IN THE SUPREME COURT OF FLORIDA
Case No. 90,990

FLORIDA BOARD OF BAR EXAMINERS,
RE: MASSACHUSETTS SCHOOL OF LAW

REPLY BRIEF OF MASSACHUSETTS SCHOOL OF LAW TO THE BRIEFS OF THE FLORIDA BOARD OF BAR EXAMINERS AND THE AMERICAN BAR ASSOCIATION

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INTRODUCTION

Petitioner, The Massachusetts School of Law ("MSL"), submits this Reply to the amicus briefs of the American Bar Association ("ABA") and the Florida Board of Bar Examiners ("FBBE"). The briefs of the ABA and the FBBE have four central themes, which are: (1) The ABA accreditation process is excellent and laudable, and therefore must be used exclusively; (2) a deluge of applications from non-ABA schools will result if the ABA process is not used exclusively; (3) the ABA process should be used exclusively because prominent Florida lawyers and academics have played a major role in shaping it; and (4) MSL is a substandard school, with an unprincipled or unsteady administration. Because each of these themes are based on inaccurate or misleading statements and omissions, MSL provides this reply to each.

REPLY ARGUMENT

A. The ABA Accreditation Process Has Been and Remains Subject To Well-Founded, Severe Criticism

Much of the ABA's brief lauds the ABA's long entrenched accreditation procedures, which are summarized as "thorough, sophisticated, and fair." ABA Brief, at 4. The ABA overlooks that the Department of Justice concluded that the ABA accreditation process has been captured by a self-interested guild, is used to improve the economic position of deans and professors, rather than to insure quality education, and employs rules -- used against MSL as a potential competitor -- that lack educational justification. Exhibits A, B & C. As highlighted in MSL's Petition, the educational experts who comprise the National Advisory Committee ("NAC") of the Department of Education ("DOE") have severely and extensively criticized

the ABA accreditation procedures. As discussed in this brief, the NAC's criticisms have continued, as recently as June 1997. If ABA accreditation was the "thorough, sophisticated, and fair" process that the ABA claims, these DOJ and DOE criticisms would not have arisen, and would not persist to this day.

Similarly, the ABA says that "The ABA Standards are intended to insure that persons who practice law are competent to perform the many functions required of lawyers on behalf of their clients, the members of the public." ABA Brief, at 6. It does not follow, however, that the ABA's model of accreditation is the exclusive means for achieving this intended goal. Nor does it alter the complaints of bench and bar alike that ABA accreditors force law schools to adhere to a research paradigm that neglects professional skills and fails to provide students with the professional training needed to service their future clients. Exhibit D, pp. 8- 17; Exhibit E, pp. 332-334, 339-341. The ABA's grounds for denying MSL accreditation, however, explicitly included MSL's use of practices that are designed to instruct students in professional skills, such as MSL's use of expert judges and lawyers as teachers,

The ABA's portrayal of its accreditation process makes several inaccurate or misleading statements and omissions. For example, the ABA relies on an allegedly favorable 1994 DOE staff report and says that in 1997 Secretary Riley renewed the DOE's recognition of the ABA as an accrediting body (albeit for only three years rather than the standard five years). The ABA even claims that the Association of American Law Deans ("ALDA") "endorsed the ABA accreditation program before the NAC at its most recent hearing in June 1997." ABA Brief, at

But, in 1992, 1994, 1996 and 1997, the NAC -- disagreeing with the staff -- repeatedly expressed deep reservations regarding the educational validity of the ABA's Standards. The most recent 1997 reservations (Exhibit E) reiterated concerns over intrusive micromanagement, and such ABA Standards as those regarding library seats. The NAC also expressed deep concern over the ABA's imposition of homogeneous, singular solutions, especially with regard to schools (such as MSL) that serve the less privileged of society. The NAC further reiterated its view that no relationship exists between the ABA's standards and educational quality -- even after the August, 1996 changes in such standards. The NAC is concerned that the ABA is still committing serious violations of DOE regulations, It has expressed reservations over both the failure of the ABA to cure these problems for five years and the prospect that the ABA will not cure them for another three or six years. Exhibit E, pp. 303, 304, 319, 321-324, 359, & 368. The ABA also fails to explain that in 1997 even the staff found the ABA in serious violation of DOE regulations. Exhibit E, pp. 240-260; Exhibit F.

