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Dean

June 30, 2025

To the Honorable Chief Justice and Justices of the Supreme Court of Texas,

I write in response to your call for comments on potential changes to the Rules Governing Admission to the Bar of Texas ("the Rules") as they relate to eligibility to sit for the Texas Bar Examination ("the Texas bar"), and in particular to the role currently played by the Council of the American Bar Association Section of Legal Education and Admissions to the Bar" (hereinafter the "ABA Council").

This is an important and timely topic, and I'm grateful to the Court for raising it. I begin below by placing the issue in historical context. I then set forth key principles that inform my thinking, and I conclude by assessing some of the options that the Court might consider.

1. Historical Context

In the first years of the Republic of Texas, obtaining the right to practice law typically followed the same lax, decentralized procedure then prevailing throughout the neighboring United States: a would-be lawyer would make application to a court; the court would empanel an ad hoc group of local attorneys to examine the applicant as to the applicant's legal knowledge and moral character; the examiners would carry out that task however they saw fit; and the court would then act on the examiners' recommendation. *See* Stephen K. Huber & James E. Myers, *Admission to the Practice of Law in Texas: An Analytic History*, 15 HOUS. L. REV. 485, 493-95 (1978). This procedure was codified in 1839, and though a subsequent legislative change left the process less determinate for the remainder of the Republic, the first legislative session of the State of Texas in 1846 re-codified the informal examination approach and this remained the state's model for the next half-century. *See id*.

From the point of view of a sparsely populated state's need to increase the number of available lawyers, this model had advantages. It was relatively quick and easy to become a lawyer, at least so long as you could obtain certification of your good moral character. But this model did little to protect the public from lawyers lacking even rudimentary legal knowledge.

In 1877, the Supreme Court of Texas responded to that shortcoming by promulgating a checklist of particular topics and authorities with which a Texas attorney ought to be familiar, stating that a license applicant "shall have studied" them. The checklist included the usual suspects (Blackstone, Kent, Story, *etc*.), as well as an airy reference to "general knowledge of the Constitution and Statutes of the State, and of the rules of the District and Supreme Courts of the State." *See* Rule 71 of the Rules of the Supreme Court (1877). But there was no mechanism to ensure that the ad hoc exams carried out across the state would be tailored to that checklist. Nor was there any requirement to obtain formal education in these subjects; there were no law schools in Texas at that time, after all, as UT was not established until 1883. The prevailing training model

instead was that a would-be lawyer would learn on the job by clerking for a licensed attorney, which might or might not result in exposure to items on the Court's checklist. *See* Huber & Myers, *supra*, at 494-96, 503-04.

Change came slowly, along two tracks. One involved efforts to steer would-be lawyers towards formal legal education. In the early 1890s, a Texas Bar Association committee chaired by B.D. Tarlton (who would later join UT as a law professor, and for whom UT's law library eventually would be named) persuaded the Legislature to adopt a "diploma privilege" for graduates of the UT law program. *See id.* at 498-99; Acts of 1891, at 23, in *Revised Statutes of the State of Texas* Tit. XI, art. 257 (1895). That meant that law graduates from UT would not have to be examined for their legal knowledge in order to become licensed, though they still would be subject to a good character requirement. Proponents of the idea felt that the ability to skip the exam would create a strong incentive for would-be lawyers to pursue a law degree rather than relying on on-the-job training. *See* Huber & Myer, *supra*, at 498-99.

The other pathway to change involved centralization and regularization of the licensing process itself, with a particular emphasis on the bar exam component. Legislation in 1903 replaced the longstanding decentralized, ad hoc model with formal written exams to be administered several times a year by standing "boards of legal examiners" attached to each court of civil appeals. *See* Acts of 1903, at 59, in *Revised Statutes of Texas,* Title XII, art. 309-10 (1911). The Legislature also charged the Supreme Court of Texas with promulgating further rules as needed concerning the examination and licensing processes. *See id*. Articles 311-16.

