THE STATE BAR
OF CALIFORNIA

OFFICE OF GENERAL COUNSEL

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
FAX: (415) 538-2220
http://www.calbar.ca.gov

March 8, 2018

ANTITRUST DETERMINATION 2018-0002

A. Authority

This determination is made pursuant to California Supreme Court Administrative Order 2017-09-20 ("State Bar Antitrust Policy"), which mandates that the State Bar Office of General Counsel provide a determination on issues submitted to it for resolution of potential antitrust concerns.

B. Issues Presented

On February 2, 2018, the State Bar of California Committee of Bar Examiners ("CBE") received a public comment from Laura Palazzolo ("Requestor"), Dean of the Lincoln Law School of San Jose, regarding CBE's ongoing consideration of an application by John F. Kennedy University to open a new branch law school campus in San Jose ("Request," attached hereto as **Exhibit A**). Requestor raises general concerns about CBE's process for consideration of new branch law school campuses. Requestor specifically references the State Bar Antitrust Policy and suggests that the following issues are potential antitrust concerns:

1) Role of CALS in CBE Decision-Making Process – Requestor expresses the position that CBE's adoption of the *Guidelines for Accredited Law Schools* ("Guidelines") was inappropriately influenced by the deans of California Accredited Law Schools ("CALS") in potential violation of the antitrust laws.[1]

2) Requirements for CALS Major Changes – Requestor alleges that the fact that there are different approval procedures for new branches of law schools accredited by CBE (as compared to approval procedures for new law schools accredited by CBE and approval procedures for law schools accredited by the American Bar Association) somehow raises antitrust concerns.[2]

[1] Request at p. 3-4: "In [the State Bar Antitrust Policy], the Supreme Court of California opined that 'anticompetitive practices may arise when a state empowers a group of active market participants to decide who can participate in its market and on what terms.' . . . This Committee is now faced with a similar situation. The CALS deans got together at CBE meetings and discussed, among other things, how to 'streamline' the approval process for branch campuses to their advantage. The result is that [CBE], if it accepts [staff's] interpretation of the Guidelines, has given power to these deans to decide on what terms CALS schools should be allowed to participate in the marketplace pursuant to the Guidelines *they've advanced* based on their agreements in those meetings." (emphasis in original)

[2] Request at p. 3: "The anticompetitive nature of the scheme may be simply illustrated. If an ABA school wanted to enter the San Jose market, it would have to go through the regular processes of getting accredited by the ABA. If a new school (not an existing CALS) wanted to open a CALS campus in San Jose, that school would have to go through the process of getting its initial accreditation from this Committee. . . . [CBE] has given existing CALS schools an anticompetitive advantage in this State."

3) Competitive Impact of Multiple Law Schools Operating in a Geographic Region – Requestor also suggests that, although outside the scope of the Guidelines, CBE should consider the effects of permitting multiple law schools to operate in a geographic area when determining whether to grant approval of a new branch law school.[3]

C. Analysis

1. The State Bar's Authority to Establish Rules and Guidelines for Consideration of an Application for a New Branch of a California Accredited Law School.

The State Bar's authority to regulate CALS is grounded in statute. Business and Professions Code[4] Section 6060.7(b)(1) provides that the State Bar, through the CBE, "shall be responsible for the approval, regulation, and oversight" of CALS. Section 6047 provides that subject to the approval of the State Bar Board of Trustees, CBE may adopt reasonable rules and regulations for the purpose of making effective the qualifications for admission to practice law (including the rules governing CALS). Pursuant to that authority, the Board of Trustees has approved Title 4, Division 2, Rule 4.164, of the Rules of the State Bar ("Rules"), requiring that CBE approve any "major changes" to a law school, including opening a new branch campus (Rule 4.165(b)). The Board of Trustees has also authorized CBE to enact guidelines to interpret the Accredited Law School Rules (Rule 4.103). Acting pursuant to and under the Board's authority, CBE has adopted the Guidelines. Guidelines 15.1, 15.2, and 15.3 describe the process and criteria for approval of a new branch campus of an existing CBE accredited law school.

