

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
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)
 Plaintiff,) Civil Action No. 95-1211 (CRR)
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 v.)
)
)
 AMERICAN BAR ASSOCIATION,)
)
)
 Defendant.)

UNITED STATES' MEMORANDUM IN SUPPORT OF THE
JOINT MOTION FOR MODIFICATION OF THE FINAL JUDGMENT

The United States files this Memorandum In Support Of The Joint Motion of the United States and the American Bar Association (“ABA”) For Modification Of The Final Judgment entered in this case. The modifications are necessary to conform the Final Judgment with requirements mandated by Department of Education (“DOE”) rules promulgated under the Higher Education Act (“HEA”), 20 U.S.C. §1099(b) (1998). The modifications are in the public interest, and, therefore, the Court should enter the Order to which the parties have agreed.

In June 1995, the United States filed this Civil Action, alleging that the ABA had violated Section 1 of the Sherman Act in its law school accreditation activities. The Complaint alleged that the ABA had restrained competition among professional personnel at ABA-approved law schools by fixing their salaries and other compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The ABA and United States agreed to a settlement, and on June 25, 1996, the Court entered the Final Judgment, enjoining the ABA from

fixing compensation and from enforcing a boycott of non-ABA-approved schools. Moreover, because the Complaint alleged that the ABA had allowed the accreditation process to be misused by law school personnel with a direct economic interest in its outcome, the Final Judgment ordered the ABA to take a number of steps to limit the influence of law school personnel in the accreditation process, including having the ABA's House of Delegates review and approve certain aspects of the accreditation process. After the Final Judgment was entered, DOE determined that allowing the House to act as the final decision-maker for accreditation activities did not conform to provisions of the Higher Education Act and DOE regulations. These provisions require a DOE-recognized accrediting body to be "separate and independent" from an affiliated trade association (here, the ABA). See 20 U.S.C. §1099(b) (1998) and 34 C.F.R. § 602.3 (1999). Consequently, the ABA, in order to retain its status as a DOE-recognized accreditation agency, has modified the House's role, and the parties to the Final Judgment have agreed that the Court should make appropriate modifications to the Final Judgment so that it conforms to the DOE requirements.

I. BACKGROUND: THE ABA LAW SCHOOL ACCREDITATION PROCESS

The ABA is the only agency recognized by DOE as a law school accrediting agency. As part of its accreditation process, the ABA has a set of Standards for the Approval of Law Schools ("Standards"), setting forth the minimum requirements for legal education that must be met to obtain and maintain ABA approval. These Standards are supplemented by formal Interpretations and Rules. The Standards and their Interpretations cover many aspects of the operation of a law school, including its salary structure, student-faculty ratios, faculty leave policies, faculty workloads, and physical facilities. (The Rules are primarily procedural.)

The ABA's Section of Legal Education and Admissions to the Bar administers law school accreditation. It was created in 1893 as the ABA's first section. The Section is governed by its Council, which has supervisory authority on all accreditation matters. The Council is the entity that DOE has actually recognized as the body that accredits law schools. The Council has a number of committees, including the Standards Review Committee and the Accreditation Committee. The Standards Review Committee reviews Standards, Interpretations, and Rules. It then recommends changes to the Council. Traditionally, the Council had forwarded its recommendations on proposed Standards to the House of Delegates for approval. By contrast, Interpretations and Rules were not reviewed by the House of Delegates until the Final Judgment subjected them to House review. The Accreditation Committee enforces the Standards and Interpretations through extensive on-site inspections of law schools to determine whether they should retain their ABA accreditation (or, in the case of schools not yet approved by the ABA, whether they should be given that accreditation). The Accreditation Committee forwards its recommendations about the accreditation of a particular law school to the Council. Traditionally, the Council had, in turn, forwarded its recommendation to the House of Delegates, which made the final decision.

II. THE FINAL JUDGMENT

The remedies in the Final Judgment are divided into three parts. Section IV prohibits the ABA from engaging in salary fixing and boycott activity. Section VII referred certain accreditation practices that had both antitrust and educational implications to a "Special Commission," which had been empaneled by the Section of Legal Education. Section VI, the section relevant to the proposed modification, increases oversight and review of the accreditation

process by people outside the law school environment and outside of the Accreditation and Standards Review Committees. These provisions were designed to address allegations that the ABA had allowed the accreditation process to be misused by law school personnel with a direct interest in its outcome.

Section VI.(B) allows appeals of certain Accreditation Committee actions to the Council. Sections VI.(C)-(E) require changes to the membership of the Council and of the Accreditation and Standards Review Committees to include more non-academic members, impose term limits, and require the reporting of appointments and elections to the ABA's Board of Governors. Similarly, Sections VI.(F)-(G) revise the membership of site evaluation teams and of the Nominating Committee, which nominates members of both the Accreditation and Standards Committee, to include more members from outside academia. Section VI contains several other oversight provisions, as well. See Sections VI.(H)-(K). These oversight provisions would remain in place and would not be affected by the modification.