Next, in asserting that the ALDA "endorsed" the ABA accreditation program, the ABA omits the critical fact that ALDA continued to seek changes in no less than 16 ABA accreditation rules. Exhibit G. ALDA also said "it is clear" that "a consensus of ALDA [deans] shares [the] views" of an NAC member who expressed severe criticisms of ABA accreditation in both November 1996 and June 1997.

In addition, the ABA omits to tell the Court that, in 1997 -- the year Secretary Riley renewed the federal recognition of the ABA as an accrediting body -- he explicitly said that the DOE had been concerned for five years over the validity of the ABA's Standards. He also stated that the financial needs of thirteen independent (i.e., non-university) law schools -- not the quality

of ABA accreditation -- were the reason renewed recognition of the ABA was being granted. Further, Secretary Riley said that ABA accreditation would not be necessary for the 167 university-based law schools to receive federal monies.'

Also omitted is that, as described in MSL's Petition, the ABA's costly standards have driven the price of legal education so high that students now regularly graduate with law school debt from $60,000 to $100,000 -- and even more. Exhibit D, pp. 46-53. Default rates have been getting close to 20 percent on these loans. Id. The size of these loans is a subject of deep concern to bar examiners, boards of bar overseers, and the entire legal profession because of the lack of sufficiently high-paying jobs to allow repayment of the debts, and because of the ethical breaches and dishonesty that are a likely consequence of extreme debt. The ABA's denial of accreditation to MSL, however, was based on MSL's unwillingness to follow rules that needlessly drive up costs and tuition (often in $20,000-$25,000 range) and that are irrelevant to educational quality. Such rules include nonsensical formulae for computing student-faculty ratios, faculty teaching hours, and average faculty workloads.

Finally, the ABA claims that federal courts have rejected MSL's arguments. The ABA fails to explain, however, that -- at the ABA's demand -- those same courts denied MSL relevant discovery that would demonstrate that the ABA treated schools arbitrarily and inconsistently, and that the ABA, as charged by the DOJ, forced schools to abide by rules requiring higher

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[1] DOE recognition of the ABA as an accreditor is essential for the thirteen ABA-accredited independent law schools to be eligible for federal monies, upon which they depend for survival (because approximately 80% of all law tuition comes from loans). University-based law schools will be able to obtain federal monies regardless of DOE recognition of the ABA, because those schools are part of parent universities that are themselves accredited by federally recognized regional accrediting bodies that accredit colleges and universities.

compensation and easy workloads and conditions for professors. Moreover, the federal courts disallowed discovery on whether the ABA retaliated against MSL for reporting the ABA to the DOJ and the DOE, and on whether state supreme courts and boards of bar examiners knew of the ABA accreditors' ill-found rules and tactics. The United States Supreme Court has made clear that collateral estoppel or res judicata do not apply where discovery has been denied in this way, because the party denied discovery did not have a full and fair opportunity to litigate. Parklane Hosiery, Inc. v. Shore, 439 U.S. 322, 328, 332-333 (1979); Blonder-Tongue v. Univ. of Illinois Found., 402 U.S. 3 13, 332-333 (1970). As a matter of simple fairness, the same principle holds here, and the ABA's arguments should be given no weight.

The ABA's reliance on the federal court decisions is also troubling because the ABA merely succeeded in the antitrust litigation by persuading the federal courts that MSL's injury is attributable to the decisions of state supreme courts, which the ABA claims it petitioned to approve its own accreditation process. State judges and bar examiners, however, claim ignorance regarding the actual ABA accreditation process. Consequently, the federal courts may have granted the ABA antitrust immunity for its petitioning activities, but it does not follow that these federal decisions have any bearing on the merits of whether any state high court, including this Court, should grant MSL's graduates the opportunity to take the bar examination.