2. Requestor's Antitrust Allegations Regarding Role of Law School Deans in CBE Policymaking.

The authority to regulate CALS belongs to the State Bar, acting through the Board of Trustees and the CBE. As explained in Antitrust Determination 2018-0001, law school deans have no power to enact any decisions affecting CALS.[5]

Requestor has suggested that law school deans may have contributed to the policymaking process for the CBE guidelines and that this activity could be in potential violation of the antitrust laws. While antitrust concerns could arise if market participants control a regulatory board and make decisions in their self-interest to the detriment of competition in the market, no such facts exist here. No participants in the market for legal education (that is, deans or representatives of CALS) sit on the CBE or Board of Trustees. Even if law school deans provided input into CBE's policymaking process as interested members of the public, this would not raise antitrust concerns because only the CBE and the Board of

[3] Request at p. 9: "Lincoln Law School of San Jose therefore asks that JFK's Major Change Request be denied outright, and that the Guidelines thereafter be amended to address the special circumstance of opening a branch campus near an existing Committee accredited school."
[4] All statutory references are to the Business and Professions Code unless otherwise indicated.
[5] All of the State Bar's Antitrust Determinations are available at http://www.calbar.ca.gov/About-Us/Our-Mission/Antitrust-Determinations.

Trustees, not law school deans, have been conferred by the California Legislature with the authority to regulate CALS.

3. Antitrust Analysis of Rules and Guidelines Governing Approval of New Branch Campuses.

    a. Different Requirements for Major Changes to a CALS.

California has two types of accredited law schools – those accredited by the American Bar Association, and those accredited by CBE. Graduation from either type of school fulfills the education requirement to sit for the California bar examination.[6] The California Legislature has authorized the State Bar to regulate CALS, but not law schools accredited by the American Bar Association.[7]

Requestor has alleged that, with respect to the policies for approval to open a new branch campus of a law school, it is "anticompetitive" that the CBE employs a different procedure for approval of a major change to a CALS, as compared with the procedure for approval of a new CALS or the procedure employed by the American Bar Association for a major change or a new school. However, Requestor has not articulated how this difference implicates the antitrust laws. The California Legislature intended that different accreditation procedures would apply to the two different types of law schools when it enacted the statute authorizing the State Bar to regulate CALS. The California Legislature also granted the State Bar the general authority to enact appropriate rules governing CALS, including the authority to establish different types of procedures for different situations. The mere fact that there are different procedures for different types of applications and different types of schools does not itself implicate the antitrust laws.

    b. Appropriate Factors for the Committee to Consider in Deciding Major Change Requests, Based on the Rules and Guidelines.

Rules 4.164 and 4.165 and Guidelines 15.1, 15.2, and 15.3 describe the criteria to be considered by CBE in determining whether to approve a new branch campus of a CALS. The principal inquiry is whether the proposed branch law school "will be in substantial compliance with all relevant academic and operational requirements as set forth in the *Accredited Law School Rules* and the *Guidelines for Accredited Law School Rules*."[8] Academic requirements include factors such as minimum cumulative bar exam passage rates and provision of competency training.[9] Operational requirements include sound governance and financial resources (whether a law school would have "adequate present and anticipated financial resources to support its programs and operations.").[10] Applying these factors, it is appropriate for CBE to consider a proposed branch law school's potential enrollment in determining whether the proposed branch would have adequate financial resources based on anticipated tuition income. The potential pool of students in a geographic area that might attend a proposed branch law school, taking

[6] Section 6060(e)(1).
[7] Section 6060.7(b).
[8] Guideline 15.2(a), 15.3. The Standards required of all CALS, including for new branch campuses, are described further in Rule 4.160.
[9] Rule 4.160(F),(N).
[10] Rule 4.160(C),(K).

into account the effect of other law schools already operating in the area, may be relevant to that analysis. However, the Rules and Guidelines do not currently permit consideration of the potential impact of a new branch campus on other law schools operating in the area, and such an inquiry would therefore be outside the proper scope of CBE's consideration of whether or not to approve a new law school branch campus.

