



May 6, 2019

ANTITRUST DETERMINATION 2019-0002

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 April 8, 2019, the State Bar received a Request for Antitrust Determination from Alex Tanachev (“Requestor”). Requestor’s submission is attached hereto as Appendix 1.

Requestor asked for an analysis of (1) the pass score for the California bar examination and (2) the eligibility requirements for the registered in-house counsel registration program (“RIHC”). Requestor suggested that the availability of RIHC to attorneys who were admitted to other jurisdictions with bar pass scores lower than California’s may present fairness issues. Requestor sought an antitrust analysis.

C. Analysis

1. The California Supreme Court’s Rules Regulating the Practice of Law are Entitled to Antitrust Immunity.

The U.S. Supreme Court has explained that the State Action doctrine immunizes from antitrust liability enactments of a state supreme court acting in its legislative capacity to regulate the practice of law.

In *Parker v. Brown* (1943) 317 U.S. 341, the U.S. Supreme Court held that state authorities are immune from federal antitrust liability for actions taken pursuant to a clearly expressed state policy. *Id.* at 351 [“We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”].

Although *Parker v. Brown* analyzed a legislative action, the U.S. Supreme Court later held that State Action immunity applies to policies enacted by a state supreme court acting in its legislative capacity to regulate the practice of law.

In evaluating an antitrust challenge to Arizona's attorney advertising rules, the U.S. Supreme Court stated that "[the Arizona Supreme Court] is the ultimate body wielding the State's power over the practice of law . . . and, thus, the restraint [on competition] is compelled by direction of the State acting as a sovereign." *Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 360 [affirming antitrust immunity but invalidating the rules on First Amendment grounds] [internal quotations and citations omitted].

State Action immunity has also been held to apply specifically to a state supreme court's exercise of its authority over attorney admissions and the bar examination pass score. In *Hoover v. Ronwin* (1984) 466 U.S. 558, a failed applicant for the Arizona Bar asserted that the bar exam grading formula restrained trade in violation of the Sherman Act by artificially reducing the number of competing attorneys in the state. The U.S. Supreme Court rejected the challenge on State Action immunity grounds. The U.S. Supreme Court explained that "[A] decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." *Id.* at 567.

2. The California Bar Examination Pass Score and the Requirements for the RIHC Program Were Set by the California Supreme Court.

The California Supreme Court has the ultimate authority over the practice of law in the state. See Rule 9.3, Cal. Rules of Court ["The Supreme Court has the inherent power to admit persons to practice law in California. The State Bar serves as the administrative arm of the Supreme Court for admissions matters and in that capacity acts under the authority and at the direction of the Supreme Court."].

Both the California Bar Examination pass score and the requirements for the RIHC program were established by the California Supreme Court, and the State Bar's role is limited to implementing and administering these policies.

a. The Supreme Court Sets the Passing Score for the California Bar Examination

The pass score for the California bar examination is determined by the California Supreme Court. Rule 9.6(a), Cal. Rules of Court. ["The Supreme Court must set the passing score of the examination."]. The California Supreme Court has set the exam pass score at 1440. *In Re California Bar Exam*, Case No. S244281, Letter dated October 18, 2017, available at <https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam>.

b. The Supreme Court Sets the Rules for Registered In-House Counsel Certification

The California Supreme Court enacted Rule 9.46, Cal. Rules of Court, which permits attorneys licensed in other jurisdictions to provide in-house legal services in California if they comply with

the registration requirements set forth in that rule and rules established by the State Bar (Title 3, Division 3, Chapter 1, Article 4, Rules 3.370 to 3.377 of the Rules of the State Bar of California). Rule 9.46(a)(2) restricts the program to active attorneys licensed in U.S. jurisdictions other than California.

3. Accordingly, the California Bar Examination Pass Score and RIHC Program Rules are Immune from the Antitrust Laws.

Both the California Bar Examination Pass Score and RIHC program rules were established by the California Supreme Court acting in its sovereign capacity to regulate the practice of law. *See* 1.3, Cal. Rules of Court. Accordingly, the State Action doctrine immunizes these policies from antitrust liability.

D. Conclusion

Based on the foregoing analysis, there is no antitrust violation related to the State Bar's administration of the rules enacted by the California Supreme Court concerning the pass score for the bar examination and the RIHC program.

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 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.**



The State Bar of California

REQUEST FOR ANTITRUST DETERMINATION

Pursuant to Supreme Court of California Admin. Order 2017-09-20

Requester Information

Date 04-08-2019

First Name Alexander Last Name Tanachev
 Organization private person
 Address 26230 County Road 97
 City Davis State CA Zip Code 95616
 Email atanachev7@gmail.com Phone 669 241 9093 Fax _____

It is the policy of the State Bar of California to comply with all laws. An important aspect of this policy is our commitment to obey the letter and the spirit of the antitrust laws. Pursuant to the Supreme Court of California's Administrative Order 2017-09-20, any member of the public may report a potential antitrust violation to the State Bar. When notifying the State Bar of your concerns, please include the following information:

- The nature of the potentially anticompetitive action;
- The department(s) or committee(s) of the State Bar undertaking the action;
- The specific type(s) of market impacts you believe may arise from that action; and
- Why you believe the State Bar does not enjoy immunity from antitrust laws for the action in question.

Request for Antitrust Determination

Please be as specific as possible. Attach additional sheets of paper as necessary.

Dear Sirs,

Hereby I would like to ask you to check the existing rules for California bar exam passing score & rules for admission of in-house counsels on compliance with the Antitrust laws. I believe that the rules violate the principles of unfair competition and they put California residents into much unfavorable position towards examinees from other states who come and practice law in California. I took the bar exam three times. My July 2018 score was 2840, the Feb 2017 was 2790 accordingly. This is much higher than the passing score nationwide (2660 across majority of UBE states). While examinees from UBE states with much lesser score come to California and practice law as in-house counsels, I am still barred from any legal job opportunities completely because the option of registered in-house counsel is not available to me. My debts continue growing and I have to pay over and over again for preparation and exam administration. I believe that such situation is unfair. Registered In-house counsel option allows to practice law in California in limited capacity and this option should be also available to those California law school graduates who earned the score higher than 2660 but less than required 2880. I believe that adjusting the rules by making the option of in-house counsel available to larger group of California examinees, California State bar would eliminate the unfair treatment of California residents towards residents from other states on California legal job market. Another way to eliminate the unfair treatment would assume introduction of an additional exam for attorneys from other jurisdictions who come to work as in-house counsels so that all applicants are similarly situated.

Thank you,
Alex Tanachev

SUBMIT THIS FORM

- 1) *By E-mail:* AntitrustRequest@calbar.ca.gov 2) *By Mail:*
 The State Bar of California
 Office of General Counsel
 Attn: Antitrust Request
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 San Francisco, California 94105