THE STATE BAR
OF CALIFORNIA

OFFICE OF GENERAL COUNSEL

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January 25, 2018

ANTITRUST DETERMINATION 2018-0001

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 October 14, 2017, the State Bar received a submission from Dr. Stan Pulle, President and Dean of the Southern California Institute of Law (the "Requestor"), to examine whether the Advisory Committee on California Accredited Law School Rules ("RAC") to the Committee of Bar Examiners ("CBE") potentially implicates any antitrust issues.[1] Requestor's submission is attached hereto as Appendix 1. The antitrust claim focuses specifically on the fact that three of the six RAC members are selected by the deans of private, California Accredited Law Schools ("CALS").

C. Analysis

1. The RAC's Composition and Role

According to the Functions and Procedures of the Advisory Committee[2] ("Functions and Procedures"), adopted by the CBE in May 2009 [attached hereto as Appendix 2], the RAC is composed of six members, three selected by the deans of the CALS and three appointed by the Chair of the CBE. Functions and Procedures, § II. The RAC generally meets in conjunction with regularly-scheduled meetings of the CBE, and must conduct its meetings in conformance with the State Bar's open and closed meeting rules. *Id.*, § III.

The RAC is a purely advisory body and lacks authority to enact any regulations affecting law schools or the practice of law in California. The RAC "provides advice to the [CBE] on matters relating to the promulgation of new rules, guidelines and amendments to the *Accredited Law School Rules (Rules)* and the *Guidelines for Accredited Law School Rules (Guidelines)*." *Id.*, § I. [attached hereto as Appendix 3]. In furtherance of this purpose, the CBE refers relevant matters to RAC for the latter's review and recommendation. *Id.*, § I (A). The RAC is provided the opportunity to present its recommendations during regularly-scheduled CBE meetings, and after due consideration, the CBE "will make a determination to accept, modify or deny the recommendations of RAC." *Id.*, § I (E). If the CBE rejects or substantially modifies a recommendation, the RAC may request review of that decision by the

[1] Although Dean Pulle's submission raised other legal issues, the Office of General Counsel addresses herein only his antitrust claim, as required by California Supreme Court Administrative Order 2017-09-20.
[2] The "Advisory Committee" is RAC.

Regulation, Admissions and Discipline Committee of the State Bar's Board of Trustees, which in turn may reject the appeal, request that all or part of the CBE decision be reconsidered, or request a formal review by the Board of Trustees. *Id.*, § I (F).

Thus, RAC offers advice, and even may seek review if its advice is not taken, but it does not have authority to actually promulgate or enforce any Rule or Guideline.[3]

2. Antitrust Laws Applied to RAC

Based on the limited role assigned to RAC, antitrust laws are not implicated. Antitrust laws generally prohibit anticompetitive activities that impose unreasonable restraints on trade, or the anticompetitive exercise of monopoly power. However, the RAC cannot impose any restraints on trade, nor can it exercise monopoly power, because it has no authority to promulgate or enforce any rule. This is so because the CBE makes its own determination whether to accept, modify or deny the recommendations of the RAC, subject to review by the Board of Trustees. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781 (1975) ("A purely advisory [action] without a showing of an actual restraint on trade," does not violate the Sherman Antitrust Act.)

D. Conclusion

Based on the foregoing analysis, the presence of three CALS deans on RAC does not raise antitrust concerns. RAC has no authority to impose any restraints on trade, and as such antitrust principles are not implicated.

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. 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.**

[3] Although the requestor argues that state power has been shared with RAC and cites *DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015), in support of this proposition, as explained above RAC exercises no state power; RAC merely acts as an advisory body to CBE. The CBE and the State Bar Board of Trustees are not bound by the recommendations of RAC.

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

APPENDIX 1

10/13/2017 (Revised 10/14/2017)

NEW DEVELOPMENTS

This short Memorandum is the draw attention to two interrelated constitutional issues that goes to State Bar regulatory power over accreditation rulemaking. To be sure, regulating the practice of law is a core function of the judicial branch. It has all along been assumed that this inherent judicial power extends over to law school accreditation. However, in November 2016, this assumed power was cast into serious doubt by an administrative ruling of the California Supreme Court. The background for this ruling was as follows.

To enforce a minimum pass rate (MPR) as reflected in Accredited Law School Guideline 12.1-12.2 the Committee of Bar Examiners must disclose to law school administrators certain information. This includes the pass/fail list of the *actual names* of a law school's graduates that took the exam within any immediate five year period, and in what year and in what capacity they took the exam, either as a first-time taker or repeat-taker, and the number of tries made in given year, and whether they passed or failed. Law schools in turn are mandated to use this information to calculate and report the MPR according to formulae designed by the Committee.

