandatory, it's voluntary, a self-evaluation process that's been distorted by those in authority to suit their own vested interests.

Now is the appropriate time to bring this issue before the American people because the current status have far-reaching ramifications that are too many to include in this letter.

The burden of proof is on the State Supreme Courts and the State Legislatures to justify the current policy. I can furnish plenty of information showing the policy is a sham.

Enclosed are three news articles I've written on this issue. I'm not an attorney; I'm writing a book that includes the law school accrediting issue. I would be delighted to debate this issue in a public forum with anyone with the courage to do so.

Please let me know if you need additional information. I'm looking forward to your response.

Sincerely,

Robert Reilly,

(602) 252–5352.

Exhibit 38, Robert Reilly's letter, included three news articles. They cannot be published in the Federal Register. A copy of these articles can be obtained from our Legal Procedures Office.

Hawaii Institute for Biosocial Research

Private Carrier Address: Century Center, 1750 Kalakaua Avenue, Suite 3303, Honolulu, Hawaii 96826

Address all Mail to: P.O. Box 4124, Honolulu, Hawaii 96812–4124, Tel: (808) 943–7910 or 949–3200 (Messages Only), FAX: (808) 943–6912

July 30, 1995.

Mr. John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice Antitrust Division, 555 4th Street, NW., Room 9903, Washington, DC 20001

Re: United States of America vs. American Bar Association, Cv. No. 95–1211, Request for modification of proposed Final Judgment.

Dear Mr. Greaney: The enclosed letter dated July 30, 1995 amends and replaces my letter of July 18, 1995.

Sincerely yours,

Robert W. Hall,

President and Director.

July 30, 1995.

Mr. John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice Antitrust Division, 555 4th Street, N.W., Room 9903, Washington, DC 20001

Re: United States of America vs. American Bar Association, Cv. No. 95–1211, Request for modification of proposed Final Judgment.

Dear Mr. Greaney: We comment and object to the following omissions and deficiencies in the proposed Final Judgment. The proposed Final Judgment is seriously flawed and will result in injustice to the group that matters the most in any antitrust action, *consumers.* No group needs government anti-trust assistance more than law school applicants who are powerless in the accreditation and application process.

The issue is the American Bar Association's (ABA) involvement in the law school admissions process. The ABA is no disinterested, academic group. The ABA is a guild, a cartel with an economic ax to grind. The fox is in the hen house.

With ABA knowledge, sanction and support, one of the many ''services'' provided by Law Services includes the LSAT. LSAC members and many non-member law schools in the United States require applicants to (1) subscribe to the Law School Data Assembly Service (LSDAS) service and (2) take the LSAT as a part of the application process, self-serving disclaimers to avoid antitrust scrutiny notwithstanding.

The Law School Admission Council (LSAC) is an association of 191 law schools in the United States and Canada founded in 1947 to ''coordinate, facilitate and enhance the admissions process.'' During 1992, the Law School Admission Council administered 150,000 LSAT's, supported 477,000 law school applications, and processed 198,000 transcripts. As owners of the LSAC, the same legal educators that control the accreditation office control the LSAC. All law schools accredited by the ABA are LSAC members. That is a classic definition of a cartel. In most states, the practice of law is controlled by this cartel. An analogy would be a teachers' union controlling accreditation and applicant selection requirements at college level teacher training programs.

Taking the most conservative line and following Judge Bork's anti-trust positions, the goal of antitrust law should focus on the *maximization of consumer welfare.* The proposed Final Judgment fails by that measure or the more liberal measures in effect today. The proposed Final Judgment is deficient for all of the antitrust reasons listed in the initial Complaint.

The ''settlement'' and proposed Final Judgment omits mention of the most egregious American Bar Association (ABA) accreditation requirements from the consumer antitrust point-of-view which are that the fact of the ABA being involved in admissions requirements at all is simply for the purpose of restricting law school output which in turn, limits competition among licensed attorneys. Competition is directly controlled by the ABA accreditation (filtration) process.

The complaint in this action states that it is the view of the United States that during the past 20 years, the law school accreditation process has been captured by legal educators who have a direct interest in the outcome of the process. The government also noted in its Competitive Impact Statement that it has learned more about the ABA's practices and their competitive effects as the investigation proceeded.

In the process of that investigation, the government appears to have missed, not fully understood, or ignored other ABA accreditation standards and interpretations that limit competition and permit competitor law schools to limit rivalry among themselves. The government appears to have spent so much time looking at trees that it did not see the forest. The government first should have questioned the role of the ABA in the accreditation process at all.

The ABA walks, talks and acts like a cartel. The subject of cartels lies at the center of antitrust policy. ABA admissions standards and interpretations constitute one threat of a

boycott after another. (See, United States v. Nationwide Trailer Rental Systems, 156 F.Supp. 800, 805, 807 (D. Kan. 1957].) In Nationwide the Supreme court applied the rule of per se illegality because the Nationwide had the power to order a boycott.

As a group, these ABA anticompetitive issues involve a conspiracy to boycott law schools and consumer applicants a number of different ways. The ABA is also engaged in fixing prices charged law school applicants in a conspiracy with the Law School Admission Council (LSAC), particularly with the LSAT.

Despite the government's statement in Section XI, (c), ''Entry of this Final Judgment is in the public interest'' the proposed Final Judgment is not in the public interest. The combination of ABA accreditation practices in a conspiracy with LSAC is a ''naked,'' anticompetitive restraint. The power exercised by conspirators is enormous, i.e., the power of entry to the law profession. The intent the ABA's accreditation standards and interpretations are anticompetitive to restrict competition for the cartel that is the ABA.

The LSAT is an entry barrier to a law school education and subsequently, the practice of law. The issues raised in the attached white paper support the allegation that LSAT's are a fraud, the con of the century. The purpose of the LSAT is to restrict entry into the law profession, reduce the number of applicants, and by that process, enable the ABA to maintain a law monopoly in the United States. In that process, the ABA is able to support the legal profession's ability to charge high legal fees by restricting competition. More important, the ABA restricts entry to the profession so that in the maximum number of cases possible, ABA members in litigation are unopposed by those who cannot afford the services of an ABA member. The ABA is the most egregious and efficient monopoly in the United States.

ABA accreditation requirements and reviews involve minimum median LSAT scores along with pressure to keep median scores high. This pressure essentially makes the LSAT a gateway requirement to the legal profession in this country. See, ABA Standards for Approval of Law Schools and Interpretations, October, 1994, Interpretation 209, Page 2, 501 and 304, i.e., ''declining median (or average) LSAT scores''. By this Interpretation, the ABA has announced a boycott against law schools that do not require LSAT's. Law schools must also stay above ''declining median LSAT scores.'' This Interpretation is proof of a boycott against applicant *consumers* who have ''declining median LSAT scores.'' Interpretation 501 requires that a law school have an artificial barrier, and threaten to boycott those with ''declining median LSAT scores'' despite the fact that there is no proven or provable correlation between LSAT scores and success in law school.

ABA Standards for Approval of Law Schools and Interpretations, October, 1994, Standard 503 is an attempt to confuse the LSAT issue, by requiring an ''acceptable (apparent aptitude) test.'' The ABA knows that no predictive or aptitude test can ever prove a correlation between LSAT scores and success in law school. Thus the ABA stands on a fraud and says that another fraud *may* be acceptable in order to avoid an ABA boycott or threat of a boycott. That is not likely. The entire issue of predictive or aptitude tests is an artificial, fraudulent barrier to entry to the ABA controlled law profession.

LSAT tests are so devoid of any proven or provable ability to predict first year law school performance that eliminating LSAT requirements entirely would result in a higher correlation with first year law school performance than LSAT scores alone provide. A statistical analysis of flipping a coin will yield a better set of correlation coefficients than LSAT's yield. The above facts are a classic definition of an unlawful, artificial barrier for the purpose of limiting the number consumer applicants who survive while. That in turn keeps law profession fees high. The accompanying white paper expounds on this subject in considerable detail.

The accreditation process reinforces the stranglehold the ABA has over law education in this country regardless of whether an applicant intends to use his/her law education in the licensed practice of law or not. Proof of that allegation lies in ABA Standards for Approval of Law Schools and Interpretations, October, 1994, Standard 301, ''(a) A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession.'' Thus a person who simply wants a legal education without intent to petition for admission to the bar is either required to participate in an inappropriate ABA admissions program or both the applicant and the law school will be sanctioned with either a boycott or the threat of a boycott.

This letter is not a challenge to any Department of Education regulation. The Department of Education cannot lawfully mandate a fraudulent test and the LSAT is not named in any DOE mandate. The issue of whether a particular aptitude test is ''suitable'' is well within the jurisdiction of this antitrust action where the issue of fraud is raised and as it is accompanied by the wealth of material found in the attached white paper. It is well known that correlation does not prove causation. The fraud inquiry can stop right there or continue if the government wants redundant proof of fraud. It is well within the U.S. Department of Justice's responsibilities to take up the issue of ''suitable'' in relation to the LSAT. The issue is that of a fraudulent LSAT on the antitrust issues of this action and the well-being of consumers. The issue is well within the United States District Court for the District of Columbia's jurisdiction in this action. Fraud is the cornerstone for much that is anticompetitive and subject to antitrust litigation.

The ABA has boycotted and intends to boycott any law school, proprietary or non-profit, that does not have ''small classes for at least some portion of the total instructional program.'' See, ABA Standards for Approval of Law Schools and Interpretations, October, 1994, Standard 303, (ii). That Standard makes the requirement to accredit proprietary schools moot. The most prestigious schools in the country have very large classes for economic reasons. Small classes are uneconomical and are an artificial barrier not eliminated by the proposed Final Judgment. The requirement for small classes is under pain of boycott if the law school does not comply. Only law schools that have substantial amounts of government financial support can meet this anticompetitive requirement. This anticompetitive ABA requirement directly results in law school education price fixing, it is an artificial barrier to competition and both limit entry to the law profession as an illegal boycott.

ABA Standards for Approval of Law Schools and Interpretations, October, 1994, Standard and Interpretation 701 essentially means that the proposed Final Judgment provision concerning proprietary law schools is not a serious remedy. Only government supported or unusually well financed non-profit law schools can start-up with only permanent facilities, and without ''leased or rented facilities.'' The issue is one of business prudence, not law education. This particular Standard and Interpretation is an artificial barrier erected under pain of boycott, or threat of boycott to limit competition. The no lease, no rental standard is anticompetitive particularly in areas where land and buildings are extremely expensive. The requirement is anticompetitive to the extent that the ABA has proven by past deeds that are established in these proceedings, that it does not want for-profit competition. Standard 701 is an anticompetitive artificial barrier to competition.

From the public's point-of-view, a Special Commission consisting of largely the same actors who created the anticompetitive guild described in the government's complaint does not constitute serious relief. The fox remains in charge of the hen house.

The above anticompetitive practices have evolved without any real public participation, scrutiny or oversight. Proposed Interpretations of Standards, Rules, and Policies to the admissions process which are very much a part of the accreditation process have been hidden from the public view and will continue to be hidden from the public if they are published only in the ABA Journal and the Review of Legal Education in the United States. The ''public comment'' requirements of the proposed Final Judgment are for insiders, not consumers. There is no evidence of reasonable notice to consumers in this action. It is this absence of public oversight that has caused the ABA as an anticompetitive cartel, to flourish and prosper.

Law school applicants have no escape from the ABA's monopoly and anticompetitive practices described herein. The above issues are a very important part of the accreditation process. Admissions requirements directly affecting consumers are also a part of the accreditation process. That process has been captured by those with an economic interest in limiting the practice of law in the United States.

It is critical that the government not limit its ABA investigation to the issues listed in the proposed Final Judgment. The fact of this

action is not widely known to the public and that has injured consumers. The proceedings to date are largely insider proceedings where once again, whenever ABA interests are at stake, the public interest i.e., consumers are ignored. The investigation must be opened to public hearings for the reasons given herein.

Sincerely yours,

Rober W. Hall,

President and Director.

RH/bh

Enclosure: The Ethics of Educational and Employment Aptitude Testing

July 18, 1995.

Mr. John F. Greaney,

Chief, Computers and Finance Section, U.S. Department of Justice Antitrust Division, 555 4th Street, N.W., Room 9903, Washington, DC 20001

Re: United States of America vs. American Bar Association, Cv. No. 95–1211, Request for modification of proposed final judgment.

Dear Mr. Greaney: The complaint in this action states that it is the view of the United States that during the past 20 years, the law school accreditation process has been captured by legal educators who have a direct interest in the outcome of the process. The government also noted in its Competitive Impact Statement that it has learned more about the ABA's practices and their competitive effects as the investigation proceeded. Unfortunately, the government's action and order have concentrated on issues far less important to the public than other ABA anticompetitive practices that severely impact the public. The issues listed in the proposed Final Judgment are essentially insider issues.

Far more serious is the ABA's role in anticompetitive admissions processes required by the ABA in the accreditation process. Listed below and attached hereto are major anticompetitive issues left out of the final judgment that will be impacted by the ten year term of the judgment if they are not reviewed, investigated and included now. In the alternative, the following issues must be specifically excluded from the settlement prescribed by the proposed Final Judgment.

The public is concerned about the preclusion and res judicata effect of the proposed Final Judgment, Clayton Act disclaimers not withstanding. For the reasons given, the proposed judgment is deficient and potentially harmful to the public interest. Despite the statement in Section XI, (c), ''Entry of this Final Judgment is in the public interest.'' the proposed Final Judgment is not in the public interest.

Major issues not dealt with include but are not limited to:

1. The Law School Admission Council (LSAC) is an association of 191 law schools in the United States and Canada founded in 1947 to coordinate, facilitate and enhance the admissions process. During 1992, the Law School Admission Council administered 150,000 LSAT's, supported 477,000 law school applications, and processed 198,000 transcripts. As owners of the LSAC, the same legal educators that control the accreditation office control the LSAC.

2. All law schools accredited by the American Bar Association (ABA) are LSAC members.

3. With ABA knowledge, sanction and support, one of the many ''services'' provided by Law Services includes the LSAT.

4. LSAC members and many non-member law schools in the United States require applicants to (1) subscribe to the Law School Data Assembly Service (LSDAS) service and (2) take the LSAT as a part of the application process.

5. The LSAT is an entry barrier to a law school education and in addition, the practice of law.

6. The issues raised in the attached white paper support the allegation that LSAT's are a fraud having no validity at all, and certainly less predictability than the toss of a coin.

7. By ABA knowledge, sanction and requirement, ABA accreditation requirements and reviews involve minimum median LSAT scores along with pressure to keep median scores high. This pressure essentially makes the LSAT a gateway requirement to the legal profession in this country.

8. By ABA knowledge, sanction and requirement, the accreditation process reinforces the stranglehold the ABA has over law education in this country regardless of whether an applicant intends to use his/her law education in the licensed practice of law or not. As but one example, the government appears to be unaware that in Hawaii and other states, an officer and sole owner of a closely held corporation cannot lawfully represent the corporation before *federal* courts including bankruptcy courts regardless of competence since federal courts follow state licensing rules requiring an ABA approved law school education. In many cases, ABA lawyers file actions unopposed as corporate officers who cannot afford attorneys are told to sit down while licensed attorneys proceed. This issue starts with accreditation and admissions requirements required by ABA accreditation.

The above anticompetitive practices have evolved without any real public view, participation, scrutiny or oversight. Proposed Interpretations of Standards, Rules, and Policies to the admissions process which are very much a part of the accreditation process have been hidden from the public and will continue to be hidden from the public if they are published only in the ABA Journal and the Review of Legal Education in the United States. The ''public comment'' requirements of the proposed Final Judgment are for insiders, not the public. It is this absence of public oversight that has caused the ABA anticompetitive guild to flourish.

ABA facilities requirements essentially rule out for-profit law schools in Hawaii since Hawaii is the only state where commercial land is largely leasehold; land and buildings are extremely expensive since government and large estates own most of the land. If current accreditation practices continue to be used and a Hawaii for-profit corporation leases land and buildings, mainland accreditation teams who are unfamiliar with Hawaii's special problems will continue to use that fact to deny accreditation.

From the public's point-of-view, a Special Commission consisting of largely the same actors who created the anticompetitive guild described in the government's complaint does not constitute relief. The situation is one where the fox remains in charge of the chicken house.

Law school applicants have no escape from the ABA's monopoly and anti competitive practices described herein. The above issues are a very important part of the accreditation process. Admissions requirements are also a part of the accreditation process that have been captured by those with a direct interest in the outcome of admissions requirements.

It is critical that the government not limit its ABA investigation to the issues list in the proposed Final Judgment. It should also be understood that the entire action was not one widely known to the public and that has injured the interest the public has in this proceeding. The proceedings to date are largely insider proceedings where once again, whenever ABA interests are at stake, the public interest is ignored.

Sincerely yours,

Robert W. Hall,

President and Director.

RH/bh

Enclosure: The Ethics of Educational and Employment Aptitude Testing

The Ethics of Educational and Employment Aptitude Testing

Robert W. Hall, Hawaii Institute for Biosocial Research, Honolulu, Hawaii, Revised, July 18, 1995

Abstract

The author presents a case against the continued use of graduate or undergraduate educational or employment aptitude or predictive tests. The author argues that educational aptitude or predictive tests have no proven or provable validity, that there is no justification to continue to require educational or employment aptitude or predictive tests from the moral, ethical or legal points of view. The author raises the issues that (1) applicants required to take aptitude or predictive tests are forced to participate in psychological research without their informed consent, (2) applicants must pay for forced participation benefiting private, for-profit corporations, (3) nationwide cheating is distorting normative standards, (4) there is no known statistical method for validating aptitude or predictive tests since in actual use, random statistical selection is routinely ignored, and (5) validity correlations reported by the test makers prove the tests do not do what they purport to do. This paper is a call for multi-discipline reflection with regard to the moral, ethical and legal issues presented.

The Ethics of Educational and Employment Aptitude Testing

Introduction

Secondary, undergraduate, and graduate level educational and employment aptitude or predictive testing has had a profound impact upon the educational, social and political fabric of this country. Entry into key professions such as medicine, law, education

and the sciences is dependent upon high, predictive test scores. Educational and employment aptitude tests are an undisputed, major influence in the selection process of our intellectual elite.

Educational institutions use aptitude or predictive tests in order to predict first year grade performance. Government and private corporations use aptitude tests in order to predict first year job performance. The tests purport to predict the future by their claimed ability to predict future performance.

The purpose of this paper is to discuss the ethical considerations of aptitude testing in light of the many deficiencies of these tests. The most obvious deficiency of predictive or aptitude tests is the fact that no one can predict the future. The aptitude tests discussed in this paper are primarily the product of the Educational Testing Service (ETS) or the Law School Admission Council (LSAC) and their affiliated organizations.

Reliability and Validity

Over the years, warnings have appeared in lay and professional literature that have added to the doubt surrounding the use of aptitude or predictive tests. Educational and employment aptitude tests must have proven statistical reliability and validity in order to enjoy academic and professional ethical support.

Reliability refers to the ability to replicate the results of the test (Kidder, 1981). Commonly used methods for determining reliability are test, re-test methods or analysis of variance methodology. Examples of uneasiness in the literature include Lumsden (1976). Lumsden suggested that the study of reliability is largely irrelevant to predictive test. He argued that reliability theory is based upon assumptions that cannot be proven.

Validity refers generally to the criteria the test measures and how useful that measurement is. In order for a test to have validity, the test must correlate with another variable of interest. This variable is sometimes called a criterion.

There are two commonly used types of validity. One is face validity which is the apparent appropriateness of the test, a judgment call. The other is content validity which refers to how adequately the items in a test sample the area of interest (Guion, 1978; Messich, 1980). Both measures are important in the measurement of aptitude. The difficulty in measuring aptitude becomes clear when one attempts to define aptitude. Any definition of that word is truly in the eye of the beholder.

Of the two measures utilized in measuring validity, the important measure for our purposes is criterion-related validity. Criterion-related validity refers to the practical use of test scores in predicting performance on non-test behaviors of interest.

Criterion-related validity may be either concurrent or predictive validity. Predictive validity is essentially subsequent academic or employment performance. With concurrent validity, both the test scores and the criterion measures are immediately available . With predictive validity, test scores are available before the criterion data are available. Time passes before we know whether the applicant performed as predicted.

Statistics used to validate aptitude tests depend upon random selection. Without random selection, validation statistics are meaningless. Schools that admit or deny admission using test scores including a minimum predictive test score destroy random selection. Applicants who are not admitted as a result of failure to achieve an acceptable or a minimum test score become a control group, or the criterion-control group.

Once the criterion-control group drops out of the statistical equation (when they are not given the opportunity to perform), the statistical basis for validating aptitude tests becomes nothing more than worthless assumptions based upon other worthless assumptions. An attorney would call this hearsay upon hearsay.

Without control group first year grades or first year performance records, there is no way of validating the tests. We must know how all of those taking the test would have performed in order to validate the tests. Once random selection is destroyed, no credible data is available to validate the tests. Each test that eliminates applicants on the basis of minimum test scores adds to the destruction of the statistical data base. As a result, ethical considerations prevent the use of statistical data that depend upon random selection if random selection is destroyed in the process of gathering statistical data. In practice ethical considerations are routinely ignored in the name of expediency in the validation, sale and use of aptitude tests. The problem is one of the test-makers and the agencies requiring applicants to take the test refuse to face. One may either choose statistical validation, or one may choose expediency. The two are mutually exclusive. This example is only one of several serious flaws in the statistical process of validating aptitude tests (Tenopyr. 1977).

