

State of New Hampshire
Supreme Court

2000 TERM

AUGUST SESSION

NO. B-99-003

AMENDED PETITION OF SOUTHERN NEW ENGLAND SCHOOL OF LAW

AMENDED PETITION FOR EXERCISE OF ORIGINAL JURISDICTION
TO ALLOW GRADUATES OF THE SOUTHERN NEW ENGLAND
SCHOOL OF LAW, WHO ARE MEMBERS IN GOOD STANDING
OF THE BAR OF ANOTHER STATE OF THE UNITED STATES,
TO TAKE THE NEW HAMPSHIRE BAR EXAMINATION

Pursuant to Supreme Court Rule 11

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INTRODUCTION

Southern New England School of Law (SNE SL) has been providing a course of study substantially equivalent to that of a law school approved by the American Bar Association, but because it is not an ABA-accredited law school, it must file this petition for permission for its graduates to sit for the New Hampshire bar exam.

A. ORDER SUBJECT TO REVIEW

There have been no prior decisions in this matter.

B. QUESTION PRESENTED FOR REVIEW

Southern New England School of law provides a “course of study substantially equivalent to that of a law school approved by the American Bar Association” within the meaning of New Hampshire Supreme Court Rule 42(4)(b). Should SNE SL’s graduates, who after examination have become a member of the bar in good standing of one of the states of the United States of America, be allowed to sit for the New Hampshire Bar Exam?

C. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS IN ISSUE

FEDERAL CONSTITUTION

U.S. CONST. art. 1, § 8

“The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states.”

U.S. CONST. art. 4, § 1

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

U.S. CONST. art. 4, § 2

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

U.S. CONST. amd. 5

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

U.S. CONST. amd. 14, § 1

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

NEW HAMPSHIRE CONSTITUTION

N.H. CONST. pt. I, art. 1

“All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.”

N.H. CONST. pt. I, art. 2

“All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”

N.H. CONST. pt. I, art. 12

“Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.”

N.H. CONST. pt. II, art. 83

“Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.”

FEDERAL STATUTE

Sherman Anti-Trust Act, 15 U.S.C. § 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

NEW HAMPSHIRE COURT RULES

N.H. SUP. CT. R. 1

“In the interest of expediting a decision, or for other good cause shown, the supreme court or a single justice thereof may suspend the requirements or provisions of any of these rules in any instance on application of a party or on the court’s or a single justice’s motion, and may order proceedings in accordance with that direction.”

N.H. SUP. CT. R. 42(4)(b)

“Every such applicant must have graduated from a law school approved by the American Bar Association having a three (3) year course and requiring students to devote substantially all their working time to study, called a full-time law school, or from a law school approved by the American Bar Association having a course of not less than four (4) school years equivalent in the number of working hours to a three (3) year course in a full-time law school and in which students devote only part of their working time to their studies, called a part-time law school. Notwithstanding the foregoing sentence, a person who has graduated from a foreign law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is (a) a member in good standing of the bar of that country, or (b) the holder of a master’s degree from a law school approved by the American Bar Association or (c) a member of the bar of one of the States of the United States who was admitted after examination and is in good standing. A combination of study in full-time and part-time law schools will be accepted only if such law schools meet the above requirements, and the applicant shall have graduated from one or the other. Study in any law school which conducts its courses by correspondence or does not require attendance of its students at its lectures or classes shall not constitute compliance with the rule.”

MASSACHUSETTS STATUTES AND RULES

MASS. GEN. LAWS, ch. 69, § 30

(reproduced in the appendix)

Massachusetts Supreme Judicial Court Rule 3.3

“Each applicant [for the bar] shall have graduated with a degree of bachelor of laws or juris doctor from a law school which, at the time of graduation, is approved by the American Bar Association or is authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor.”

Rules of the Massachusetts Higher Education Coordination Council, 610 CMR § 2.00 *et seq.*

(submitted as an exhibit)

D. PROVISIONS OF DOCUMENTS

Documents cited in this petition are included as appendices or submitted as exhibits, and listed at the end of this petition.

E. STATEMENT OF THE CASE

This is an original jurisdiction petition.