All of this came to a halt on January 1, 2016 when such disclosures were prohibited by Bus. & Professions Code §6060.25. That provision added the State Bar as an entity covered by the California Public Records Act (CPRA). To get around this privacy law, the State Bar sought an exemption for the release of student privacy data by engrafting a proposed amended onto a 2016 State Bar Dues Bill. That Bill collapsed in the legislature. Thwarted by this legislative defeat, the State Bar petitioned the Supreme Court to add a proposed rule 9.8 to Title 9 of the California Rules of Court.
See, http://www.courts.ca.gov/documents/SP16-11.pdf

As part of this proposed rule 9.8, the State Bar petitioned the Supreme Court that it exercises its ***inherent*** authority that would empower the Committee to provide information "to a law school that is ***necessary*** for the purpose of the law school's compliance with accreditation or regulatory requirements." See proposed rule 9.8 (a) (3). (Emphasis added.)

The relevant text of the State Bar petition speaks to this. "Under the California Constitution, the Supreme Court bears the ultimate responsibility and authority for determining the issue of admission to the practice of law in this state (*In re Garcia* (2014) 58 Cal.4th 440, 451.) Under this inherent authority, the Supreme Court has adopted the rules in title 9 of the California Rules of Court, which address attorney admission and disciplinary proceedings (Cal. Rules of Court, rule 9.2). The proposed new rule is intended to facilitate the ability of applicants to demonstrate they qualify for licensure and to ensure proper functioning of the admissions process."

http://www.courts.ca.gov/documents/sp16_11_invitation_to_comment_chart_attorney_admissions_disclosure_of_ap_and_exam_info_2016_10_26.pdf

The Supreme Court's declined to act on the State Bar's petition as reflected in its short order as follows: "The Supreme Court has reviewed public comments submitted with respect to proposed Rule of Court, rule 9.8, which involves the proposed disclosure of applicant and examination information by the State Bar. (See the original news release). In light of those comments and after consultation with both houses of the Legislature, the court will defer consideration of the rule."

http://www.courts.ca.gov/17177.htm

However, unlike denying the adoption of a proposed rule or engaging in a partial adoption of a proposed Rule, as the Court does from time regarding attorney admission and discipline, it did something extraordinary. It instead wholly deferred this "necessary" accreditation regulation to the legislative branches of government. The Supreme Court did not buy into the "***inherent***" authority or "***necessary***" purpose argument advanced by the State Bar. Rather, the Supreme Court's action here strongly suggests that, unlike in matters pertaining to attorney admission and discipline, it has no such sovereign inherent authority in the field of law school accreditation no matter how necessary the rationale for implementation may be and its alleged nexus to attorney licensing.

This is a seismic shift in who exercises proper authority over accreditation matters. ALS Guideline 12.1-12.2 both, in its enactment and implementation, rested on the state Supreme Court's core power. If the Court ruled it had no power in the Guideline's implementation, it must have had no inherent power in its formulation as well. Hence ALS Guideline lacks the assumed constitutional basis on which it was established.

RULES ADVISORY COMMITTEE

Far more constitutionally problematic is the structure of the Rules Advisory Committee and its operational powers in terms of both legislative delegation and anti-trust exemption. The Committee of Bar Examiners has invested ***private*** parties with unparalleled state power to sit on one of its formal Committees known as the Rules Advisory Committee (RAC.) The RAC is an official committee of the State Bar. The RAC has six members. Three of them are ***private*** agents of California Accredited Law Schools ("CALS") and three represent the Committee. The private agents of CALS are not sworn to constitutional oath and nor are they required to file any conflict of interest statement with the state. Some agents represent law schools that are part of large institutions whose operations transcend state boundaries.

Under Paragraph 1(A) of the RAC framework, any new rules, amendments and Guidelines must be first, as a necessary precondition, be first referred to, and be recommended by the RAC to the Committee ***prior*** to adoption. The Committee must therefore first secure a formal quasi-legislative and quasi-judicial "recommendation" from the RAC ***before*** it can introduce any new regulations or modify existing ones.

This is lawlessness.

The upshot of this structure is that ***private*** parties, the representatives of CALS are invested with unprecedented state power to operate as "state actors," and are empowered to block the initiation of new accreditation Guidelines. Unless a recommendation ensues from the RAC, the Committee is shackled ball-and-chain from adopting any new regulations or making amendments to existing ones under power delegated it by the legislature. This delegation of state power by the Committee to private parties that provides the RAC with a *preclearance veto* before new regulations may go into effect constitutes a blatant violation of separation of powers.