The test-makers are aware that it is not wise to use educational tests as the sole selection criterion with regard to any of its tests. The producers of the LSAT for example, routinely warn law schools not to use the LSAT as the sole selection criterion. At the same time, the LSAC knows or should know, that law schools habitually ignore those warnings and are pressured to do so in the accreditation process. In practice, the LSAC leaves the decision of how to use test results up to individual law schools. The failure to control the use of the tests is but one of the ways the tests become statistically worthless.

Despite their disclaimers, the candor of the test makers in presenting a clear, truthful statement concerning their products may be questioned. As an example, the validity statement in the 1984–85 General Information Booklet for the Law School Admission Test is notable for its brevity and general lack of information. Part of the statement reads, ''while correlations between test scores and grades are not perfect, these studies show that LSAT scores help to predict which students will do well in law school.'' Correlation between LSAT scores and first-year law school grades for 139 schools ranged from .06 to .71. The 1992–93 LSAT Information Book reported correlations from .11 to .64 (median is .41) between LSAT scores and first-year law school grades and from .22 to .69 (median is .49) between LSAT scores combined with undergraduate grade-point averages and first-year law school grades.

The concept of validity may be best understood by translating psychometric and statistical jargon into something everyone can understand. Correlations look like percentages. In fact, they are not. In order to obtain percentages, correlations must be squared. A correlation statistic of .06 becomes .0036 or about a third of one percent. A correlation statistic of .71 becomes .5041 or slightly over 50%. Such statistics cannot seriously be described as validations. It is also important to keep in mind that correlation does not prove causality. The assertion that one variable causes another always remains not proven.

Correlations for the GRE exam are routinely published between .20 and .30 or 4% to 9%. The 1992 LSAT correlations translate into from 1 to 41% (median is 17%) between LSAT scores and first-year law school grades and from 5% to 48% (median is 24%) between LSAT scores combined with undergraduate grade-point averages and first-year law school grades. Those validation statistics are terrible regardless of the criteria. A flip of the coin does better. When one realizes that careers are determined on the basis of assumption drawn from these statistics, the situation is even more of a human tragedy.

The 1984–85 LSAT statement could be characterized as one of no validity at all for an entirely different reason. The correlation data presented by the test maker in the 1984–85 LSAT statement describes an old, entirely different test. A new LSAT test was introduced in June, 1982. No correlation or validity data was available at the time of the 1984–85 test. In order to correlate and validate the new test, the test makers used the remarkable expedient of simply reporting correlation and validity data for the old test. The data presented failed to substantiate validity for the old test much less the new test. The ethical implications of that decision are that ethical standards were not observed.

The 1992–93 LSAT ''Information Book'' published by the Law School Admission Council (LSAC) claims (p. 4), ''The LSAT is designed to measure skills that are considered essential for success in law school:'' ''The LSAT provides a standard measure of acquired verbal and reasoning skills that law schools can use in assessing applicants.'' The validity information found on p. 125 does not support either of these statements i.e., medians of 17% to 24% (LSAS, 1992).

The 1984–85 GRE Information Bulletin reported validity correlations of from .13 to .40 (1.7% to 16%) in various categories (p. 27). The test maker did not even bother to publish criterion statistics. Despite that omission, the Educational Testing Service confidently states that the General Test or Subject Tests are appropriate for admitting students for graduate study, and for decisions in awarding fellowship awards.

The test-makers also recommended their tests for predicting success in graduate

school and for guidance in counseling students in their courses in graduate study (p. 28). There is considerable irony in the fact that most accredited graduate schools of psychology depnd upon GRE test scores despite the fact that such scores have no acceptable proven or provable validity.

For a period of time, some test-maker bulletins omitted validity correlation statistics entirely. For reasons best known to the test-makers, validation information was for a time, not published in the test information sent to and read by the student. In order to obtain validation statistics, the bulletins instruct SAT student applicants, for example, to order a second manual called the ATP guide. The reference to this second guide is not prominent in the bulletin.

The 1987–88 ATP Guide admits that the SAT-verbal and mathematical predictive correlation is 27% for 10% of the colleges measured (.52×.52=27%), between 13% and 27% for 40 percent of the colleges (.36 – .52), between 4% and 13% for 40 percent of the colleges (.21 – .36), and below 4% for 10 percent of the colleges. ETS admits, ''The validity of high school record is typically somewhat higher than the validity of the optimally weighted combination of SAT scores.'' ETS claims that the weighted combination of the highs chool record and SAT scores by a correlation addition of less than one half percent (9.07×.07). The ETS fails to state how the data should be weighted. There is no indication in the ATP Guide that any admissions director or admissions committee weights SAT scores or high school grades in the admissions process. (The College Board, 1987).

The 1984–85 Graduate Management Admission Test Bulletin of Information resolved validity disclosure problems by the simple expediency of not publishing validity information to test applicants. GMAT disclaimers are in comparison, much stronger than those provided with the GRE. ETS admits that the test, ''cannot and does not measure all the qualities important for graduate study in management and other pursuits, whether in education, career, or other areas of experience; . . . (2) there are psychometric limitations to the test—for example, only score differences of certain magnitudes are reliable indicators of real differences in performance. Such limits should be taken into consideration as GMAT scores are used.''

Employment test validity information provided by the ETS for tests such as the NTE teacher's test is also less than a resounding vote of confidence. The NTE teacher's test is sold to states and counties without validation. ETS simply tells prospective users to validate the test themselves. Incredibly, state after state has bought the test with that proviso.

The test-makers have not and cannot validate these tests with ethically applied, generally accepted statistical methods. A more serious question involves whether or not the test-makers use vague, ambiguous or highly technical disclosure information. The average applicant taking a predictive test is not skilled in statistics or psychometrics. Why then, do the test-makers persist in using statistical and psychometric language in place of plain English? Why are correlation figures used in place of percentages? The answer may be that the plain English information does not look very good. The data provided by the test-makers constitutes prima facie proof that forcing students or job applicants to take predictive tests is an economic and human waste.

Why don't the test-makers and their affiliates publish percentage statistics? Would you publish percentage statistics if your correlations were this bad?

Practical Considerations

The actual field use of predictive tests is even more interesting than their statistical shortcomings. A large number of prospective law school applicants expressed concern when the 1982 LSAT test was announced, and they rushed to take the old test. The same thing happened in 1991 when the test was changed once again. As a result, applicants for the 1983–84 and 1992–93 school years are believed to be heavily represented by those who took the old test while applicants for the 1984–85 or 1993–94 school years are a mixed group. There is no ethical justification to support the use of two entirely different tests in selecting a particular law school class or any other class.

The Richardson School of Law at the University of Hawaii as but one example, admitted as much in a 1993 report to the Hawaii Legislature footnote (p. 12): ''It is impossible to compare Law School Admission Test (LSAT) scores for all 20 years of the law school because both the test and the scoring system of the LSAT exam have changed during that period. The three different score ranges used since 1973 are not comparable. When the law school first opened in 1973, the range of scoring was 200–800; from the early 1980s until 1991, the test was scored on a 10–48 range. The latest scoring scheme—120–180—was first effective with the 1992 entering class.'' Here we have an accredited, ABA approved law school admitting LSAT scores over the years ''are not comparable'' and yet LSAT are still used to deny admission to applicants. In fact, either the new test score or the previous test scores were accepted for a time during an overlap period by educational institutions whenever new tests were introduced. That created a situation where a particular class would be entered using two different test score ''schemes'' despite the fact that they ''are not comparable.''

Another weakness with the practical use in the field of predictive test scores involves the limited psychometric background of those using the test scores. Most of those who make final selection decisions have no training whatsoever with regard to the limitations of predictive tests. Few decision makers understand the meaning of the psychometric cautions or the disclaimers found in testing literature. The average selection committee member may be reading far more into test scores than they should. To the extent that a situation has been created where users have too much confidence in the tests, the responsibility lies both with the test-maker and the institution requiring the tests. Additional responsibility lies with those in the academic community who know better and keep quiet.

At least one fully accredited, ABA approved law school, has a six person admissions committee two of whom are law students elected by the student body. Both are able to lobby and one has voting power. If any of the student admissions committee members have training in psychologicl testing, it would have to be by pure coincidence. When test makers send out test results, they routinely disclaim any responsibility with regard to the educational qualifications of those using their test results. The Standards for Educational and Psychological Tests and Ethical Principles of Psychologists of the American Psychological Association are simply ignored.

Admissions committee members may also be missing other important cautions found in standard psychometric texts such as Graham and Lilly's Psychological Testing (1984). Graham and Lilly caution (p. 42), ''If not all people can be accepted by an institution, those admitted should be randomly selected in the absence of any validity information. Only if the test scores are not used in the selection process can an accurate determination of the predictive validity of a test be made.'' Once predictive test scores are used in the admissions process, any hope of determining validity based upon generally accepted statistical models is destroyed.

Graham and Lilly also note (p. 40), ''* * * being able to predict who will be successful in a given job, whether as a police officer or airline pilot (or we might add, a physician, psychologist or an attorney), saves the person involved from an embarrassing failure and the institution from possible economic loss.'' The statement fails to deal with the embarrassing failure of not being admitted to graduate school. The statement also fails to deal with the potential economic loss to the applicant and the community despite the equal opportunity laws and constitutional protections of this country.

The uneasiness that continues to surface in the literature with regard to predictive tests (Fitzpatrick, 1983; Guion, 1978; Tenopyr, 1977; Messick, 1980; Federal Trade Commission, 1978; Owen, 1985) comes from the knowledge that criterion information is far from perfect. It is well known that grades in graduate programs are a function of, and are influenced by, many factors other than academic aptitude. In the real world, criterion information represents a measure of convenience. There is no evidence that the criteria measured proves anything (Graham & Lilly, 1984).

The most important criterion from society's point of view is not grade point average, but the far more important criterion of excellence in one's chosen profession. The criterion actually used in this context is a compromise between one that is ideal and one that is readily available.

Substantial legal questions are involved whenever educational and employment tests are used in the admissions or employment process. Not only are careers being decided, the applicant is forced to pay for the privilege of taking a test that cannot be validated using either statistical or ethical principles. Those who make decisions utilizing predictive tests are vulnerable pursuant to federal and state privacy, due process, equal opportunity, and civil rights laws.

Coaching Courses

Statistical assumptions validating predictive tests assume that the person taking the test has no previous experience with the content of the test. That assumption is not true for a group of privileged individuals.

A new dimension of concern surfaced with the publication of the ''Staff Memorandum of the Boston Regional Office of the Federal Trade Commission'' (FTC) with regard to ''The Effects of Coaching on Standardized Admission Examinations'' (1978). The Staff memorandum viewed the coaching of educational aptitude testing in light of equal education opportunity as mandated by federal law, and found educational testing wanting. The FTC memorandum presented evidence that well run coaching organizations can significantly increase test scores. The FTC memorandum found that coaching score increases (p. 1), ''have a practical, educationally meaningful, effect in that coaching can be the determining factor in deciding who is admitted to undergraduate and graduate colleges and universities. The availability of coaching is positively correlated to the ability to pay the tuition at coaching schools, which can be as high as $500 or more. Therefore coachable, standardized admission examinations create financial barriers to educational opportunities in direct conflict with our Congressionally declared national education policy.''

The FTC memorandum involved a 124,022 person LSAT study group of whom 8,660 had a total of 9,029 coaching school enrollments. The data showed that increases of anywhere from 30 to 100 or more test points on a test with a possible 800 points, could be achieved by the better coaching schools. That translates to an increase of from 2 to 6 points on the LSAT test that has a possible maximum of 48 points. The test makers represented that the 48 point test is reliable to within 2 plus or minus test points or roughly 4%. Thus a person with a 27 could raise his/her score to 29 or 33 points with coaching. That difference could easily be the difference between rejection and admission at many law schools.

The FTC memorandum contained (p. 2), ''* * * the existence of only one coaching school (and there is more than one) that can materially increase individuals' scores on standardized admission examinations such as the Scholastic Aptitude Test and the Law School Admission Test reveals the lack of reliability and validity of these examinations. The test makers themselves tell us that standardized admission examinations should be used to help predict the academic performance of an individual in undergraduate or graduate school. Yet, since short-term preparation can increase scores, but has a questionable long-term effect, the true predictive value of the standardized examinations is suspect.''

The most damning statement in the FTC memorandum involved discrimination between applicants. ''The standardized admission examinations are discriminatory in a number of ways. They discriminate against any individual who either: (1) cannot afford the cost of commercial preparation or (2) elects not to attend a commercial preparation course even if he can afford it because of acceptance of the dogma promulgated by the test makers, test administrators, and test users over the past twenty years that coaching is valueless.'' Two additional factors not noted in the report are that some applicants simply do not have an additional 250 hours of time to spend on coaching. Those who are successfully coached raise the national norms used to standardize the tests. Those who are not successfully coached pay not one, but several unfair penalties.

The FTC memorandum reported that educational aptitude examinations appeared to discriminate on the basis of race since certain sub-populations may receive a lesser benefit from coaching than others. The memorandum also noted that, ''The economic and social benefits flowing from admission to undergraduate and graduate colleges and universities (especially the more prestigious) are axiomatic.''

The FTC staff estimated that in 1979 the total cost of educational coaching, much less educational testing, was in excess of $10,000,000. The total cost of coaching for college, graduate school and employment applicants is now far more than $50,000,000 a year. At a time when the political administration in Washington is cutting back college student aid, the economic discrimination inherent in those numbers is weighted more than ever in favor of the wealthy.

The Federal Trade Commission was sorely embarrassed by the Boston staff memorandum. The Commission quickly watered down some of the credibility of the staff memorandum with a second, 1979 report that questioned purported methodological flaws in the data analysis. It should be noted that the Federal Trade Commission has not seen fit to subsequently commission a research study where the data analysis would be more acceptable to the FTC. The second report was not convincing. The original staff report made its point.

Coaching courses influence ''aptitude'' test scores. Each time that happens, national statistics are influenced in favor of those who have access to the better coaching courses. Thus the disparity between those with the $500–$600 tuition fee and access to the better coaching courses, and those who do not have access affects those who are not coached at least two ways. First, those who are not coached do not get the inside information necessary to increase their scores. Second, national predictive test statistics become a fraud.

Incredibly some school systems and universities are attempting to resolve the problem by offering their own coaching courses (Lynch, 1985). Owen (1985) compares various coaching courses and concludes that some courses are close to being worthless. The law School Admissions Services (Law Services or LSAS) has its own ''Official LSAT Prep Test'' as well as a series of ''Official'' preparation materials (LSAS, 1992).

There are some very good coaching courses, however, and those who have the key or the ''Trick'' to ETS examinations have an enormous advantage. In the real world, the Princeton Review may have the most salable service. The New York Times reported (Associated Press, 1987) a settlement of a lawsuit between the Educational Testing Service and the Princeton Review Inc. John Katzman, the founder of the Princeton Review was reported as having admitted ''distributing test questions from the company's (ETS) tests to students taking his (Katzman's) course giving them an unfair edge in the tests.'' (Insertions added for clarity.) Katzman was reported in an interview as having boasted that the lawsuit, ''guadrupled'' his business at $595 per student. Since its founding in 1981, the Princeton Review alone had grown to become a multi-million dollar business annually. The ethics of this situation is now to the point where ''coaching courses'' that give an unfair advantage to a privileged group taking ETS tests is a national disgrace. The word cheating has been used and will continue to be used to describe this situation.

Opting out:

The New York Times (Fiske, 1984) reported that Bates College in Maine, Bowdin College in Maine, and Sarah Lawrence in Yonkers discontinued their policy of requiring SAT scores. The University of Florida now makes achievement tests optional for those who do not do well on the SAT. The article reported that Harvard has considered achievement scores as an alternative to the SAT. The Harvard Business School dropped the GMAT test as an admissions requirement shortly thereafter (Day, 1985).

The Dean of Admissions at Bowdin was quoted as having ''serious'' ethical questions'' about the SAT. He noted concern about the growth of commercial ''coaching'' courses that help students prepare for the standardized tests. ''There has been an explosion of coaching schools,'' he said, ''but enrollment (in coaching schools) is almost stratified along financial lines. We have some real problems using something that can be so biased by economic resources. It's just not fair to minority, blue-collar and rural students'' (Fiske, 1984).

The New York Times reported (Lederman, 1985) on the findings of James Kulik and his associates at the University of Michigan's Center for Research on Learning and Teaching in an attempt to find an unbiased summary of the research literature on the subject to coaching. Kulik disagreed with previous findings of the Educational Testing Service (ETS.) that the average gain by coaching was small. Kulik found that ETS ''did not make clear that some individuals may make gains (through coaching) that cannot be ignored.'' Mr. Kulik said equality must be reached in one of two ways. ''Either no one gets any preparation which is more or less how it used to be; or everyone should have enough familiarity with the test. The former cannot happen now, and that latter raises the question: who's going to pay for it?''

The Law School Admission Council, the developer of the LSAT test, has contradicted long-standing ETS coaching disclaimers by proposing to enter the coaching business (Adams, 1988). The president of LSAC, Craig W. Christensen, was quoted in the National

Law Journal as admitting, ''* * * it's hard to say with a straight face that coaching does a student no good.'' The LSAC's own Pre-law Handbook statement admits, ''very few people can achieve their full potential by not preparing at all.''

Science (Holden, 1985) reported that the prestigious Johns Hopkins University School of Medicine has dropped the Medical College Admissions Test (MCAT) as an admissions requirement. Johns Hopkins dean Richard S. Ross stated that they were dropping the MCAT since the process has been ''distorting the premed curriculum grossly.'' The Science article reported that ''many see the MCAT as contributing to the dehumanizing aspects of medical school by favoring the more narrowly focused, competitive-minded students.'' Norman D. Anderson of Johns Hopkins was reported as stating ''there are no data indicating that MCAT scores correlate with either clinical performance in medical school or later success in medical careers.'' Another article appearing in the New York Times (''Top Medical,'' 1985) quoted Dr. Ross as stating ''We want people who are not monochromatic'' and stated that the tests ''perverted the undergraduate experience. It tends to displace all thinking about a general education. A student may think about taking a course in astronomy or European history, but then thinks about that test. The whole thrust of the undergraduate experience becomes a multiple choice standardized test.''

The admissions director of Harvard was quoted in the New York Times (S.A.T. coaching, 1988), ''Spending time on coaching takes time away from working on getting good high school grades, on extracurricular activities or community service, all of which are important when admissions officers are choosing a class.''

Other ethical questions:

Each predictive test has one section that is ''experimental''. That section is interposed in order to develop questions for future tests. Applicants are not informed which section is the experimental section. Applicants cannot skip the experimental section. Applicants have not volunteered to participate in a predictive test research project. Test-makers do not have the informed consent of those taking the test regarding psychological experimentation. The test-makers experiment with human subjects in what amounts to psychological research without full disclosure or informed consent. Applicants are not volunteers as test subjects in what amounts to psychological research without full disclosure or informed consent. Applicants are not volunteers as test subjects in order to support test-maker income producing activities. Yet, test-maker position is clear. There are no deviations. They have a monopoly. It is amazing how universities across the country blithely teach that such experiments are professionally unethical while at the same time, cooperating with test-makers. The hypocrisy of the situation is obvious.

As Owen (1985) reports, the experimental sections of ETS tests are the sections most likely to have ''miskeyed, flawed, badly written, and ambiguous items'' (p. 135) that are usually much more difficult than standard questions. A student coming across one of those sections without realizing it can become completely demoralized. The student could easily suffer a loss of confidence that would affect test performance. Experimental sections are moved around from test to test and according to Owen, have been placed as early as section 3 on the SAT. The final assault on the dignity of the hapless student is that he/she has to pay for the privilege of being humiliated while the subject of a hidden experiment.

The Ethics Code of the American Psychological Association (APA) states ''Ethical practice requires the investigator to respect the individual's freedom to decline to participate in or withdraw from research. The obligation to protect this freedom requires special vigilance when the investigator is in a position of power over the participant, as for example, when the participant is a student, client, employee, or otherwise is in a dual relationship with the investigator'' (''APA ethics'', 1979). Despite that well defined ethical standard, psychology professionals throughout this country require the GRE and related ETS examinations complete with the coerced research sections. It is clear that the disparity between preached and practiced ethics must be addressed.

ETS has had other problems with its tests. The release of the results for the 1996 National Assessment of Educational Progress reading test developed by the ETS were postponed until major problems in the exam are corrected. The first results of the $4 million a year contract were so unbelievable that Chester E. Finn, Jr., the Education Department's assistant secretary for educational research was quoted as saying, ''I'm pretty disgusted by the whole situation.'' (Reading test, 1988)

What to do?

