



October 5, 2017

ANTITRUST DETERMINATION 2017-0001

A. Authority

This determination is made pursuant to California Supreme Court Administrative Order 2017-09-20, 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. Issue Presented

On September 27, 2017, Joanna Mendoza (“requestor”), a member of the State Bar Board of Trustees, inquired whether the State Bar’s refusal to certify to the California Supreme Court for admission out-of-state attorneys who have not passed the California bar examination implicates any antitrust issues. The requestor inquired specifically about the effect of SB 1782 (2000), which states the intent of the Legislature that the California Supreme Court should study the issue of granting admission on motion to attorneys from states that afford the same benefit to California-licensed attorneys.

C. Analysis

1. State Bar’s Role in Attorney Admissions.

The California Supreme Court has the ultimate authority over attorney admissions. The California Legislature also shares authority to regulate attorney admissions. *See, e.g., Brydonjack v. State Bar of California*, 208 Cal. 439, 443 (1929) (conditions of admission to practice law are proper subjects of legislative control). The Legislature has enacted the State Bar Act, Bus. & Prof. Code §§ 6000 et seq., which establishes requirements for admission to practice law in California and prescribes the duties of California attorneys.

The State Bar and its Committee of Bar Examiners serve as the administrative arm of the Supreme Court for admissions matters and in that capacity act under the authority and at the direction of the Supreme Court. The State Bar’s role in the admissions process is to administer the admissions requirements set forth in the State Bar Act and the California Rules of Court and to certify to the Supreme Court for admission those applicants who fulfill the admission requirements.

2. Antitrust Laws Applied to Attorney Admissions in California.

In attorney admissions matters, the State Bar acts only as an instrumentality of the Supreme Court and Legislature. The U.S. Supreme Court has held that the antitrust laws do not apply to state legislative enactments, regardless of anti-competitive intent or effect. *See, e.g., Parker v. Brown*, 317 U.S. 341, 350-51 (1943) (“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.”); *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984) (“When the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise. Where the conduct is that of the state legislature or supreme court, we do not need to address the issues of clear articulation and active supervision.”).

3. Statutory Law Requires Out-of-State Attorneys to Pass the California Bar Examination.

Business and Professions Code¹ Section 6062 describes the circumstances under which attorneys licensed in other states may receive a license to practice law in California. The statute requires that an out-of-state attorney pass the general bar examination, unless the attorney has been licensed for over four years in another U.S. jurisdiction, in which case the attorney may elect to take the attorneys’ examination. The statute does not permit admission on motion for attorneys licensed in other states, nor is there any other authority (such as a Rule of Court) that would allow for such admission.

4. SB 1782 (2000) Did Not Alter this Statutory Requirement.

In 2000, the Legislature passed SB 1782 stating the “intent of the Legislature that the Supreme Court of California should adopt rules permitting the admission to the practice law in California of an attorney who is licensed in another state and who has not passed the California State Bar examination, if the state in which the attorney is licensed to practice affords the same opportunity to license attorneys from California.”

Although this bill stated an intent of the Legislature to modify the practice with respect to out-of-state attorneys, no policy action has been taken to implement the directive. The task force appointed by the California Supreme Court recommended against implementing admission by motion.² The Supreme Court has not adopted rules implementing the Legislature’s desire, nor has the Legislature modified the statutory requirement that out-of-state attorneys must pass the California bar examination.

The State Bar does not have independent authority to change the requirements applicable to out-of-state attorneys so long as Section 6062 remains in place. SB 1782 was simply an expression of legislative intent. It did not effect any changes to the laws governing attorney admissions in California and did not command the State Bar to take any action with respect to out-of-state attorneys.

5. Conclusion: Antitrust Laws are Not Implicated by California’s Statutory Restrictions on Admission of Out-of-State Attorneys.

The policy decision to require that out-of-state attorneys must pass the California bar examination was set by the Legislature through statutory command and the State Bar lacks independent authority to

¹ All statutory references are to the Business and Professions Code unless otherwise indicated.

² See Final Report and Recommendations of the California Supreme Court Advisory Task Force on Multijurisdictional Practice (Jan. 7, 2002), available at http://www.calbar.ca.gov/Portals/0/documents/reports/2002_MJP-Report.pdf (recommending establishment of registered in-house counsel rules and changes to the definition of unauthorized practice of law to accommodate out-of-state transactional attorneys providing legal services in California on a temporary and occasional basis, but declining to recommend broader admission on motion to out-of-state attorneys).

change this requirement. The Supreme Court has not exercised its inherent authority over attorney admissions to modify this requirement.

An out-of-state attorney who has not passed the California bar examination has not fulfilled the statutory requirement and cannot be certified to the California Supreme Court for admission. The State Bar's refusal to certify for admission out-of-state attorneys who do not meet the statutory requirement is a ministerial act to enforce Section 6062. The State Bar's actions are exempt from the antitrust laws as the State Bar is simply acting to implement the policy set by the Legislature.

D. 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. The 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.**

* * *

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