B. The FBBE's Parade Of Horribles Should Be Given No Weight

The FBBE claims that, if MSL's petition is granted, a deluge of schools applying for approval will result because "as of October 1, 1996, there were 43 unaccredited law schools in America." FBBE Brief, at 8. The FBBE fails to disclose that almost all of these schools are in California, with only a half dozen unaccredited schools east of the Rockies, in Alabama,

Tennessee, Georgia and Massachusetts and the possibility of two new, unaccredited schools in Florida. It is this Court's sovereign responsibility, however, to decide who will be permitted to take the bar and practice in Florida -- not the ABA's. A court should fulfill its responsibility -- and not exclusively delegate it to the ABA. This view has prevailed in those states in which courts have granted oral hearings to MSL. These states include Maine and New Hampshire, where MSL was approved after oral hearings, and Wisconsin, where an oral hearing is upcoming. Similarly, this view has prevailed -- in Connecticut and Rhode Island -- where boards of bar examiners have granted MSL oral hearings or visited MSL for inspection. In these states, the same argument regarding a deluge of applications has been made. Yet these states have carried out their sovereign responsibilities to consider accreditation without exclusive reliance on the ABA. We urge this Court to do no less.

C. It Is Irrelevant That Prominent Florida Lawyers Have Played A Role In The ABA's Accreditation Process

The FBBE points out that prominent Floridians were on a "Special Commission" that studied ABA accreditation. FBBE Brief, at 10; Exhibit H, pp. 3-4, 8-9. The FBBE could say with accuracy that Florida has contributed more of its prominent citizens than any other state to the creation and operation of the ABA's accreditation system. Exhibit I. While no reasonable person can assail the reputations of these prominent Florida lawyers, it is self-evident that a court's accreditation decision is based on facts and not personalities. It could easily be countered that many prominent Floridians have played major roles in establishing a system that has been severely criticized by the DOJ, the NAC, the Secretary of Education, and a host of university presidents, law school deans and members of the bench. Exhibit D. The point is that the involvement of prominent Floridians in the ABA accreditation system does not strip this Court

of its sovereign responsibility to determine the appropriate standards and accreditation process by which law graduates become lawyers in this state.

D. The ABA's Personal Attacks Against MSL And Its Dean Are Uniustifiable

The ABA's personal attacks against MSL and its Dean are improper, and not based on fact. The ABA claims that the Massachusetts Higher Education Coordinating Council (now called the Board of Education) had expressed concern over elements of MSL's program, was worried that MSL was financing its program from revenues paid by unqualified students who flunked out, and threatened to revoke MSL's degree-granting authority unless MSL demonstrated the reliability of its admissions process. ABA Brief, at 4 & 14-17. The ABA also claims that MSL has not been independently evaluated since March, 1993, when the ABA inspected MSL. Id. at 11 n.5. And the ABA distorts MSL's bar results.

The ABA's attack is unjustifiable. First, just this year MSL was inspected by the New England Association Of Schools & Colleges ("NEAS&C"), the federally recognized accreditation body for higher education in New England. The NEAS&C -- which reinspects accredited schools on a periodic basis -- accredits Harvard University, Yale University, Brown University, Dartmouth, Amherst, the University of Connecticut, the University of Massachusetts, etc. After this inspection, which found MSL and its administration to be of high quality and deeply ethical, MSL was recommended for NEAS&C accreditation. Unlike the ABA's inspection, the NEAS&C's site inspection team had no economic self-interest at stake -- all team members were acting for an accrediting body that had no economic interest at stake.[2]

[2] The four inspectors were: (1) Site Team Chairman William Dill, the former Dean of the NYU Business School, the former President of Babson College and the Interim President of the

This independent team found that, far from being the substandard institution and administration that the ABA contends, MSL and its administration are characterized as follows:

- "The primary focus of MSL is the education of its students. To this end, it offers a program of study that is in line with that generally offered in American law schools...." Evaluation Report ("ER"), p. 6.[3]

- "The clinical and externship programs offered for credit off campus are supervised by full-time faculty and, as discussed below, are integral parts of the curriculum." ER, p. 7.