It is no answer to say that although the Committee cannot act without first receiving a "recommendation" from the RAC, it is yet free to amend, reject, or modify such a recommendation. There is no analogue to this private veto power with respect to the initiation of state regulations exercised by any state or federal agency anywhere in the country. That the Committee calls itself an "Advisory" committee has no legal relevance.

The California Supreme Court declared in *City of Cotati v. Cashman,* (2002) 29 Cal.4th 69, 75, that a statute's preamble cannot confine the meaning of the words themselves.

A canon of construction, *noscitur a sociis*, holds that a word gathers it's meaning from its context established by the surrounding words. *Jarecki v. G.D. Serle & Co.,* 367 U.S. 303, 307 (1961.) The RAC's authority to "recommend" must be interpreted as part of a symmetrical and coherent regulatory scheme in which operative words like "modify," "reject," and "accept" all acquire a consistent and common theme framing the formal state process for the adoption of new Guidelines by the Committee. "[T]he coupling of words together shows that they are understood in the same sense." *Neal v. Clark,* 95 U.S. 704, 709 (1877.)

There is also the issue of the State Bar's sovereign immunity from the ***anti-trust*** law. The linchpin of the exemption for anti-trust immunity is completely eroded when private "[e]ntities purporting to act under state authority might diverge from the State's considered definition of the private good," *North Carolina State Board of Dental Examiners v. FTC,* 135 S. Ct. 1101,___(2015.) This principle forbids Deans serving on the RAC to bend state judicial power to private interests.

We have representative of ***private*** law schools engaged in the formal sharing of state power enacting regulations for a ***private industry*** of accredited law schools The interest of these private individuals may not only clash with other accredited law schools like SCIL but also with California's ***public interest***. This is brought into sharp relief when some of those serving on the RAC represent out-of–state entities and are in active competition with neighboring law schools. Made worse, when actions taken by the RAC could result in one law school's attempt to exercising monopoly accreditation over two contingent counties.

The sharing state power with private parties is brazenly unconstitutional. See, *Department of Transp. v. Association of American Railroads,* (2015) 135 S.Ct.1225, 1238 ("When it comes to private entities, however, there is not even a fig leaf of constitutional justification.") We have a catalogued a whole list of items whereby Deans serving on the RAC were in the past able to obtain waivers and dispensations that primarily benefits the entities they represented on the RAC. This appearance makes matters far worse when law deans serving on the RAC represent law schools with whom they are in direct competition located almost within a short mile of one another.

The RAC functions no differently than a cartel composed of private interests that gets to tell the State Bar which proposed Guidelines it gets to consider and green light that benefits their interests and what gets frozen from *any* consideration by the RAC. This is *classic* protectionism.

Those who are seeking accreditation but yet unaccredited may not be members of CALS and hence their interests are not served the RAC. *Teladoc v. Texas Medical Board*, No. 1-15-CV-343, 112 F. Supp. 3d 529 (W.D. Tex. 2015) (granting motion for preliminary injunction against anticompetitive rulemaking by self-interested licensing board.)

One of the current law dean representatives on the RAC is from a law school in direct competition with SCIL and where the two law schools have frequently had a serious clash of interests in the past. This exercise of private power in the RAC raises precisely the type of anti-trust specter that made our state Supreme Court caution the State Bar whenever it embarks upon regulations that may compromise the public interest.

The pre-clearance veto power whereby state power is shared with private parties in the initiation of accreditation regulations or the modification of existing ALS Guidelines violates a core legislative power, and perhaps a core Supreme Court power.

We submit that ALS Guideline 12.1-12.2 that first emanated from a RAC "recommendation" is null and void and, the RAC be forthwith disbanded as being contrary to law.

SCIL is not against the use of bar pass rates as "a" key factor in evaluating the quality of legal education if used prospectively rather than retroactively. Given the different weights that are now assigned to the bar exam as opposed to four years ago, we really have two versions of the rule. We respectfully suggest a new Guideline be formulated. One based simply on first-timer percentage pass rates only of a school's graduates who sat for a bar exam. Law schools should not be forced to try unmasking the non-passers. The State Bar, in particular, cannot be heard to complain of unfamiliarity with the "well-known principle that the courts will not permit a party to do indirectly what the Constitution prohibits doing directly. This principle has long been recognized and applied by both the United States Supreme Court and this court." Justice Mosk (dissenting, in *Rossi v. Brown* (1995) 9 Cal 4th 693, at 722.

