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Breaking the ABA's Law School Cartel: A Proposal to Make Oklahoma Top-Ten in Innovative Lawyer Education

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"The big truth about the current structure of legal education in America is that it is the handiwork of a well-functioning cartel, the product of ABA mandated rules that are enforced by state legislatures and supreme courts. As with all such state enforced, cartel creating and policing barriers to entry, the putative purpose of these requirements is to protect the public by ensuring a relatively high minimum standard of competence and training of those permitted to practice in the profession. Whether, and to what extent, it does that, another salutary effect for those currently employed in the field is that it substantially increases the cost of entry to those who wish to become attorneys, thereby reducing the supply and increasing the income of those already members of the bar."

-Lloyd Cohen, *Comments on the Legal Education Cartel*.[1]

Introduction

The American Bar Association (ABA) has a monopoly over legal education in the United States as the only accrediting body for law schools. This monopoly was no accident, as it was written into law—at the ABA's behest—in 47 states, including Oklahoma. This erects unnecessary barriers to entry of new law schools, creates unnecessary burdens for acquiring a law license, and has homogenized legal education, stifling innovation.

The ABA is a conflicted interest group representing incumbents in the field, making it an inappropriate entity to give the power to police new entrants. It has also demonstrated itself to be politically biased. This bias would typically be of little consequence since the ABA is a private trade association, but given the ABA's state-mandated dominance over the education of lawyers, and lawyers' unique position in American politics and government, this bias has significant real world consequences.

Despite its central position in legal education and licensing, and its claim to speak on behalf of the profession, the ABA is unrepresentative of the vast majority of lawyers in the United States. Only a small fraction of the nation's lawyers, approximately 14 percent in 2018, belong to the ABA.[2] In 1970, the figure was closer to 50 percent, which while not justifying the ABA's legal monopoly, at least could be said to be more representative of the bar.[3]

Oklahoma can spark innovation in the delivery of legal education by eliminating its ABA accreditation requirement.

Moreover, the ABA's accreditation practices have come under increasing criticism from leaders in legal education.

Oklahoma can spark innovation in the delivery of legal education by eliminating its ABA accreditation requirement. Doing so would open the space to new law schools that are more affordable, tailored to students' professional goals, and more effective in producing competent lawyers. If coupled with improvement of the bar exam to make it a better measure of legal competence, Oklahoma would find itself at the leading edge of innovation in an area that has been stagnant in the United States for more than seven decades. More importantly, Oklahomans would benefit from a more competent bench and bar and more affordable legal services, and aspiring lawyers would have more opportunity to pursue their professional goals. A true win-win.

Current Law and State of Legal Education in Oklahoma

To become licensed to practice law in Oklahoma, applicants must, among other requirements, demonstrate proof that they have completed a course of study and graduated from an ABA accredited law school.[4] There are three such law schools in the state, with a combined 389 students matriculating in 2019. In 2019, The University of Tulsa College of Law (TU) awarded 88

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degrees, University of Oklahoma College of Law (OU) awarded 176, and Oklahoma City University School of Law (OKCU) awarded 125.

Tuition is exorbitant at all three schools, with OKCU ($35,340 per year) outpacing OU ($20,903 in-state, $32,288 out-of-state) and TU ($25,254). Note that despite OKCU's relatively poor bar exam passage rate among graduates its tuition is highest.[5] It was reported that in 2020 that approximately 70 percent of students at Oklahoma's three law schools incurred student loan debt to complete their course of study.[6]

No Oklahoma law school is ranked in the "first tier" (top 50) of law schools nationally. OU and TU are considered second tier law schools (ranked between 50 and 100) and OKCU bounces between the third or fourth tiers (ranked between 100 and 150, and 150 and 200, respectively).[7] There are 203 ABA accredited law schools in the United States.[8]

Oklahoma's requirement that bar applicants hold a degree from an ABA accredited law school has been in place for more than 60 years.[9] The current iteration of the requirement is imposed by rule of the state Supreme Court (questionable legally, given a lack of constitutional or statutory authority to create and enforce such a rule),[10] and contains no exceptions.[11]

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Insulating Lawyers From Competition: The Origins of ABA Accreditation