F. STAGE OF PROCEEDINGS

There have been no lower court or administrative proceedings.

G. REASONS THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

1. This Court May Waive Provisions of Rule 42 and Allow SNESEL Graduates to Sit for the New Hampshire Bar

The Supreme Court rules provide that any person can apply to sit for the bar exam if s/he is qualified in accordance with the rules. SUP. CT. R. 42(3). This Court may waive provisions of its rules when justice requires. SUP. CT. R. 1. In addition to a variety of other qualifications:

Every such applicant must have graduated from a law school approved by the American Bar Association having a three (3) year course and requiring students to devote substantially all their working time to study, called a full-time law school, or from a law school approved by the American Bar Association having a course of not less than four (4) school years equivalent in the number of working hours to a three (3) year course in a full-time law school and in which students devote only part of their working time to their studies, called a part-time law school. Notwithstanding the foregoing sentence, a person who has graduated from a foreign law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is (a) a member in good standing of the bar of that country, or (b) the holder of a master's degree from a law school approved by the American Bar Association or (c) a member of the bar of one of the States of the United States who was admitted after examination and is in good standing. A combination of study in full-time and part-time law schools will be accepted only if such law schools meet the above requirements, and the applicant shall have graduated from one or the other. Study in any law school which conducts its courses by correspondence or does not require attendance of its students at its lectures or classes shall not constitute compliance with the rule.

SUP. CT. R. 42(4)(b)

Graduates of the Southern New England School of Law (SNESEL) spend three years in school, devoting substantially all their working time to legal study. They take all the courses normally associated with a traditional law school. SNESEL is not yet accredited by the American Bar Association (ABA).

SNESEL graduates are otherwise qualified to practice law in New Hampshire, and the

requirement that their school have ABA accreditation before they can sit for the bar should be waived.

This Court has waived the ABA-accreditation requirement of Rule 42 at least three times. *Tocci's Case*, 137 N.H. 131, 133 (1993); *In re Costello*, 401 A.2d 447, 448 (R.I. 1979); *Petition of the Massachusetts School of Law*, Sup. Ct. No. B-95-017, *petition granted* (June 7, 1995).

There is no known reason to distinguish those cases from this.

Accordingly, this Court should waive the ABA-accreditation requirements of Rule 42 and allow SNE SL graduates who are members in good standing of the bar of another state to sit for the New Hampshire bar examination.

2. Southern New England School of Law Is a Foreign Law School Providing an Education Substantially Equivalent to an ABA-Accredited Law School

A person who graduated from a “foreign law school” in an English-speaking country, whose studies were “substantially equivalent” to an ABA-accredited school, and who is a member of the bar in another state may take the New Hampshire bar exam. SUP. CT. R. 42.

a. Southern New England School of Law is a Foreign Law School

Southern New England School of law is a foreign law school for the purposes of the rule. “Foreign” has been determined to mean a person who resides in another state, or a corporation organized in another state. *Blanchette v. New England Tel. & Telegraph Co.*, 90 N.H. 207, 209 (1939). SNE SL is a non-profit law school organized under the laws of the Commonwealth of Massachusetts, ABA REPORT at 5, and is thus a foreign law school. 610 CMR 2.04.

b. Southern New England School of Law Provides an Education Substantially Equivalent to an ABA-Accredited Law School

Substantial equivalence means similarity of essential attributes. *Selke v. MedCare HMO*, 147 B.R. 895, 901 (N.D. Ill. 1992) (HMO found substantially equivalent to insurance company). To be found *not* substantially equivalent, the two things must clearly differ in kind. *Worthen v. Kingsbury*, 84 N.H. 304 (1930) (public notice required by statute to be “substantially equivalent” to the statutory notice; notice provided differed to such an extent to be not substantially equivalent). Thus, differences that are not materially significant are insufficient to make two things not substantially equivalent. *Fiber v. New Mexico Bd. of Med. Examiners*, 596 P.2d 510 (N.M. 1979) (“Things may differ one from the other and still be ‘equivalent,’ if they are of equal value, significance or import, in relation to a common standard, here the promotion and preservation of standards for practicing physicians in both states.”).