Requestor has asked that the Guidelines "be amended to address the special circumstance of opening a branch campus near an existing Committee accredited law school."[11] As explained above, the Rules and Guidelines already require an assessment of whether a proposed branch would be financially viable, and this may include analysis of anticipated enrollment. However, it may be improper for CBE to otherwise consider the potential competitive impact of a proposed branch on other law schools operating in the area. The State Bar Antitrust Policy requires the State Bar to "promote the principles of fair and open competition in all of its policies and actions in support of its overarching public protection mission."[12] Under the antitrust laws, "market allocation" (where certain competitors are guaranteed exclusive or preferential rights to operate in particular geographic areas) is prohibited.[13] Action by the State Bar to limit the number of law schools for reasons other than academic quality and operational viability could raise the inference that the State Bar is seeking to unreasonably limit entry to the legal profession, potentially implicating the antitrust laws. Antitrust principles therefore counsel against adopting the approach suggested by the Requestor. Rather, the optimal procompetitive approach would be to encourage allowing more law schools to operate in California, provided that they meet appropriate academic and operational standards, so as to give consumers of legal education more choices and potentially lower prices.

D. Conclusion

Based on the foregoing analysis, there is no antitrust violation related to the process under which CBE adopted the *Guidelines for Accredited Law Schools*, including those governing the approval process for opening new branch campuses of existing CBE accredited law schools. There are no active participants in the market for legal education (i.e. law school deans) sitting on the CBE or the State Bar Board of Trustees. The Guidelines do not currently permit consideration of the impact to other existing law schools operating in proximity to the proposed new branch, except where relevant to determine the financial viability of the proposed law school branch, and such consideration could be suspect under the State Bar Antitrust Policy.

E. Reviewability

The State Bar Office of General Counsel's determinations on reports of potential antitrust violations may be reviewed *de novo* by the California Supreme Court. Requestor is hereby advised of the right to

[11] Request at p. 9.
[12] State Bar Antirust Policy at p. 3.
[13] *See, e.g., Palmer v. BRG of Ga., Inc*., 498 U.S. 46, 49, 111 S. Ct. 401, 402 (1990) ("horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.") (citations and quotations omitted).

request review by filing a petition with the Court, pursuant to rule 9.13, subsection (d) through (f), California Rules of Court, within **60 days of the date of this determination.**

Rule 9.13. Review of State Bar Court decisions

(a) Review of recommendation of disbarment or suspension

A petition to the Supreme Court by a member to review a decision of the State Bar Court recommending his or her disbarment or suspension from practice must be filed within 60 days after a certified copy of the decision complained of is filed with the Clerk of the Supreme Court. The State Bar may serve and file an answer to the petition within 15 days of service of the petition. Within 5 days after service of the answer, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar must serve and file a supplemental brief within 45 days after the order is filed. Within 15 days of service of the supplemental brief, the petitioner may serve and file a reply brief.

(Subd (a) amended effective January 1, 2007; previously relettered and amended effective October 1, 1973; previously amended effective July 1, 1968, and December 1, *1990.)*

(b) Review of State Bar recommendation to set aside stay of suspension or modify probation

A petition to the Supreme Court by a member to review a recommendation of the State Bar Court that a stay of an order of suspension be set aside or that the duration or conditions of probation be modified on account of a violation of probation must be filed within 15 days after a certified copy of the recommendation complained of is filed with the Clerk of the Supreme Court. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (b) amended effective January 1, 2007; adopted effective October 1, 1973; previously amended effective December 1, 1990.)

(c) Review of interim decisions

A petition to the Supreme Court by a member to review a decision of' the State Bar Court regarding interim suspension, the exercise of powers delegated by rule 9.10(b)-(e), or another interlocutory matter must be filed within 15 days after written notice of the adverse decision of the State Bar Court is mailed by the State Bar to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (c) amended effective .January 1, 2007; adopted effective December 1, 1990.)

(d) Review of other decisions

A petition to the Supreme Court to review any other decision of the State Bar Court or action of the Board of Governors of the State Bar, or of any board or committee appointed by it and authorized to make a determination under the provisions of the State Bar Act, or of the chief executive officer of the State Bar or the designee of the chief executive officer authorized to make a determination under article 10 of the State Bar Act or these rules of court, must be filed within 60 days after written notice of the action complained of is mailed to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer and brief. Within 5 days after service of the answer and brief, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar, within 45 days after filing of the order, may serve and file a supplemental brief. Within 15 days after service of the supplemental brief, the petitioner may file a reply brief,

(Subd (d) amended effective January 1, 2007, previously amended effective July 1, 1968, May 1, 1986, and April 2, 1987; previously *relettered and amended effective October 1, 1973, and December 1, 1990.)*

(e) Contents of petition

(1) A petition to the Supreme Court filed under (a) and (b) of this rule must be verified, must specify the grounds relied upon, must show that review within the State Bar Court has been exhausted, must address why review is appropriate under one or more of the grounds specified in rule 9.16, and must have attached a copy of the State Bar Court decision from which relief is sought.