In 1919, the Legislature more-clearly concentrated all licensing authority in the Supreme Court, while at the same time creating a single statewide body (the Texas Board of Law Examiners) under the Court's authority. *See* 1919 Tex. Gen. Laws, ch. 38, sections 1 and 9, at 63-64. Soon thereafter, the Court promulgated the first version of the "Rules Governing Admission to the Bar of Texas." The new rules adapted the Court's earlier checklist of expected legal knowledge, setting forth twenty-three specific topics for study (along with corresponding recommendations of leading treatises, relevant statutes, and the like). The Court did not require a person to carry out this course of study in a particular way, however, still less to do so in a formal academic setting. It was enough that the "attainments of the applicant … should, in a reasonable measure, correspond" to the approved course of study. *See* Rule II ("Eligibility for Examination").

The new statewide bar exam would, of course, correspond to the checklist set forth in the Rules. But a growing number of applicants did not have to take the exam at all, thanks to expansion of diploma privilege. By 1919, UT had enjoyed a monopoly on diploma privilege in Texas for three decades. But by then new Texas schools were emerging, and one of them (the short-lived law school at Texas Christian University, led by the formidable Egbert Railey Cockrell) successfully pushed the Legislature and the Court for expansion. *See* Huber & Meyer, *supra*, at 512. Under the revised approach, there were two tracks to diploma privilege. First, UT was joined by UVA, W&L, Harvard, Yale, Columbia, Chicago, Michigan, and George Washington as approved schools whose law graduates automatically enjoyed diploma privilege. *See* Rule VI ("Exemption from the Examination"). Second, the Court charged the Texas Board of Law Examiners with "investigat[ing] the merits of other law schools" to see whether their graduates too should have the privilege. *Id.* Drawing on the 1919 legislation, the Court specified a handful of benchmarks that the Board should use when considering which schools to approve: an approved school's program of legal education must be three years long; students at the school must have

graduated high school; the school must regularly use written examinations; and the school's library had to have at least 2,500 law books. *See* 1919 Tex. Gen. Laws, ch. 38, section 6, at 64.

This was the true beginning of law school assessments in Texas, and it was part of a larger national trend in that same direction. Or, rather, it mirrored a larger national trend. For whereas Texas was using assessments to determine which schools' graduates could skip the bar exam, the national trend favored assessments to determine which schools' graduates could sit for the exam in the first place.

That national trend broke through in a big way in 1921, when the American Bar Association adopted a highly influential resolution urging states to reject diploma privilege altogether, and instead to require a law degree as a precondition for taking the bar exam. *See* 7 A.B.A. J. 472 (1921). And not just any law degree should count. Similar to the Texas benchmarks, the ABA's resolution created an approval system that would focus on four core questions. Did a school:

- require at least two years of college study as a condition for admission;
- require three years' of full-time study in law;
- provide "an adequate library"; and
- provide a "sufficient number" of full-time faculty to ensure "personal acquaintance and influence with the whole student body."

The resolution went on to direct the ABA Council to implement this approval system, determining which law schools met these conditions and "publish[ing] from time to time the names of those law schools …." The resolution also directed both the Council and the ABA President to carry out lobbying efforts to persuade the relevant authorities in each state to embrace this approach in their examination and licensing rules.

That lobbying effort met with near-complete success over time, but it did not take hold in Texas initially. In fact, the Legislature in 1925 affirmed the recent expansion of diploma privilege. *See The Revised Statutes of Texas* (1925), art. 307. But this did not prevent the Texas Board of Law Examiners from taking advantage of the assessment work being done by the comparatively well-resourced ABA Council. Their quality-assessment benchmarks were much the same, after all, even if the underlying purposes of the inquiries differed. It is not surprising, then, that the Board appears to have largely followed the ABA Council's list. *See* Huber & Myers, *supra* at 521.

The Texas commitment to diploma privilege finally ended a decade later, amidst the Great Depression. Perhaps the Legislature was moved by a desire to reduce competition for legal work amidst high unemployment. Perhaps members instead were motivated by concern about the quality of the lawyers attracted to Texas by its exceptionally broad approach to diploma privilege. Perhaps a bit of both. Whatever the case, the Legislature eliminated diploma privilege in 1935. *See* 1935 Tex. Gen. Laws, ch. 176, section 1.