SNESL has gained accreditation by the Massachusetts Higher Education Coordinating Council, is a traditional law school employing standard teaching and clinical practices, and the reasons for ABA’s denial of accreditation is based largely on matters that do not reflect on the quality of the education it provides.

i. Accreditation by Massachusetts Higher Education Coordinating Council

The Massachusetts Higher Education Coordinating Council (HECC) exists to establish procedures and criteria by which to grant schools in Massachusetts the authority to operate there. MASS.GEN. LAWS ch. 69, §§ 30, 30A, 31A; 610 CMR. 2.00 *et seq.* The HECC’s purpose is “to assure . . . that [educational] institutions licensed meet minimal levels of quality consistent with current professional judgment.” 610 CMR 2.02. An institution in Massachusetts cannot award a

degree without HECC accreditation. 610 CMR 2.03(4).

To be accredited by the HECC, a school such as SNESL must file an application with the HECC stating its mission, admission requirements, enrollment plans, quality of its faculty, courses and syllabi offered, academic and student services available, tuition costs and availability of financial aid, quality of its physical plant, library holdings, financial qualifications for continued existence, graduation requirements, and other matters. 610 CMR 2.07(1). The HECC then requires two site inspections by a professional committee of non-biased and credentialed experts. 610 CMR 2.06(2). The committee must hold a public hearing, 610 CMR 2.06(3), file a written report of its findings, 610 CMR 2.07(2), and determine whether to approve or disapprove the institution as a degree-granting school. 610 CMR 2.07(2)(h). There are penalties for non-compliance. 610 CMR 2.10.

The HECC measures educational institutions against a list of specific criteria promulgated by the agency. 610 CMR 2.07(3). These criteria include:

- “Graduate and professional programs should be conducted so as to provide for the development of high levels of competence with appropriate scholarship and skills in the area. Programs designed to provide professional training should be related to current practice in the professional field and to licensing requirements, as well as to generally accepted standards.” 610 CMR 2.07(3)(c)(1)c.
- “Degree requirements for all programs shall be clearly stated, and students shall be held to the accomplishment of a defined amount and quality of work.” 610 CMR 2.07(3)(c)(1)b.
- “The institution shall have an appropriate qualified faculty in sufficient numbers to meet all requirements of the institution’s courses of study” and “those in professional, technical, or specialized fields shall have equally appropriate education’s, preparation, experience and attainments.” 610 CMR 2.07(3)(d).
- “Teaching loads and schedules may vary from institution to institution, but normally should not exceed 15 contract hours per week.” 610 CMR 2.07(3)(d)(d).

- “The institution shall publish its admissions policies, standards, procedures and affirmative action policy as it relates to admissions.” 610 CMR 2.07(3)(e)(2).
- “The institution should present evidence of past, present and future financial stability, with resources adequate for effective accomplishment of its announced purposes.” 610 CMR 2.07(3)(f).
- “The institution shall maintain adequate student records, including but not limited to: official transcripts of academic courses taken and grades earned, information concerning the date of admission, period of attendance, honors awarded, diploma, degree, or certificate earned, and appropriate evaluation of the quality of work completed.” 610 CMR 2.07(3)(e)(6).
- “Libraries and information resources shall be professionally staffed, with holdings electronic retrieval systems, and/or networks sufficient and appropriate to support the curriculum of all degrees and programs offered by the institutions.” 610 CMR 2.07(3)(i).
- “The institution’s publications available to applicants and students should provide full, accurate and current information” for many components consistent with the comprehensive standards for higher education.” 610 CMR 2.07(3)(g)(1)a-1.
- “Classrooms shall be sufficient in size, in number, and in equipment to meet all requirements of the institution’s course of study.” 610 CMR 2.07(3)(h).

In short, degree-granting educational institutions are highly regulated in Massachusetts.

Graduates of a law school with HECC accreditation may sit for the Massachusetts bar.

SUPREME JUDICIAL COURT RULE 3.3, MASS. GEN. LAWS, ch. 69 § 30.