(2) When review is sought under (c) and (d) of this rule, the petition must also be accompanied by a record adequate to permit review of the ruling, including:

(A) Legible copies of all documents and exhibits submitted to the State Bar Court supporting and opposing petitioner's position;

(B) Legible copies of all other documents submitted to the State Bar Court that are necessary for a complete understanding of the case and the ruling; and

(C) A transcript of the proceedings in the State Bar Court leading to the decision or, if a transcript is unavailable, a declaration by counsel explaining why a transcript is unavailable and fairly summarizing the proceedings, including arguments by counsel and the basis of the State Bar Court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before any action is requested from the Supreme Court other than issuance of a stay supported by other parts of the record.

(3) A petitioner who requests an immediate stay must explain in the petition the reasons for the urgency and set forth all relevant time constraints.

(4) If a petitioner does not submit the required record, the court may summarily deny the stay request, the petition, or both.

(Subd (e) amended effective January 1, 2007; previously repealed and adopted by the Supreme Court effective December 1, 1990, and February 1, 1991; previously repealed and adopted effective March 15, 1991.)

(f) Service

All petitions, briefs, reply briefs, and other pleadings filed by a petitioner under this rule must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar, and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court. The State Bar must serve the member at his or her address under Business and Professions Code section 6002.1, and his or her counsel of record, if any.

(Subd (f) amended effective January 1, 2007; adopted by the Supreme Court *effective December 1, 1990; previously amended by the Supreme Court effective February 1, 1991; previously amended effective March 15, 1991.)*

Rule 9.13 amended and renumbered effective January 1, 2007; adopted as rule 59 by the Supreme Court effective April 20, 1943, and by the Judicial Council effective July 1, 1943; previously amended and renumbered as rule 952 effective October 1, 1973; previously amended effective July 1, 1976, May 1, 1986, April 2, 1987, December 1, 1990, February 1, 1991, and March 15, 1991.

The address to file your petition with the California Supreme Court is:

CALIFORNIA SUPREME COURT
CLERK'S OFFICE
350 McALLISTER STREET
SAN FRANCISCO, CA 94102

RESPONSIVE MEMORANDUM

TO: THE COMMITTEE OF BAR EXAMINERS, STATE BAR OF CALIFORNIA

FROM: DEAN LAURA PALAZZOLO, LINCOLN LAW SCHOOL OF SAN JOSE

SUBJECT: EDUCATION STANDARDS COMMITTEE, AGENDA ITEM 0-404

DATE: FEBRUARY 2, 2018

CC: AMY NUNEZ, DIRECTOR OF ADMISSIONS

The matter before you, a Major Change Request to open a branch campus in San Jose brought by John F. Kennedy University ("JFK"), is a matter of first impression. Not because this Committee has not previously approved branch campuses. But because, in this instance, the branch campus is to be located in the same city as an existing California Accredited Law School ("CALS"). To my knowledge, for as long as the Committee has been accrediting schools, no major change has been authorized allowing one accredited school to move where another accredited school exists absent "good cause" and then only after due, careful, deliberate and reasonable consideration by the Committee and its staff. JFK's Request has been given no such consideration.

The requirement of such careful consideration is commanded by sound logic, and sound policy. The Committee must inquire as to the merits of such a substantial change and its consequences, both beneficial and otherwise, to the policies and constituencies it serves. Otherwise the Committee becomes just a "rubber stamp" for dean-proposed policies and dean-influenced staff recommendations. Historically, the Committee has reviewed all the relevant facts, presented by all interested parties, and made a full inquiry before acting. Such an inquiry is for the benefit of the Committee, its members and the constituencies it serves.

It is well known that this was Gayle Murphy's policy when she was Director of Admissions. To my knowledge there has been no official change to this policy. But the message to me last Friday was that JFK's request will, essentially, be "rubber stamped" by the Committee. Two factors were cited by staff: (1) the new streamlined Guidelines; and (2) antitrust concerns. I will address each in turn.