At that time, it remained possible to take the bar exam in Texas based on having "read the law" under an attorney's tutelage, without having attended law school at all. But the on-the-job training pathway was receding, and the demise of diploma privilege drew attention back to the other aspects of the ABA's 1921 resolution. Might Texas go further in that direction?

The Court answered that question affirmatively in its revised Rules of 1936. The new rules stated that a person seeking to take the bar exam had to demonstrate that they had engaged in legal

studies for at least 27 months (unless of course they were among the decreasing number of applicants pursuing the on-the-job pathway, which triggered other requirements). Moreover, the new rules stated that having a diploma from an ABA Council-approved law school automatically would satisfy the 27-hour legal studies requirement. The only departure from the ABA's model, in fact, was that the Court left open the door for the Board of Law Examiners to recommend to the Court that other schools be similarly approved. *See* Rule V ("Time for Study").

The Court's embrace of the ABA model waxed and waned in the years after that. In 1943, for example, a revision to the Rules seemed to herald a further step towards the ABA model, as all references to the independent role of the Texas Board of Law Examiners in connection with school approvals were dropped, with pride of place instead given to the ABA Council. Yet those same 1943 rules still preserved a narrow pathway for those who had studied at schools not accredited by the ABA Council: while no out of state school could invoke this path, the 1943 rules permitted approval of a Texas school despite its lack of ABA Council approval if it instead had accreditation from "the local bar association in the city where the school is situated" (and met certain class-hours-per-week requirements). *See* Rule V. Then, just two years later, the Court reversed course, removing the exception for local bar association accreditation but also reinserting reference to the Texas Board of Law Examiners as a source of school approval on par with the ABA Council. *See* 1945 Rules, Rule V.

Things remained that way until 1958, at which point the Court conspicuously removed all reference to the ABA Council. *See* Rule V(a). In relevant part, the 1958 Rules opened with a lengthy statement emphasizing the Court's ultimate authority to specify which schools shall be approved for purposes of the law study requirement, and reaffirming that the Court could rely upon the Board of Law Examiners or any other source it cared to consider for this purpose. The same rule also modestly updated the now long-standing benchmarks intended to inform the approval decision. Thus the Court bolstered the idea that it could, in theory, approve a school that did not have ABA Council approval (though it is not clear that the Court ever actually acted on that authority).

At any rate, the pendulum began to swing back in 1974. That year, the Court's revision to the Rules not only reinserted reference to the ABA Council as a potential source of approval but further stated that the Court would treat ABA Council accreditation as *prima facie* evidence that a school satisfied the Texas benchmarks. *See* Rule VI(A)(9).

This made sense from an efficiency perspective. If a law school could navigate the more-numerous and more-detailed "standards and rules" employed by the ABA Council in its assessments, then it would certainly clear the bar with the Texas benchmarks. And by treating the Council's approval as a sufficient but not a necessary condition, moreover, the Court still preserved for itself the possibility of recognizing a meritorious situation presented by a school that for whatever reason could not pass muster with the Council. In short, the 1974 model prioritized efficiency while preserving a modicum of space to recognize innovation.

But that space turned out to be more valuable in theory than in practice, for it does not appear that any situation arose in the following years through which some new entrant obtained approval from the Board and Court without also obtaining ABA Council approval. And that perhaps explains why the Court eventually decided to close this safety valve altogether.

The 1983 revision to the Rules preserved the longstanding requirement that a would-be Texas lawyer must satisfy the law study requirement through completion of the program at an "approved" law school. But the Court removed the portion of the Rules that previously had described the Court's ultimate authority over that approval decision, as well as language on the supporting role of the Board and even the law school adequacy benchmarks themselves. In place of all that, the 1983 Rules included a pithy sentence that simply defined the phrase "approved law school" to mean "a law school officially approved by the American Bar Association," full stop.

With that change, the window for schools to obtain approval from the Court despite lacking approval from the ABA Council closed. And it remains closed to this day.