Thank you so much for your kind attention.
Sincerely,
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APPENDIX 2

The Committee of Bar Examiners
Of
The State Bar of California

ADVISORY COMMITTEE ON CALIFORNIA ACCREDITED LAW SCHOOL RULES

FUNCTION AND PROCEDURES

I. Function

The Advisory Committee on California Accredited Law School Rules (Advisory Committee) provides advice to the Committee of Bar Examiners of the State Bar of California (CBE) on matters relating to the promulgation of new rules, guidelines and amendments to the *Accredited Law School Rules* (*Rules*) *and* the *Guidelines for Accredited Law School Rules* (*Guidelines*).

(A) The CBE will refer such matters to the Advisory Committee for its review and recommendation prior to making a final decision.

(B) The CBE will set reasonable deadlines for receipt and review of the Advisory Committee's comments and recommendations. Generally, the Advisory Committee will provide recommendations regarding new rules and guidelines within 90 days of receiving a referral from the CBE.

(C) The Advisory Committee may also develop related proposals for consideration by the CBE.

(D) The Advisory Committee will provide all comments, proposals and recommendations to the State Bar's Office of Admissions for distribution to the CBE in compliance with the CBE's regular notice requirements. However, recommendations provided to the CBE at least 30 days prior to a regularly scheduled meeting at which the matter will be presented will be distributed to the CBE as soon as practicable following receipt. Language in proposed rules and guidelines must be consistent with the State Bar's rules standards.

(E) The Advisory Committee will be provided the opportunity during a regularly scheduled meeting to present the recommendations. After due consideration, the CBE will make a determination either to accept, modify or deny the recommendations of the Advisory Committee, and the Advisory Committee will be advised of the CBE's decision within ten days following the last day of the CBE meeting where the matter was presented for a final vote. The CBE will have the sole and exclusive authority to decide the

issues presented and its decision is final, unless the Advisory Committee by a majority vote determines to seek review pursuant to section (F) below.

(F) Upon CBE's rejection or substantial modification of an Advisory Committee recommendation related to the *Rules* and *Guidelines*, by majority vote, the Advisory Committee may request review of the decision by the Regulation, Admissions and Discipline Committee (RAD) of the State Bar of California's Board of Governors. RAD may reject the appeal, request that all or part of the CBE decision be reconsidered, or choose to request a formal review by the Board of Governors. If RAD rejects the appeal, the decision is final with no further appeal to the Board of Governors.

II. Composition and Term of Office

The Advisory Committee will consist of six members, three selected by the deans of the California-accredited law schools by whatever process they deem appropriate, and three appointed by the Chair of the CBE.

(A) Persons selected from the law schools must be individuals with California Accredited Law Schools (CALS) experience, including current and previous CALS deans, associate deans or senior faculty.

(B) Persons selected by the CBE may be current of former members of the CBE or other individuals with professional or board level expertise in the fields of legal education, higher education, or regulation.

(C) The term of office for each member is three years. For the first Advisory Committee appointed, each member will serve initial terms of one year, two years and three years, such terms to be determined by lot.

(D) The Chair of the Advisory Committee will be selected on an annual basis by the Advisory Committee from among its members. The Advisory Committee Chair will serve a minimum of one year, in accordance with the State Bar's appointments schedule, with no prohibition on serving as Chair for more than one year.

III. Meetings, Agenda and Summaries

(A) The Advisory Committee will approve a meeting schedule that is necessary to meet its responsibilities. Generally, the Advisory Committee will meet in conjunction with regularly scheduled meetings of the CBE

(B) Advisory Committee meetings will be conducted in conformance with the State Bar's open and closed meeting rules.

(C) The logistics and agenda for each meeting will be coordinated by the State Bar's Office of Admissions in consultation with the Chair of the Advisory Committee. The agenda and copies of all items under consideration will be distributed to Advisory Committee members at least 30 days prior to the meeting. Generally, distribution will by email. The Advisory Committee will also be provided any additional information related to the Advisory Committee's recommendations that are included in the general agenda and materials provided to the CBE, consistent with the State Bar's Open and Closed Meeting rules.

(D) A member of the Advisory Committee will be designated by the Advisory Committee Chair to compile a summary of the meeting for distribution to its members.

IV. Budget

Each year's cost of the Advisory Committee's activities will be determined annually by the State Bar's Office of Finance, which will also determine what portion of the costs shall be assessed to the CALS as an additional annual fee. The cost of the program will consist of both direct and indirect costs in accordance with the State Bar's established budget procedures. The annual fee will be charged to California-accredited law schools, which must be paid at the same time as the annual compliance report fee is due.