

COMMITTEE OF BAR EXAMINERS OPEN SESSION AGENDA ITEM

AGENDA ITEM: December 2018 – O-403

DATE: November 26, 2018

TO: Committee of Bar Examiners

FROM: Natalie Leonard, Principal Analyst, Educational Standards

SUBJECT: **Southern California Institute of Law
Notice of Noncompliance with Guideline 12.2 and Notice of
Objection of Fees**

SUMMARY

All California Accredited Law Schools (CALS) must maintain a Cumulative Five-Year Minimum Bar Passage Rate (MPR) of at least 40% (See Rule 4.160(N) and Guideline 12.1, Rules and Guidelines for Accredited Law Schools). Schools report the MPR annually each July.

When Southern California Institute of Law (SCIL) reported a verified MPR of 26.4% in July 2018, the Committee of Bar Examiners (Committee) issued a Notice of Noncompliance to the school.

SCIL provided the attached response challenging the basis of the rule and also withholding and challenging the deposit required under Rule 4.170(B). (Attachment A).

BACKGROUND

Now that the Committee has issued a Notice of Noncompliance to SCIL, and the school has responded, Rule 4.170 prescribes that the Committee should choose one of the following actions:

(1) If the Committee deems the [school's] response satisfactory, it will notify the law school within thirty days of its consideration of the matter.

(2) If the Committee deems the [school's] response unsatisfactory, it must schedule an inspection by the Senior Executive within sixty days of its consideration of the matter.

DISCUSSION

SCIL has been unable to meet the minimum MPR since at least 2015 when the State Bar first issued a Notice of Noncompliance to the school regarding its MPR. In 2017, the

Office of Admissions sent a courtesy warning letter to the school confirming that the reporting requirement would likely be reinstated in 2018 and the school's pass rate appeared to continue to be out of compliance. Later in 2017, when SCIL's periodic inspection report, it was not given a full term of reaccreditation, in part, because its MPR did not appear to meet the minimum. In 2018, the school received its most recent Notice of Noncompliance. While the school's MPR has increased from 25.3% in 2015 to 26.4% in 2018, it still has not reached the 40% minimum.

SCIL does not dispute the calculated values of these figures in its response. Instead, the school also indicates that it added mandatory bar preparation classes in March 2017, it has added several writing courses to the curriculum as well, and it has evaluated its admissions policies.

The school also contests the authority of the Committee and the State Bar of California to create Guidelines 12.1 and 12.2, and asks that any Notices of Noncompliance issued in connection with these Guidelines be vacated. Here, however, the Committee's role involves creating and applying these Rules and Guidelines, so this is not a forum in which any such challenge can be addressed.

RECOMMENDATION

Because the school has been out of compliance with the MPR for at least four years with minimal change, it appears that the Committee will not find the school's response satisfactory and will instead choose the option to schedule an inspection.

The purpose of the inspection as defined by 4.171 would be to confirm whether: "the accredited law school is in compliance with these rules; or . . . the accredited law school, or any approved branch or satellite campus is not in compliance with the rules for specific reasons that warrant probation or termination of accreditation."

Because much of this inspection will involve analysis of school programs and curricula, it seems likely that a remote inspection conducted by videoconference or telephone could be appropriate, reducing time and cost to the school.

The results of the inspection would be brought back to a future meeting to be evaluated in accordance with Guideline 12.2. This guideline indicates that, pending the results of the inspection, when the Committee issues a Notice of Noncompliance as to the MPR in 2018, if *"[the] law school . . . fails to report compliance with Guideline 12.1 in its 2019 MPR Report[, it] will be placed on probation by the Committee pursuant to Rule 4.172; a law school places on probation that does not meet the terms of its probation by the end of 2020 will be subject to the loss of its accreditation."* Note that a school that is no longer California accredited can seek registered, unaccredited status if it meets those requirements.