The New Guidelines Cannot Encourage This Committee To Act Without Appropriate Deliberation.

No Guideline should be used or interpreted to take away from this Committee's duty to act with appropriate deliberation. As I understand it, this Committee approached the very first request for a branch campus (in a city *without* an existing CALS) with appropriate caution. For-profit Alliant University sought to add a San Diego campus to its existing (accredited) San Francisco location. As is its custom, the Committee proceeded with diligence, and the process took some time while the Committee convinced itself that the new location would have the required resources, provide appropriate personnel, and would not leave its students with debt and with limited options if the experiment did not work out.

Other deans, perhaps seeing an opportunity to expand their own reach, thereafter championed guidelines to "streamline" the process, which the Committee approved. To my recollection, the purpose of the streamlined guidelines was to make it possible for an affordable CALS education to be offered in smaller unserved markets (as they have been in San Luis Obispo and Bakersfield). I do not recall the issue of a potential branch campus where an existing CALS resides being raised before the Committee at that time.

I expressed my concern about this unexpected turn of events with staff last Friday. I was struck by Mr. Leal's apparent lack of neutrality. I've since been advised that Gayle Murphy would not allow Mr. Leal to lead site visits to JFK because of Mr. Leal's long friendly history with Mr. Barbieri. I leave that to Ms. Nunez and the Committee to explore. If this is true, I would object to the Committee's reliance on Mr. Leal's Memorandum and Recommendation in this matter.

In our conversation, Mr. Leal told me that the Guidelines now *require* the Committee to approve a branch campus if the Dean has certified that such campus will be in substantial compliance with the Guidelines by its opening. If this is true, the Committee has been divested of its power to thoroughly review and approve this extraordinary Request, contrary to its longstanding procedures. It is this unprecedented assumption this Memorandum seeks to address.

JFK's Request is brought pursuant to a set of Guidelines, which, by their very nature, evoke a flexible structure that would allow for some variation under appropriate circumstances. If there are consequences the Committee had not considered when the Guidelines were adopted, then it is appropriate to talk about how we address those consequences. Otherwise, by Mr. Leal's interpretation, the accredited parties have been given the power to draft rules that effectively tie the accreditors' hands. I do not believe the Guidelines were intended to operate this way. Nor should they.

Automatic Approval Here Impermissibly Interferes With The Marketplace.

This point drives us smack into the middle of the other argument raised by Mr. Leal in our telephone conversation (though it is missing in his Memorandum). Mr. Leal opined that the Committee must approve the Request, or risk being accused of interfering with market forces. But I believe the opposite is true. If Mr. Leal's statement to me that the new Guidelines essentially require the Committee to rubber stamp this Request based only on the representations of the dean proposing to open the campus, and thus without significant inquiry, then it is my opinion that antitrust laws are being compromised, not furthered, by such a "no look" policy.

In my view, antitrust concerns prohibit the self-serving declarations that purportedly require automatic accreditation. No such concern is, or should be, raised by this Committee's thoughtful consideration of the potential ramifications of opening a branch campus under circumstances that have not previously presented themselves. It cannot be the case that such thoughtful consideration may never result in a denial of the Request, or else it must follow that it is the branch campus scheme itself, as proposed by the self-same persons who now seek its implementation, which violates antitrust laws.

The anticompetitive nature of the scheme may be simply illustrated. If an ABA school wanted to enter the San Jose market, it would have to go through the regular processes of getting accredited by the ABA. If a new school (not an existing CALS) wanted to open a CALS campus in San Jose, that school would have to go through the process of getting its initial accreditation from this Committee. As is more particularly explained below, that is not a 6 month "no look" process based solely upon the proposed Dean's representation that the new campus will eventually meet the Rules and Guidelines.

So, it seems to me that the Committee has given existing CALS schools an anticompetitive advantage over other schools with respect to opening a new law school in this State. And, more than that, it has done so based on guideline proposals submitted by the members of the very marketplace who now seek to take advantage of that anticompetitive privilege (the deans of the law schools). In its Administrative Order 2017-09-20, filed September 27, 2017 (the "Administrative Order" attached hereto as Exhibit A), the Supreme Court of California opined that "[a]nticompetitve practices may arise when a state empowers a group of active market participants to decide who can participate in its market and on what terms." *Id.* The Administrative Order makes the reporting of such activities mandatory for State Bar personnel. *Id.,* Section II.C.1.