Another, better approach to evaluating people may be the one suggested by the recent research of Dr. Siegfried Streufert of Pennsylvania State University College of Medicine (Goleman, 1984). Dr. Streufert indicates that thinking style is a better indicator of achievement than intelligence tests. Similar criticism has been made by David McClelland, a psychologist at Harvard. Dr. McClelland argued in the American Psychologist that it makes more sense to test for competence than intelligence. Dr. McClelland argued ''there are almost no occupations or life situations that require a person to do word analogies or choose the most correct of four alternative meanings of a word.'' While some commentators caution not to throw the baby out with the bath water, the approach urged by Dr. Ernest L. Boyer, president of the Carnegie Foundation for the Advancement of Teaching may be the most sensible (Hechinger, 1985). ''Let's decide what should be the goals of education before we think of tests.''

The issue of predictive and aptitude testing involves ethical and moral considerations, not to mention legal considerations. Anyone who has read H.C. Anderson's ''Emperor's Fine Clothes'' knows why a more conservative approach must be taken. The use of predictive or aptitude tests in the educational and employment settings cannot be defended on ethical, moral or legal grounds. They are a fraud (i.e., misrepresentation) foisted upon a hapless public by those who know the truth about their products.

References

Adams, E.A. (1988, February 8). Will admissions council counteract a change in composition of LSAT? *The National Law Journal,* p. 4.

American Psychological Association, (1979, November). APA ethics code, *APA Monitor,* Washington, DC: Author, p. 17.

Associated Press (1987, December 24). Accord ends S.A.T. copyright suit. New York: *New York Times,* p. 10.

Day, K. (1985, August 16). Harvard Business School ditches standardized admissions test, *The Honolulu Advertiser, Los Angeles Times News Service,* p. B–6.

Educational Testing Service. (1984). *Graduate Record Examinations, 1984–85 Information Bulletin,* pp. 26–28. Princeton: Educational Testing Service.

Federal Trade Commission. (1978, September). *Staff Memorandum of the Boston Regional Office of the Federal Trade Commission; The effects of coaching on standardized admission examinations,* Washington: Federal Trade Commission, pp. 1–4, 8–9, 12–15, 31.

Fiske, EBB. (1984, October 9). Some colleges question usefulness of S.A.T.'s, *N.Y. Times,* p. 25.

Fitzpatrick, A.R. (1983). The meaning of content validity. *Applied Psychological Measurement, 7, 1,* 3–13.

Goleman, D. (1984, July 31). Style of thinking, not I.Q. tied to success, *New York Times,* p. 15.

Graduate Management Admission Council. (1984). *GMAT, 84–85 Bulletin of Information, Graduate Admission Test.* Princeton: Educational Testing Service, pp. 15, 33.

Graham, J.R., Lilly, R.S. (1984). *Psychological Testing,* Englewood Cliffs: Prentice-Hall, Inc, pp. 1–76.

Guion, R.M. (1978). ''Content validity'' in moderation. *Personal Psychology, 31,* 205–213.

Hechinger, Fred M. (1985, May 28). S.A.T.'s: True, False, none of the above?, *New York Times,* p. 20.

The Ethics of Educational and Employment Aptitude Testing, Holden, C. (1985, August 16). Johns Hopkins drops MCAT requirement, *Science,* Vol. 229.

Kidder, L.H. (1981). *Research Methods in Social Relations,* New York: Holt, Rinehart and Winston, pp. 7–9.

Law School Admission Services Inc. (1984). *1984–85 General Information Booklet.* Princeton Educational Testing Service, pp. 6, 15–16.

Law School Data Assembly Service (1992). *LSAT 1992–93 Information Book.* Law School Admission Services, Inc., p. 4.

Lederman, D.J. (1985, January 6). S.A.T. coaching, a new assessment. *N.Y. Times,* Section 12, p. 9.

Lumsden, J. (1976). Test theory. *Annual Review of Psychology, 27,* 251–280.

Lynch, K. (1985, October 12). Kids may get school help on SATs, *The Honolulu Advertiser,* Honolulu, A–3.
Messick, S. (1980). Test validity and the ethics of assessment. *American Psychologist, 35,* 1012–1027.
Owen, D. (1985). *None of the above.* Boston: Houghton Mifflin Company.
Reading test may be re-tested. (1988, January 27). *New York Times,* p. 15.
S.A.T. coaching disparaged. (1988, February 2). *New York Times,* p. 16.
Tenopyr, M.L. (1977). Content—Construct confusion. *Personnel Psychology, 30,* 47–54.
The College Board (1987). *ATP Guide for High Schools and Colleges, SAT and achievement tests.* Princeton, N.J.: Educational Testing Service, pp. 26–27.
Top Medical school dropping admission test. (1985, May 13). *New York Times,* p. 7.
Williams, D.A. & Anello, R. (1985, August 12). Testers vs. Cram courses, *Newsweek,* p. 62.
William S. Richardson School of Law, University of Hawaii at Manoa, 1973–1993, *A Promise Fulfilled,* 1993.

338 Joy Lane, West Chester, Pa. 19380
July 15, 1995.

Joel Klein, *Esquire,*
Deputy Assistant Attorney General, Department of Justice, Washington, D.C. 20000

Re: Recent settlement with ABA

Dear Mr. Klein: Wish to congratulate you on successful resolution of the ABA's anti-trust and corrupt influences in the accreditation process of the law schools which had the direct effect of Board of Law Examiners not admitting to the Bar lawyers who were otherwise qualified but had attended non-accredited law schools.

The purpose of this letter is to request that the Department of Justice should also investigate similar corrupt influences of ABA and the National Conference of Bar Examiners in fixing the number of lawyers who will be admitted to the Bar through the unethical and corrupt manipulation of Bar Exam results.

In my case, the Pa. Board of Law Examiners impounded my results because I was attempting to change career from teaching to law practice and because of my age, ethnic identity and national origin.

You would be surprised to find how many violations of human rights occur within the boundary of the United States under the guise and pretext of one unjustifiable regulation or the other.

See if you or your other colleagues can do something on this matter.

Yours truly,

Amrit Lal, Ph.D.

Massachusetts School of Law at Andover

Woodland Park, 500 Federal Street, Andover, MA 01810, 508/681–0800, FAX: 508/681–6330

September 28, 1995

Mr. John F. Greaney,
Chief, Computers and Finance Section, U.S. Department of Justice, Antitrust division, 555 4th Street NW., Room 9903, Washington, D.C. 20001

Dear Mr. Greaney: Enclosed are MSL's Tunney Act comments on the Consent Decree filed in the Division's case against the ABA.

Sincerely,

Lawrence R. Velvel,

Dean.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, v. American Bar Association, Defendants. Docket No. CA95–1211.

Comments of the Massachusetts School of the Law on the Consent Decree and the Competitive Impact Statement

Massachusetts School of Law at Andover, Inc. 500 Federal Street, Andover, MA 01810, (508) 681–0800

Table of Contents

1. Introduction
2. The Consent Decree Does Not Contain Provisions Needed To Insure Against Continued Or Renewed Capture Of The Regulatory Process By Directly Interested Persons Who Hold Economically Self Interested, Anticompetitive Views
3. The Consent Decree Will Not Eliminate The Secretary Which Has Led To Violations Of Law, Unwritten Rules, And Capture Of The Process
4. The Consent Decree's Novel Provisions For Review Of Anticompetitive Practices By A Special Commission Heavily Comprised of Accreditation Insiders May Cause The Decree To Fail To Remedy Anticompetitive Practices Charged In The Complaint
5. The ''Novel'' Relief Involving Review By The Special Commission Raises Additional Problems (i) Because It May Bind The Court, Regardless of Relevant Circumstances, To Use A Full Blown Rule Of Reason Analysis Rather ''Quick-Look'' Rule Of Reason Analysis When Considering A Government Challenge To Recommendations Of The Special Commission, And (ii) Because It Circumvents The Tunney Act Rights Of Third Parties
6. There Are Important ''Procedural'' Matters Which Have Not Been Addressed Effectively In The Consent Decree Or Have Not Been Addressed At All
7. The Government's Heavy Reliance On the ABA Leadership Could Result In Failure To Remedy The Violations Charged In The Complaint
8. The Effectiveness Of The Decree Is Potentially Diminished By Lack of Knowledge Regarding The Identity Of An Antitrust Compliance Officer, By A Serious And Inexplicable Limitation On The Compliance Officer's Duties, And By Reliance On Staff Of The Department Of Education Who Have Been Ineffective In Regard To The ABA
9. In Order To Insure That The Purposes Of The Tunney Act Are Carried Out And Its Provisions Complied With, The Consent Decree Needs To Provide For the Filing Of Determinative Documents And Materials, And Approval Of The Decree Must Be Conditioned On Making Available The Documents That Injured Private Parties Need To Effectively Pursue Their Claims
10. There Are Three Areas, Involving Rules Which Stifle Competition, In Which MSL Urges The Division To Reconsider Its Decision Not To Act
11. Conclusion

In the United States District Court for the District of Columbia

United States of America Plaintiff, v. American Bar Association, Defendants. Civil Action No. 95–1211 (CR).

Comments of the Massachusetts School of Law on the Consent Decree and Competitive Impact Statement

1. Introduction

The Massachusetts School of Law (''MSL'') hereby submits its Comments on the Consent Decree filed June 27, 1995 and the Competitive Impact Statement (''CIS'') dated July14, 1995.

As the Antitrust Division is aware, MSL—a gravely injured victim of the anticompetitive conduct challenged by the Department of Justice (''DOJ'') in this case—has been in the forefront of the battle against that illegal conduct. MSL alone challenged the conduct before the Department of Education (''DOE'') in 1992 and 1994. MSL challenged the conduct before the American Bar Association's (''ABA's'') Board of Governors and House of Delegates in 1993 and 1994. The School filed an antitrust case against the conduct in November, 1993. It subsequently brought the conduct to the attention of the Antitrust Division, and provided the Division with documents and depositions in the School's possession. MSL's history of being injured by the anticompetitive conduct at issue here, of studying that conduct, and of combating it, gives the School extensive insight into the anticompetitive actions challenged by the DOJ.

MSL's consent views are stated in these Comments. To some extent, the views reiterate those in MSL's prior *Memorandum* in support of its motion to intervene. However, these Comments also deal with numerous topics not covered in that *Memorandum*, and contain additional information on

several topics which were covered in it.[1]

We also wish to point out, as indicated in the prior Memorandum, that we believe the Complaint and Decree are a step toward eliminating serious anticompetitive practices that have injured hundreds of schools and hundreds of thousands of students. With changes to cure weaknesses that might otherwise undermine the effectiveness of the Decree, it could become not a mere step toward eliminating injurious anticompetitive practices, but almost certainly a highly effective step toward doing so. The needed changes, moreover, while curative, are relatively small in the total scheme of things. Yet, unless the changes are made, the Decree could fail to remedy the anticompetitive practices charged in the Complaint. We therefore urge the Government to make the necessary changes, so that the Complaint and Consent Decree will not risk ineffectiveness, but will instead fulfill their capability of being a major accomplishment which rectifies long-standing secretive practices that wreaked extensive anticompetitive and, indeed, antisocial injury.

2. The Consent Decree Does Not Contain Provisions Needed To Insure Against Continued or Renewed Capture of the Regulatory Process by Directly Interested Persons Who Hold Economically Self Interested, Anticompetitive Views

The Complaint and the Competitive Impact Statement accurately say that the ABA's ''accreditation process has been captured by legal educators who have a direct interest in the outcome of the process.'' (CIS, p. 10; Complaint, pp. 12–13; *see also* CIS, p. 1.) Thus ''the ABA at times acted as a guild that protected the interests of professional law school personnel.'' (CIS, p. 2.) So strong was the evidence of guild capture that the Division eventually concluded ''that mere amendment of the ABA's Standards and practices would not provide adequate or permanent relief and that reform of the entire accreditation process was needed. * * * [T]he larger and more fundamental problem of regulatory capture also had to be addressed.'' (CIS, p. 16.)

One of the most important steps taken in the Consent Decree to address the problem of regulatory capture is to limit the percentage of law school deans or faculty who can comprise the membership of key committees. (CIS, pp. 11–12.) Their membership on the Accreditation Committee, the Council and the Standards Review Committee cannot be greater than 50 percent (Consent Decree, pp. 5–6; CIS, pp. 11–12); their membership on the Nominating Committee (which nominates Section officers) cannot be greater than 40 percent. (Consent Decree, p. 6, CIS, p. 11.) (These four committees are hereinafter referred to collectively as ''committees.'')

In addition, for five years appointments to the Council, the Accreditation Committee and the Standards Review Committee—but *not* the Nominating Committee—will be subject to approval by the Board of Governors.

Limiting the membership of academics on the foregoing committees to ''only'' 50 percent or ''only'' 40 percent is not likely, however, to cure the problem of capture of the process. Not only will the ostensible limitations make little difference to the existing percentage memberships on the Council and the Accreditation Committee,[2] but, far more importantly, the capture of the process has not been primarily a question of numbers or percentages. It has been, instead, a matter of who has been interested in and willing to devote the most time to the work of the Section—to the work of establishing and implementing Section policies. As the DOJ recognized, accreditation is of direct concern to the professional well-being of the existing academic participants—it has deeply affected their academic salaries and working conditions and, because a leading position as an accreditor regularly enables them to obtain (lucrative) deanships, it has even been the determinant of their professional positions. Because of its effect on their academic salaries and working conditions, it has been of preeminent interest to academics who hold the anticompetitive view that the accreditation process should be used to force increases in salaries, enhanced fringe benefits, decreases in hours of teaching, and increases in perquisites. Members of the aforementioned committees who are judges or practicing lawyers, on the other hand, are usually far too busy on the bench or in practice to give accreditation the intense attention given it by the academics. And even when they do give it comparable attention, it almost invariably is the case that they are in agreement with the academics who captured and control accreditation, often because the lawyers and judges are themselves former academics (e.g., the most recent past Chairman of the Council, Joseph Bellacosa), or because, as events and testimony make plain, they defer to the views of the academics and support the academics' agenda.

As stated buy a leading academic at Northwestern University Law School who from time to time has been active in the Section:

> * * * the most powerful force in the Section is made up of law school deans, who by and large defend the regulatory status quo. It could hardly be otherwise. The other predominant occupational groups represented in the Section—practitioners, judges and bar admissions officials—more often than not defer to the deans on most questions involving legal education. Such deference is natural both because the deans necessarily have superior knowledge of the internal workings of legal education and because they are willing to spend the substantial time necessary to maintain direction of the Section. To the practitioners, judges and bar admissions officials, service in the Section is a voluntary diversion from their real work; to the deans, it is part of their real work of effectively governing legal education.[3]

The academics' capture and use of the accreditation process has also been augmented by additional factors. One is that, as said in the CIS, most of the accreditation process as it applies to particular schools ''was carried out by the Accreditation Committee and the Consultant's office. * * *'' (CIS, p. 10.) The Consultant ''direct[s]'' ''[t]he day-to-day operation of the ABA's accreditation process.'' (CIS, p. 4.) However, as the Division recognized, ''the individuals who served on the Accreditation Committee and in the Consultant's office had been in these positions for many years.''(CIS. p. 10.) indeed, the Consultant, James White,

[1] Among the topics covered here but not in the Memorandum are the composition of site inspection teams, the practice of writing one-sided and even untrue site reports in order to force compliance with anticompetitive rules, appeals from the Accreditation Committee to the Council of the Section of Legal Education, term limits on membership on committees, the identity of an antitrust compliance officer, validation of ABA accreditation requirements in accordance with Department of Education rules, requiring first year courses to be taught by full-time faculty as defined by the ABA, barring full-time students from working more than 20 hours per week, and requiring expensive library facilities and very large and expensive hard cover collections of books.

[2] At a meeting of the American Association of Law Libraries, accreditation leader Roger Jacobs, a member of the Council, recently indicated correctly that the percentage limitations on the Accreditation Committee and Council will have little effect because the limitations ''only requires the shift in one member or so in each of those bodies.'' (Exhibit 1.)

[3] John S. Elson, *The Regulation Of Legal Education; The Potential For Implementing The MacCrate Report's Recommendations For Curricular Reform*, 1 Clinical L. Rev. 363, 372–3 (1994) (footnotes omitted).

has held the office for nearly 22 years—from January 1, 1974 until today.

Furthermore, the Section as a whole, though containing approximately 6650 members, has long been under the control of about one percent of that total, or about 50 to 60 persons, who are the insider group that establishes and implements the Section's policies, and who are supported and assisted by another 30 to 35 persons who provide vigorous written and oral approbation for anticompetitive policies and additional manpower to carry out those policies.[4]

None of these factors is affected by the percentage limitations on membership of committees. Nor is there any bar to continued domination of the Section by precisely the same individuals who captured it in the past. Therefore, because these persons continue to have a direct interest in accreditation, it is reasonable to expect that they will continue to be accreditation leaders in the future—as they are today, three months after entry of the Decree. But these persons have highly anticompetitive views, resisted the entry of the Consent Decree, continue to resist the existence of a Decree which they regard as the product of a Department of Justice that is ''out of control'' and an ABA leadership that ''sold out,''[5] and have already been taking concrete actions which directly flout specific provisions of the Decree.[6]

Notwithstanding that membership on crucial committees is limited to ''only'' 50 percent or ''only'' 40 percent academics, continued domination of the accreditation process by these same capturing individuals must be expected to result in compliance with the Decree that is at best grudging and in the maximum amount of anticompetitive conduct that the members of the group feel they can ''get away with''—for example, as has occurred, in conduct which flouts the Decree if this can be gotten away with and, as evidence and testimony show to have occurred in fact, in anticompetitive conduct that can be hidden by not stating the *real* reasons for action in documents and formal meetings, so that there can be no readily available evidence of anticompetitive purpose such as price fixing.[7]

Furthermore, requiring Board of Governors' approval for appointments to the Accreditation Committee, the Council and the Standards Review Committee may have little or no effect on any of this. There is no evidence of any effect to date, three months after the Decree was filed on June 27, 1995, and there are several reasons for skepticism that there will be significant future effect. For example, the Consent Decree contains no provision requiring the Nominating Committee—whose membership was recently raised to 80 percent academics, *in violation of the Decree*, by adding leading insider Steven Smith—to seek out nominees known to hold procompetitive views instead of nominating persons who hold the capturing insiders' anticompetitive views. Nor is there any provision requiring the Board of Governors itself to insist that there be nominees who hold procompetitive views instead of the prevailing anticompetitive views. Nor is there assurance, particularly given the annual turnover in ABA leadership, that the Board will long have any stomach for opposing the wishes of the powerful, anticompetitively-oriented Section of Legal Education. The high level politics of the ABA have made it a goal of Board members to make no enemies lest this stand in the way of advancement. The Board has therefore acceded to anticompetitive Section wishes in the past despite heavily documented warnings of serious antitrust violations, and already has failed to prevent violations of the Consent Decree even though it is being relied on to do so.

What curative steps, then, can be taken to ensure that the Consent Decree effectively guards against continued capture of the accreditation process by precisely the same persons and continued anticompetitive conduct camouflaged by hiding underlying anticompetitive reasons? First, the Decree should bar members of the insider group, who are the persons responsible for the anticompetitive problems which arose—and also should bar their supporters—from any continued participation on behalf of the ABA in the accreditation process, just as securities law violators are often barred by injunctions from continuing to be active in the brokerage business.

Second, just as federal injunctions often bar defendants from engaging in future violations of laws they have already violated, in order to preclude future anticompetitive use of the process by captors, the Consent Decree should not only bar the actions which it already does enjoin, but should also include a provision specifically banning the ABA from violating the Sherman Act through use of its other

[4] The members of the insider group include (in alphabetical order): Jacquelyn Allee, Philip Anderson, Nina Appel, Joseph Bellacosa, Donald Dunn, Fred Franklin, Jose Garcia-Pedrosa, Laura Gasaway, Kathy Grove, Harry Groves, Jane Hammond, Joseph Harbaugh Frederick Hart, Rudulph Hasl, Thomas Jackson, Roger Jacobs, John Kramer, Wayne McCormack, Erica Moeser, Carl Monk, Lizabeth Mody, Richard Nahstoll, Gary Palm, William Powers, Henry Ramsey, Jr., Frank Read, Norman Redlich, Millard Ruud, John Ryan, Gordon Schaber, Pauline Schneider, Cathy Schrage, Marilyn Shannon, Philip Shelton, Steven Smith, Claude Sowle, Robert Stein, Rennard Strickland, Roy Stuckey, Leigh Taylor, Robert Walsh, Frank Walwer, Peter Winograd, James White, Sharp Whitmore, Marilyn Yarborough, and Diane Yu.

The persons who have supported and assisted the insider group include (in alphabetical order): Steven Bahls, James Castleberry, Charles Daye, Roger Dennis, John FitzRandolph, Arthur Frakt, Steven Frankino, Martin Frey, Nelson Happy, Richard Huber, Isaac Hunt, Vincent Immel, Barbara Lewis, Jeffrey Lewis, Dennis Lynch, Peter McGovern, John O'Brien, Michael Olivas, Kenneth Randall, Barney Reams, Gail Richmond, Victor Rosenblum, Laura Rothstein, Anthony Santoro, Richard Schmalbeck, Randall Schmidt, John Sebert, Rodney Smith, Dennis Stone, Bradford Toben, Linda Whisman, and Leah Workman.