SCIL also requests a fee waiver rather than pay the \$800 deposit and costs of any follow up actions related to the Notice of Noncompliance based on challenging the validity of the rule. Here, the Committee's role is to apply the rules, rather than to assess legal or administrative

challenges to its rule. Therefore, the staff recommendation is to deny the waiver and require payment of the appropriate deposit and fee.

PROPOSED MOTION

If the Committee agrees with the staff recommendation, the following motion is suggested:

Move that the Response of Southern California Institute of Law Response to the Notice of Noncompliance with Guideline 12.2 be received and filed; required fees; and that an inspection be scheduled within sixty days, which may be conducted remotely, to determine whether or not the school is in compliance with Rule 4.160 (N) and Guidelines 12.2, and, if not, whether probation or termination of registration is appropriate;

Further move that SCIL's request for a waiver of fees related to the Notice of Compliance be denied, and the school be advised to remit the appropriate deposit immediately and agree to pay fees related to the Notice of Noncompliance that are billed in accordance with the Rules and Guidelines for Accredited Law Schools.

Attachment:

Attachment A Southern California Institute of Law Response to the Notice of Noncompliance with Guideline 12.2.

October 05, 2018

Amy C. Nunez
Interim Director, Admissions
State Bar of California
Committee of Bar Examiners
180 Howard Street
San Francisco, CA 94105-1639

Via e-mail and
U.S. Postal Service

RE: Notice of Noncompliance (September 27, 2018)

Dear Ms. Nunez:

This is a formal response to the Notice of Noncompliance dated September 27, 2018. For the reasons that follow, and as explained in the accompanying attachment citing five independent grounds, we petition the Committee of Bar Examiners to vacate any and all Notices of Noncompliance sent under the provisions of Accredited Law School Guideline § 12.1-§12.2.

At the outset we would like to call your attention to a few threshold matters.

1. The Accreditation Inspection Report (Report) of October 31, 2017 noted that: “overall “SCIL’s curriculum, admissions, scholastic standards, faculty, library, facilities, Dean and administrators all compliant in offering students a sound program of legal education.” (Report, p.2.)
2. In our letter of November 14, 2017 to the then Director of Admissions, Gayle Murphy, we supplied a detailed list of steps that were taken to fully and completely address all concerns, all technical, in the Report.
3. We had requested the usual five-year extension following compliance. However, Mr. Greg Shin, a Team Member and Programs Manager for Operations and Management wrote us and copied Ms. Gayle Murphy via e-mail of November 21, 2017 (timestamped:11.48 a.m.) that the only reason this was not possible was because of a past Notice of non-compliance.

Thank you,

Sincerely,

Stanislaus Pulle Ph.D.
Dean of Law

ATTACHMENT
PETITION TO VACATE ALS GUIDELINES §§12.1-12.2

INTRODUCTION

Now that it has been acknowledged that the State Bar does not act in its inherent sovereign capacity as a branch of state government in the formulation, execution, and interpretation of accreditation Guidelines, and following the seminal decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct 1101 (2015), we assert several state and federal constitutional, statutory, and antitrust grounds as to why Guideline § 12.1-§12.2 that addresses a five-year minimum pass rate must be vacated.

This Guideline became effective on January 01, 2013 after having being “**recommended**” by the now disbanded Rules Advisory Committee (RAC.) The RAC was a **six-member** formal committee of the State Bar. Three of its members were law school deans from California Accredited Law Schools (CALS) or their representatives, and three were committee representatives. Often the RAC committee representatives were the Committee members themselves. And not infrequently included the Chair of the Committee as one of the three Committee representatives. While the Committee, under the terms of the RAC framework ¶1(A), may modify, approve, or reject the RAC recommendation, without the pre-requisite “recommendation” from the RAC there is of course nothing to approve, reject or modify.

ALS Guideline § 12.1-§12.2 was recommended by the RAC and approved without change including all later amendments.