2. Key Principles and Observations

This historical context informs my thinking on the question the Court has raised, and so too do the following principles and observations.

a. It is valuable to ensure that new lawyers enter practice with a reasonable degree of preparation.

As the survey above illustrates, our state for the past century has recognized an important interest in ensuring that those who enter into legal practice do so with an adequate baseline of preparation. Hard experience early on, not to mention common sense, both support that conclusion.

The more interesting question has always been: how best to advance that interest? Over time, the answer that emerged was the combination of requiring would-be lawyers to get a formal legal education at a school meeting certain baseline standards of quality, and then making everyone pass a well-designed and regularly-administered bar exam. While not perfect, this combination has worked reasonably well when considered in historical perspective.

As for the future? For a host of reasons—but particularly in light of the accelerating emergence and diffusion of artificial intelligence capabilities—it seems all but certain that we are entering a period of significant change for legal practice and institutions. And so we should be asking whether there is sufficient play in the joints of the system to facilitate desirable innovation and adaptation.

b. To play their part in this system, law schools should be held to baseline quality standards (but should not be overregulated).

For this system to work as intended, law schools do need to meet at least a baseline standard of quality; that is, after all, the justification for Texas shifting over time to having an approval process that prohibits graduates of some law schools from sitting for our bar exam. This has always been a worthy project in the abstract, and it continues to be so.

The trick is to carry out this screening without unduly suppressing innovation, imposing unwarranted conformity, or driving up educational costs unnecessarily. Efforts to ensure adequate law school quality, in other words, need to be balanced with appreciation for those risks. This is particularly important in the context of accreditation mechanisms, where the stakes are immensely high. The sweeping nature of the authority wielded by gatekeeping accreditors at times may make it hard for schools to voice objections in a full-throated way. And it is only natural that those with

such gatekeeping authority might use it to advance a vision of best or preferred practices rather than limiting themselves to mere baseline standards of adequacy—all the more so if the accreditor's own conception of their role affirmatively embraces such broader regulatory goals.

Is it fair to say that the ABA Council has such a broad conception? The Court is aware of various recent controversies associated with Standards 206 and 303(c). I do not intend to comment on those here, as they have received much attention elsewhere and the point I am exploring is independent of the political and policy dimensions of those disputes. Instead, I draw the Court's attention to a more-mundane example.

Recently, the Council's Standards Committee proposed imposition of a significant change to law school education, building on an earlier imposition of a similar kind. The change concerns "experiential learning" courses--that is, courses that provide actual or simulated practice experience (such as clinics, internships, and simulation-style courses). To be clear: experiential education courses are highly valuable (we have long been particularly committed to them at my school, where we have an unusually large number of excellent clinics as well as one of the most robust pro bono programs in the country). Even so, when the ABA Standards not long ago were amended to require every law school to change their graduation requirements such that every student (no matter their career goals and no matter the school's resources) must spend at least six of their credits taking experiential courses, it seemed to many to be an example of the Council growing increasingly comfortable imposing its conception of best practices rather than confining itself to policing the baseline adequacy of the schools. But that original intervention was minor compared to the proposed expansion of this rule currently on the table. Under the proposed new standard:

- The number of experiential credits required to graduate would rise from a minimum of six to a minimum of *twelve* (thus claiming more than 10% of the Law School experience overall, and a full quarter or more of the typical student's elective opportunities).

- All students would have to include amidst these twelve credits a clinical course.

- The definition of a qualifying clinical courses would expressly include courses in which students would work on "public policy and legislation."

- Non-credit practice experience (whether in the form of supervised pro bono representation or summer employment) would not count.

- And nothing a student might take in their 1L year would be permitted to count towards the twelve-credit requirement.

There is more to say in criticism of these proposed changes (see the extensive and persuasive criticisms set forth by Professor Derek Muller at https://excessofdemocracy.com/blog/2025/6/my-comment-in-opposition-to-the-abas-proposed-amendments-to-standards-303-304-and-311). And it is certainly possible that the broader ABA Council will sand some of the edges off the committee's proposal. The point here, however, remains: the ABA Council appears to understand its role to encompass promotion of its conception of best practices and desirable educational policies, not just safeguarding baseline adequacy

c. *Many factors lead law schools to seek and maintain ABA Council approval (not just the Court's Rules).*

It certainly is true that the Court's current approach to bar exam eligibility suffices, on its own, to ensure that every Texas-based law school will seek and maintain ABA Council approval. But it is important to underscore that there are other factors that also suffice, on their own, to motivate schools to do this.