- "The curriculum contains a solid core of traditional courses emphasizing legal analysis and theory and taught by a rigorously applied Socratic method." ER, p. 8.

- "The program...develops in students the capacity to interpret, organize, communicate about, and apply the law and gives them the analytical, research, and practical professional skills needed for practice." ER, p. 9.

- "Despite the emphasis on the Socratic method, other methods of instruction are used as appropriate to particular course objectives." ER, p. 10.

- "The MSL faculty engages in an unusual and intensive program of monitoring and critiquing the quality of teaching...." ER, p. 10. "The faculty's dedication to reviewing and improving the quality of teaching is commendable." ER, p. 11.

- "Academic advising is deemed the responsibility of each faculty member. There is, in addition, a formal system of faculty advisors. Students and faculty members indicated that faculty take these responsibilities seriously and that the informal system is effective to meet student needs." ER, p. 11.

- "MSL has an orderly and ethical program of admission conducted under policies that arc clear and consistent . ..." ER, p. 11.

- "MSL's faculty are sufficient in their qualifications, number, and performance to meet the mission of the School. The faculty has a high level of commitment to the institution, to teaching, and to the other non-academic tasks they commonly perform.... The full-time

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Boston Architectural Center; (2) Lawrence Ladd, the Director of Budget & Financial Planning of Harvard University; (3) Kinvin Wroth, the Dean of Vermont Law School and the former Dean of the University of Maine Law School; and (4) Paul LeBlanc, the President of Marlboro College.

[3] The NEAS&C has given MSL permission to make the Evaluation Report available to this Court, if requested.

faculty is small in number, yet it appears quite effective in its advising, mentoring, and academic planning role." ER, p. 13.

- "MSL is particularly sensitive to the intellectual and personal needs of its students." ER, p. 15.

- "[T]he access approach to materials and the service orientation of an excellent library staff seems well suited to all but occasional 'short notice' requests for materials,..." ER, p. 17.

- "The financial management and organization is sound." ER, p. 19.

- "There is strong concern for ethics and integrity in how faculty and staff operate and in what they teach." ER, p. 19 (emphasis added.) "The Team leaves with a sense that MSL's concern for ethics in courses across the curriculum is reflected in the way the School is run and in the deep personal concerns that the Dean and faculty express about raising performance levels in the legal profession," ER, p. 20 (emphasis added).

- **"Priority is given to the quality of teaching and to personalized attention and support for students.** Many longer-established, better-known schools could envy MSL's accomplishments. The focus on quality of teaching and advising is impressive at all levels; the continuous program of peer review and skills development for both full and part-time faculty; the attempt to teach in ways that make students active learners; the degree to which faculty and staff know students and graduates; the testimony students and alumni give to the help they have received; even the layout of offices to assure accessibility," ER, p. 20 (emphasis added, bold in original),

- **"The effectiveness of efforts to develop writing, speaking, and related professional skills.** MSL takes this part of its commitment to students very seriously. The effort pervades the faculty. The results are good." ER, p. 20 (bold in original).

- **"Quality, layout, and development potential of facilities.** MSL made a bold move in acquiring its present building. It is set up and run well. It is an asset for the future...." ER, p. 20 (bold in original).

- **"Commitment to high ethical standards.** The Team leaves with a sense that MSL's concern for ethics in courses across the curriculum is reflected in the way the School is run and in the deep personal concerns that the Dean and faculty express about raising performance levels in the legal profession. Given the serious implications of outcomes of the School's contention with the ABA and changing opportunities for licensing after graduation, people and publications at MSL have been candid and clear about where things stand and what the realistic outlook is for applicants to the program." ER, p. 20 (bold in original, emphasis added).