This would be analogous to our state legislature being constrained from approving any legislation in the energy field unless and until it receives a recommendation from a six member legislatively created panel of whom three are legislators and three are representatives of the energy industry. In short, without the approval of one or more members of the energy industry, the legislature is handcuffed from introducing legislative new proposals or amending existing rules.

The Law Deans on the RAC, as attorneys serving on *state* committees, while manifestly promoting their own trade interests were not required to sign a conflict of interest disclosure or waiver statement and were neither appointed or removable by the either the legislature or the Supreme Court.

Guideline § 12.1-§12.2 included **retroactive** bar pass rates from 2010 for the initial 2010-2015 period. In other words, the RAC law deans *knew* their own pass rates for the preceding three years 2010, 2011, and 2012, and thus they were in a position to fix both the calculation formula and the timeframe to benefit the majority of CALS they represented.

Prior to the accreditation visit in March 2017, SCIL's continued accreditation was approved in February 2012 and its accreditation extended through 2016 that included a review of bar pass rates that included the years 2010 and 2011.

1. UNCONSTITUTIONAL RETROACTIVITY

There is a deeply rooted presumption against unconstitutional laws (*Landgraf v. USI Film Products*, 511 U.S. 244 (1994); 114 S. Ct 1483, 1499 (1994), and a "strong presumption" against the retroactive application of statutes. *McClung v. Employment Dev. Dept.* (2004) 34 Cal. 4th 467, 475. Legislation is retroactive when "it attaches new legal consequences to events completed before its enactment. *Landgraf* at 1499.

By retroactively attaching *new* legal consequences to the previously approved pass rates of the period 2010-2011, Guideline §§12-1-12.2 violated state and federal constitutional due process against retroactive rulemaking.

2. UNEQUAL APPLICATION OF GUIDELINE §§12-1-12.2

At the time Guideline §§12-1-12.2 was enacted it was based on a set of scoring metrics according to what was scored on the written and MBE sections of a three-day bar examination. These metrics were significantly changed when a two-day rather than a three- examination was instituted as of the July 2017 bar exam. As a result, three different yardsticks have been used to measure the minimum pass rates.

Some schools were measured by the three-day metrics, others by the two-day metrics, and schools like ours were measured by a combination of both two-day and three-day metrics over the past five years. By changing the metrics the very content of §§12-1-12.2 was altered whereby the minimum pass rate is obtained by the use of three different yardsticks yielding disparate results and applied unequally to various law schools.

3. UNLAWFUL DELEGATION OF STATE REGULATORY POWER

In its preamble, the "A" in RAC is labeled "Advisory," but this by itself is not conclusive. 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. Likewise, Chief Justice Roberts, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), wrote that magic words or labels have no bearing on a "functional" approach to interpretation. It is "not controlled by Congress' choice of labels." Id. 2595.

A canon of construction, *noscitur a sociis*, holds that a word gathers its meaning from its context, which is established by the surrounding words. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961.)

The RAC's authority at the time to "recommend" must be interpreted as part of a symmetrical and coherent governmental regulatory scheme in which operative words like "modify", "reject", and "accept" all acquire a consistent and common theme, framing the formal state processes 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.) In short, the RAC is part of the formal state regulatory process.

Aside from serious anti-trust issues, the delegation of the "*initiation*" power in rulemaking to private parties violates a cardinal rule of non-delegation and separation of powers doctrine. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) explained that a delegation to a private party "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interests of others in the same business."

More recently in *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. ___, 135 S. Ct. 1225 (2015) it was noted that in the delegation of governmental power to private parties, "there is not even a fig leaf of constitutional justification." *Id.* at 1237 (Justice Alito concurring.)

ALS Guideline §§12.1-12.2 must be declared a violation of the settled cannon *Delegatus Non Potest Delegare* especially when it involves a delegation of state regulatory power to private parties in the initiation of accreditation Guidelines such as ALS Guideline§12.1-12.2.