[5] The verbal opposition to the Decree is illustrated by statements made by a leading insider, Joseph Bellacosa (Exhibit 2), and by the knowledgeable statement of Dean Ronald Cass of Boston University Law School that ''People who are long-time section activists regard what's going on now as crazy and can't understand how this came to pass.'' ''They think the Department of Justice people are out of control and that the ABA sold out by settling.'' Ken Myers, *ABA Accreditation Panel Urges Changes, But Critics Want More*, National Law Journal, August 21, 1995, p. A16. (Bellacosa's statements, Exhibit 2, illustrate Cass' points.)

[6] Actions that contradict the Decree include the following. The ABA agreed the Decree was binding as of the day it was filed, June 27, 1995. The Decree provides (and the CIS confirms) that the Nominating Committee's membership cannot be comprised of more than 40 percent academics. It also provides that no data is to be collected on salaries. Nonetheless, (1) in August, 1995, it was announced by the capturing insiders that a fourth academic was being added to the five person Nominating Committee, so that its membership was raised from 60 percent academics to 80 percent academics, instead of declining to the 40 percent allowed by the Decree. The academic being added to the Nominating Committee is preeminent captor Steven Smith, who, though apparently well-aware of antitrust problems with the ABA's practices (Exhibit 3), continued to be a leader in training site inspectors to engage in what he admitted was thought by many to be ''a guild effort to up salaries'' and in training them to disguise the true purpose of this guild effort by claiming it was necessary for quality. (Exhibit 4.) And (2) notwithstanding the Decree's ban against collection of salary information, in August 1995 the Consultant's office circulated a new questionnaire to law schools seeking salary data. (Exhibit 5.) The data are sought in a form that allows calculations of average salaries and, possibly, identification of individual salaries in certain instances. (The questionnaire was circulated approximately one month after accreditation captor Roger Jacobs, who is a law library director, circulated a letter on the Internet saying that several law library directors were wondering whether the Association of American Law Schools (''AALS'') would be willing to collect and distribute salary information now that the ABA is barred from doing so, and had received a reply from a law librarian saying this would not be wise. (Exhibit 6.))

[7] Efforts to ''get away'' with anticompetitive action are exemplified when anticompetitive conduct is hidden by not stating in writing or at formal meetings the *real* reasons for action, so that there can be no readily available evidence of anticompetitive purpose such as price fixing. (This was done in connection with MSL.) Inspectors have also disguised price-fixing motivation by claiming that higher salaries were necessary for quality. See note 6, *supra*.

accreditation criteria to achieve anticompetitive purposes (which the Complaint and CIS specifically say was done at times by the captors).[8]

Third, the Decree should require the Board of Governors, on which the Division is depending, to itself seek out, and to insist that the Nominating Committee likewise seek out, nominees for the Accreditation Committee, Council and Standards Review Committee who are known to have procompetitive views and to oppose the anticompetitive conduct which prevailed for two decades. There are numerous individuals who, notwithstanding academic affiliations, are already known to fill this bill and who have shown great knowledge of and/or interest in accreditation matters.[9]

3. The Consent Decree Will Not Eliminate the Secrecy Which Has Led to Violations of Law, Unwritten Rules, and Capture of the Process

A second problem with the remedial provisions of the Decree arises because it does not curb the secrecy which infested the accreditation process and allowed illegality to flourish.

A. The CIS correctly says that application of the accreditation process to individual schools ''was kept from public view and the supervision of the ABA's Board of Governors and House of Delegates.'' (CIS, p. 10.) The application of the process was in fact kept totally secret. Self studies, site inspection reports, schools' responses to those reports, transcripts of hearings before the Accreditation Committee and Council, action letters, schools' responses to action letters, and correspondence between schools and accreditors were all treated as highly confidential. Time and again—in articles, in briefs and in oral statements—the accreditors said such secrecy was essential because without it schools allegedly would be unwilling to share the truth with accreditors, and the accreditation process assertedly would collapse.[10] On the basis of these assertions, complete secrecy was demanded and enforced, even though there are other accrediting bodies that make similar documents and assessments public and have thrived rather than collapsed.[11]

A less charitable way of looking at the accreditors' demands for secrecy is that total confidentiality was needed not to preclude collapse of the process, but because (1)without total secrecy schools would not provide the extraordinary criticism of their own competence and programs which the accreditors needed to force universities to give the law schools more money for ever higher salaries, more full-time teachers, larger buildings, ever expanding libraries and other matters comprising the guild interests, and (ii) without secrecy the actions of the accreditors would have come to light. In the latter regard, the total secrecy of the accreditation process with respect to individual schools is what enabled the accreditors to fix prices and commit the other violations of the Sherman Act detailed in the Complaint, to develop and apply secret rules that were written nowhere, to treat schools inconsistently and arbitrarily, and to use the same people over and over again to enforce the anticompetitive policies.

It is literally impossible to overestimate the extent to which violations, secret policies and arbitrary action flourished because of the secrecy. As is often the case with regard to written standards of conduct, the ABA's written criteria most often are generalized vessels whose content is supplied by the enforcement policies followed by enforcement officials.[12] What was done in practice was therefore often more important than generalized written standards. The DOJ itself has recognized this de facto by saying time and again in the complaint and CIS that certain policies were followed *in practice,* including policies regarding compensated leaves, physical facilities, extending salary criteria from faculty alone to deans and librarians as well, the definition of an hour, and failure ever to recommend accreditation of a proprietary school. (See Complaint, pp. 6, 8, 9; CIS, pp. 5, 6, 8.) MSL itself, moreover, was subjected to a host of unpublished secret rules, which it has learned are common, to arbitrary and illegal procedures, and to inconsistent actions.

Thus, among the commonly followed but unpublished rules to which MSL was subjected are ones requiring that: a school's salaries must be in the top half of schools with which it is compared; no transcription is permitted of fact-finding inspection meetings even though the accreditors perform a quasi-judicial function; site team reports are done jointly by representatives of the ABA and the Association of American Law Schools (''AALS''); and AALS representative writes the portion of a site report dealing with a school's faculty; a university cannot take more than 20 percent of the tuitions generated by its law school and, if a law school is not part of a university, it must spend all its revenues rather than use a part of them to create an endowment; law schools must meet a librarian/student ratio; law students (unlike medical students) cannot be given credit for clinical experience obtained in cases from which a supervising professor obtains fees; the faculty must control a school; not matter how much work she does for a school—even if she works 60 hours per week for it—a professor cannot be treated as a full-time professor if more than 20 percent of her time is spent doing compensated work for clients, but a professor will be counted as a full-time faculty member although she spends extensive time every week working on a probono basis; leaves of absence have to be granted with pay; the Law School Admissions Test (''LSAT'') is the only permissible entrance test; a school often must require full-time students to sign affidavits saying they are not working more than 20 hours per week; a school will ipso facto be said to be of poor quality if it makes extensive use of adjuncts instead of employing a

[8] We note in this regard that the Consent Decree already requires a number of Section officials to certify annually that they are abiding by the terms of the Decree and know of no unreported violations of it, and requires the Executive Director of the ABA (leading insider Robert Stein), the Consultant and the Consultant's staff to certify annually their understanding that failure to comply with the Decree can result in conviction for contempt of court. (Consent Decree, p. 10.) Clearly it would not be unfair to require the ABA itself to agree that it is abiding by the Decree by not committing acts that the Government had already determined to be anticompetitive but withheld challenging pending the Special Commission's Report.

[9] They include, among others, Dean Colin Diver of the University of Pennsylvania Law School, Dean Ronald Cass of Boston University Law School, Dean Howard Glickstein of Touro College Law Center, Dean Patrick Hetrick of Campbell University Law School, President Thomas Brennan of Cooley Law School, Dean Howard Eisenberg of Marquette University Law School (formerly Dean of the University of Arkansas Law School at Little Rock), Dean Robert Reinstein of the Temple University Law School, Dean Anthony Pagano of the Golden Gate University Law School, Dean Henry Manne of the George Mason University Law School, Dean Richard Matasar of the IIT-Kent Law School, Thomas Leahy, who is a recent President of the Illinois Bar Association, Chancellor R. Gerald Turner of the University of Mississippi, Dean Timothy Heinsz of the University of Missouri Law School, Provost Mary Sue Coleman of the University of New Mexico, Dean David Shipley of the University of Kentucky Law School, President Steven Sample of the University of Southern California, Chancellor William H. Danforth of Washington University of St. Louis, Dean Majorie Girth of Georgia State University College of Law, President William Greiner of the State University of New York at Buffalo, President Thomas Salmon of the University of Vermont, and Dean Harvey Perlman of the University of Nebraska Law School.

[10] See, e.g., the materials in Exhibit 7.

[11] See, e.g., the materials in Exhibit 8.

[12] This is another reason why the procompetitive or anticompetitive views of accreditation personnel are so crucial.

large full-time faculty; and a school's physical facilities will be called inadequate if they are not new or recently refurbished and do not cost literally tens of millions of dollars.

The arbitrary procedures and inconsistent actions to which MSL was subjected included: the site inspection team was stacked with the insiders to insure the adverse site report desired by the accreditors; site inspectors were prejudiced against MSL before they even inspected it; they intentionally wrote a biased and false report; rules were applied against MSL that were applied to no other schools or that were invented on the spot; MSL was criticized on the basis of comparative statistics that had been withheld from it; the School was criticized for matters on which it had a far better record than other schools that were praised (e.g., bar passage rates); procedural delays were placed in the School's path; site inspectors were chosen who had grave conflicts of interest; some of the same persons sat on both the Accreditation Committee and on the Council which reviewed the Accreditation Committee's decision; intentionally false statements were made to MSL and its students; and certain site inspectors may have been applying more stringent Association of American Law Schools (''AALS'') criteria although MSL was not seeking AALS membership.

From MSL's study of the accreditation process, knowledge the School has obtained in discovery, information it has received from other schools, and even statements in the Complaint and CIS, it is clear that MSL's experience was typical in the sense that secret rules and arbitrary and inconsistent conduct, as well as grave violations of the antitrust laws, have been de rigueur in ABA accreditation. Yet *none* of this could have happened if the accreditation process regarding schools had been open—if the documents kept secret had instead been made public. For, if the relevant documents had been public—just as their analog court and agency briefs, records and opinions are public—then the affected law schools, faculty members, students, scholars and analysts, law enforcement agencies, reporters, potential students and members of the public would all have been able to see that there were violations of law, unwritten rules, and inconsistent treatment of schools. The result would have been that these things would not have occurred or, at minimum, would have been quickly stopped.

B. The short of it is that secrecy was and remains the essential precondition of accreditation misconduct, and openness was and remains the best guarantee against it. Yet, the Consent Decree does not require an end to the secrecy that has prevailed. The closet the Decree comes to providing for openness on any matter other than the identity of site inspectors is to say that the Council must annually send the Board of Governors a report of accreditation activities during the preceding year, including a list of schools on report or under review, with identification of each school's areas of actual or apparent non compliance with the Standards and how long the School has been on report or under review. (Consent Decree, p. 6.) But even this report—which goes *only* to the Board, and not to any other person—can be provided ''on a confidential basis if necessary.'' (Consent Decree, p. 6.) Given the long, strongly held view of the accreditors that confidentially is always necessary, as a practical matter it is certain that these annual reports will be kept confidential, thus maintaining secrecy from everyone but Board members. And, since the reports do not need to discuss the reasons why schools are held not to comply with given Standards, even complete openness of these reports would not enable schools, scholars and analysts, potential students, reporters or others to know such underlying reasons, much less to know of unwritten rules that are used as reasons.[13]

C. Thus, the secrecy which led to illegality will, as a practical matter, be preserved under the Consent Decree. There is, however, a simple step that would cure this and would almost certainly insure, in and of itself, that the process is conducted in a legal and fair way in the future—in a way that does not violate the Sherman Act and does not violate elemental rules of fairness and due process. The Consent Decree should be changed to provide that the documents created during the accreditation process will be available to any person, just like analogous court and agency briefs, records, transcripts and opinions are available to any person. This would make it impossible to have a repetition of the illegality, unwritten rules, inconsistency and arbitrariness that arose. For such conduct would be quickly discovered and attacked by a host of schools, analysts, students, reporters, members of the public, and enforcement officials. Justice Brandeis said that sunlight is the best disinfectant; the principle is applicable to ABA accreditation.

4. The Consent Decree's Novel Provisions for Review of Anticompetitive Practices by a Special Commission Heavily Comprised of Accreditation Insiders May Cause the Decree To Fail To Remedy Anticompetitive Practices Charged in the Complaint

A. The CIS says that the DOJ originally intended to seek to prohibit anticompetitive rules relating to calculation of student/faculty ratios, limitations of teaching hours, leaves of absence, and banning of credit for bar review courses. (CIS, p. 15.) Ultimately, however, the DOJ agreed that, although these practices, plus practices regarding physical facilities and allocation of revenues between law schools and universities, had been used ''inappropriately'' ''at times to achieve anticompetitive, guild objectives'' (CIS, pp. 9, 13), they nonetheless should be reviewed ''in the first instance by the ABA itself'' (CIS, p. 16). The practices, the Government agreed, should thus be submitted to a ''Special Commission.'' (Consent Decree, pp.7–8; CIS, p. 16). That Commission, it is now known, is the so-called Wahl Commission. It is packed with accreditation insiders who had captured the accreditation process and, when the Decree was filed on June 27, 1995, it had been sitting for over a year and was nearing the end of its work, which from inception had been due to be completed by the first week in August, 1995.

Under the Consent Decree, the Special Commission's Report is to be submitted to the Board of Governors ''no later than February 29, 1996'' (CIS, p. 13), and the Board, after reviewing it for an unspecified period (presumably for the purpose of possibly making changes in the Commission's recommendations), will file it with the Government and the Court. (CIS, p. 13.) The Government can then challenge the Report in Court within 90 days if the Special Commission ''fails to consider adequately the antitrust implications of continuing the ABA's past practices * * *'' (CIS, p. 16.)

The government states that this arrangement is ''novel relief.'' (CIS, p.13.) The DOJ's agreement to allow an insider-dominated Special Commission to make the initial decisions on crucial anticompetitive practices could result in failure of the Consent Decree to stop those practices, however.

B. The members of the Special Commission were appointed by two leading members of the group which controls ABA accreditation: Joseph

[13] The provision of the Consent Decree (p. 6) requiring the Accreditation Committee to send reports to the Council suffer from all the same weaknesses plus the weakness that the reports go to the Council alone.

Bellacosa, the immediate past Chairman of the Council, and Robert Stein, who preceded Bellacosa in that position and now is Executive Director of the ABA. There are 15 Commission members, at least eight of whom are part of the heart and soul of, or are closely tied to, the capturing inside group. A ninth member belonged to a closely cooperating group, the Special Accreditation Committee of the Association of American Law Schools, and the Commission has worked closely with two other leaders of the controlling inside group.

Confining ourselves to listing only one or two of the accreditation credentials for each of these persons, the relevant members of the Special Commission are: Commission Chairperson Rosalie Wahl, a former Chair of the Council, which oversees the Accreditation Committee; Henry Ramsey, Jr., a recent former Chair of the Council and Chair of the committee which produced a 1990 report seeking broader funding for insiders; Pauline Schneider, a recent chair of the Accreditation Committee; Diane Yu, recently a member simultaneously of both the Accreditation Committee and the Council; Talbot D'Alemberte, a former Chairman of the Council; Joseph Harbaugh, a Section activist and former head of the Section committee on diversity; Nancy Neuman, a member of the Accreditation Committee and recently the president of the AALS, which cooperates closely with the ABA in accreditation; and Thomas Sullivan, who has been a member of the Accreditation Committee of the cooperating AALS.

In addition, the Special Commission worked closely with the ABA's Consultant, James White, who has headed the controlling group for nearly 22 years. And, of the two ''reporters'' who helped write the Commission's report, one was Frank Read, a long time Section activist and former president of the cooperating Law School Admission Council, who was serving as James White's Deputy Consultant during the period of the Special Commission's work.

Thus, review of anticompetitive accreditation practices has initially been placed largely in the hands of persons who have vigorously implemented and thoroughly approve of those anticompetitive practices, who resisted the Consent Decree and continue to resist it, and who, in the words of Dean Cass, regard the Decree as the product of a Department of Justice that is ''out of control'' and of an ABA leadership that ''sold out by settling.'' [14] (P. 7, and pp. 7–8, N. 5, *supra*.)

C. It would be unrealistic to expect a 15 person Commission with so many members and associated persons who are leaders of the controlling inside group to vigorously recommend changes in accreditation practices, or not to minimize any changes that intense opposition to their practices cause the group to feel compelled to recommend notwithstanding their predilections. Thus, it is not surprising that the Commission's initial Report (Exhibit 9), delivered August 3, 1995, did in fact minimize recommended changes in the subjects of interest to the DOJ. And although their own views were published for 61 single spaced pages, members of the Commission (successfully) requested Commission member Ronald Cass to suppress publication of a ''lengthy separate statement'' of views which differ from ones the majority had put forth.

In a brief, 1¼ page ''Separate Statement'' appended to the Commission Report, Dean Cass said he had prepared a ''lengthy separate statement'' of his views because he disagrees both with the Commission's views on accreditation and with its treatment of specific issues. (Exhibit 9, p. 62). The specific issues include two which the DOJ agreed to have reviewed by the Special Commission, student/faculty ratios and the allocations of funds between law school and university. They also include other specified issues plus unspecified ones as to which Cass says there is ''a basis for skepticism'' about existing accreditation practices or the changes proposed by the Commission. (Exhibit 9, p. 62.) However, ''[a]t the request of a number of Commission members'' Dean Cass withheld his lengthy separate statement from publication ''until the Commission completes its work.'' (Exhibit 9, p. 62.) Until then, his separate statement will be available only members of the Council and the Board of Governors. (Exhibit 9, p. 62.)

Dean Cass' timing of the publication of his views is a reference to the fact that, because the DOJ has agreed to have the Commission review anticompetitive practices listed above, the Commission has said it will meet again in September and issue a supplementary Report sometime in October. It is Dean Cass' hope that the withholding of his lengthy statement of dissenting views will contribute to the Commission changing its mind, and accepting recommendations *that he says it already has rejected,* when it meets again this fall. (Exhibit 9, pp. 62–63.) It is his further hope that, if the Commission does not accept recommendations it has already rejected, the ABA will nonetheless take further steps to remedy the problems. (Exhibit 9, p. 63.)

Thus, it is impossible at this time to know Dean Cass' views regarding weaknesses in the majority's current recommendations. Also, it is possible that neither additional changes recommended in the majority's supplementary Report due in October, nor Dean Cass' views, will be available early enough to be known to the Division or the Court if the latter assesses in October, 1995 whether the Decree's provisions for review of anticompetitive practices by the Special Commission are within the reaches of the public interest. Additionally, it is certain that, if the Court considers the issue this October, neither the Division nor the Court will know what if any corrective action the ABA will take should the Commission's Supplementary Report continue to reject

[14] From the Complaint and the CIS, it is not clear whether and the extent to which the DOJ, when negotiating the Decree, had been informed by the ABA as to the heavily insider nature of the Special Commission , the length of time it had been sitting (over one year), or that its work was due to be completed at the beginning of August, 1995. The Consent Decree contains some language which, because expressed in the future tense (the ''ABA *shall:* establish a Special Commission'') (Consent Decree, P. 7 (emphasis added)), would indicate that the Government did not know, when negotiating the Decree, that the already long-existing Wahl Commission would be the *Special Commission.* On the other hand, the CIS, filed approximately three weeks after the Decree, contains language which, because expressed in the past tense, indicates that the Government had possessed at least some relevant knowledge about the Wahl Commission when negotiations were in progress. (The CIS says, for example, that the DOJ had ''considered'' that the Commission ''had progressed'' in the work doing. (CIS, p. 27).)

The question of the extent of the Government's knowledge when negotiating the Decree is an important one. Prior to agreeing that the insider-packed Wahl Commission, which was due to finish its work shortly, would be the Special Commission, the DOJ had proposed that the Special Commission should be ''separately constituted as an antitrust review committee.'' (CIS, p. 17.) If the DOJ was apprised, when it agreed that the Wahl Commission rather than a separate antitrust committee should be the Special Commission, that the Wahl Commission was an insider-packed group that had been sitting for a long period and was about to finish its work, then one might disagree with the Government's decision that the Wahl group should be the Special Commission, but the decision was nonetheless an informed one. But if the Government had not been told of the heavily insider nature of the Wahl Commission and that the Commission had been sitting for over a year and its work was nearly completed—if the DOJ had not been informed that the Commission was heavily comprised of persons who, the Government correctly charged, had captured the accreditation process and used it for anticompetitive purposes and who were about to submit their report—then it would appear that the ABA leaders with whom the Government was negotiating withheld crucial information even though the Government is heavily depending on them to make the Consent Decree efficacious.

significant changes in anticompetitive practices.

Thus, although both the Senate and House Reports on the Tunney Act, and the Court of Appeals for this Circuit, have made clear that the Court must receive information necessary to determine whether a consent judgment is in the public interest,[15] information of consequence to this question will continue to be unavailable to the Division and the Court well into the future.