- **"MSL's success in holding tuition to affordable levels.** Despite budget pressures which the School currently faces, its long-term performance in resisting tuition increases has built a significant marketing asset. MSL has a much healthier base for future financial management than many schools which have chosen high tuition policies and corresponding rebate and discount programs." ER, pp. 20-21 (bold in original, emphasis added.)

- **"The quality of staff leadership and faculty involvement in admissions, advising, and placement.** While the Team suggests considering at least a modest expansion of core staff, it is impressive to see how it has functioned and how much even part-time faculty participate." ER, p. 21 (bold in original).

The independent and accomplished NEAS&C inspection team found that MSL and its administration are run in a highly ethical way. Notably, the ABA knows its attacks are baseless because it was aware that: (a) the HECC did not pursue revocation of MSL's license because it quickly learned no basis existed for the claimed concerns, and (b) a new Chancellor of the HECC, who was not connected to any political group opposed to MSL, put an end to the obstruction of MSL's efforts.

The ABA also unjustifiably attacks MSL's Dean, claiming that his strategy was to wage "a war of attrition, a war directed at bleeding the defendants into submission." ABA Brief, at 20-21. How a small, unaccredited Massachusetts law school could wage such a war against an organization with 370,000 member and $100 million in annual revenues is not evident. Further, the ABA relies upon a privileged memorandum that -- if read in its entirety -- is a fairly ordinary explanation of the DOE process. In addition, the letter reflects that the Dean, as a long-term practitioner in antitrust and constitutional law, believed (wrongly in hindsight) that the ABA would be willing to agree to an expeditious and reasonable settlement, rather than pursue a long, expensive battle.

In addition to sullying MSL and its Dean, the ABA adopts the strategy of impugning prominent lawyers who signed a report lauding MSL.[4] The ABA also ignores that the report was reviewed and signed by these prominent lawyers after they personally inspected MSL and that the signers include persons who have been or are federal or state judges, President of the ABA, and Trustee of a competing law school. It is implausible that these individuals chose to sacrifice their integrity by signing a report with which they did not agree after they had personally inspected the institution.

Of course, MSL urged the ABA to depose the inspectors, but the ABA declined. The ABA may have feared that the inspectors would say -- as one inspector publicly did -- that MSL was the subject of prejudice on the part of ABA accreditors: "I'm not sure it was a completely fair hearing. . . . I just felt that they got a hearing by a Board that was somewhat prejudiced in favor of the present situation." Exhibit J. Interestingly, the report is very much consistent with the 1997 report that the accomplished NEAS&C inspection team recently wrote.

Notably, in its first nine years, MSL has been inspected five times -- twice by the HECC, once by the seven lawyers team, once by the ABA, and once by the NEAS&C. Further, all four of the non-ABA inspection teams were comprised of prominent academics, librarians, lawyers and judges. All four of the non-ABA inspection teams, with no economic self-interest at stake,

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[4] Those lawyers included: (1) Robert Meserve, the highly regarded President of the ABA in 1974, who received the ABA's highest award for accreditation; (2) John Fenton, the former Chief Judge of the Massachusetts Land Court, then the Chief Administrative Justice of the Massachusetts Trial Courts, and now Dean of Suffolk University Law School; (3) Reginald Lindsay, Jr,, now a Federal District court judge in Boston and at the time a partner in the major Boston firm of Hill & Barlow; (4) Robert Quinn, a former Attorney General of Massachusetts and former Speaker of its House, and a Trustee of the competing New England School of Law; (5) and Lois Cantor, a clinical professor at the New England and Harvard Law Schools.

issued favorable reports on MSL. Only the ABA team, and the economically-self-interested Council and Accreditation Committee, took the position that MSL was lacking as a school. Is everyone out of step but the ABA?