The goals of HECC- and ABA-accreditation are similar, if not identical, and are largely duplicative. Both, for instance, contain requirements for library resources, faculty expertise and experience, maximum teaching loads, teacher/student ratios, financial stability, and standards for admission and graduation. The procedure used by both include a detailed application process, site visits by a qualified panel, and periodic review. The similarities between the two sets of standards are striking, and point-by-point comparison is unnecessary. *Compare* ABA

STANDARDS *with* 610 CMR 2.07(3). It appears, in fact, that the HECC rules may be modeled, at

least in part, on the ABA criteria.

The ABA recognizes the authenticity, respectability, and rigorousness of individual state accreditations. *See* ABA STANDARD 506 (ABA-accredited law school may accept credits from state-accredited law school); ABA Internal Operating Procedures (in ABA STANDARDS at 151) ¶ 6.c., “Due Regard for Decisions of Other Accrediting Agencies,” (ABA takes into account actions of state accrediting agency). Likewise, the HECC rules operate with an eye to “licensing requirements, as well as to generally accepted standards.” 610 CMR 2.07(3)(c)(1)c.

The HECC awarded SNESSL authority to grant the degree of juris doctor in 1988. SELF-STUDY at II-2. Its first graduating class took the Massachusetts bar exam in 1989.

ii. SNESSL is a Traditional Law School

SNESSL’s mission is to “provide[] its students the intellectual and practical training necessary for the practice of law” by “developing students’ analytical skills in the law,” giving them the “opportunity to begin developing practical legal skills so as to have a realistic grasp of what practicing law means,” and introducing them “to the fundamental human questions connected with the study and practice of law so that they may more fully understand the responsibilities of being a lawyer.” *Mission Statement*, contained in SELF-STUDY, Appendix A. It seeks to do this by “foster[ing] an atmosphere of cooperation and collegiality,” having professors “devoted to helping students learn,” by recognizing “its obligation to serve the local bar and community, as well as society at large.” *Id.*

The teaching methods and courses offered by SNESSL are squarely regarded as traditional in legal education. SELF-STUDY at IX-3. The SNESSL catalogue describes each of the courses,

seminar, and clinics it offers.¹ CATALOGUE at 20-27. The eight-page list contains exactly what one would expect of a law school curriculum. ABA STANDARD 301; *see, Forum, That Impecunious Introvert from New Hampshire: Re-Imagining Langdell*, 17 LAW & HIST. REV. 57, 57-58 (1999). Many of the courses are innovative and important to professionalism and practice.

The normalcy of the curriculum was highlighted by the ABA inspection team which evaluated the school for the ABA accreditation process. It noted that:

“Southern New England school of law follows the traditional law school curriculum expected of a small school. In their first year, full-time students are introduced to such basic legal topics as Torts (6 credits), Contracts (6 credits), Property (6 credits), Civil Procedure (6 credits), and Legal Research and writing (6 credits). Full-time students study Legal Writing I (Legal Research and Objective Writing) in the fall (3 credits) and Legal Writing II (Persuasive Writing and Oral Advocacy) in the spring (3 credits). Part-time students (both day and

¹Courses offered by the school are: Administrative Law; Admiralty; ADR Seminar; ADR Practice; Advanced Criminal Law; Advanced Electronic Legal Research; Appellate Litigation Clinic; Bioethics and the Law; Business Crime; Business Organizations; Business Torts; Civil Procedure I & II; Commercial Law; Comparative Law; Computer Law; Conflict of Laws; Constitutional Law I & II; Constitutional History: Civil Rights and Civil Liberties; Constitutional Law: The Fourteenth Amendment as an Instrument of Change; Constitutional Law Topics: Original Intent; Consumer Bankruptcy; Consumer Bankruptcy Seminar; Consumer Protection Law and Remedies; Contracts I & II; Criminal Law; Criminal Procedure; Criminal Prosecution Seminar; “Early Start” Bar Exam Prep Course; Employee Benefits Law; Employment Discrimination; Environmental Law; Evidence I & II; Family Law; Family Law/Juvenile Law Seminar; Federal Courts; Federal Income Tax; Health Law; History of Civil Rights and Civil Liberties; Ideas of Justice; Immigration Law; Immigration Law Seminar; Independent Legal Research; Insurance Law & Practice; Intellectual Property; International Law; Interviewing, Counseling and Negotiating; Issues in Massachusetts Tort Law; Jurisprudence; Juvenile Law; Justice & Self-Determination; Labor Law; Land Use Regulation; Law & Literature; Legal Clerking; Legal Clinic; Legal Ethics; Legal Methods; Legal Process; Legal Research and Writing I & II; Massachusetts Civil Practice; Massachusetts Civil Practice Seminar; Massachusetts Criminal Practice; Massachusetts Workers’ Compensation Law; Mediation Clinic; Medical Malpractice; Mini-Internships; Moot Court; Probate and Juvenile Court Practice; Products Liability; Property I & II; Public Interest Litigation Seminar; Real Estate Law; Regulatory Takings; Religion and the Law; Remedies; Right of Privacy; Secured Transactions; Selected Topics in Torts; Sports Law; Tax Seminar; Torts I & II; Trial Practice; Trusts & Estates; Women, Law and the Legal System.