First, many if not most students very much want the option of national degree portability—that is, the ability to move to other jurisdictions and become licensed in those places. They may want this because they know they want to practice somewhere else, either upon graduation or later. They may want it because they appreciate that some employers will need this flexibility from them. Or they may simply appreciate that life sometimes throws personal and professional curveballs that might compel an unexpected move. Whatever the reason for it, though, widespread interest in national degree portability means that schools have to account for the bar exam eligibility rules across the country and not just in their home state. And perhaps not surprisingly, most other states as well as the District of Columbia (though not California) have the same exclusive emphasis on the ABA Council in their bar exam eligibility rules as does Texas. Some of these jurisdictions may shift to a different or more-flexible model, just as Texas might do so. But so long as an appreciable number of major markets stay exclusively with the ABA Council as their gateway mechanism, schools across the country will have a strong incentive to keep their ABA accreditation even if their own state's rules do not require it.

Second, there also is the fact that the U.S. Department of Education currently recognizes only the ABA Council as the federally approved accreditor for law schools. This matters quite apart from bar eligibility rules. Schools care about the ability of their students to access federal student loans, as these are generally understood to be the most affordable loans most students can access. Under Title IV of the Higher Education Act, though, access to those loans is limited to students enrolled in schools that are accredited by a federally recognized accreditor. So long as the Department of Education solely recognizes the ABA Council for this role, then, this is a further independent incentive for schools to maintain ABA Council approval.

There are other considerations of a like kind (though some of the ones I mention below are speculative in comparison to the factors just discussed). Some would argue, for example, that a generalized concern for reputational risk would cause most schools to continue with ABA Council approval even if the aforementioned considerations did not apply. Others might invoke a different species of caution: changes to bar eligibility rules at the state level or to federal accreditor recognition might not last, after all, if they result from regulatory decisions rather than statutory enactments. And so, even in the event of such a change, it might be wise to carry on with ABA Council approval just in case the change is undone later. Finally, it should be emphasized that some academic leaders no doubt support the ABA Council's approach on its merits, and would not walk away from it just because they could do so.

In light of all this, it seems that the question of how the Court should proceed with respect to the Texas bar exam eligibility rules is not about whether Texas law schools will continue to seek and maintain accreditation from the ABA Council. They will, or at least they will do so for as long as other major jurisdictions and the federal government maintain their ties to the ABA Council. After all, no one is suggesting that the Court should affirmatively bar graduates of ABA Council-approved schools from sitting for the Texas bar exam. The conversation, instead, is about whether

the Court should continue with the 1983 model in which only the graduates of ABA Council-approved schools can sit for the bar, or if instead it should revert to a more flexible posture. This is a very interesting question, especially bearing in mind (1) the Council's increasing emphasis on promoting its vision of best practices, (2) the evergreen need to address access to justice challenges associated with the absence of attorneys in some areas, and (3) the possibility that we are entering an era of technology-driven innovation across many industries, law and legal education among them.

3. Options

To answer that question, a review of the reasonably-available alternatives to the 1983 model is in order. Here is my assessment of three of those possibilities.

Option 1: Incorporate by reference whichever entities are approved at any given time by the U.S. Department of Education for purposes of federal accreditation.

This option has advantages. For one, it keeps the Board and the Court out of the decision-making business, which is efficient. It also has some potential to restore the Rules to a focus just on assurance of baseline law school quality. Whether it would achieve that result, though, is less clear. This requires the Department of Education actually to name a new or additional accreditor, which has not happened yet. And it requires that new entity to limit its assessments to assurances of baseline quality, which might or might not happen.