Indeed, under the Consent Decree this information could be delayed until mid 1996. The Decree provides that the Special Commission will submit its report to the Board of Governors no later than February 29, 1996 (Consent Decree, p. 8), eight months after the Decree was filed. There is no written time limit on the time during which the Board of Governors can review the recommendations. (Consent Decree, p. 8.) It is realistic to believe the Board might not finish its review until the ABA's August, 1996 convention. The Government then has an additional 90 days to decide whether or not to challenge the recommendations. (Consent Decree, p. 8.) Therefore, it is entirely possible that the recommendations, and whether there will be a government challenge to them, will not be known until 15 months to 1½ years after the Consent Decree was filed. And, if the Government does challenge the recommendations in Court, the final result might not be known for yet another year or two. Thus, in addition to placing in the hands of anticompetitively-oriented insiders the task of recommending changes to practices they desire, the provisions of the Decree relating to the Special Commission are a recipe allowing extensive delay, instead of requiring expedition.

D(i). Although neither the contents of the Supplementary Report nor subsequent corrective actions by the ABA can presently be known, what *can* be known at this time is that the Special Commission's current recommendations, as expected, often exemplify avoidance and minimization of changes in anticompetition practices. A prime example is the student/faculty ratio, as can be illustrated by discussing the origin of the ratio, its anticompetitive effects, its indefensibility, and the minimal or nonexistent nature of the change recommended by the Commission. We discuss these in turn.

D(ii) With the exception of fixing of salaries, which is banned outright by the Consent Decree, the accreditors' methods of calculating and using the student/faculty ratio are the most anticompetitive restrictions enforced by the insider group. They are in origin *solely* the products of that group. They appear nowhere in the accreditation Standards, but rather were created by capturing insiders via an Interpretation in 1978 without action by the House of Delegates. They have been used for their own purposes ever since by the capturing insiders without action by the House of Delegates.

D(iii). The anticompetitive effects of the ratio are drastic. In an anticompetitive blow at the ability of any law school to provide a lower cost education by using fewer full-time professors (whose presence in large numbers is desired by the capturing insiders), and in a simultaneous anticompetitive blow at the ability of a law school to provide practical instruction instead of only the theoretical instruction usually provided by the full-time professors, the ratio discourages the use of adjunct professors to teach courses. That is, it anticompetitively discourages teaching by highly knowledgeable judges and lawyers whose teaching salaries, even when adequate, are less than those of full-timers, and who bring a wealth of practical knowledge and experience to the classroom. It discourages this by providing that no adjunct can be counted *at all*, not even fractionally, when computing the ratio. Thus, schools must hire more full-timers to meet the ratio, instead of using adjuncts to teach courses.

To insure that schools do hire more full-timers, the ratio is enforced with Draconian stringency. Schools have, indeed, been forced by the accreditors to hire enough full-timers to bring their ratios down even far below the written ones stated in the insiders' published Interpretation on the subject.

Additionally, in a further anticompetitive blow against use of individuals with practical experience, unlike the prevailing practice in medical schools where many full-time professors also engage in active practice and regard this as essential to keeping abreast of knowledge needed in the classroom, the ABA accreditors preclude full-time professors from engaging in an active practice and thereby obtaining practical knowledge that should be brought to the classroom. The preclusion is accomplished by refusing to count a full-time professor in the student/faculty ratio if he or she also maintains an active practice. Because schools are stringently required to meet the ratio, and expensive full-time professors will not be counted towards the ratio if they have an active practice, no school can afford to have such professors. Similarly, and with the same effect, a full-time professor, including one who teaches a full load of courses, will not be counted toward the ratio if he or she also does significant administrative work. Thus, no school can afford to have its professors hold administrative positions as well as teach.

D(iv). None of this can successfully be defended on the ground that it is needed for quality. The Consultant has admitted on deposition that the ABA has developed no empirical proof that the ratio leads to quality education. (Exhibit 10.) The DOJ has pointed out in its Complaint and CIS that, although part of the policy supporting the ratio is the desirability of smaller classes and more student/faculty contact (Complaint, p. 8; CIS, p. 7), the ABA ''did not measure actual class size or effectively measure actual student/faculty contact.'' (CIS, p. 7.) It is a well known fact that, notwithstanding the ratio, large classes, not small ones, are the norm in most law schools, particularly in the first year or two of school, and student/faculty contact is at a minimum because the interests of the full-time faculty members lie elsewhere. We question, indeed, whether it is accidental that the Section of Legal Education, though it has maintained an elaborate statistical measurement program that includes extensive figures on fully *85* different subjects, has never sought easily available statistics on actual class sizes, let alone statistics on estimated amounts of student/faculty contact. Such data, it is obvious, would have shown that the insiders' ratio does not result in small classes or student/faculty contact.

It is becoming increasingly understood that, if one truly desires small classes, the way to achieve them is by use of knowledgeable judges and lawyers as adjuncts. This provides a cost-effective method of obtaining large numbers of highly competent professors whose presence enables a school to offer many more, and smaller, classes. It is also becoming increasingly recognized that, because of a difference in attitude, adjunct professors often make themselves more available to students than full timers.

Furthermore, notwithstanding the traditionally prejudiced views that the capturing insiders hold against adjunct professors—who inherently threaten insiders' guild objectives of ever higher

[15] S. Rep. No. 93–298, 93d Cong., 1st Sess. 6–7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); *United States* v. *LTV, Corp.*, 746 F.2d 51, 52 n. 2 (D.C. Cir. 1984).

salaries for full-time professors and ever more full-time professors—the results of a recent survey of student bar association personnel,[16] discussed in an article on the use of adjuncts,[17] show that law students regard adjunct professors as equal or preferable to full-time professors. Students are, of course, the consumers who are paying the bills, and consumers, the Supreme Court has said, are the persons to whom the Sherman Act awards choice. *National Society of Professional Engineers* versus *United States,* 435 U.S. 679, 695 (1978).

Student bar association officials at 29 schools responded to a survey questionnaire which inquired about students' evaluations of adjunct teachers versus their evaluations of tenure track professors, i.e., full-time professors. Sixty-one percent of the respondents found adjuncts as qualified as full-time professors, 32 percent found adjuncts *more* qualified, and only 7 percent found them less qualified. Forty-three percent of the respondents found adjuncts to be as available to meet with students as full-timers, 32 percent found them *more* available, and only 25 percent found them less available. Sixty-four percent said an adjunct had been the professor who contributed most to their education; only 36 percent said that it had been a full-time professor. Sixty-eight percent said that if a particular state law course were on a bar exam, they would prefer to take it from an adjunct professor; only 32 percent preferred a full-time professor. Sixty-eight percent said full-time professors should practice law—which is anathema to the full-time faculty who captured ABA accreditation and dominate the Special Commission—and only 32 percent felt to the contrary. Views favorable to adjuncts were also expressed, by overwhelming percentages, with regard to other important matters.[18] All these results obtained though 93 percent said adjuncts taught not just electives, but core or required courses—which, like full-time professors practicing law, is anathema to the full-time faculty who captured ABA accreditation and dominate the Special Commission.

This survey of the opinions of the consumers of legal education directly contradicts the unfounded claims made about adjuncts by the accreditation insiders—claims which the consultant had to admit under oath lack any empirical statistical basis. (Exhibit 10.)

The situation has been aptly explicated in letters written to the Special Commission by knowledgeable deans and lawyers, including the Deans of the Touro, University of Pennsylvania, Campbell University, and Case Western Reserve University Law Schools. Their comments, which are appended at the back of this Memorandum, make clear that the failure to include adjuncts when calculating the student-faculty ratio is for many reasons arbitrary and unjustified. The Dean of the Touro College Law Center aptly summed up the matter by saying, ''I agree with those who find it insulting to the practicing bar to refuse to recognize the contributions that adjuncts can make to a law school's program. Adjuncts are not included in the calculation of the student-faculty ratio. * * * The leading trial lawyer in the state, who taught trial practice as part of the law school's program, would not be included in that law school's student-faculty ratio.'' Appendix, *infra.*

The Dean of the University of Pennsylvania Law School summed up the matter by calling the student/faculty ratio arbitrary and by saying its definition of full-time faculty is ''arbitrary almost to the point of absurdity.'' Appendix, *infra.*

D(v). Yet, notwithstanding the deeply anticompetitive nature of the student/faculty ratio and particularly its anticompetitive effect of greatly reducing the number of adjunct professors,[19] the Special Commission made only minimal recommendations for change.[20] And, though obviously cognizant that intense opposition to current practices regarding the ratio disabled it from declining to recommend any change whatever, the Commission couched its suggestions in language so abstract and general that it is meaningless because it could be met even if there were to be no change whatever in actual results.

Thus, although in one place the Report says the ratio should ''take into account'' the contributions of adjuncts, in its immediately following ''recommendation,'' the Commission does *not* say adjuncts should be counted on some proportional basis or on any basis at all. Rather, it says only that it is ''reasonable to consider the effect of adjuncts on the quality of the academic program in assessing the significance of student/faculty ratios.'' (Exhibit 9, p. 29.) One who is so minded can take these effects into consideration as the insiders claim to have done for years, but can then decide the effects do not warrant any change in the application of the ratio, as the insiders have also done for years. Furthermore, rather than require adjuncts to be counted on some basis, the insider dominated Wahl Commission accepted the insiders' erroneous assertions regarding alleged problems with adjuncts.[21] (Exhibit 9, pp. 27–28.)

E. The foregoing discussion of the student/faculty ratio demonstrates that, by agreeing to have anticompetitive practices reviewed by the Special Commission comprised largely of insiders who enforced, approved of and created those practices, the Government has agreed to a compliance procedure that may cause the Consent Decree not to rectify the anticompetitive practices

[16] Exhibit 11.

[17] The article, entitled ''The Advance of the Adjunct,'' is in Exhibit 12.

[18] Seventy-nine percent said with regard to Criminal Procedure—now widely regarded as a core course and often a required one—that they would prefer to take it from an adjunct; only 21 percent preferred a full-time professor. Eighty-six percent found full-time professors more likely to cancel classes than adjuncts, and only 14 percent found adjuncts more likely to cancel. Ninety-three percent found full-timers more likely to arrive late to classes; only seven percent found adjuncts more likely to be late. Ninety-six percent thought that ABA accreditation guidelines should be the same with regard to use of adjuncts as with regard to full-timers, and only four percent felt to the contrary.

[19] At a recent meeting of the American Association of Law Libraries, Donald Dunn, who is the Library Director of the Western New England College School of Law and has been on many site inspection teams, stated publicly that the ''action letter'' recently received by his law school placed it under a show cause order to decrease the number of its adjunct professors. (Exhibit 13.)

[20] The Government has indicated a need for reconsideration of the exclusion of adjuncts from the student/faculty ratio. There appears to have been a drafting mistake that could nullify this, however. Apparently in an effort to insure that adjunct faculty members who belong to the Accreditation Committee, Council, Standards Review Committee or Nominating Committee are not counted against the percentage limitations on academics who can belong to those committees, the Consent Decree defines ''faculty'' as all persons who teach *except* for adjuncts. (Consent Decree, p. 2 (emphasis added).) This apparent drafting error could be used to assert that the exclusion of adjuncts from ''faculty'' need not be reconsidered and changed in *any* way, when in reality its intended meaning is only that adjuncts should not be considered ''faculty'' when determining whether there is a violation of the percentage limitations applying to the number of faculty on committees. This drafting error should be corrected, perhaps by simply including adjuncts in the Consent Decree's definition of ''faculty,'' but adding that ''adjuncts shall not, however, be considered faculty for purposes of determining the number of faculty members on the Accreditation Committee, Council, Standard Review Committee or Nominating Committee.''

[21] Given the meaningless nature of the Special Commission's recommendations regarding the ratio, and the Commission's reliance on shop-worn cliches, it is not overly surprising that Commission members did not care to see publication of Dean Cass' views on the ratio.

identified in the Complaint. There are, however, at least two curative practices that could solve this problem.

The first is that, in accordance with the DOJ's initial intent, misuse of the practice should simply be enjoined. As discussed above, using a technique common to federal law, such an injunction would prohibit the practices from being used to violate the Sherman Act.

Second, instead of following the presently contemplated schedule under which a Tunney Act hearing is planned for October 23, 1995, in accordance with a revised and expedited schedule discussed below, a postponement of the hearing should be sought until the Special Commission's final report and Dean Cass' lengthy separate statement have been published, the ABA has either made changes in the Report or announced that it will not do so, and the Government has determined whether to challenge any of the Special Commission's recommendations. This would enable first the DOJ and then the Court to know if what if any changes have been recommended and/or made with respect to anticompetitive practices charged in the Complaint, when assessing what action to take. Such knowledge would at minimum be desirable to the DOJ's assessment, and under the Tunney Act is essential to the Court's assessment, of whether the decree is within the reaches of the public interest. *Otherwise the Court will be passing on a decree without knowledge of what, if anything, will be banned in connection with anticompetitive practices identified in the Complaint.*

Furthermore, postponing the Tunney Act hearing until such knowledge is available should be combined with a revised schedule in order to spur quicker action that would avoid the undue passage of time invited by the current provisions of the decree. Instead of the Special Commission not having to submit the Report until February 29, 1996, the Board of Governors then having unlimited time to review the recommendations, and the DOJ then having 90 days to decide on challenges, a firm date such as December 31, 1995, should be set as the time by which the Commission's report must be finished, any changes to it need to have been made by the ABA, and the DOJ need have notified the Court whether it accepts the Report or intends to challenge any of its provisions. The date of December 31, 1995 is, after all, more than six months after the Consent Decree was filed.

5. The ''Novel'' Relief Involving Review by the Special Commission Raises Additional Problems (i) Because it May Bind the Court, Regardless of Relevant Circumstances, to Use a Full Blown Rule of Reason Analysis Rather ''Quick-Look'' Rule of Reason Analysis When Considering a Government Challenge to Recommendations of the Special Commission, and (ii) Because it Circumvents the Tunney Act Rights of Third Parties

In addition to compliance weaknesses stemming from the composition and views of the Special Commission, there also are other reasons why use of this admittedly novel compliance mechanism may cause failure to rectify the anticompetitive practices identified in the Complaint.

A. First, the Government has agreed that, if it challenges any of the proposals in the Special Commission's Report, the challenge will be decided ''by this Court applying a Rule of Reason antitrust analysis.'' (Consent decree, p. 8.) This may be intended to bind the Court in advance to use a *full blown* Rule of Reason analysis. It would be inappropriate to confine the Court in advance to such a full blown Rule of Reason analysis, when it is surely possible and indeed probable that some of the anticompetitive practices on which the Commission is to make recommendations are susceptible to a ''quick-look'' Rule of Reason analysis in which the Court could quickly determine that there is a lack of redeeming procompetitive value.[22]

This is even more the case since, in accordance with its incredible standard practice of saying that there are no determinative documents to be made available to the Court and the public, the DOJ has not provided any information indicating why it believes that the matters which are to be the subject of recommendations by the Special Commission should necessarily be adjudicated under a full blown Rule of Reason analysis rather ''quick-look'' Rule of Reason analysis or other analysis.

The following examples demonstrate why this Court should not be bound in advance to a full blown Rule of Reason analysis:

A(i). The exclusion of adjuncts from the student/faculty ratio has been a method used to increase dramatically the demand for full time professors and, by doing so, to (a) simultaneously make necessary the payment of higher salaries to them while (b) lowering their individual output by spreading the same work among a larger body of full-timers. It has been, in short, a method of concertedly increasing the demand for and the price of full-time labor, whether this is efficient or not.[23] Such concerted action is normally a *per se* violation of the antitrust laws (except when taken by a certified labor union)—it normally is not even given the benefit of ''quick-look'' Rule of Reason treatment. However, the recommendations of the Special Commission may result in little or no change in the rule excluding adjuncts from computations of the student/faculty ratio. If that is the result, it would seem proper to apply, at most, a ''quick-look'' rule of reason analysis.

A(ii). The exclusion of clinicians who are not on tenure track or its equivalent, when computing a school's student/faculty ratio, has been a method of concertedly insuring higher salaries for non-clinical, or ''academic,'' faculty. There is, indeed, evidence showing that opposition to including such clinicians in the ratio arose because they generally were paid less than ''academic'' faculty and thus would bring down the average and median salary levels that all schools were required to meet for academic faculty. (Exhibit 14.) There is not as yet any recommendation from the Special Commission reversing the exclusion of such clinicians, nor has the Government provided any evidence as to why such exclusion has any procompetitive benefits, let alone significant ones. In the circumstances, ''quick-look'' Rule of Reason treatment is the most that is warranted.

A(iii). As appears to be implied by the statement in the CIS that over one-third of all ABA-approved schools are on report for inadequate facilities even though nearly all schools occupy new or substantially renovated facilities (CIS, p. 8), the problem existing with regard to physical facilities has been, in the bluntest terms, that the accreditors have required schools to build the law school equivalent of the Taj Mahal. The accreditors seem never to be satisfied unless a school's facilities are such that they cost from $20 to $60 million. The accreditors operate at such a

[22] It is even possible that in certain instances *per se* analysis should apply. In the *Ivy League Overlap* case, *United States* v. *Brown University, et al.,* 5 F. 3d 658 (3d Cir. 1993), the Third Circuit repeatedly and extensively pointed out that quick-look Rule of Reason treatment, or even *per se* treatment, could be appropriate in an antitrust case involving education if restraints were motivated by self-interested economic factors, involved price-fixing, or lowered output. Such factors are often present here, as discussed below.

[23] Simultaneously, at least at schools with limited resources that cannot afford to adequately pay both a large number of full-timers and a large number of adjuncts, and probably at other schools as well, it reduced the demand for adjuncts, and thereby caused reduction in the compensation paid to them.

micromanagement level in this regard that, as the Dean of the Temple University Law School recently pointed out, they will put a school ''on report'' if it allegedly does not provide adequate office space for every one of dozens of not-for-credit student organizations. (Exhibit 15, Testimony of Robert Reinstein, Dean of Temple University Law School, before the Wahl Commission.)

The Special Commission's present recommendation regarding physical facilities will make little or no change in this situation. For the Commission, while recommending that the current Standards be replaced by a new one, simultaneously recommends that the current Standards be retained as Interpretations, i.e., that they be retained in a different guise. (Exhibit 9, p. 31.) And the Commission's recommendation does not even begin to reach what has been the *real* problem: the way in which the rules, be they Standards or Interpretations, are enforced in practice by the accreditors. It is the method of enforcement which here, and often elsewhere too, has caused inappropriate application of rules to further anticompetitive guild interests.

In these circumstances, it is difficult to comprehend why continuation of a failure to recommend drastic changes in practices that inevitably require unnecessarily huge inputs of resources—that inevitably require $20, $40 or $60 million dollar buildings to satisfy the accreditors when far less expensive facilities would be completely serviceable—should be given anything more than ''quick-look'' Rule of Reason treatment.

A(iv). It is not difficult to cure the problem arising because the Decree may bind the Court to use a full blown Rule of Reason analysis in deciding a governmental challenge to recommendations of the Special Commission. Cure requires only that the provision in question be removed from the Decree. That would leave the Court free to use a full blown or ''quick-look'' Rule of Reason analysis, as appropriate, or even a *per se* analysis if and when appropriate.

B. Second, the Decree unnecessarily and improperly allows only the Government to challenge the Special Commission's recommendations. (CIS, p. 17.) Unlike the Tunney Act, which allows third parties to file documents explaining why they believe the provisions of a decree are too weak to cure the violations identified in the Government's Complaint, there is no provision here for other parties to file comments explaining why they believe Special Commission recommendations which the Government should accept in whole or in major part are insufficient.

In the normal consent decree the relief is stated, and private parties can comment on it under the Tunney Act. Here, realistically speaking, the provisions for review by the Special Commission are not themselves relief, but only a method of obtaining possible future relief. Yet, there is no provision for private parties to comment on that future relief when it becomes known—why may not occur for a considerable period of time, as discussed above. Hence, the Tunney Act's provisions allowing third parties to comment on relief stated in a consent decree have been circumvented. This will be of particular importance if the Special Commission issues minimalist recommendations, as thus far seems likely, the Board of Governors does not strengthen them considerably, and the Government either does not challenge them at all or challenges them only in minor or minimal ways.

To cure this problem, third parties should specifically be given the right to comment on the Commission's recommendations in order to ensure that their Tunney Act right to comment on relief is preserved. Alternatively, as discussed earlier, the Court should postpone its Tunney Act hearing until a specified date (such as December 31, 1995) by which time the Commission's recommendations shall have been submitted, any changes shall have been made by the Board of Governors, and the DOJ shall have decided which recommendations it accepts and which it will challenge.

6. There are Important ''Procedural'' Matters Which Have not Been Addressed Effectively in the Consent Decree or Have not Been Addressed at all

Contributing to the violations of law charged in the Complaint are several ''procedural'' points which, when directly addressed in the Consent Decree, have been addressed in a way that may not remedy the problems, or which have not been addressed at all in the Decree.

A. First is the composition of inspection teams. These have been stacked by the Consultant and his colleagues to insure the anticompetitive results they desire at a school. Thus, even the insider-dominated Special Commission has had to concede that only two percent of the inspectors have participated in 38 percent of the inspections. (Exhibit 9, p. 51.)

MSL's inspection team was illustrative, having been stacked with insiders who previously had anticompetitvely devastated schools, and who would be sure to write a highly adverse report against MSL in order to anticompetitvely stifle its innovations and efforts. The inspectors thus included leading insiders such as Steven Smith, Peter Winograd, Jose Garcia-Pedrosa, and Richard Nahstoll.