evening) study the five courses listed above plus Constitutional Law (6 credits) during their first two years. In essence, then, by the end of their second year, part-time students have completed the full-time first year curriculum.

“The initial courses in Torts, Property, contracts and civil Procedure are similar to those taught in most law schools in the first year. For example, contracts emphasizes the issues of what promises are enforced in the law and how these promises are enforced. The Property course introduces the students to the legal concept of Property through personal and real property cases, and covers estates in land. The Torts class studies the basics of civil liability, from intentional torts to negligence, and also strict and products liability, defamation, invasion of privacy, and misrepresentation.

“The first year curriculum includes a required, one-credit Legal Methods course. . . . The first few weeks of the course focus on the basics of reading cases and identifying the format and issues in appellate decisions. For the remainder of the semester, the course examines six rules of law and provides students with a multitude of hypotheticals and practice essay questions. By concentrating on a small number of rules and extensive analytical exercises, the course seeks to isolate, and thereby provide a clear focus on the development of analytic skills.

“The required courses beyond the full-time first year course of study are Criminal Law (3 credits), Criminal Procedure (3 credits), Trusts and Estates (4 credits), Ethics (3 credits), Commercial Law (4 Credits), Constitutional Law (6 credits), and Evidence (4 credits). Part-time students take Civil Procedure and Legal writing after their first year.”

ABA REPORT at 39.

To graduate, students must take at least one course focusing on statutory law, such as bankruptcy, taxation, and UCC, at least one “perspective” course designed to broaden intellectual horizons, such as Jurisprudence, Law and Literature, and Legal History. *Id.* at 40. Compared with other schools, SNESL “has a larger number of required courses than many law schools. The faculty believes that, in keeping with the school’s mission, a somewhat more structured course of study best suits the needs of the school’s students.” *Id.* at 40.

Teaching at SNESL is by standard law school methods. “Some faculty members consistently use the Socratic method; others combine the Socratic with discussion and a more deductive approach to the law; and still others have designed courses around the solution of

individual problems.” *Id.* at 38.

The school’s faculty is qualified.

“Although the faculty of Southern New England School of Law is composed of only 15 full-time professors, it is remarkably diverse in terms of its members’ preparation for law teaching. Ten professors hold graduate degrees in other disciplines, and the Associate Dean is a Ph.D. candidate. Four additional faculty members have advanced degrees in law. Eleven faculty members were engaged in the full-time practice of law prior to joining the faculty. Most of those members of the faculty have had substantial practice experience: four between 2-4 years; five between 6-10 years; and two more than 15 years. All except one also had prior teaching experience. Seven of the last nine hires were taken from the ranks of the school’s adjunct professors. Given its proximity to the greater Boston area, the school has a rich pool of potential adjuncts.”

Id. at 19. The ABA report found that the faculty is accomplished in its scholarship. *Id.* at 22.

All of the faculty have impressive credentials, CATALOGUE at 12-15 (regular faculty);

CATALOGUE at 16-17 (adjunct faculty), including several current and former judges.