The ABA further misstates that MSL has a student/faculty ratio of 105-to-1 or 135-to-1. ABA Brief, at 22. Of course, the student/faculty ratio as calculated by the ABA has nothing to do with the size of classes, which is where a ratio matters. Further, the ABA made its miscalculation by failing to count (1) full-time MSL professors who also do administrative work, (2) full time professors who also have practices (as medical professors often do), and (3) MSL's adjuncts. Put differently, the ABA arrived at its so-called ratio by ignoring approximately 80 to 85 percent of MSL's teaching resources.

Given the ABA's method of counting full-time professors, it is little wonder that the DOJ attacked the ABA and that the NAC found it arbitrary and out of step with the other professions, even after the changes of August 1996. By considering all MSL's teaching resources, MSL's ratio of about 5.5 students per teacher is only about two-thirds of the lowest ratio at any ABA school and is only about 40 percent of the average ratio at ABA schools. The size of classes -- which is where the ratio of students to faculty actually matters -- indicates that, unlike ABA schools (where "small" classes most often have 30 to 50 students and most classes often have 75 to 125 students), 66% of MSL's classes generally have twenty students or fewer, and 45% generally have ten students or fewer.[5]

[5] A full discussion of the student faculty ratio is contained in Exhibit D, at pages 66-79.

The ABA also distorts both the bar passage rates of ABA-accredited schools and MSL's bar passage rates. It claims that the aggregate bar passage rates of ABA schools is 75%. ABA Brief, at 23. But it fails to mention that it has often accredited, or continued the accreditation of, schools whose bar passage rates were in the 20%-40% range (Exhibits K, L & M). And it omits to mention that, as recently became public knowledge, there are seventeen ABA schools which still have pass rates below 65%, with most of those being only in the 30%-50% range. Exhibit M.

The ABA says MSL's bar passage rate was 48.8% in July 1992, while the statewide rate was 80.7 percent, ABA Brief, at 23. The 48.7% figure is MSL's "all taker" rate on a single bar exam, not MSL's "first time taker" rate on the same examination, which was 60.7%. ("All taker" rates for a school on any single bar examination are almost always less than its "first time taker" rate on that examination.) A far better gauge of the ability of MSL's graduates to pass the bar examination is the fact that over 86% of MSL's graduates have passed the bar exam, either on their first try or subsequently. Moreover, the figures for passage by MSL's first time takers, which have always been close to ABA-accredited schools and often exceeded various ABA-accredited schools, have been as follows since MSL students began taking the bar examination in 1990:

YEAR	% PASSED ON FIRST TRY
JULY, 1990	64.28%
FEBRUARY, 1991	57.1%
JULY, 1991	36.84%
FEBRUARY, 1992	66.7%
JULY, 1992	60.7%
FEBRUARY, 1993	52%
JULY, 1993	64.4%
FEBRUARY, 1994	69.23%
JULY, 1994	72.4%
FEBRUARY, 1995	80.5%
JULY, 1995	72.6%
FEBRUARY, 1996	75.6%
JULY, 1996	77%
FEBRUARY, 1997	73.1%

These data clearly reflect that MSL provides a sound legal educational program and is an institution whose graduates are worthy of the opportunity to become practicing lawyers in Florida.

CONCLUSION

The briefs of the FBBE and the ABA make claims for ABA accreditation that are inconsistent with the conclusions of independent assessors of ABA accreditation. They also make insupportable statements regarding MSL, and are contradicted by the detailed findings of four independent, non-economically-self-interested bodies that have inspected MSL. These arguments should not deter this Court from exercising its sovereign power to decide who can become lawyers in Florida, and do not support denial of MSL graduates from the opportunity to take the Florida bar examination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copies of the Reply Brief and accompanying Appendix have been furnished by United States Mail to: Kathryn E. Ressel, Executive Director and Thomas A. Pobjecky, General Counsel, Florida Board of Bar Examiners, 1891 Eider Court, Tallahassee, Florida 32399-1750; John J. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; Darryl L. DePriest, General Counsel, American Bar Association, 541 North Fairbanks Court, Chicago, Illinois 60611; and John M. McDonough, Esquire and David R. Stewart, Esquire, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603, this 13th day of October, 1997.

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