4. ALS GUIDELINE §§12.1-12.2 VIOLATES STATE AND FEDERAL ANTITRUST LAW AND STATE BAR IS BEREFT OF SOVEREIGN IMMUNITY

ALS Guideline §§12.1-12.2 that went into effect on January 1, 2013 predates the **Parker-Walton** Draft Report of June 2018, and the February 2015 decision of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct 1101 (2015) ("*N.C. Dental*")

The State Bar may no longer consider itself the relevant state sovereign exercising inherent powers in the formulation, execution and oversight functions on law school accreditation matters. The State Bar is a multi-polar agency that "performs a variety of actions." *Keller v. State Bar of California* 496 U.S. 1, 5 (1990.) In its proper constitutional role the State Bar, then and now, as one of its many responsibilities, functions as an executive agency of the legislature pursuant to Business and Professions Code §6060.7(b)(1.) The **Parker-Walton** Draft Report underpins this fact.

North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct 1101 (2015) (“*N.C. Dental*”) demands that when private parties control the regulations of a defined market their actions must conform to specific “interstitial policies made by the entity claiming immunity” **and** further, these decisions must be “review[ed] and approve[d]” by the appropriate state sovereign. (Id. at p. 1112.) This is a two-part requirement.

As analyzed above, the consent of private parties was **required** to initiate or to make amendments to existing regulations as part of the accreditation rulemaking process.

Absent a recommendation on the proposed ALS Guideline §§12.1-12.2 voted out by a six-member RAC there was nothing for the Committee of Bar Examiners, acting in the capacity not as agents of a judicial sovereign but as executive agents of a legislative sovereign, to accept, reject or modify. Four of the six voting members are needed to approve new Guidelines or make modification to existing regulations

The Federal Trade Commission Staff Guidance Paper on Active Supervision of State Regulatory Boards Controlled by Market Participants is very instructive:

“Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.” **FTC, October 2015, p.8.**

¶1(A) of the RAC framework allowed private law deans to sit in the driver’s and to be in charge of the controls. They were able to and actually did steer regulations that were self-serving in substance. Often times they would themselves write and introduce a draft of the resolution for recommendation and adoption by the full Committee.

N.C. Dental (Id. p. 1114) references *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-362 (1977) as an example of the proper application of state action immunity. There, *N.C. Dental* found that the Arizona State Bar’s rules were “subject to pointed re-examination by the policymaker.” i.e. The Arizona Supreme Court. In *Bates*, anti-trust immunity was defensible because rules relating to lawyer advertising reflected a “clear articulation of the [Arizona Bar] State’s policy.

Again, in *Goldfarb v. Virginia State Bar* 421 U.S. 773, 781 (1975) the Court did rule that the State Bar is entitled to immunity only when it is acting in a sovereign capacity. Id. pp.790-791. As *Goldfarb* put it: “the anticompetitive activities must be compelled by direction of the State [Virginia Bar] acting as a sovereign.”

In *Patrick v. Burget*, 486 U. S. 94, 100,101 (1988), the active supervision requirement demanded, inter alia, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”

Not so with ALS Guideline §12.1-12.2. The legislature and not State Bar is the appropriate and independent “state sovereign” for oversight purposes. Besides, the Committee members empanelled on the RAC then again, go on to approve and adopt the very same regulations they previously voted to recommend with the private Law Deans.

Therefore the independent sovereign oversight demands articulated in “*N.C. Dental*,” have manifestly not been met.

Although our law school can provide actual proof of many qualified students who failed to enroll in law school upon hearing of the Notices of Noncompliance causing major revenue losses to the school, there is no requirement for poof of actual harm. Justice Kennedy explicated this issue when in referring to *City of Columbia v. Omni Outdoor Advertising, Inc.*, he wrote: “*Omni* made clear that recipients of immunity will not lose it on the basis of *ad hoc* and *ex post* questioning of their motives for making particular decisions.” (*N.C. Dental*, Id 1105.)