The ABA report noted that the faculty are extraordinarily available to students for mentoring, ABA REPORT at 21, to the point of being available by phone at home until 11:00 pm. The report called its commitment to faculty and student interaction “truly a special aspect of the school.” *Id.* at 39. The quality of teaching at SNESL is generally good, *id.* at 20, with problems being addressed, *id.* at 21. There is a well-developed legal practice skills program, *id.* at 51, and grading is by blind-graded examinations with in-place grade-inflation safeguards. *Id.* at 41.

The school is well-managed and financially sound, *id.* at 8, and is administered by a qualified staff, *id.* at 17-18. The library has rapidly expanded to supply necessary legal materials, recently entered an agreement with the University of Massachusetts at Dartmouth (three miles away) for general reference material, is well managed, and has adequate computing resources and on-line research. *Id.* at 28-32, 36. Physically the school is in its own attractive and accessible

building, with adequate classroom and library space, and sufficient and faculty and administration office space. It also has a moot-courtroom. *Id.* at 77-78.

SNESL's most recent bar examination passage rate was 63.2 percent, ranking it above Suffolk Law School (58.5 percent), Western New England School of Law (55.6 percent), Massachusetts School of Law (55.2 percent), and New England School of Law (55.0 percent). Edward J. Barshak, Chairman, *Massachusetts Board of Bar Examiners Bar Examination Results – February 24 and 25, 1999*. The only law schools in Massachusetts with bar exam passage rates higher than SNESL were Harvard, Boston University, and Northeastern.

c. SNESL Graduates in Good Standing of Another State's Bar Should be Allowed to Sit for the New Hampshire Bar Examination

A law school may apply for ABA accreditation after three years of operation. Its application includes a self-study, setting out its view of its present and future compliance with the ABA standards and explaining any variation from them. An accreditation committee reviews the application and sends a team to visit the school, interview faculty and administrators, and inspect the school's students, library, teaching, and physical plant. If the school meets each of the standards, it may be accredited. ABA STANDARDS, "Rules of Procedure for Approval of Law Schools," at 75, *et seq.* The ABA bases its decision on its checklist of criteria, contained in the ABA standards. ABA STANDARDS at 21, *et seq.* See also Robert Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. R. 379 (1995); John Sebert, *Modest Proposals to Improve and Preserve the Law School Accreditation Process*, 45 J. OF LEGAL ED. 431 (1995); *Massachusetts Sch. of Law v. American Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998).

The ABA based its decision to not accredit SNESL on the checklist of criteria contained in its Standards. It was the failure to conform to benchmarks that led to the ABA's denial of

accreditation, and not a disparaging assessment of the course of study actually provided to SNESL students. New Hampshire Supreme Court Rule 42 demands “substantial equivalence” with ABA accreditation, not rote lockstep compliance with each of the ABA’s technical standards. It should be noted also that there has been a recent effort by the federal Department of Education to revisit its policy of relying on the ABA law school accreditation standards. Michael M. Bowden, *ABA Resists ‘Practical’ Legal Education: Education Department Threatens to Strip ABA Accreditation Authority*, LAWYERS WEEKLY USA, April 5, 1999 at B3 (article included in appendix to this petition).

Because SNESL graduates receive a sound legal education in compliance with most of the letter and all of the spirit of the ABA standards, they have thus “pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association.” N.H. SUP. CT. R. 42(4)(b). Accordingly, upon becoming a member in good standing of another state’s bar, they should be allowed to sit for the New Hampshire bar examination.

3. It Is Unfair to Treat Graduates of SNESL Different Than Graduates of Foreign Law Schools and Other Domestic Law Schools

Rule 42 provides that a graduate of a foreign school in an English-speaking country may take the New Hampshire bar exam if the school’s education is substantially equivalent to an ABA-accredited school, and the graduate is a member of a state bar or the bar of another country.

