accreditation criteria to achieve anticompetitive purposes (which the Complaint and CIS specifically say was done at times by the captors).[8]

Third, the Decree should require the Board of Governors, on which the Division is depending, to itself seek out, and to insist that the Nominating Committee likewise seek out, nominees for the Accreditation Committee, Council and Standards Review Committee who are known to have procompetitive views and to oppose the anticompetitive conduct which prevailed for two decades. There are numerous individuals who, notwithstanding academic affiliations, are already known to fill this bill and who have shown great knowledge of and/or interest in accreditation matters.[9]

3. The Consent Decree Will Not Eliminate the Secrecy Which Has Led to Violations of Law, Unwritten Rules, and Capture of the Process

A second problem with the remedial provisions of the Decree arises because it does not curb the secrecy which infested the accreditation process and allowed illegality to flourish.

A. The CIS correctly says that application of the accreditation process

to individual schools "was kept from public view and the supervision of the ABA's Board of Governors and House of Delegates." (CIS, p. 10.) The application of the process was in fact kept totally secret. Self studies, site inspection reports, schools' responses to those reports, transcripts of hearings before the Accreditation Committee and Council, action letters, schools' responses to action letters, and correspondence between schools and accreditors were all treated as highly confidential. Time and again—in articles, in briefs and in oral statements—the accreditors said such secrecy was essential because without it schools allegedly would be unwilling to share the truth with accreditors, and the accreditation process assertedly would collapse.[10] On the basis of these assertions, complete secrecy was demanded and enforced, even though there are other accrediting bodies that make similar documents and assessments public and have thrived rather than collapsed.[11]

A less charitable way of looking at the accreditors' demands for secrecy is that total confidentiality was needed not to preclude collapse of the process, but because (1) without total secrecy schools would not provide the extraordinary criticism of their own competence and programs which the accreditors needed to force universities to give the law schools more money for ever higher salaries, more full-time teachers, larger buildings, ever expanding libraries and other matters comprising the guild interests, and (ii) without secrecy the actions of the accreditors would have come to light. In the latter regard, the total secrecy of the accreditation process with respect to individual schools is what enabled the accreditors to fix prices and commit the other violations of the Sherman Act detailed in the Complaint, to develop and apply secret rules that were written nowhere, to treat schools inconsistently and arbitrarily, and to use the same people over and over again to enforce the anticompetitive policies.

It is literally impossible to overestimate the extent to which violations, secret policies and arbitrary action flourished because of the secrecy. As is often the case with regard to written standards of conduct, the ABA's written criteria most often are generalized vessels whose content is supplied by the enforcement policies

followed by enforcement officials.[12] What was done in practice was therefore often more important than generalized written standards. The DOJ itself has recognized this de facto by saying time and again in the complaint and CIS that certain policies were followed *in practice,* including policies regarding compensated leaves, physical facilities, extending salary criteria from faculty alone to deans and librarians as well, the definition of an hour, and failure ever to recommend accreditation of a proprietary school. (See Complaint, pp. 6, 8, 9; CIS, pp. 5, 6, 8.) MSL itself, moreover, was subjected to a host of unpublished secret rules, which it has learned are common, to arbitrary and illegal procedures, and to inconsistent actions.

Thus, among the commonly followed but unpublished rules to which MSL was subjected are ones requiring that: a school's salaries must be in the top half of schools with which it is compared; no transcription is permitted of fact-finding inspection meetings even though the accreditors perform a quasi-judicial function; site team reports are done jointly by representatives of the ABA and the Association of American Law Schools ("AALS"); and AALS representative writes the portion of a site report dealing with a school's faculty; a university cannot take more than 20 percent of the tuitions generated by its law school and, if a law school is not part of a university, it must spend all its revenues rather than use a part of them to create an endowment; law schools must meet a librarian/student ratio; law students (unlike medical students) cannot be given credit for clinical experience obtained in cases from which a supervising professor obtains fees; the faculty must control a school; not matter how much work she does for a school—even if she works 60 hours per week for it—a professor cannot be treated as a full-time professor if more than 20 percent of her time is spent doing compensated work for clients, but a professor will be counted as a full-time faculty member although she spends extensive time every week working on a probono basis; leaves of absence have to be granted with pay; the Law School Admissions Test ("LSAT") is the only permissible entrance test; a school often must require full-time students to sign affidavits saying they are not working more than 20 hours per week; a school will ipso facto be said to be of poor quality if it makes extensive use of adjuncts instead of employing a

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[8] We note in this regard that the Consent Decree already requires a number of Section officials to certify annually that they are abiding by the terms of the Decree and know of no unreported violations of it, and requires the Executive Director of the ABA (leading insider Robert Stein), the Consultant and the Consultant's staff to certify annually their understanding that failure to comply with the Decree can result in conviction for contempt of court. (Consent Decree, p. 10.) Clearly it would not be unfair to require the ABA itself to agree that it is abiding by the Decree by not committing acts that the Government had already determined to be anticompetitive but withheld challenging pending the Special Commission's Report.

[9] They include, among others, Dean Colin Diver of the University of Pennsylvania Law School, Dean Ronald Cass of Boston University Law School, Dean Howard Glickstein of Touro College Law Center, Dean Patrick Hetrick of Campbell University Law School, President Thomas Brennan of Cooley Law School, Dean Howard Eisenberg of Marquette University Law School (formerly Dean of the University of Arkansas Law School at Little Rock), Dean Robert Reinstein of the Temple University Law School, Dean Anthony Pagano of the Golden Gate University Law School, Dean Henry Manne of the George Mason University Law School, Dean Richard Matasar of the IIT-Kent Law School, Thomas Leahy, who is a recent President of the Illinois Bar Association, Chancellor R. Gerald Turner of the University of Mississippi, Dean Timothy Heinsz of the University of Missouri Law School, Provost Mary Sue Coleman of the University of New Mexico, Dean David Shipley of the University of Kentucky Law School, President Steven Sample of the University of Southern California, Chancellor William H. Danforth of Washington University of St. Louis, Dean Majorie Girth of Georgia State University College of Law, President William Greiner of the State University of New York at Buffalo, President Thomas Salmon of the University of Vermont, and Dean Harvey Perlman of the University of Nebraska Law School.

[10] See, e.g., the materials in Exhibit 7.

[11] See, e.g., the materials in Exhibit 8.

[12] This is another reason why the procompetitive or anticompetitive views of accreditation personnel are so crucial.