In short, *N.C. Dental* formulates an *ex ante* rule, to identify those entities who, by their very composition, are likely to “pursue private interests in restraining trade.” (Id.)

The Law dean representatives on the RAC are explicitly committed to pursuing the interests of CALS and indeed had been recognized by the Committee as an indispensable construct of the state’s regulatory process on initiating accreditation regulations.

There are no independent review mechanisms in place here to satisfy the “constant requirements of active supervision” that the Supreme Court identified in N.C. Dental, 135 S. Ct. at 1116. Those requirements are the foundation of the active supervision test, which is why the Court described them as “constant” and that supervision must be by the state legislature.

N.C. Dental compels that all contested ALS Guidelines, including ALS Guideline §§12.1-12.2, be vacated as unlawful and any Notices of Non-Compliance issued under this regulation must be rescinded.

Just to be sure, the losses to the school continue to mount as a result of public awareness of the Notices of Noncompliance that the school discloses to prospective students to avoid any possible future liability. Because of the notice of Noncompliance the school has been unable to add new degrees or seeks mergers and acquisitions as part of a major change.

5. ALS GUIDELINE §§12.1-12.2 FAILS THE SUBSTANTIAL EVIDENCE TEST REQUIRED OF EXECUTIVE AGENCIES UNDER THE STATE ADMINISTRATIVE PROCEDURE ACT

The state Administrative Procedure Act, Government Code §11350 (b)(1), declares that the court may invalidate a regulation that is not supported by “substantial evidence.”

However, Government Code §11340.9(a) exempts: “An agency in the judicial or legislative branch of the state government.”

It now undisputed that the State Bar does not act as a sovereign “judicial....branch of the state government” on accreditation matters.

Rather, it exercises executive authority derived exclusively from the legislative branch of government. This is in keeping with the fact that in California, “[l]abeling an entity as a “state agency” in one context does not compel treatment of that entity as a ‘state agency’ in all contexts.” *Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal. App. 4th 1098, 1114.

Moreover, regulations on accreditation for schools accredited by the American Bar Association must meet the substantial evidence requirements of the federal Administrative Procedure Act. See *Thomas M. Cooley Law School v. American Bar Ass’n*, 459 F.3d 705, 711 (6th Cir. 2006.)

Accordingly, any contested Accreditation Law Schools (ALS) Guidelines for which there is no empirical evidence supporting the “substantial evidence” standard, simply put, are unlawful.

Prior to Accredited Law School (ALS) Guideline §§12.1-12.2, the Committee engaged in a holistic review by focusing on a whole array of factors that touches every aspect of a law school, including: honesty and integrity; faculty governance, admission policies, academic good standing; faculty credentials and student and peer review; student and faculty diversity, curriculum; instructors; course materials; teaching quality; admission requirements; class size; quality of assignments, student experiential and clinical work, evaluation of faculty grading; system; research resources; library access and graduates performance on the California Bar Exam.

No one single rule, guideline, or regulation was decisive as to the quality of legal education. There was no single litmus test.

However, based on a RAC recommendation that was approved by the Committee as ALS Guideline §§12.1-12.2, bar pass rates became the single, sole, and dispositive factor in continuing law school accreditation.

This is a radical departure from the comparable ABA Standard 316(a)(2) that based on first-time pass rates schools are allowed to post pass rates that are 15 points below the average first time pass rates, and then in Standard 316 (c) (1)-(8) a number of factors are listed whereby a school may show good cause for not meeting this minimum.