If SNESL is not regarded as a foreign school, than Rule 42 may create a disparity between graduates of SNESL and foreign law schools which raise a number of federal and state constitutional and federal statutory issues. If SNESL is not treated the same as other domestic law schools which have come to this court for the same remedy being requested here, *see Tocci’s Case*, 137 N.H. 131, 133 (1993); *In re Costello*, 401 A.2d 447, 448 (R.I. 1979); *Petition of the*

Massachusetts School of Law, Sup. Ct. No. B-95-017, *petition granted* (June 7, 1995), the disparity in treatment may likewise raise a number of federal and state constitutional and federal statutory issues. This court avoids deciding constitutional issues if possible. *Korpi v. Town of Peterborough*, 135 N.H. 37 (1993). Principles of fairness and equity suggest that a waiver should be granted to SNESEL graduates to allow them to take the New Hampshire bar exam. A brief discussion of the potential issues is provided here, however, to present a more fully rounded view.

To the extent that a state's bar admission requirements create distinctions among similarly situated applicants, the rules "must have a rational connection with the applicant's fitness or capacity to practice law." *Schwartz v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 239 (1957). In *In re McCartney*, 786 P.2d 967 (Ariz. 1990), the Arizona Supreme Court held that there was no rational basis to distinguish between the non-accredited school from which Ms. McCartney graduated and foreign law schools. The court noted that, unlike foreign schools, Ms. McCartney's school taught standard law school courses, it did not focus on non-American law such a foreign law school must necessarily do, and its graduates had a respectable rate of success on state bar exams. As in *McCartney*, there is no rational basis here on which to distinguish between SNESEL and a foreign law school; in fact it is likely that, because SNESEL seeks the recognition of ABA accreditation and because it focuses on American law, it provides a better foundation than a foreign school for practicing law in New Hampshire. N.H. CONST. pt. I, arts. 1, 2, & 12; U.S. CONST. amds. 5 & 14.

While several courts have rejected equal protection claims, unlike *McCartney* they focus on questions different than whether the school provides a substantially equivalent education.

See, e.g., Schumacher v. Nix, 965 F.2d 1262 (3rd Cir. 1992) (state reciprocity provisions upheld); *Nordgren v. Hafter*, 789 F.2d 334 (5th Cir. 1986) (rule distinguishing between in-state and out-of-state non-accredited law schools upheld because legislature relied on own knowledge of in-state school); *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1995), *cert. denied*, 106 S.Ct. 862 (1996) (waiver of examination requirement for resident attorneys upheld); *Scariano v. Justices of Indiana Supreme Court*, 852 F.Supp. 708 (S.D Ind. 1994) (same); *Matter of Sorensen*, 509 N.W.2d 285 (Wis. 1994) (preferential treatment sought over graduates of accredited schools); *see* Robin Miller, *Validity, Construction, and Application of Enactment, Implementation, or Repeal of Formal Educational Requirement for Admission to the Bar*, 44 A.L.R. 4th 910 (and cases cited therein).

For reasons similar to possible equal protection violations, due process may be implicated. N.H. CONST. pt. I, arts. 1, 2, & 12; U.S. CONST. amds. 5 & 14. *See* Michael Prairie & Lori Chamberlain, *Due Process in the Accreditation Context*, 21 J. C. & U. L. 61 (1994); *see* *Validity, Construction, and Application*, 44 A.L.R. 4th 910.

To the extent that a SNESL graduate may work in other states but not in New Hampshire, this case may raise issues concerning the right of travel, the right to work, *see* *Validity, Construction, and Application*, 44 A.L.R. 4th 910, and the privileges and immunities clause of the federal constitution. *State v. Lancaster*, 63 N.H. 267 (1884) (state statute requiring citizens of other states to procure a license to sell trees, shrubs, or vines, that may be sold by its own citizens unlicensed, is in conflict with Article 4, § 2 of the United States Constitution). There may also be federal commerce clause violations. *Vantine Studio v. Portsmouth*, 95 N.H. 171 (1948) (ordinance requiring non-resident photographers to pay license fees while local photographers

not required constituted barrier to interstate commerce). It may also implicate the full-faith-and-credit clause of the federal constitution. *Validity, Construction, and Application*, 44 A.L.R. 4th 910.