The Consent Decree does not effectively remedy the problem. All that it does is require (i) that ''to the extent *reasonably feasible*'' (Consent Decree, p. 6 (emphasis added)), each inspection team shall include one non-law school university administrator and one practicing lawyer, judge or public member, and (ii) that there be publication of the names of those who inspected each school (Consent Decree, pp. 6–7). These remedies could easily prove useless, for several reasons:

F

A(i). Given publicly acknowledged difficulties in finding six or seven persons whose schedules simultaneously allow them to inspect during a given week, it often may *not* prove ''reasonably feasible,'' and it usually will be easy for the Consultant to *claim* it is not ''reasonably feasible,'' to find a knowledgeable non-law school administrator and a knowledgeable practicing lawyer, judge or public member to be on an inspection team.

A(ii). The Consultant can continue to appoint anticompetitively oriented insiders to inspection teams for schools for which the insider group desires highly critical reports that preclude or cause threatened withdrawal of accreditation. Publishing the list of inspectors will not cure this. For all that the Consultant will need to do is save anticompetitive insiders for inspections of schools the insiders privately desire to be injured by adverse reports.

A(iii). Even when the Consultant appoints non-law school administrators, practicing lawyers, judges or public members to an inspection team, if the insiders desire to injure a school, the appointees can be persons who will support the goals of the insider group. This was done to MSL.

B. A second problem, not addressed anywhere in the Decree, is that inspection teams regularly write deeply one-sided, even outright false, inspection reports designed to castigate schools and thereby force them to adhere to the insiders' wishes regardless of how anticompetitive those wishes may be. MSL was a victim of this practice [24] and, notwithstanding the

[24] Instead of reporting the favorable views expressed about MSL by Massachusetts judges and

secrecy with which the accreditation process has been cloaked, in conversations, in some site reports it has managed to obtain, and even in other written materials it has learned of other schools that were likewise subjected to the practice. Thus notwithstanding the prevailing secrecy, even a letter to the Wahl Commission reveals an analogous experience at the highly regarded law school of the State University of New York at Buffalo. There the inspection team wrote a negative report notwithstanding expressions of approval and even delight that it made in person. The President of the University thus wrote as follows to the Wahl Commission:

The site evaluation team expressed amazement that a law faculty could develop such a well-coordinated, thoroughgoing revision of its curriculum and build near-unanimous faculty support for the changes. In meetings with the faculty, dean, provost and me, they expressed great enthusiasm for the path our law school had marked out for its future. From all that they said, it was clear that the team took a very positive view of the law school, its faculty, and its programs and new curriculum.

But, the team's positive firsthand response notwithstanding, their report and the Accreditation Committee's response to us was full of quibbles. It bore faint evidence of what the site evaluation team saw and applauded. It bore ample evidence, however, that the elaborate and complex rules of the accreditation system are focused on the trees—some might even say the scrub underbrush—rather than the forest. It is this approach in accreditation report after accreditation report that has ground down innovative, forward-thinking law faculty members and law faculties over the years.

Lest you think this is another president beating his drum, please note that I have been a member of UB's law faculty for 28 years; I taught regularly in our law school until I became provost eleven years ago; and *I have observed this process from up close for a long time. I generally believe that it will take more than tinkering to put right the encrusted system that has grown over the years. After reading the testimony before the National Advisory Committee last December, I was left wondering whether the current system has the capacity to get past tinkering and into significant reform.* (Exhibit 16 (emphasis added).)

C. A third problem is that it is unlikely that any beneficial effect will flow from the Decree's provision that the ABA shall ''permit appeals from Accreditation Committee Action Letters to the Council.'' (Consent Decree, p. 5.) For such appeals have *always* been permitted. They are, indeed, provided for in the existing rules. The difficulty has not lain in the absence of a right of appeal. It has lain, rather, in the fact that the Council has mainly been a rubber stamp for the Accreditation Committee because both have been dominated and populated by the same group of insiders, and it is therefore explained to and widely understood by schools caught in the toils of the process that an appeal to the Council will do them no good. The only thing that would do them any good, they are made to understand, is knuckling under to the Accreditation Committee. (Thus it is that capturing insider Henry Ramsey admitted to the DOE at a hearing that the Council rarely disagrees with Accreditation Committee actions. (Exhibit 17.))

Accordingly, the provision for an appeal to the Council is meaningless as a practical matter.

D. The Decree also does not address, and therefore fails to remedy, another feature of the process that has kept it in the hands of the group of insiders: The same persons sometimes serve simultaneously on two of the four committees mentioned in the Decree (e.g., serve simultaneously on the Council and the Accreditation Committee), and, even when persons don't serve on two of the committees at the same time, membership on the committees is rotated among the same group of persons, so that an insider serves first on the Accreditation Committee and then, having acted in accordance with the group's wishes, moves up to the Council, while at other times being a member of the Standards Review or Nominating Committees.

The Decree cures none of this. It does not prevent simultaneous service on two committees. And its provisions for term limits allow a *minimum* of twelve years membership, through successive nonsimultaneous memberships on the Accreditation Committee and Council; and actually allows *18* years of successive membership on those two committees if a person chairs each of them, as several have done.[25] The ostensible term limits further allow an additional three years on the Standards Review Committee and an unlimited period of membership on the Nominating Committee.

Nor, of course, does the Decree place any limit on the length of time that a person can be Consultant. It this allows one to use the Consultancy for decades as a power base, as James White has done.

Thus, the provisions for term limits, far from limiting the power of the group which has captured the accreditation process, presents opportunities for that group to perpetuate themselves in power.

E. What, then, can be done about these various problems? There is a certain amount of tinkering that can be done to improve the Decree, such as providing that a person's membership on any and all committees shall be limited to a *collective* total of six years, or that service as Consultant is limited to five years. But the two really crucial changes that would virtually insure against further violations and improper conduct are ones discussed above. First, the whole process should be made an open one. If all the pertinent documents, meetings and transcripts are open and subject to scrutiny by interested parties and the public, accreditors will no longer have the ability to get away with violations of law, false statements, phony or incompetent site reports, inconsistent and arbitrary conduct, and so forth. Second, the entire body of persons who captured and misused the process in the past, or assisted those who did, should be excluded from it in the future.

7. The Government's Heavy Reliance on the ABA Leadership Could Result in Failure to Remedy the Violations Charged in the Complaint

It is evident from the Consent Decree and the CIS that the DOJ is relying *very* heavily on the leadership of the ABA to prevent the Decree's effectiveness from being undermined by its weaknesses. Thus the Decree requires that all Interpretation and Rules shall go before

lawyers, the site report on MSL invented false claims that Massachusetts judges were concerned about MSL's student/faculty ratio and about the small percentage of applicants interviewed by the entire Admissions Committee rather than by one admissions officer. The report also omitted to mention, mentioned only cursorily, or gravely distorted MSL's objectives, the persons whom MSL serves and the fact that they have been frozen out of legal education, the methods MSL uses to bring efficiency into law school operations, MSL's efforts to diminish the long standing gulf between the academic and practical sides of law, its innovative courses and methods, its high percentage of truly small classes, important qualifications of MSL's faculty, the quality of instruction, the capabilities of MSL's students, the extensive student/faculty contact at MSL, MSL's view of scholarship, MSL's salary structure, MSL's teaching loads, the School's grading curve, the faculty's role in School governance, the School's views on attendance, MSL's views on the use of adjuncts, the student/faculty ratio, MSL's admissions process, MSL's electives, MSL's instruction in ethics, the School's program of concentrations, its residency practices, its class schedules, its clinical programs, the School's financial aid views and practices, its minority policies, its retention rates, its bar passage record, MSL's administrative structure, its library philosophy, its physical facilities, the School's law review, its placement philosophy, the criticism of legal education discussed in MSL's self study and underlying many of the School's views and practices, and crucial philosophies underlying MSL's finances.

[25] The Decree's provisions allow an individual two three-year terms on each of the committees (for a total of twelve years) plus an additional three years as chair of each committee.

the House of Delegates (Consent Decree, pp. 4–5), requires that for five years elections to the Council, Accreditation Committee and Standards Review Committee (but not the Nominating Committee) shall be subject to Board of Governors approval (Consent Decree, pp. 5–6), requires the Council to send annual reports to the Board of Governors (Consent Decree, p. 6), requires the Board to receive site inspection questionnaires before they are sent to law schools (Consent Decree, pp. 6–7), and indicates that the Board will review the Special Commission's recommendations (Consent Decree, p. 8). And thus it is that the CIS says that one reason the DOJ agreed that the insider-dominated Wahl Commission could be the Special Commission is that the ''ABA leadership was now familiar with and sensitive to antitrust concerns.'' [26] (CIS, p. 17.)

It is therefore clear that reliance on the ABA leadership to rectify anticompetitive actions has supplanted the more usual procedure of barring such actions in a consent decree. This course of conduct, however, is fraught with problems. One major problem is the perception it invites. The other is whether the ABA leadership can or should in fact be depended upon.

With regard to perception, although MSL does not claim to be au courant with all Division practices, it seems unusual for an enforcement agency not to seek to bar practices it finds illegal, and to instead tell the organization that violated the law to cure its derelictions itself. Reminiscent of overly generous treatment of violations that arose from misuse of power by private parties and led to the Tunney Act, this course of conduct leads to the question of why the ABA was given special dispensation. Further fueling this question is the fact that the ABA and government officials work together on many projects, high DOJ officials speak regularly at ABA conventions, the ABA passes on judicial nominees, and there are other ties. As wrong and unfair as the perception of untoward leniency may be, it will be there, particularly in this day and age.

Nor will the perception of special leniency necessarily be dissipated by assertions that questions of educational quality exist. The DOJ found instances when guild objectives rather than educational quality was the catalyst for inappropriate use of requirements regarding ratios, resources, facilities, etc. The question will thus remain of why wasn't anticompetitive conduct barred in at least those circumstances? Why was ''novel'' relief devised in *those* circumstances?

The perception of inappropriate leniency will be heightened because of serious questions over whether the ABA's leadership can or should be depended upon to be a major vehicle for reform. We note that, as a matter of history, in the mid 1970's it was thrice necessary for the DOJ to bring litigation or issue warnings, or for private parties to bring litigation, in order to put an end to antitrust violations committed or encouraged by the ABA. This occurred with regard to lawyers' fees, lawyer advertising, and prepaid legal service plans.[27] Yet the same mid 1970's, precisely when it was caught in three violations, was also the period when the ABA undertook the massive development of a fourth set of violations, in the field of accreditation of law schools. These historical facts do not give any reason to believe that the ABA leadership should be depended upon to be the vehicle of antitrust enforcement.

Further, the more recent record provides ample additional reason to think the leadership should not be depended on in this way, notwithstanding the statement in the CIS that the leadership has undergone some sort of conversion to better appreciation of the needs of antitrust. Prior to this claimed epiphany, the leadership had no interest in rectifying the antitrust violations. Thus, both the Board of Governors and the House of Delegates rejected MSL's efforts to resolve the relevant matters, notwithstanding MSL's extensive written and oral warnings of serious antitrust problems. The Board, indeed, after debate on whether to hear an oral presentation by MSL, decided against even hearing it. Subsequently, as the Section 16(g) Statement would indicate, the DOJ investigation was in progress for nearly 1½ years before ABA officials displayed any interest in resolving the antitrust matter with the Government. (They have never shown the slightest interest in resolving it with MSL.)

Then, after signing the Consent Decree, the ABA leadership has shown no sign indicating it can be relied on to be a primary vehicle of rectification, but has instead shown it should *not* be so relied on. When announcing the Decree, the President of the ABA, with the General Counsel sitting next to him, proclaimed, as said, that ''We do not believe that we have violated the Sherman Act in any particular''; this June 27th statement denying violation was carried in the ABA's national publication, the ABA Journal, as well as in other nationally circulated media.[28] Today, three months after the Decree was filed, the leadership appears to have done little if anything to enforce it, but has instead acted in a manner that is inconsistent with both its letter and spirit, and that augurs further anticompetitive actions. Thus, the leadership has not stopped the insiders from already violating the Consent Decree by demanding salary information from schools and *raising* the number of academics on the Nominating Committee to 80 percent, though the number permitted under the Consent Decree is only 40 percent.[29] The leadership has not taken steps to replace the insiders who have controlled and used the Section to further guild purposes: the same people still populate the pertinent committees, new persons with pro-competitive views have not been added to the committees, James White, the ABA's Legal Consultant still sits, and the new ABA Executive Director was a recent Council Chairman.

Additionally, rather than requiring postponement and change in the Special Commission's Report, the leadership allowed the insider-dominated Commission, on August 3rd, to release an initial report whose recommendations are vastly inadequate to remedy violations. Nor has the leadership taken steps to remedy untrue statements made in antitrust proceedings regarding the alleged nonavailability or irrelevance of documents and regarding an alleged longstanding practice of supposedly not considering salaries when making accreditation decisions. The statements regarding nonavailability of documents contradict the ABA's production to the Government in this antitrust proceeding and the statements regarding salaries contradict the Government's statements in its Complaint and Competitive Impact Statement.

Nor can it be ignored that the ABA is a very political organization in which the Section has long wielded great political power, that ambitious persons rise in the leadership by *not* making enemies of those with power, that there is continuous turnover of the elected

[26] It is a curious contrast that, when he announced the Consent Decree, the ABA's president, with its General Counsel at his side, said ''We do not believe that we have violated the Sherman Act in any particular.'' *See* n. 28, *infra.*

[27] See materials in Exhibit 18.

[28] Henry J. Reske, *ABA Settles Antitrust Suit on Accreditation,* ABA Journal, August 1995, at 24; Shanie Latham, *ABA, Justice Dept. Settle Antitrust Suit,* The National Jurist, August/September, 1995, at 6.

[29] The leadership allowed salary information to be sought via questionnaire even though the Consent Decree provides that the Board of Governors should receive questionnaires before they are sent to law schools. (Consent Decree, pp. 6–7.)

officers of the ABA, that the politically powerful Section continues to violently oppose the Consent Decree, and that, while it is claimed that the leadership has now undergone a metamorphosis regarding its antitrust responsibilities, the leadership, as said, cared nothing about antitrust for a long period of time.

Thus there is ample historical and current reason to fear that the DOJ's reliance on the ABA leadership, rather than on an injunction, as the vehicle for obtaining compliance with the antitrust laws will prove inadequate and may result in a failure to rectify the violations charged in the Complaint. There are two simple steps that can be taken to cure this problem, however. First, anticompetitive practices found to exist by the Government should be enjoined, as discussed above. Second, to test whether the leadership will in fact act in accordance with a new found commitment to antitrust, the Tunney Act hearing should be postponed until December 31, 1995 (as discussed above) to see whether the leadership forwards recommendations adequate to cure the violations and whether it has taken other steps that are required by the Decree or are desirable to cure violations. Such other steps would include, for example, appointing numerous persons known to have procompetitive views to the various committees, and excluding from further Section work the capturing insiders and their supporters, who are responsible for the problems.

8. The Effectiveness of the Decree is Potentially Diminished by Lack of Knowledge Regarding the Identity of an Antitrust Compliance Officer, by a Serious and Inexplicable Limitation on the Compliance Officer's Duties, and by Reliance on Staff of the Department of Education Who Have Been Ineffective in Regard to the ABA

The Consent Decree provides that the ABA shall appoint an Antitrust Compliance Officer who shall supervise a compliance program by, among other things, supervising accreditation activities to insure they are not inconsistent with certain provisions of the Decree. (Consent Decree, pp. 8–10.) The Antitrust Compliance Officer is to be appointed within 30 days of entry of the Decree. The Decree also provides that the ABA shall, by October 31, 1995, hire an independent, non-legal-educator, outside consultant to assist in validating all Standards and Interpretations as required by the Department of Education (''DOE'') and to develop a plan for such validation by December 31, 1995. (Consent Decree, p. 7.)

A. The existence of an Antitrust Compliance Officer could be a matter of the first importance. However, the identity of the Officer is crucial. Antitrust is a field in which there is a wide gulf between the opinions of two vigorously differing sides of the bar. There is the plaintiff's side of the bar, composed of Government enforcers and plaintiffs' treble damages lawyers, who believe in and seek relatively widespread and vigorous application of antitrust. On the other side, there is the defense side of the bar, whose members, by belief and affiliation, generally minimize the circumstances in which antitrust violations should be found to exist. There are relatively few lawyers who straddle the two camps intellectually and by professional affiliations.

If the person appointed to be the Compliance Officer is highly defense oriented by belief and previous professional commitments and work, then the result is likely to be approval of activities which would be found anticompetitive and which would not be approved even by persons who straddle the two camps. What is anticompetitive, and what cannot be justified by claims of being necessary for quality, are, after all, matters which are subject to differences of opinion. Thus, the identity, professional background, and views of the Compliance Officer will almost surely be vital in determining whether the person will be an adequate proponent for the strictures of the Decree. His or her identity will be vital to assessing whether the public interest will be served or thwarted by the provision for a Compliance Officer.

Yet, as said, under the Decree the Compliance Officer will not be selected until *after* the Decree is entered—and thus will not be known to the Court when assessing whether the public interest will be served. The Court will thus be unable to make a fully knowledgeable assessment.

The problem, however, is readily curable. The Decree need only provide that the Compliance Officer must be named a reasonable time *before* the Tunney Act hearing, so that knowledgeable assessments can be made by the DOJ, commentators and the Court as to the likelihood that the named individual will be a vigorous proponent of antitrust. Naming a Compliance Officer before the Tunney Act hearing should not pose any more problem than naming a DOE consultant by October 31, 1995, which the Decree specifically provides shall be done. (Consent Decree, p. 7.)

Additionally, the Decree presently contains a paramount hole in the duties of the Compliance Officer. The Officer is to review ABA actions to be sure they do not violate Sections IV and VI (Consent Decree, pp. 8–9.), which respectively (a) list the activities banned outright by the Decree—including price fixing, denial of entry into graduate programs, denial of transfer credit, and preclusion of profit making status—and (b) supervise various procedural matters such as those involving membership on committees. *But the Compliance Officer has no supervisory responsibilities relating to Section VII of the Decree, and therefore does not supervise the ABA's accreditation activities in the areas where recommendations are to be received from the Special Commission (after review by the ABA leadership), recommendations which are to govern if not challenged by the Government or which are to govern as possibly amended after a DOJ challenge. This is an incomprehensible lacuna in the duties of the Compliance Officer.* The accreditation rules governing the matters to be treated by the Special Commission—e.g., student/faculty ratios, hours of work by professors, physical facilities, and so forth—have encompassed several of the most crucially important, most anticompetitive, actions of the accreditors. Yet, as said, such matters are not to come within the purview of the Antitrust Compliance Officer. How can this possibly be justified? How can it be within the reaches of the public interest? There is, of course, a simple corrective step, which is to change the Decree so that the Compliance Officer also has the duty of reviewing and supervising accreditation activities involving student/faculty ratios, hours of work and other matters that are to be addressed in the first instance by the Special Commission and reviewed by the ABA.

B(i). The reason why the DOJ has required the ABA to ''validate'' the accreditation criteria as required by the DOE is not entirely clear. It *would* be clear if, in accordance with the DOE's abstract written criteria of ''validity,'' DOE approval ensured that ABA accreditation criteria assure educational quality. Unfortunately, however, DOE review of the ABA has been wholly ineffective to date in assuring quality.

(ii). DOE assessment of accrediting agencies such as the ABA is carried out by a small office which has relatively few staff members. For convenience we shall refer to it simply as the Accreditation and State Liaison Division (''ASLD''). The ASLD receives reports from accreditation agencies such as the ABA; ASLD has charge of scores of such agencies who report to it. After

reviewing a report from an accrediting agency, and otherwise communicating with it, ASLD makes a recommendation to the National Advisory Committee on Institutional Quality and Integrity (''NAC'') on what action should be taken regarding the accrediting agency. To consider and recommend such action, the NAC meets two times a year, for about three days at a time. Its recommendation for each agency is forwarded to the Secretary of the Department of Education, whose office sends the accrediting agency a letter that usually adopts the NAC's recommendation.

The NAC is by and large an admirable group. It is comprised of volunteers who generally are accomplished in the field of education or other public fields—numerous university presidents, professors, other knowledgeable academic persons, legislators, and public spirited people serve on the NAC. They appear to give it extensive time and to work hard, and most of them seek to do what is right.[30]

But the NAC operates under serious handicaps. Being comprised of volunteers who have time consuming, energy consuming professional careers elsewhere, but who nonetheless are confronted with the need to read reports and make decisions on scores of matters annually, the time that NAC members can give to any one accreditation agency individually, or even to all collectively, is limited. To a major extent, therefore, the NAC has to rely on the Staff of the ASLD.