The Supreme Court gave the example of attorneys meeting at State Bar events and discussing anticompetitive issues, such as prices and associate salaries. Administrative Order, Section II.C.1. In response to the Administrative Order, the State Bar separated itself from its various bar "sections". This Committee is now presented with a similar situation. The CALS deans got together at CBE meetings

and discussed, among other things, how to “streamline” the approval process for branch campuses to their advantage. The result is that this Committee, if it accepts Mr. Leal's interpretation of the Guidelines, has given power to those deans to decide on what terms CALS schools should be allowed to participate in the marketplace pursuant to the Guidelines *they've advanced* based on their agreements in those meetings.

As An Accrediting Body The Committee Has A Duty To Carefully Consider Each CALS Request On Its Own Merits.

The legislature has tasked the Committee with accrediting and monitoring CALS. It is therefore the Committee's duty to consider all the ramifications of each CALS request on its own merits. One of the key functions of an accrediting body is consumer protection. The history of failed programs at the proposed, and other, National University campuses, as well as the complete lack of any information relating to the impact of the proposed campus on the target market, indicates that the Committee might give special attention to consumer protection concerns in the context of this Request.

The recent collapse of the likes of the Corinthian schools and ITT Technical Institute did not result in their accreditor (the Western Association of Schools and Colleges ("WASC")) arguing in its defense that it cannot discriminate in the marketplace, and thus must accredit any school that meets its guidelines. It resulted in WASC tightening its guidelines. In the same way, this Committee must not be easily convinced that it should abdicate its consumer protection role in favor of schools advocating for market advancement.

When Southern California Institute of Law sought permission for a day program some years back, when Dean Barbieri was the Director of Education Standards, I am informed that Dean Pulle was required to obtain field studies and letters of support. The Committee was inquiring whether the market would support another day program. Not because it wanted to interfere with the market, but because it did not want to strand students half way through a law program if the program proved to be unsustainable.

Now the Committee is presented with a Major Change Request, not just for a *program,* but for a *campus.* And the Request comes from a school which admits its initial foray into a branch campus was not successful. JFK's Request tells of a hurried approval for a Berkeley law program, which only existed for two years and was quickly folded into its Pleasant Hill campus. I am also advised that a paralegal program was started at the San Jose campus not long ago. But that program was also discontinued when enrollment did not meet expectations. These are examples of why this Request should be considered on its merits, and not just the representation of the dean.

The Ramifications Of This Request Highlight A Real Concern That Special Interests Are Seeking To Expand The Guidelines, And Limit The Committee's Powers, To Their Own Advantage And To The Potential Detriment Of The Public.

It is disconcerting that such a monumental request as this was mailed on January 12, and staff had completed its evaluation and drafted its Memorandum a mere ten days later, on January 22. With all due respect to staff, the timing does not suggest that this Committee can have confidence that appropriate consideration was given to the significant policy considerations implicated by the Request. Mr. Leal has apparently concluded (without saying as much in the Memorandum) that the Guidelines make approval of the Request mandatory. However, he does not appear to have thought through what such an interpretation would mean to the Committee and its constituencies. A policy is not a sound policy if it may be easily exploited. And Mr. Leal's interpretation could easily be used to turn the entire CALS system inside out.

To test the result of staff's approach, consider a worst case scenario: Dean Barbieri, emboldened by the acceptance of a "no look" policy, submits a request to open a branch campus at each of National University's 43 other California campuses, accompanied by his representation that each such campus will be compliant with the Guidelines.[1] The concern is that blanket approval of all of these campuses, which would, according to staff, be required, not only further implicates antitrust concerns, but may also endanger consumers. And what staff has not seen, or chose not to point out, is that the Committee would be virtually powerless to protect those consumers.

I read the rules to give branch campuses two years to operate before a site visit, which does not give opportunity for the Committee to timely intervene if the students are not being well-served.[2] Moreover, if staff is overburdened and in a budget deficit now, with 19 main campuses and 3 branch campuses, the Committee should consider how staff's “no look” approach could impact the inspection and discipline of a potentially unlimited number of branch campuses. If a well-funded commercial enterprise wanted to exploit, on a mass scale, the vulnerable population the CALS exist to serve, one could certainly do so.