Section VI.(A) was designed to increase oversight by subjecting Standards, Interpretations, and Rules to "the same public comment and review process and approval procedures." During our investigation, the Justice Department had discovered that certain Standards were enforced through anticompetitive Interpretations. While the House of Delegates had approved Standards, it had not reviewed or approved these anticompetitive Interpretations. Consequently, this provision was intended to require that Standards, Interpretations, and Rules

would all be subject to House of Delegates review. At the time the Final Judgment was entered, the Department of Justice and the ABA believed that Section VI fully complied with DOE rules and regulations.

III. THE DEPARTMENT OF EDUCATION'S DETERMINATION IS CAUSE FOR SEEKING A JUDGMENT MODIFICATION

According to the Higher Education Act ("HEA"), 20 U.S.C. § 1099b (1998), and DOE regulations, 34 C.F.R. § 602.3 (1999), a DOE-recognized accrediting agency must be "separate and independent" from an affiliated trade association. The "separate and independent" rule mandates that the related trade association may not make final accreditation policies or decisions. The body that makes those decisions not be elected or selected by the board or chief executive officer of the related trade association. See 20 U.S.C. § 1099b(b)(1); 34 C.F.R. 602.3(b)(1). The HEA also requires that 1/7 of the accrediting agency's decision-making body be members of the general public, and not members of the trade association. See 20 U.S.C. § 1099b(b)(2); 34 C.F.R. 602.3(b)(2).

Without a waiver of these requirements, the ABA could not meet the separate and independent standard because the House of Delegates made the final decision on accreditation matters. The House is an elected body of delegates from the trade association membership. Moreover, because it consists only of ABA members with no public representatives, it fails to meet the 1/7 public membership requirement, and could not meet that requirement without changing its composition. On the other hand, the ABA would satisfy the separate and independent requirements if the Council made final accreditation decisions and set final

accreditation policies. (A waiver would not be necessary under these circumstances.) See Letter from Karen Kershenstein, Director, Accreditation and State Liaison, U.S. Department of Education at 2 (March 24, 2000) (Exhibit A).

The ABA had previously received a waiver from DOE of the separate and independent requirements, so that the House could make final accreditation decisions and approve accreditation standards. In 1997, the ABA came before DOE for review of its petition for renewal as an accrediting agency, a procedure that was completed in February 2000. Under DOE regulations, 34 C.F.R. 602.3(d)(1), a waiver may not be granted if the trade association plays any role in the "making or ratifying" of accreditation decisions. Therefore, DOE determined, during its most recent review, that the ABA did not qualify for a waiver. See Kershenstein letter at 1 (Exhibit A).

Accordingly, pursuant to DOE's requirements, the ABA has changed its procedures so that the Council is the sole ultimate decision-making authority in accreditation matters. DOE has determined the "separate but independent" criteria of the HEA would not be violated by a "House of Lords" role for the House of Delegates, which would give the House the ability to review and remand Council decisions for further consideration. The ABA has adopted rules to provide the House of Delegate with this type of role. Thus, the Council will report its decisions to the House, so the House will continue to review them. The House may remand Council decisions, but not reverse them. The Council must reconsider remanded decisions. The House will be limited to two remands of a Council decision, except for a decision to remove accreditation, for which there would be one remand. After the last permitted remand, the Council's decision shall be final. DOE has approved this procedure. See Kershenstein letter at 2-3 (Exhibit A). This will

enable the House to exercise an oversight function of Council activities. Hence, the Court should modify the Final Judgment so as to conform the ABA's obligations under the Judgment with DOE's requirements.

IV. PROPOSED MODIFICATIONS

A. Standard For Modification

The Court has jurisdiction to modify the Final Judgment, under both Section XI of the Final Judgment ("Jurisdiction is retained by the Court . . . to modify or terminate any of its provisions") and Federal Rule of Civil Procedure 60(b)(5). When considering an uncontested motion to modify an existing Judgment, the Court's role is limited to determining whether the proposed modification is within the "zone of settlements" consistent with the public interest. As the D.C. Circuit has explained,

the "public interest test", as applied to a modification assented to by all parties to a decree, "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today." That formulation made clear that it was not up to the court to reject an agreed-on change simply because the proposal diverged from its view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest.

United States v. Western Electric Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citation omitted).

See also United States of America v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995)

(court's function in reviewing agreed-upon decree modification is "not to determine whether the resulting array of rights and liabilities 'is the one that will best serve society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest'"). These proposed modifications clearly meet this standard.