The Staff's work with regard to the ABA, however, has been ineffective to date in assuring quality and in precluding self-interested conduct unrelated to quality. Perhaps this is because, as the responsible staff member said at a hearing on December 5, 1994, the staff members, who are not lawyers, feel that they are ''not in a position to say'' whether or how quickly ABA criteria need to be revised. (Exhibit 21.) Perhaps it is because the ASLD is a small office. Perhaps it is simply a reflection of the fact that, as publicly stated by Assistant Secretary David Longanecker at a meeting of the NAC on December 5, 1994, the DOE had not been doing its job well (''there was serious skepticism about the Department of Education's performance and very, very, very serious questions about the performance of the accrediting community * * *'' (Exhibit 22)). Whatever the reasons, there was ineffectiveness with regard to the ABA. Time and space preclude extensive elaboration here of the many facts showing such ineffectiveness, so we are simply attaching as exhibits illustrative materials showing crucial points the staff ignored (Exhibit 23.) *Many of those points are the same ones that the Division has now made in the Complaint and CIS.* Thus, it is perplexing that the Antitrust Division would now rely on the DOE as a vehicle for assuring quality or for precluding self-interested conduct.

9. In Order To Insure That the Purposes of the Tunney Act Are Carried Out and Its Provisions Complied With, the Consent Decree Needs To Provide for the Filing of Determinative Documents and Materials, and Approval of the Decree Must be Conditioned on Making Available The Documents That Injured Private Parties Need to Effectively Pursue Their Claims

A. Under Section 2(b) of the Tunney Act, 15 U.S.C. 16(b), any ''materials and documents which the United States considered determinative in formulating'' the proposed consent decree ''shall also be made available to the public at the district court and in such other districts as the court may subsequently direct.'' Under Sections 2(e) (1) and (2) of the Act, 15 U.S.C. § 16(e) (1) and (2), in considering whether the consent decree is in the public interest, the court may consider the decree's ''competitive impact,'' its ''impact * * * upon the public generally,'' and its ''impact * * * upon * * * individuals alleging specific injury from the violations set forth in the complaint.''

Notwithstanding Section 2(b)'s injunction that determinative materials and documents should be made available, the DOJ, following its nigh uniform practice, has said in the CIS that there are no such materials or documents. (CIS, p. 15.) It has also said that the decree will ''neither impair nor assist'' the bringing of treble damages actions (CIS, p. 14.), which is a way of saying the decree will have no ''impact * * * upon * * * individuals alleging specific injury from the violations set forth in the complaint.'' As discussed in more detail below, these statements raise serious questions regarding the compliance mechanisms of the decree and regarding whether the DOJ is fulfilling the duties placed upon it by the Tunney Act.

B. When the Tunney Act was enacted in the aftermath of a scandal over settlement of a government antitrust case against IT&T, Congress was deeply concerned, as Senator Tunney said, about ''antitrust violators [who] wield great influence and economic power'' and can ''bring significant pressure to bear on government, and even on the courts, in connection with the handling of consent decrees.''[31] An important matter, said Senator Tunney, was ''the excessive secrecy with which many consent decrees have been fashioned.''[32]

Congress desired the consent decree process to remain a viable method of resolving government antitrust litigation, but it also wanted courts to have sufficient information to make a considered judgment on whether the public interest was being served, and it was deeply concerned lest consent decrees injure the interests of private plaintiffs who had been harmed by violations. The need for a balance was stressed in the Senate Report in language later quoted in the House Report. The Reports said that a ''court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option.''[33] The Reports then pointed out that, where the interests of private plaintiffs required it, ''*the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private*

[30] Unfortunately, one member of the NAC, Robert Potts (who was supported by the General Counsel's office of DOE, amazingly enough), refused to disqualify himself from participating in the NAC's 1994 discussion of the ABA though he was then the President of the National Conference of Bar Examiners (''NCBE'') which works *very* closely with the Section of Legal Education. (Exhibit 19.) The relationship between the NCBE and the Section is exemplified by the fact that the NCBE and the Section jointly publish a ''Comprehensive Guide To Bar Requirements,'' that the joint Guide sets forth the Code of Recommended Standards for Bar Examiners, which says that all bar admission candidates should be required to have attended *an approved ABA School,* and that Potts and Joseph Bellacosa, then Chairman of the Council, jointly signed a Preface to the 1995–96 edition of the joint Guide. Exhibit 20. Not surprisingly, Potts supported the ABA in the NAC's discussion.

[31] 119 Cong. Rec. 24597 (quoting Judge Skelly Wright) (1973).

[32] Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 38 (1973).

[33] The Circuit Court stated in *United States* v. *LTV Corp.*, 746 F.2d 51, 52 n.2 (D.C. Cir. 1984), that ''The APPA was adopted in the wake of concerns that government consent decrees had been entered in secrecy and without adequate attention to the public interest. The twin goals of the Act have been described as ''[f]irst, that the courts would be able to obtain the requisite information enabling them to make an independent determination, and second, that the consent decree process would be preserved as a viable settlement option.''

plaintiffs which will assist in the effective prosecution of their claims.'' [34]

The concern over harm to private plaintiffs was elaborated on the floor by Senator Tunney. He said that, because the Government may be the only party with sufficient resources to effectively counter a wealthy defendant, one consequence of a consent decree is that it leaves few private plaintiffs who have the resources to sustain a case:

> The consent decree [as distinguished from pursuing a case to judgment through trial] has a number of major public consequences, however. First, it means that the substantial resources of the Justice Department will be removed from the effort to establish that the antitrust laws were violated. Because consent decrees by statute carry with them no prima facie effect as an admission of guilt, private parties who may have been damaged by the alleged violations are left to their own resources in their efforts to recover damages. As a practical matter because of the protracted nature of antitrust litigation, and the deep pockets of many corporate defendants, few private plaintiffs are able to sustain a case in the absence of parallel litigation by the Justice Department.[35]

He then extensively pointed out that, because of the effect of consent decrees on private plaintiffs harmed by the violations, it can be appropriate *not* to enter a decree, but to instead require the Government to go to trial so that private plaintiffs will be aided:

> * * * [I]n addition to weighing the merits of the decree from the viewpoint of the relief obtained thereby and its adequacy, the court is directed to give consideration to the relative merits of other alternatives and *specifically to the effect of entry of the decree upon private parties aggrieved by the alleged violations* and upon the enforcement of the antitrust laws generally.
>
> These latter two points merit some additional explanation. First, as is well known by the antitrust bar, in the vast majority of cases, the Government is the only plaintiff with resources adequate to the task of protracted antitrust litigation. Thus, a major effort of defense counsel in any antitrust case is to neutralize the Government as plaintiff and leave prospective private plaintiffs to their own resources. Consent decrees have that effect because by statute they cannot be used as prima facie evidence of a violation in subsequent suits by private plaintiffs.
>
> Thus, removal of the Government as plaintiff through entry of a consent decree has a profound impact upon the ability of private parties to recover for antitrust injuries. Such a result is by no means improper nor perhaps in every case unreasonable. But because of that impact, it is a factor which should enter into the calculus by which the merits of the decree are assessed. *It may well be that the economic cost to the public of a particular antitrust violation merits the application of governmental resources toward gaining a recovery of that cost in damages for those who can establish their injury.*[36]

As Congress provided, an alternative to refusing to enter a consent decree and thereby forcing the government to try a case in order to aid private parties is, in the words of the House and Senate reports, to ''condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims.''

C. To incorporate in the Tunney Act its concerns that the Court receive information needed to determine whether a decree is in the public interest, and whether the interests of injured private parties are preserved, Congress enacted three specific provisions. One is Section 2(e)(1), under which the Court is to consider the competitive impact of the consent decree. The second is Section 2(e)(2), under which the Court considers the impact of the decree on parties harmed by the violations and can condition approval of the decree on the government's making available to private parties the information and evidence it obtained. The third is Section 2(b), under which the Government is to file the documents that were determinative in formulating the consent decree. Section 2(e)(1) and 2(e)(2) are self explanatory. Section 2(b), the determinative documents provision, requires some elaboration.

There is a wide spectrum of documents, evidence, memoranda and other materials that can be determinative in deciding what provisions shall be put into and which kept out of a consent decree. For the specific provisions of the decree—the practices it bans, the ones it does not ban, and its enforcement mechanisms—depend on what the government has learned in the course of its investigation. This was put as follows in Senate hearings on the Tunney Act by Professor Howard Lurie, who testified that the determinative materials provision:

> Covers more than simply those materials and documents which were relevant to the Government's decision to settle the case by consent, but covers in addition those which were relevant to the formulation of the consent judgment. In other words, the bill calls for the disclosure of those materials and documents which were relevant to the relief, and that of necessity includes those materials and documents which go to establish or prove the violation of law.[37]

Precisely because it was aware that the ''determinative documents'' provision encompasses a wide range of documents and evidence, the Antitrust Division vigorously opposed it. Thus, Assistant Attorney General Thomas Kauper wrote Congress a letter of opposition saying that:

> The bill, as reported out, provides that the United States shall file, in addition to that which it already files, ''other materials and documents which the United States considers determinative in formulating the proposed consent judgment.'' This conceivably could require production of virtually every piece of paper generated by the staff of the Antitrust Division, outside reports of complainants and the like, as such documents may be considered in one way or another to have entered into the determination of the government to enter the settlement, and thereby would be ''determinative.'' [38]

Notwithstanding the Division's opposition, Congress enacted the determinative documents provision as originally drafted.

The Division, however, then embarked on a course of nullifying the provision by saying in nearly every case, as it has here, that no documents were determinative. Reduced to its essence, the Division's position almost uniformly has been that, because many documents were determinative, no documents were.

The Division's position has been litigated in only one case—*United States* versus *Central Contracting Co., Inc.*—in which the court rejected the Government's position three separate times, at 527 F. Supp. 1101, 531 F. Supp. 133, and 537 F. Supp. 571 (E.D. Va. 1982). In its first opinion, the court, pointing out that the Tunney Act ''sets out procedural requirements with which the parties are to comply,'' held that:

> Where the parties ignore the procedures, not only is the public hampered in its efforts to provide the Court with information that the Court may find helpful, but also the silent record raises a specter, however incorrect in a given case, of the questionable practices which characterize some of these arrangements that Congress sought to guard against through passage of the Act. See 119 Cong. Rec. 24598 (1973).[39]

---

[34] S. Rep. No. 93–298, 93d Cong., 1st Sess. 6–7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); *LTV, supra* n. 33.

[35] 119 Cong. Rec. 3449, 3451 (remarks of Sen. John V. Tunney, introducing S. 782, 93d Cong., 1st Sess., February 6, 1973).

[36] 119 Cong. Rec. 3449, 3452 (1973) (emphasis added).

[37] Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 128 (1973).

[38] 119 Cong. Rec. 24601 (1973).

[39] *Central Contracting,* 527 F. Supp. 1101, 1102.

The court then refused to accept the Government's nullification of the determinative documents procedure:

The Court finds plaintiff's statement in Paragraph 7 of its competitive impact statement that it considered ''no materials and documents * * * determinative'' in formulating its proposal for a consent judgment to be almost incredible. Section 2(b) of the Act refers in ''any * * * materials and documents which the United States considered determinative in formulating such proposal.'' 15 U.S.C. 16(b). The Court is skeptical that *no* documents were significant in formulating the proposed consent judgment. If any documents were considered plaintiff should comply with Section 2(b) forthwith.[40]

The Court expressed its views even more vigorously in its second opinion, 531 F. Supp. 133, 134:

But in the instant case, plaintiff appears to interpret ''determinative'' as if it means a single critical or decisive document which evoked a cry of ''Eureka!'' from the Justice Department. The Government seems to contend that if no *one* document were ''determinative'' it may refuse to disclose the several documents which were determinative. Although it is conceivable that in some rare case a single document may hold such vital importance it is hardly conceivable that *no* document is of vital importance. Indeed, in most circumstances a determination will be based upon an aggregate of facts, materials, and documents, no one of which may be of overwhelming importance but when viewed together are determinative as to the way in which the United States elects to proceed in a given situation. The materials and documents that substantially contribute to the determination to proceed by consent decree must be disclosed and a list thereof published pursuant to section 2(c) of the Act. 15 U.S.C. 16 (b) and (c). (Emphasis in original.)

In its third opinion, the Court rejected the Government's position that ''the legislative history of the Act supports a definition of 'determinative' which excludes 'evidentiary materials' obtained by the government.'' 537 F. Supp. at 574. The Court said that ''[i]n most cases * * * a determination to proceed on a given course will be reached upon an aggregate of information'' which today is ''collected and communicated in document form,'' and it is ''the aggregate of these documents and other materials that leads the Justice Department to a conclusion that it should enter into a consent decree.'' *Id.* at 575. Nor, said the Court, did the government argue that ''the decision to proceed with the consent decree was an idea that came out of the blue. *Rather, the idea emerged through consideration of compiled information concerning the alleged offense * * *''* *Id.* at 576 (emphasis added).

The Court once again rejected the Division's continued claim that there are no determinative documents, saying:

* * * by it own statistics, the Department of Justice states that out of the 188 cases that have settled by consent decree since the enactment of the Act, only 16 have involved ''documents [and other materials] which the government considered determinative in formulating the relief,'' Pl.Br. at 6. If this be true, (and given the Justice Department's construction of the Act, the Court does not doubt its truth) then the directive in the Act is either superfluous, or it is being misinterpreted or subverted. The Court presumes that Congress did not intend legislation to be superfluous * * * *Id.* at 575.

* * * * *

Plaintiff suggests that it is not unusual for there to be no determinative documents even in the most complicated of cases. *CF., United States* v. *AT&T*, Civ. No. 74–1698 (D.D.C.) (dismissal of monopolization suit against AT&T in which Justice Department has agreed to abide by provisions of the Act). That view, in the opinion of the Court, is based upon a misinterpretation of the Act. The Act clearly does not require a full airing of Justice Department files *but the Court cannot countenance plaintiff's claim that though Congress enacted sunshine legislation the courts may blandly (and blindly) accept government certification in case after case that no documents or materials, by themselves or in the aggregate, led to a determination by the government that it should enter into a consent decree.* (*Id.* (emphasis added).)

*The Court simply cannot accept an interpretation of legislation that permits the government to assert in 172 out of 188 cases that it considered neither documents nor any other materials determinative in reaching its conclusion to enter into a consent decree. To reiterate, the Act as interpreted by this Court requires the government to disclose ''[t]he materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree. * * *''* *United States v. Central Contracting Co., supra*, at 134 (E.D.Va. 1982). This does not require full disclosure of Justice Department files, or grand jury files, or defendant's files, but it does require a good faith review of all pertinent documents and materials and a disclosure of those which meet the above criterium. (*Id.* at 577 (emphasis added).)

In short, first Congress overrode the Antitrust Division's efforts to defeat the broadly encompassing determinative documents provision, and then the only Court to consider this issue flatly rejected the Division's consistent efforts to subvert Congressional intent, including efforts to subvert it by arguing that determinative documents do not include evidentiary materials. Notwithstanding this, and even though antitrust law is a documents-driven field, the Government, as here, continues to ignore its responsibilities, the will of Congress, and judicial disapprobation by claiming in virtually every case that no documents were determinative.

D. Serious questions regarding the efficacy of the Consent Decree's compliance mechanisms, and the DOJ's fidelity to its statutory duty, arise because here the Government claims, as usual, that there were no determinative documents. Such questions also arise because of a need to protect the interests of injured parties by making available to them documents and information gathered by the Government that will ''assist in the effective prosecution of their claims.''

D(i). *Determinative documents and materials.* As discussed above, there are numerous questions here regarding the efficacy of compliance mechanisms in the Decree. Without submission by the Government of documents and materials showing why the DOJ believed those mechanisms will be successful and therefore decided to include them in the Consent Decree, the Court cannot make—as Congress intended it to make—an *informed* determination that the Decree's remedial provisions are in the public interest. Without submission of the determinative documents and materials, the Court is remitted to simply accepting the Government's unsupported claims that provisions it agreed to are in the public interest—the very kind of uninformed judicial acceptance that Congress sought to avoid by passage of the Tunney Act. This can be demonstrated by the following examples:

(a). Having found that reform of the accreditation process is necessary because it has been captured by self interested persons, the Government formulated a Consent Decree that relies on percentage limitations on the number of faculty on various committees to achieve such reform. The Government determined to so rely even though, under the Decree, the very same persons who captured and used the process are free to comprise up to 50 percent of the membership of pertinent committees, and even though the problem of capture has resulted not from mere numbers, but from these individuals' deep interest in and their consequent willingness (and their time) to do the work of accreditation. What determinative documents and materials persuaded the Government that notwithstanding these facts, (1) accreditation will not continue to be controlled by these individuals, and (ii) they will not be able to continue to maneuver accreditation in their own interest? Is the Government persuaded that these apparent problems are not in

[40] *Id.* at 1104.

fact problems because determinative documents and materials show that the ABA leadership has promised it that the individuals who captured the process will be excluded from the relevant committees or will comprise only a very small proportion of them?

(b) The Government has formulated a Decree that places heavy reliance on the ABA leadership to control the Section and preclude further anticompetitive actions. The DOJ did so even though it knew that the leadership resisted correcting the problems in the past when they were called to its attention in 1993, 1994, and early 1995, that the leadership persuaded it to allow a Special Commission packed with insiders—who believe in the violations—to make recommendations for change, and that the ABA is a highly political organization in which the Section wields much power. The Government continues to rely on the leadership though the latter has thus far taken no steps to clean house in the Section and has allowed the Section to flout the Consent Decree. Why has the Government done this? Are there determinative documents and materials showing that the ABA leadership has made promises of change and that such promises are backed by believable commitments for future action even though events to date do not bear out any such commitments?

(c). At least on its face, the Government's formulation of a Decree that relies on the insider dominated Wahl Commission to be the Special Commission that recommends changes in anticompetitive practices is unwarranted. This is the more true because of the inadequacy of the Commission's initial recommendations and its members' request for the suppression of the views of Dean Cass. What, then, do determinative documents show to be the reasons that led the Government not to adhere to its initial position that a special antitrust review committee should be the Special Commission, and to agree instead that an insider-dominated group responsible for the challenged violations can be the Special Commission? Are there determinative documents showing that the ABA leadership made a commitment to change the recommendations of the Wahl Commission if they were inadequate?

(d). As with almost all conspiracies, secrecy concerning accreditation has been the linchpin of the conspiracy. It is secrecy that allowed anticompetitive actions, secret rules and inconsistent conduct to exist unknown to scholars and analysts, enforcement agencies, reporters, members of the public and others, and which disabled potential students from learning more about schools as a matter of consumer protection. At least on its face, the Consent Decree formulated by the DOJ allows extensive secrecy to continue. Why? What do the determinative documents show as to why this is being allowed? Do they show that, notwithstanding that the Decree does not on its face open up the process to public scrutiny, there are commitments from the ABA leadership to open it to public scrutiny in order to insure against future anticompetitive actions, secret rules and inconsistent conduct?

(e). The Government initially intended to seek a prohibition against anticompetitive ABA rules on student/faculty ratios, limitations of teaching hours, leaves of absence, and banning of credit for bar review courses. It has evidence that such rules, plus rules on physical facilities and allocation of resources, have at times been used to further guild interests. It knew the circumstances in which they had been so used. It knew that it was common for the rules to be used in conjunction with fixing of the price of salaries, which is banned outright, and that actions taken in conjunction with forms of price fixing are normally banned along with the price fixing.

Yet, the DOJ became persuaded that the rules implicate educational concerns and, instead of enjoining them, at least in the circumstances in which they have been used anticompetitively, agreed to formulate a Decree that allows them to be considered by a Special Commission. Why? What do determinative documents and materials show to be the reasons why they were not banned outright in any circumstances whatever, not even when used in conjunction with price fixing or in circumstances known to be intended to advance guild interests?

(f). The DOJ formulated a Decree in which the duties of the Antitrust Compliance Officer do not encompass accreditation rules in areas where the Government has found the accreditors to have anticompetitively pursued guild interests instead of educational quality (areas such as ratios, physical facilities, etc.). Why were such areas excluded from the antitrust compliance program? What do the determinative documents show in this regard?

D(ii) *Interest of injured private parties.* In the last two decades, the ABA has caused injury to and sometimes even the outright destruction of a significant number of law schools, because anticompetitive rules identified in the Complaint were used to deny accreditation to the schools, to withdraw accreditation from them, to make clear to schools that it was useless for them even to seek accreditation, and to raise the costs of beginning new schools. Many of these injured institutions, particularly those injured during the latter half of the period, have potential claims against the ABA, but most of them will never be able to afford to bring the claims, and if they were to bring them, would be unable to afford to pursue them to victory, unless approval of the Decree is conditioned upon the Government making available the claim-proving information and documents it has gathered. For as the ABA has shown in its litigation against MSL, its defense tactics are the very scorched earth tactics that caused Senator Tunney to say when introducing the Tunney Act (i) that ''because of the protracted nature of antitrust litigation, and the deep pockets of many corporate defendants, few private plaintiffs are able to sustain a case in the absence of parallel litigation by the Justice Department,'' (ii) that ''a major effort of defense counsel in any antitrust case is to neutralize the Government as plaintiff and leave prospective private plaintiffs to their own resources,'' and (iii) that the costs to injured parties of violations might justify requiring the Government to go to trial instead of being allowed to settle by consent, and that led Congress to say in its Reports that a court should consider conditioning approval of the Decree upon the Government making relevant documents available to private parties.