[1] A list of these campuses is attached hereto as Exhibit B. Their proximity to existing CALS may be ascertained by reference to Exhibit C.

[2] By contrast, a registered unaccredited fixed-facility law school seeking provisional accreditation (and demonstrating substantial compliance) is subject to an annual inspection and its students are subject to the First Year Law Students Examination requirement. Multiple other restrictions also apply. See Accredited Law School Rules, Rule 4.120, *et seq*.

Exploring further the unconsidered effects of staff's approach on a smaller scale, suppose two schools submit requests to open branch campuses in or near an existing CALS. The Committee should certainly inquire, as a matter of due diligence, whether the public would be served by multiple schools; whether one or more such schools is likely to fail; and what effect such failure might have on the Committee's constituents. But I understand staff to interpret the Guidelines to say the Committee cannot inquire as to such things or, if it does so inquire, it cannot base its decision on anything other than the certification by the dean as to substantial compliance with the Guidelines.

These are unlikely scenarios, but not impossible. The point is that if a "no look" interpretation is adopted, there are no safeguards to *prevent* such possibilities from occurring. And if the Committee is the slightest bit uncomfortable with the idea of subjecting *the entire CALS system* to the unmitigated desires of its self-serving deans, regardless of the possible consequences, it should not, in fairness, "experiment" with what might happen to a single CALS in the present case.

The California legislature and the Federal government have recently enacted legislation designed to crack down on the onslaught of online and other educational programming targeted at military personnel. My fellow CALS know this because we had to get a special exception written into the California legislation to allow for Committee accreditation. So, our legislators are speaking on the proliferation of online and other programs that target vulnerable populations who are not well informed about the high possibility that many for-profit and multi- campus online programs will take their money but never give them a useful degree. It's part of the reason this Committee is taking its time with accrediting online law programs, and has a pilot hybrid program slowly working its way through the accreditation process. I implore the Committee to consider these same issues in the context of branch campuses.

As a further test of staff's position, the Committee should at least consider the possibility that the underlying purpose of requests for branch campuses is not the dissemination of a fixed-facility law program, but as a holding space for the future dissemination of online hybrid programs. Thus, under the "worst-case" hypothetical above, as soon as the online programs currently under consideration are approved, the Committee would have grandfathered in, on the declaration of a single dean, 43 new accredited campuses with immediate online capabilities. It would be difficult, if not impossible, for current staff to monitor the impact on student success of all that online programming - especially if individual campus results are hidden in the combined bar pass rate reporting of the main campus, as is required by the Guidelines.

All of this is, as my mother used to say, "borrowing trouble"; but isn't it our *duty* to consider what COULD happen? The point of all this speculation is to highlight the fact that this is **not** a one-off approval. It *can't* be. As you walk through JFK's Request, and the bases for Mr. Leal's Recommendation, I want you to consider whether, if you say "yes" to THIS Request, you will have any rational basis for

saying “no” to the next one - from any National University campus - or from any for-profit WASC-accredited university with multiple campuses that might seek to partner with a CALS school for the sole purpose of occupying the space. Also consider whether it is fair and reasonable to "see what happens" with one CALS (Lincoln Law School of San Jose) while the others stand safely by and watch.

The Request Should Be Denied As Insufficiently Supported.

While the JFK Request appears to address each of the required Guideline subjects, the representations contain almost no factual support. For example, with respect to Research and Planning for the new campus, Dean Barbieri speaks in broad terms about transfer students from other CALS. However, JFK’s Business & Professions Code Section 6061.7(a) Disclosure (attached as Exhibit D) states that it received no transfer students in the last two academic years. It also states that the reasons students are interested in JFK include federal funding, more schedule options (day and evening, full and part time); full time faculty; and online modalities. But the Request is to begin with a part time evening program with faculty borrowed from Pleasant Hill, so three of these four bases for student interest will not apply.