Would this option help to avoid a dual-accreditor scenario in which schools must bear the expense of satisfying two accreditors at once, with the added risk of facing incompatible obligations? Possibly, but by no means for sure. Assume that the Department of Education moves away from the ABA Council in favor of some other entity, and that the Court has adopted a mirror rule of this kind. Even so, it is likely that major jurisdictions (such as New York and Washington, D.C.) would continue to condition access to their bars on ABA Council approval. In that scenario, as suggested above, many if not most schools would end up pursuing dual accreditation. Of course, the same thing would occur if the Court leaves the status quo in place but the Department of Education makes a change.

Option 2: Pick a new accreditor for purposes of access to the Texas bar exam and bake that directly into the Rules, just like the ABA Council currently is baked in.

The fundamental problem with this option is that, so far as I know, there is no actual alternative accreditor to perform such a role. If an appealing one does emerge, though, then the question is whether the Department of Education intends to embrace it as well. If not (or in any event, if not done in a way that seems likely to stick over time), then a change to the Texas rules would produce the dual-accreditation scenario discussed above. And even if the federal accreditor was changed in a way that seemed likely to stay, there would still be the question of whether other major jurisdictions would follow suit.

Option 3: Open the door to innovation by embracing a modified version of the pre-1983 model (in which ABA Council approval is sufficient, yes, but not necessary in every case)

As emphasized above, a law school that does manage to get and maintain ABA Council approval no doubt has more than achieved the baseline adequacy standard. As such, it remains

efficient to treat such approval as a sufficient condition also for purposes of the exam-eligibility rules in Texas. But why keep the bar raised that high in all cases? The decision to align fully with the ABA Council model in 1983 made sense at the time, perhaps, but it seems overly restrictive today in light of the Council's ambitious approach. Perhaps it is time to re-open the door, at least a bit, to innovative alternatives.

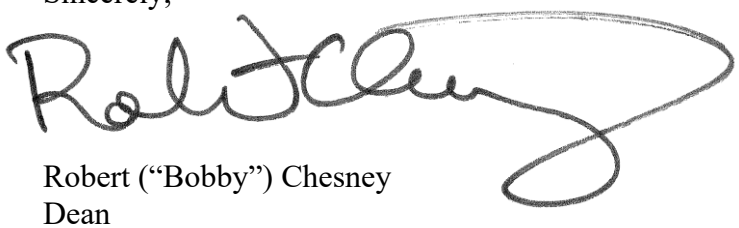
As noted above, prior to 1983 that door was open at least in theory. For many decades, a program that did not have ABA Council approval *could* make its case to the Board (and thus the Court). That this did not yield innovation back then means that reopening the door now might not yield benefits. But it also might mean that, back then, there simply was not much of a difference between the Texas benchmarks and the then-prevailing ABA Council approach. It could be different today.

The primary obstacle, arguably, is the potential for administrative burden. It is the Texas Board of Law Examiners who would be most likely to receive responsibility for this task, and the Board does not lack for obligations as things stand. But it is worth considering whether the burden could be managed effectively.

The answer might be yes if the Court were to lean into the idea that a primary purpose of reopening an alternative pathway to approval is to help pave the way for innovative, lower-cost approaches to legal education. From that perspective, a well-designed alternative pathway should turn on an intentionally-parsimonious set of benchmarks for baseline adequacy, thus leaving maximum room for innovation. If well chosen, those benchmarks might actually be relatively administrable. They might consist, for example, of relatively-objective input measures such as the credits and particular courses required for graduation, the quantity and qualifications of the faculty, grading policies, *etc.* But in the spirit of innovation, they probably should as much or more emphasize *outcome* measures, especially bar passage, employment percentages, and cost-to-salary ratios.

One could err on the side of taking great risk in this way, in hopes of unleashing exciting innovations. Or one could err the other way, cracking the door open only to a limited degree by keeping the benchmarks (particularly requisite bar passage levels) demanding. Either way, however, it would be fascinating to see what might arise should the Court reopen such a pathway given the current climate of innovation, change, and cost concerns. I hope the Court will give some version of it a shot; it seems the Texas thing to do.

Sincerely,



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