The ABA's defense tactics, tactics Congress knew and feared, feature stonewalling against production of documents needed to prove a case: in nearly two years, as the Government knows, the ABA has produced to MSL less than 50,000 of the 544,000 documents which it admits to having produced to the Government and which led the latter to say in its CIS that it could prove the charges in the Complaint—which are mainly identical to MSL's.[41]

That the ABA uses these tactics to defeat the claims of injured private parties is an unhappy demonstration that, contrary to the Government's statement, the Consent Decree will have a deeply adverse impact on private

[41] As said earlier, the ABA has also made untrue representations regarding alleged lack of availability of documents which it has already assembled and produced to the DOJ, and has presented false deposition testimony, concerning price fixing, which contradicts the charges the Government has made and says in the CIS it can prove. We have attached recent briefs filed by MSL discussing the false testimony. (Exhibit 24.)

parties, many of whom will be unable to afford even to bring their claims, let alone pursue them to victory, if the Decree is entered without making documents and information available to the private parties. It is likewise a demonstration that approval of the Decree, in accordance with Congressional intent and statutory language, should be conditioned on the Government making available to private parties the documents and materials it has gathered that will enable them to effectively prosecute their claims. This is required in order to give appropriate consideration to the decree's ''impact * * * upon * * * individuals alleging specific injury from the violations set forth in the complaint.'' 15 U.S.C. 16(e)(2).

10. There are Three Areas, Involving Rules Which Stifle Competition, in Which USL Urges the Division to Reconsider its Decision not to Act

We conclude with a discussion of three matters to which we recommend the Government give further consideration.[42] Because the matters were not charged as violations in the Complaint, in accordance with the Court of Appeals decision in *United States* v. *Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), MSL is not urging that the Court should require the Consent Decree to be revised to cover these matters. Rather, MSL is urging only that the Division itself might decide to reconsider them because they involve anticompetitive guild actions used to prevent the establishment of new, and to eliminate existing, law schools that provide a more efficient, lower cost education. Such education makes law school accessible to less economically privileged individuals, e.g., to persons from working class and minority backgrounds. These guild practices also lessen the quality of legal education.

A. *The Requirement That Substantially All First Year Courses Be Taught By Full-Time Faculty Members As Defined By The ABA.* In the CIS, the Government says that it initially proposed injunctive relief barring the ABA's requirement that substantially all first year courses be taught by full-time faculty (CIS, p. 15), but that evidence it gathered persuaded the DOJ to abandon its opposition to the practice. (CIS, p. 16.) Given the current unavailability of determinative documents showing what evidence persuaded the Division to abandon its opposition, MSL cannot know why the DOJ came to feel it permissible to force all 178 accredited law schools, and every law school seeking accreditation, to follow this practice without even a single exception. What we do know, however, is that the practice is anticompetitive, can result in legal education being unaffordable to persons who are less privileged economically, and often lessens, not heightens, the quality of legal education.

The anticompetitive nature of the practice is obvious. There are a number of unaccredited law schools in this country—in California, Tennessee, Alabama, Georgia and Massachusetts—which seek to make legal education available to less privileged individuals, particularly persons from the working class and minority persons such as African-Americans and Hispanic-Americans. Many of these schools use highly knowledgeable judges and lawyers as adjuncts to teach various first year courses. The schools exist in the aforementioned states because the states allow the schools' graduates to take bar examinations. But the growth of the schools is stifled because their students cannot take bar exams elsewhere, and such schools cannot be established elsewhere.[43]

The rule thus anticompetitively stifles the growth and establishment of schools devoted to serving the less-privileged. Furthermore, the rule reflects true—and correctly felt—terror of competition. For at least 90 years the Section of Legal Education has been aware that, because they provide a lower cost method of legal education, the schools in question will ultimately expand to populations additional to the economically less-privileged if the schools are allowed to flourish with the cachet of ABA accreditation. Many people—whether poor, middle class or rich—do not want to pay $20,000 per year in tuition for legal education if good education is available at $5,000 or $10,000 per year. The terror this potential competition presents has become particularly acute today (as it was in the 1920s) because (i) the cost of tuition at ABA schools, driven by the expensive guild mandates of the accreditors, has become so high and (ii) (a) students, like the practicing and judging arms of the legal profession, are increasingly demanding education in practical skills, (b) current ABA schools often are deficient in such education and have locked themselves into high cost structure that leave little or no financial room for adding skills training to the curriculum, (c) students would go to schools that offer such skills if the schools were ABA accredited, and (d) the schools which currently are precluded from obtaining accreditation do, or if established would, offer extensive education in practical skills (as well as the customary theoretical training).[44] There is thus serious concern over the competition such schools would offer if accreditation were not precluded by ABA rules, including the rule requiring substantially all first year courses to be taught by full-time faculty members as defined by the ABA.

B. *The Ban On Full-Time Students Working More Than 20 Hours Per Week.* This rule bars a school from competing by allowing its full time students to work for compensation more than 20 hours per week outside the law school. By preventing schools from thusly competing, the rule destroys the ability of some less-economically privileged persons to obtain a legal education and works an enormous hardship on other such persons.

[42] There are additional deeply anticompetitive practices which MSL believes are violations of the antitrust laws, but they are not discussed here.

[43] The populations whom those schools seek to serve in the five aforementioned states, and who would be served by similar schools elsewhere, often are in straitened economic circumstances. Yet they too wish to rise on the socio-economic scale, and it has been the promise of America that they should have a chance to rise as high as their capabilities and willingness to work can take them. Nonetheless, the unchallengeable historic record show that, since its founding in 1878, the ABA has regularly taken actions to bar this rise, and that actions which prevent it have for more than 30 years been a staple of the activity of the Section of Legal Education. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s, passim* (1983); Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America, passim* (1976). Such actions by the ABA and the Section of Legal Education have always been defended by the mantra of quality. But though wrapped in the flag of quality, the actions have always knowingly harmed and continue to knowingly harm the poor, immigrants, minorities and the working class.

[44] It is especially crucial that adjunct professors teach the all-important practical skill of writing in the first year of law school. Failure to train students to write well is one of the gravest deficiencies of legal education. It can be cured only by giving extensive, intensively supervised writing courses to students in small groups having approximately ten or less students and taught by competent, perhaps even professional, writers. This is the way that writing is taught competently in the few areas of education where it *is* taught competently. The only financially feasible method of doing this for most law schools is to hire a large corps of capable adjuncts who are professional writers or, in some cases, are lawyers who write well. Every other method the law schools have tried has been a jury rigged, Rube Goldberg failure. Using third year students to supervise writing classes has been a failure. Using instructors who are recent law school graduates with no practical experience has been a failure. Having a full-time professor supervise scores of students has been a failure because the amount of work needed is too great to effectively supervise scores of people. But under the ABA's rule regarding first-year courses, the only method that will work cannot be used, since the use of a large body of professional writers or competent lawyers as adjunct writing teachers would almost surely cause a violation of the guild rule regarding first year classes.

Since only slightly more than one-third of the ABA law schools offer part-time study,[45] there are many geographical areas of the country where no part-time legal education is available. In those areas persons whose financial situation compel them to hold full-time jobs are precluded from attending law school or can attend only under extreme hardship. The rule barring schools from competing by allowing students to work more than 20 hours per week thereby makes it especially difficult or even impossible for such individuals, however competent, to attend law school as a means of exercising their right to choose a career and of improving their socio-economic position. In other geographic areas the same results obtain because, though part-time education is available, it is only available in sufficient quantity at ABA schools to accommodate a fraction of the competent but less-privileged applicants who must hold full-time jobs.[46] The anticompetitive rule perpetuates these antisocial results regardless of whether the excluded or injured individuals are capable of taking a full schedule of law school courses while working more than 20 hours per week, as many are.

There is no defensible justification for this rule. To begin with, when the Standards were adopted in 1973, the House of Delegates expressly made clear its intention, which was part of the legislative history, that the rule would not apply to persons who worked in a law firm—that was regarded (rightly) as in itself being legal training. (Exhibit 27.) It is the capturing insider group which has extended the rule to work done for a law firm. It has done so in defiance of the express intent of the House of Delegates.

Furthermore, it is widely known that the rule is regularly violated instead of being enforced in the name of purported quality of education. It is common in large cities for full-time students to work more than 20 hours per week for compensation, especially at law firms. The ABA accreditors know this is occurring, and in effect wink at it.[47] They wink at it even while ostensibly enforcing it by forcing schools to require full-time students to sign affidavits saying they are *not* working more than 20 hours per week.

Moreover, the accreditors discriminatorily purport to bar more than 20 hours of work per week *only* when it is done for compensation (by students who need the money). The accreditors do not bar a full-time student from working 25, 30 or even 40 hours per week at a public interest organization that does *not* pay the student. Nor do the accreditors ban a woman (or a man) from working in the home 30 or 40 hours per week or more, as many female students do, nor bar a wealthy full-time student—and there are such—from spending 30 or 40 hours per week tracking investments. As said, the only thing banned by the anticompetitive, antisocial rule is work exceeding 20 hours per week by those who need to and do obtain compensation—by those who need the money.

C. *The Requirement of Enormously Expensive But Needless Hard Copy Books In A Law School Library.* It is widely regarded that librarians have been among the groups which most effectively captured the ABA accreditation process and used it to advance their own, often anticompetitive guild interests, including higher salaries for librarians, ever greater prestige obtained through greater independence within the law schools and university library systems, obtaining of near-tenure for library directors, ever fancier and more elaborate physical facilities for libraries (facilities that now can cost ten million dollars or more), and very large, ever expanding hard cover collections of books that cost several millions of dollars.

Because of their enormous costs, the requirements of ever more elaborate physical facilities for libraries and ever larger hard cover book collections are instrumental in anticompetitively preventing the establishment and growth of lower cost, efficient schools that seek to serve the economically less privileged.'

In recent years, the advance of computerized, electronic research capabilities, and CD Rom collections, have made cost of the expensive hard cover books totally unnecessary and correlatively had made it unnecessary to have huge library facilities to store and service enormous hard cover collections. We are, indeed, hurtling towards the age of what the Dean of the University of Pennsylvania Law School has called the ''virtual library.'' (Exhibit 28.) The vast bulk of materials needed by most law school libraries is now instantly available on computers, and students and faculty members can access these materials not just in law school libraries or law school offices, but at home, or anywhere, by means of modems.[48]

Yet the ABA accreditors, though *slowly* changing their rules, still require a law school to have millions of dollars worth of hard cover books to obtain accreditation and still require elaborate physical facilities. These requirements are simply another of the devices which, because of the costs they impose, are used to anticompetitively exclude schools that desire to make education available at lower cost to less affluent persons.

Conclusion

As said at the inception of these Comments, MSL believes the Consent Decree is a step towards eliminating long-standing anticompetitive practices. But the Decree contains weaknesses that could undermine its effectiveness in combatting these practices. MSL therefore urges the Division to cure those weaknesses so that the Decree, rather than possibly being undermined, will in fact prove to be the major procompetitive step it is capable of being.

Respectfully submitted,

The Massachusetts School of Law at Andover, Inc.

500 Federal Street, Andover, MA 01810.

PROPOSED MODIFICATION TO PROPOSED FINAL JUDGMENT, p. 5, Part VI (B)

(Note: deletions are bracketed; insertions are italicized.)

to the same public comment and review process and approval procedures that apply to proposed Standards;

(B) permit appeals from Accreditation Committee Action Letters to the Council;

(C) revise the Council's membership as follows:

(1) for a period of five years, all elections shall be [subject to] *reported to the* Board [approval];

(2) members shall serve staggered three-year terms, with a two-term limit; however, officers may serve as officers for an additional term beyond the six-year limit; and

(3) no more than 50% of the members shall be law school deans or faculty;

(D) revise the Accreditation Committee's membership as follows:

[45] Only 15 percent of first year seats in law school are devoted to part-time students. (Exhibit 25.)

[46] Leading insider Leigh Taylor has said that ''Evening students are older (4 to 5 years older at [his law school]), *tend to come from a lower economic situation, and tend to be married and have children. Typically there are more minority students in the evening.*'' (Exhibit 26 (emphasis added).)

[47] American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,* 268 (July 1992).

[48] The materials are also available within minutes or hours via fax machines, and overnight via Federal Express and other forms of overnight mail.

(1) for a period of five years, all appointments shall be [subject] *reported to the* Board [approval];

(2) all members shall serve staggered three-year terms, with a two-term limit; and

(3) no more than 50% of the members shall be law school deans or faculty;

(E) revise the Standards Review Committee's membership as follows:

(1) for a period of five years, all appointments shall be [subject to] *reported to the* Board [approval];

U.S. Department of Education

Staff Analysis of the Interim Report Submitted by the Council of the Section of Legal Education and Admission to the Bar of the American Bar Association

December 5–6, 1994.

Background

The Council of the section of Legal Education and Admission to the Bar of the American Bar Association (ABA) appeared on the first list of nationally recognized accrediting agencies published by the Commissioner of Education in 1952. The Council has received periodic renewal of recognition since that time.

The Council's most recent review by the National Advisory Committee was in May 1992. At that time, there was considerable third-party opposition to the Council, most of which centered on its accreditation standards. As a result, Advisory Committee members questioned Council representatives at length about their process for reviewing and revising the standards. Upon completion of that discussion, the Advisory Committee recommended that, while renewing the Council's recognition for a period of five years, the Secretary should also require the Council to submit an interim report by July 1, 1993 on its effort to strengthen compliance with § 602.16(i)—maintenance of a systematic program of review designed to assess the validity and reliability of the Council's criteria, procedures and standards. On August 18, 1992, the Secretary renewed the Council's recognition for a period of five years and requested the interim report on § 602.16(i).

In January 1994, the Massachusetts School of Law (MSL), one of the third parties that testified in opposition to the Council at the May 1992 meeting of the National Advisory Committee, filed a formal complaint against the Council and requested that the Secretary terminate the Council's recognition on the grounds that it failed to follow appropriate and required standards, procedures, and regulations. MSL cited a number of reasons for its request, many of which were related to the issue of whether the Council's criteria, procedures, and standards were valid and reliable. Consequently, in this analysis, Department staff examines both the Council's interim report and MSL's complaint. The analysis also takes into account both the Council's response to MSL's compliant and subsequent responses by MSL and the Council.

It should be noted that, as is customary when the Department receives a compliant against an accrediting agency, staff provided the Council with an opportunity to respond to MSL's complaint. MSL subsequently requested and, because of the seriousness of its charges against the Council, was granted an opportunity to rebut the Council's response. MSL's rebuttal was not received by the Department, however, until August 1994. Department staff's investigation of MSL's complaint was completed in as timely as manner as possible, given the delay in the submission of MSL's rebuttal and the extent of the documentation submitted by both parties.

Summary of Findings

While the Council has technically complied with the requirement to provide the Secretary with a progress report on its efforts to assess the validity and reliability of its standards by describing its process for reviewing its 100- and 200-series standards, it has not provided any results of its work to date. The Council needs to do so.

Staff Analysis

602.16(i) It maintains a systematic program of review designed to assess the validity and reliability of its criteria, procedures, and standards relating to its accrediting and preaccrediting activity and their relevance to the educational and training needs of affected students.

Problem: At the time of the Council's last review, there was considerable third-party opposition to the Council, most of which centered on the validity and reliability of its standards. Noting that the Council had reported that work was continuing on the assessment of the validity and reliability of its standards as a result of a conference held on the subject in 1989, the Advisory Committee requested an interim report on the Council's continuing progress assessing validity and reliability.

Agency Response: The Council maintains a Standards Review Committee, each of whose meetings includes a review of the validity and reliability of certain standards among the ones currently used to accredit programs. At its November 1992 meeting, the Committee agreed to concentrate on the 100- and 200-series of its standards. At its meeting in January 1993, the Committee focused on the 100-series standards, discussing various comments received from the membership on the standards and agreeing to proposed some changes to the membership. At its May 1993 meeting, the Committee continued its review of the 100-series and began work on the 200-series. At the conclusion of the meeting, the Committee decided that, rather than propose changes in either series' standards to the Council's different constituencies, it would continue its standards review for the next 2–3 years and then propose all the changes at once. Its rationale for this course of action was the effect that more than one of the modified standards would have on some of the Council's other standards.

Staff Determination: By describing the process it is engaged in to review the validity and reliability of its standards, the Council has technically complied with the requirement that it submit an interim report addressing its continuing progress assessing validity and reliability. However, the Council has failed to provide any concrete results of its efforts, presumably because it plans to extend its current review effort over the next 2–3 years.

The Department's new regulations require not just a demonstration that the Council has in place a systematic program for the review of the validity and reliability of its standards but a demonstration that each of its standards provides a valid measure of the educational quality it is intended to measure and a consistent basis for determining the educational quality of different law schools. It is the Council's compliance with this new requirement that is challenged by MSL in its complaint against the agency.

Like all agencies, the Council must take action to bring itself into compliance with this new requirement. Department staff recognizes that this will take some time. However, Department staff also recognizes that in the interim some institutions may be denied accreditation, placed on probation, and/or forced to take corrective action to come into compliance with standards that may in fact prove not to be valid and reliable measures of educational quality. For this reason, Department staff believes it is critical that the Council keep the Department thoroughly informed of its progress in assessing the validity and reliability of its standards and the *results* of that assessment. Specifically, the Council should provide the Department with an interim report in each of the next two years, and that report should include complete reports of each meeting of its Standards Review Committee, including any proposed changes in Council standards that are under consideration, and reports of any other meetings, forums, or other opportunities for discussion of its standards that took place that year. Department staff has been informed by MSL that at least one such opportunity—a meeting of a group of law school deans—is scheduled to take place in January or February of 1995.

At this point, Department staff believes that any termination of the Council's recognition on the grounds that its standards are neither valid nor reliable measures of quality, as has been requested by MSL, is premature and without merit. All currently recognized accrediting agencies need to come into compliance with the requirement in the new regulations that each of their standards must provide a valid measure of the educational quality it is intended to measure and a consistent basis for determining educational quality. To single the Council out for noncompliance at this time when other agencies are likewise in noncompliance would be unfair to the Council.

While MSL may not like the Council's current standards and may question their validity and reliability, it has not provided convincing evidence to contradict the Council's assertion that its current standards have in fact been adopted by its members in the manner that has been agreed to by the members for the establishment of accreditation standards. Thus, even though they may be found at some future date not be fully valid or reliable indicators of educational quality, at the present time the Council's standards represent the current best thinking of those in the profession.

MSL has indicated that there is some opposition to the current standards from within the organization but has provided no evidence of large numbers of members opposing ABA standards at its meetings and being constantly frustrated in their efforts to change the standards by undemocratic procedures on the part of the Council. If there is in fact opposition to the Council's standards, it is Department staff's opinion that the Council appears to have in place the mechanisms that will allow those who seek change to be heard. The scheduled meeting of the law school deans early in 1995 is evidence that those in opposition to the standards have the ability to work from within and propose changes that they believe will strengthen the accreditation process.

Department staff further believes that the Council's standards have been subject to regular, systematic review by the profession and have been changed whenever the profession deemed necessary. It also appears to Department staff that any changes to the standards have been decided upon only after proper consultation with the membership and other relevant constituencies. Thus, from the Department's perspective, the Council has acted in accordance with the criteria for recognition as far as the review and subsequent revision of its standards is concerned. MSL points out that, as an unaccredited law school, it is not part of the membership, and therefore, does not have adequate opportunity for input into any changes to the standards. Department staff's response to this concern is that the Council is not obliged by the requirements for Secretarial recognition to consult with non-members like MSL.

One other aspect of MSL's complaint against the Council is particularly relevant to the validity and reliability issue. MSL charges that the Council has throttled diversity among law schools by refusing to follow a written provision contained in its own standards that is intended to promote such diversity. As evidence to support its charge, MSL states that its requests for several variances have been repeatedly denied by the Council. Department staff believes that in general MSL's requests for variance were not accompanied by a compelling rationale for the request and that there is no evidence to suggest that, if they were accompanied by such rational, they would not have been given fair consideration by the Council.

Other aspects of MSL's complaint against the Council have no direct bearing on the validity and reliability issue. Department staff has investigated them and found some of them to be without merit. For example, MSL charges that the Council regularly violates the requirements of due process but does not provide convincing evidence to support its charge.

Still other aspects of MSL's complaint relate to new requirements imposed on accrediting agencies as a result of the Higher Education Amendments of 1992 and the Department's regulations implementing those amendments. For example, MSL charges that the Council does not provide public notice of when a law school will be considered for accreditation and does not provide an opportunity for public comment on the school's qualifications for accreditation. All agencies must come into compliance with this requirement and the other new requirements, but it takes time for them to develop and implement the requisite standards, policies, and procedures. Department staff believes that there is no evidence to suggest that the Council will not do so in a timely and appropriate manner.

It should be pointed out that MSL presented many aspects of its current complaint to a member of the National Advisory Committee when it reviewed the Council in 1992, yet the Advisory Committee was satisfied with the Council's overall performance at the time and recommended renewal of recognition for the maximum period of five years. Thus, it does not appear to Department staff that MSL has presented compelling new evidence to warrant a full review of the agency before its originally scheduled renewal date.

Note. One aspect of MSL's complaint against the Council that is totally outside of the Department's purview is the charge that the Council has violated federal anti-trust laws for the economic benefit of law professors, law deans, and law librarians but on the detriment of students. That matter is currently before the Justice Department.

[FR Doc. 95–28678 Filed 12–11–95; 8:45 am]

BILLING CODE 4410–01–M