B. Section VI(A) Of The Final Judgment Should Be Modified

Section VI(A) of the Final Judgment currently provides that:

The ABA shall:

(A) require that all Interpretations and Rules be subjected to the same public comment and review process and approval procedures that apply to proposed Standards. . . .

The parties have agreed to modify this Section, first, to clarify that Standards, Interpretations, and Rules will be reviewed by the House of Delegates, and, second, to specifically set forth the nature of the review to be performed by the House of Delegates. The modification serves the public interest by requiring House oversight of the accreditation process to the maximum extent allowed by DOE rules and regulations. At the time the Final Judgment was entered, Standards were reviewed and approved by the House of Delegates. This is the role that the House had played for many years with regard to Standards. It was the intent of the parties in entering the Final Judgment that Interpretations and Rules be subject to the same House of Delegates review and approval process. Because DOE has determined that House of Delegates' approval is not permissible under the HEA, the Court should modify the Final Judgment to incorporate the House of Lords advisory role that DOE has approved for Standards, Interpretations, and Rules. The modification will ensure that the House of Delegates will oversee Council and Section accreditation activities.

Furthermore, the parties have agreed to modify the Final Judgment to specifically provide for the House of Delegates to have a House of Lords advisory role in accrediting individual law schools. At the time the Final Judgment was entered, the House of Delegates had been the final decision-maker on accrediting individual law schools for more than half a century, and, therefore,

the Justice Department did not need to seek relief on this issue. Because DOE has now determined that the House may not make these decisions, the parties have agreed to add this provision to mandate the House of Lords oversight role that DOE has approved. Moreover, adding this provision to the Final Judgment will prevent further dilution of the role of the House of Delegates without the Court's permission.

Accordingly, the parties have agreed that the Court should vacate the existing Section VI(A), and replace it with the following:

The ABA shall:

(A) require

- (1) that the adoption or amendment of all Standards, Interpretations, and Rules be subject to the same public comment process before the Standards Review Committee and Council and the same review process, including approval by the Council; and
- (2) that following notification by the Council of the Council's action to adopt or amend any Standard, Interpretation, or Rule, the House of Delegates shall vote either to agree with the Council's action, or refer it back to the Council for reconsideration based on reasons specified by the House; provided that the House shall be limited to referring an action back to the Council a maximum of two times, and that the decision of the Council will be final following its consideration of the last permitted referral;

The Court should also add Section VI(M) to the Judgment to require that the ABA shall:

(M) permit appeals to the House of Delegates from a Council decision granting or denying provisional or full approval to a law school or withdrawing, suspending or terminating approval of a law school. The House shall vote either to agree with the Council's action or to refer it back to the Council for reconsideration based on the reasons specified by the House. An action granting or denying provisional or full approval may be referred back to the Council a maximum of two times. An action withdrawing, suspending or terminating approval may be referred back to the Council one time. The decision of the Council will be final following its consideration of the last permitted referral.

C. Section VIII(D) Of The Final Judgment Should Be Modified

The Court should also modify Section VIII(D). Section VIII sets out the Final Judgment's Compliance Program. Subsection (D) requires the ABA's Antitrust Compliance officer to undertake certain activities, including:

(D) providing the United States, during the term of the Final judgment, a copy of all proposed changes to the Standards, Interpretations and Rules before they are acted on by the House of Delegates, and a copy of all Standards, Interpretations and Rules adopted by the House.

Since, under DOE's requirements, Standards, Interpretations, and Rules will no longer be approved by the House of Delegates, the parties have agreed that this provision should be modified to substitute the word "Council":

(D) providing to the United States, during the term of the Final Judgment, a copy of all proposed changes to the Standards, Interpretations and Rules before they are acted on by the Council, and a copy of all Standards, Interpretations and Rules adopted by the Council.

Furthermore, this modification will enable the United States to receive earlier notice of proposed changes, i.e., before action by the Council, rather than action by the House.

D. The Modifications Are In The Public Interest

The agreed-upon modifications are necessary to conform the Final Judgment to DOE requirements. They fulfill the original purpose of Section VI of the Final Judgment: to increase oversight of the accreditation process to the extent allowed by DOE regulation and the HEA. The continued review by the House of Delegates of Standards, Interpretations, Rules, and accreditation decisions coupled with the other provisions of Section VI will allow for significant oversight and open debate of the Council's accreditation activities. Hence, taken as a whole, the remedies in the Final Judgment, as the parties propose to modify it, would address the violations

alleged in the Complaint. Accordingly, the Final Judgment as modified would be within the zone of settlements consistent with the public interest.

IV. CONCLUSION

The Court should modify the Final Judgment as the parties have agreed to conform to the Department of Education's requirements.

Dated:

Respectfully submitted,

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