In addition, relying on the ABA to accredit schools raises antitrust issues, in violation of the New Hampshire Constitution, Pt. II, art. 83, and the federal Sherman Anti-Trust Act, 15 U.S.C. § 1. Andy Portinga, *ABA Accreditation of Law Schools: an Antitrust Analysis*, 29 U. MICH. J. L. REFORM 635 (1995); George Shepherd & William Shepherd, *Scholarly Restraints?*, 19 CARDOZO L.REV. 2091 (1998); Henry Reske, *ABA Settles Antitrust Suit on Accreditation: Justice Department Says Review Process Inflated Law School Faculty Salaries*, 81 A.B.A. J. 24(1) (Aug. 1995). *Cf. Mass Sch. of Law v. American Bar Assoc.*, 107 F.3d 1026 (3^d Cir. 1997), *cert. denied*, 118 S.Ct. 264. *See also* Mark Dykstra, *Why Can't Johnny Sit for the Idaho Bar? The Unfair Effect of ABA Accreditation Standards on State Bar Admission Requirements*, 3 SAN DIEGO JUST. J. 285 (1995); Clark Havighurst, *Foreword: the Place of Private Accrediting among the Instruments of Government*, 57 No. 4 LAW AND CONTEMP. PROBS. 1 (1994).

H. JURISDICTIONAL BASIS FOR THIS PETITION

This court has jurisdiction over this case pursuant to the New Hampshire Constitution, pt. II, art. 72-a, RSA 490:4, Supreme Court Rule 11, and Supreme Court Rule 42.

This court has several times before decided to allow graduates of non-ABA-accredited schools to sit for the New Hampshire bar. *Tocci's Case*, 137 N.H. 131, 133 (1993); *In re Costello*, 401 A.2d 447, 448 (R.I. 1979); *Petition of the Massachusetts School of Law*, Sup. Ct. No. B-95-017, *petition granted* (June 7, 1995). There is no known reason to distinguish those cases from this.

Original jurisdiction is the only procedural device available to the petitioner.

I. PRESERVATION OF ISSUES

Because there have been no prior proceedings, preservation concerns are not applicable.

J. PARTIES

Southern New England School of Law is the only party to this matter.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court exercise its original jurisdiction over this case and issue an order directing the Board of Bar Examiners and other appropriate authorities to allow graduates of Southern New England School of Law who are members in good standing of a bar of another state to sit for the New Hampshire bar examination.

Respectfully submitted,

Southern New England School of Law
By its Attorney,

Nadeau Professional Offices

Dated: August 7, 2000

J.P. Nadeau, Esq.
507 State Street
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CERTIFICATION

I hereby certify that a copy of this petition has been delivered to the New Hampshire Board of Bar Examiners, and in accordance with Supreme Court Rule 31 to the Office of the Attorney General.

Dated: August 7, 2000

J.P. Nadeau, Esq.

APPENDIX

1. LETTER, from James P. White, Consultant on Legal Education to the American Bar Association, to Honorable William A. Dimitri, Jr. Chair, Board of Trustees, Southern New England School of Law, and also to Dean Francis J. Larkin, Dean, Southern New England School of Law (Aug. 8, 1997) (cited as “ACTION LETTER”)23
2. MASS. GEN. LAWS, ch. 69, § 3027
3. Michael M. Bowden, *ABA Resists ‘Practical’ Legal Education: Education Department Threatens to Strip ABA Accreditation Authority*, LAWYERS WEEKLY USA, April 5, 1999 at B329

LIST OF EXHIBITS

1. SOUTHERN NEW ENGLAND SCHOOL OF LAW CATALOGUE (1998/1999) (cited as “CATALOGUE”)
2. AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS (Aug. 4, 1998) <<http://www.abanet.org/legaled>> (cited as “ABA STANDARDS”)
3. REPORT ON SOUTHERN NEW ENGLAND SCHOOL OF LAW, ABA Site Evaluation Team (Mar. 1997) (cited as “ABA REPORT”)
4. SOUTHERN NEW ENGLAND SCHOOL OF LAW FEASIBILITY AND SELF STUDY (Sept. 1998) (cited as “SELF-STUDY”)
5. Rules of the Massachusetts Higher Education Coordination Council, 610 CMR 2.00 *et seq.*