Dean Barbieri does not state how many students expressed an interest in a JFK San Jose campus. All this Committee has to consider with respect to planning and research is Dean Barbieri's “confidence” that *with proper marketing and promotion,* the San Jose area will support his program. He does not state how much that marketing and promotion will cost, and whether it may affect his existing campus. If it is coming from the National University coffers, then it begs the question whether the law school has any control over whether National University will spend sufficient amounts to support Dean Barbieri’s confidence.

With respect to Financial impact, Dean Barbieri asserts that *his* analysis (to which the Committee is not privy), indicates that there is nothing but upside for the Pleasant Hill campus. His analysis does not include the cost of marketing and promotion, but limits itself to a brief recitation of the fact that National University has an existing campus, so the law school’s only cost would be the part time professors. If this is the analysis (every existing campus provides the law school with upside revenue), again I caution the Committee about the 43 other branch campuses to come from National, or some other large commercial enterprise, and consider whether such schools should be given an advantage in the marketplace on the basis of such pre-existing campuses, which the majority of existing CALS do not have.

With respect to Resources, Dean Barbieri indicates he will split his time between the schools. He will delegate some of his authority to Assistant Dean Kanios, who previously presided over the failed New College School of Law. Each will be on campus only one night a week, from 4pm to the start of classes, which will constitute the entire academic support, assistance and counseling for the students. Yet, Dean Barbieri states that the San Jose students will have access to “the same

student support, counseling and other services that the law students at the Pleasant Hill campus receive, as well as other JFK University students at the existing San Jose and Berkeley campuses." Does he mean the same services they received *before* he proposed to split his faculty and staff between the two campuses? Or that *everybody* now gets only half his time? Or that the existing financial aid and advising staff from unrelated National University baccalaureate and masters degree programs are assumed to know the answers to all the questions regarding a never-before-offered law program?

It is not clear that Mr. Leal sought clarification with respect to any of the issues raised by the Request. His Memorandum simply parrots the Request. However, I am more concerned by the fact that his Recommendation does not limit the branch campus to its initial evening program. It is not clear whether he intends that the branch school should be grandfathered in to all the programming currently available at the Pleasant Hill campus (including a day program, a full-time program, and online programming - all of which the Pleasant Hill campus (and all the other CALS) were required to obtain by Major Change Request). This issue should be given significant consideration.

It is not my intention to "nit-pick" the Request and the staff Memorandum, but only to point out the scarcity of any actual factual analysis upon which the Committee's decision may be based. The Guidelines require that the Committee make a finding which it must necessarily make solely on the basis of Dean Barbieri's representations. The Committee should therefore take great care in analyzing those representations. If the information given by the requesting party is insufficient, the Request should be denied. I submit that the representations made in JFK's Request are not sufficient for the Committee to support the required finding.

As noted by Mr. Leal, some of you may know Dean Barbieri from his time on the Committee, or from his time as the Director of Education Standards. But he is not appearing before you as either of those things. He is appearing before you with a distinct career and business interest in the outcome of this proceeding. So, to "just trust" Dean Barbieri here is to "just trust" *any other dean who makes the same broad generalizations.* And to allow the JFK Request is to allow the same Request of a non-WASC accredited institution (or else give advantage to national or programmatic affiliation, or to the expense of dual accreditation which small non-profit campuses cannot afford).

My point is that it should not be assumed that the Committee is a "rubber stamp" – particularly if the only staff member looking at these Requests appears himself to be a "rubber stamp" (at least in this instance). As stated above, this Request is for **extraordinary relief**. Permission to put a branch CALS campus in the same city as an existing, successful CALS ***has never been given,*** and should require significantly more research and analysis with respect to its potential consequences to this Committee's constituencies, including both future Jaw students and the entire CALS program, than has been provided in this Request.

Lincoln Law School of San Jose therefore asks that JFK's Major Change Request be denied outright, and that the Guidelines thereafter be amended to address the special circumstance of opening a branch campus near an existing Committee accredited school. If the Committee chooses not to deny the Request, it should consider whether the time provided in the Guidelines is sufficient to gather the information that might be required to make an informed decision. I would ask that you not so limit yourselves, and that you would give Lincoln Law School of San Jose, and other interested parties, sixty days to gather appropriate support for our position (a difficult task on the 7 days' notice we had) and return for further argument in San Francisco in March, rather than issuing a final decision at or prior to the next scheduled meeting. The Northern California public and members of the Bar might like to be heard.