The “first-time bar passage rate for black bar applicants tends to lag behind the white passage rates by thirty percentage points. Similar but less severe disparities exist for Hispanic/Latino bar applicants.” Source: p.7 of Appellant’s Answering Brief: in *Richard Sander v. State Bar of California*,

<http://www.courts.ca.gov/documents/7-s194951-apps-answer-brief-merits-113011.pdf>

It is critical to bear in mind that that the genesis for this minimum bar pass rate was to address the issue of federal student loan defaults among many ABA law schools and was engineered by the then U.S. Ed. Sec. Margaret Spellings of the Bush administration. Students attending non-WASC CALS are not entitled to draw on Title IV funds. Yet, no such distinction of any kind was made in ALS Guideline §§12.1-12.2.

In a letter to former U.S. Sec. of Education Arne Duncan on August 28, 2011, Governor Brown decried the one-size-fits-all standard for determining qualitative competencies in secondary education. He wrote:

“You are not collecting data or devising standards for operating machines or establishing a credit score.”.....“Most current state wide tests rely too much on closed end multiple choice answers and do not contain enough written and open ended responses that require students to synthesize, analyze and solve multi-dimensional problems and construct their own answers.” (Emphasis added.)

This applies with equal or more vigor to the format of the two-day state bar examination.

Despite a written opposition to the proposed ALS Guideline §§12.1-12.2 that was filed by a former retired state appellate court jurist, a retired law dean and professor of constitutional law of Loyola Law School, Los Angeles, and SCIL’s Dean (the author of this petition) the *retroactive* forty-percent minimum pass rate was recommended unanimously by the RAC, thereafter approved by the Educational Standards Committee in a telephonic meeting, and then adopted Committee of Bar Examiners in a period of three consecutive days.

The final benchmark minimum pass rate was a compromise offer between a 50% pass rate with mitigating factors, much like ABA Standard 301-6 (C) or a one-size-fits-all absolute 40% pass rate. The absolute 40% “compromise” (known as the “Sheingold Amendment”) was the RAC “recommendation” that became ALS Guideline §§12.1-12.2.

The RAC’s rulemaking relative to ALS Guideline §§12.1-12.2 finds itself in the crosshairs of rules made without the benefit of a single piece of empirical evidence supporting the “substantial evidence” test; it is in violation of state separation of powers; and more to the point in violation of state and federal antitrust laws.

Never mind the “substantial evidence” standard, ALS Guideline §§12.1-12.2 does not even the rational test in California. In *American Board of Cosmetic Surgery v. Medical Board of California*, (2008) 162 Cal.App.4th 534, the Court wrote:

“[T]he inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . . When making that inquiry, the ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’” (*Id.* at pp. 547-548.) (Internal citations omitted.)

The empirical record on supporting evidence for ALS Guideline §§12.1-12.2 is non-existent.

Besides, it is in flat out opposition to several legal precedents and expert studies as **catalogued below** in numerical order

1. “Merely . . . picking a compromise figure is not rational decision-making.” *Qwest Corp. v. FCC*, 258 F.3d 1191,1202 (10th Cir. 2001). Political compromises in legislation are different from those in agency rulemaking: See *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007).

2. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) when a change in agency policy “rests upon factual findings that contradict those which underlay its prior policy...a reasoned explanation is needed for disregarding facts and circumstances that underlay” the prior policy. *Id.* at 515–516. Four dissenters led by Justice Breyer demanded more: “To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, ‘Why did you change?’” *Id.* 549.

http://www.supremecourt.gov/opinions/15pdf/15-415_mlho.pdf (June 20, 2016) p.12

3. *Med. Inst. of Minn v. Nat'l Ass'n of Trade & Technical Schools*, 817 F.2d 1310, 1314 (8th Cir. 1987) (“Strict guidelines would strip [the accreditor of] the discretion necessary to adequately assess the multitude of variables presented by different schools.”)

4. State free speech principles are violated when a regulation causes a “real and appreciable impact” affecting traditional Socratic instruction. See *Planning & Conservation League, Inc. v. Lungren* (1995) Cal. App 4th 497, 506. It cannot be doubted that all CALS have now embedded commercial bar prep courses into their required curriculum and that instructors teach to the bar exam.

“[P]rivate schools have a First Amendment right to academic freedom,” part of which is a school’s right “to determine for itself on academic grounds who may teach, what may be taught, *how it shall be taught*, ..” *Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 9-11 (1st Cir. 2007.)

The rule has a direct and “fairly traceable” impact a law school’s First Amendment right to shape its curriculum. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Cut. 2743, 2752 (2010.)

5. “Bar prep courses now offered within law schools are being outsourced to bar review companies, defeating a more reasonable relationship between such courses and sound, semester-long pedagogy with more deeply embedded understandings of the application of law.” Erica Moeser, President NCBE. *The Bar Examiner*, Vol.83, No.4 (2014) 4 at p.6.

6. Several Law CALS have now formally engrafted mandatory Bar Review instruction into their regular curriculum. Bar pass rates, as Moeser points out, is more a reflection of “drill and kill” pedagogy through bar prep instruction beginning from year one until graduation rather than a comprehensive reflection of a school’s qualitative instruction. (See Attachment.)

7. In enacting ALS Guidelines §12.1-§12-2 the market participants swept aside expert studies. In a State Bar commissioned study undertaken by Dr. Chad Buckendahl, [July 15, 2013 (PR-13-02)] titled: “*Key Factors To Consider When Engaging In A Development Or Redevelopment Process For Examinations*” he writes:

“One of the primary purposes of a professional licensure examination is to provide independent evidence that candidates possess sufficient competency for entry-level practice. It would be inappropriate to confound that intent with the purposes of educational training programs or accreditation activities with that program...**Although often misused for such purposes, licensure testing program scores are not intended to serve as a comprehensive evaluation of a program’s curriculum and instruction.**” (Emphasis added.)

8. Addressing “*Accreditation and Quality of J.D. Programs*,” a 2014 ABA Task Force On The Future of Legal Education concludes: The “quality of legal education” is, “[A]n abstract notion as to which there is no objective metric for progress or achievement.”

Indeed ABA Standard 316 (c) (1)-(8) list several mitigating factors and eschews a dispositive percentage rate and allows for a fifteen point differential with respect to bar pass rates such as in California in 316(a)(2)

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_august_guidance_memo_S316.authcheckdam.pdf

9. In a Study of Texas Law Schools by Klein and Bolus who are the primary “psychometric analysts for the State Bar of California, conclude:

“*[T]here is a nearly perfect relationship between a law school’s mean total bar exam score and its mean LSAT score (the correlation is 98 out of a possible 100.*”

10. The Society of American Law Teachers (SALT) wrote in 2014:

“*[M]aking bar pass rates the linchpin of accreditation has the potential to stifle innovation, pose serious resource issues, and drive curricular choices aimed at increasing bar passage rates rather than developing students’ ability to integrate doctrine, skills, and values.*” And it goes on to say: “**Retaining bar passage rates as an independent bright line measure serves to reify bar passage and place it above the achievement of other student outcomes**” (emphasis added)

CONCLUSION

Following the State Bar Inspection visit in March 2017, our law school has reluctantly introduced mandatory Bar-Review test preparation material and study into the law school curriculum. Apparently this is what nearly all CALS do. This was done at the recommendation of the Inspection Team. Given the switch to a two-day examination, the school now requires all faculty to include MBE test questions as part of the course syllabus.

The school has introduced a vigorous writing component to its curriculum as well including both a 1L and upper division advanced Legal Writing classes. The school has also tightened its admissions requirement by turning down applicants that have less than what we believe is a minimum writing proficiency. The school's student profile consists of over seventy percent who are foreign born and for whom English is not their first language. This was a factor that greatly impressed our graduation speaker, the Chair of the Assembly Judiciary Committee, this past June.

For all of the above reasons the deans and faculty of our school respectfully request that the Notices of Non-compliances be voided.

Thank you very much.

With gratitude.

Regards,

Stanislaus Pulle
Dean of Law
www.lawdegree.com