Contrary to received wisdom, the ABA began accrediting law schools not to improve the quality of legal education, but in response to a perceived "overcrowding" of the legal profession in the early 20th century.[12] The widespread belief among the bar at the time was that too many lawyers were entering legal practice, creating competition for established lawyers.[13] Thus, the ABA was motivated first by a desire to pad its members' pocketbooks, and second (if at all) by a desire to improve the quality of lawyering in America.[14] Not coincidentally, this period corresponded with the push for integrated (mandatory) bar associations, a movement that shared the goal of artificially reducing the supply of new lawyers.[15] There is also strong evidence indicating that a desire to prevent ethnic and racial minorities from entering the legal profession played a significant role in the ABA's efforts.[16]

The ABA was correct in its judgment that the supply of lawyers and law schools was expanding, though talk of an "oversupply" was an economic non sequitur. The number of law schools in the United States tripled between 1890 and 1930, largely due to part-time schools opening to compete with established law schools on both flexibility and price.[17] The number of lawyers also doubled over roughly the same period.[18] Presumably, the proliferation of law schools was caused by an increased demand for formal legal education, as opposed to the traditional office study or apprenticeship, and the increase in practicing lawyers resulted from increased demand for legal services. If the supply began to outrun demand, as the ABA believed it had, the situation would have been short-lived as the market naturally corrected.

Nonetheless, the ABA led the charge to tamp down the supposed oversupply of new lawyers, often expressing its goal of protecting established lawyers' economic interests. This focus on its members' economic interests is hardly remarkable. The ABA is a trade association, and that's what trade associations do.

What is remarkable, however, is the speed and completeness with which the ABA achieved its goals. In 1927, no state in the nation required attendance at any law school, accredited or not, to gain admission to the bar. By 1941, 41 states required an ABA-approved degree as a condition of obtaining a license.[19]

The ABA achieved this extraordinary feat through aggressive lobbying of state policymakers, convincing them to write an ABA monopoly into their lawyer licensing laws.[20] These licensing laws specifically designated the ABA as the only state-sanctioned accreditor of law schools, closing the door to any would-be accreditation competitors. The federal government followed suit, limiting federally subsidized financial assistance only to students attending ABA accredited law schools.[21]

The Character of the ABA Makes its State-Enforced Monopoly Inappropriate

The ABA has thus been granted a formal gatekeeping role, acting as the first filter for who enters the legal profession. This is unseemly because the ABA has a massive conflict of interest and has demonstrated a marked political bias. Further, the ABA's accreditation standards are poorly designed and constitute a top-down, one-size-fits-all approach to legal education. This stultified system stifles innovation, raises prices, and reduces the overall quality of legal education.

As a Private Trade Association, the ABA Protects Lawyers' Interests, Not the Public's

The ABA is a private trade association, and as such, its primary purpose is to protect and promote its members' interests. Just as labor unions and business associations concern themselves first with their members' economic well-being, and only second (sometimes not at all) with the broader public interest, so too does the ABA concern itself first with the financial interests of lawyers.

Placing such a group in a privileged, gatekeeping position is improper as the ABA is incentivized to limit new competition for its members. It is not surprising, then, that the ABA has made its law school accreditation process exceedingly costly and cumbersome, discouraging new law schools from opening.[22] Formally delegating accreditation of law schools to the ABA is akin to handing authority over the issuance of drilling permits to Devon Energy.

Because of the Unique Role of Lawyers in Politics and Government, the ABA Wields Outsized Influence

The ABA has long possessed a left-leaning political bias,[23] becoming more brazenly political in recent years. Perhaps the clearest manifestation of this bias is seen in the ABA's highly influential ratings of candidates for the federal judiciary. The ABA rates judicial nominees "well qualified," "qualified," or "not qualified," and its ratings carry sway with presidential adminis-

trations and United States senators. But the ABA has been shown to operate with a partisan bias in its ratings. A 2012 study, for example, examined all federal appellate nominees between 1985 and 2008, and determined that nominations submitted by a Democratic president were significantly more likely to receive higher ABA ratings than nominations submitted by a Republican president.[24] The ABA's bias has only grown since the inauguration of Donald Trump, as has been extensively documented by knowledgeable observers.[25]

Beyond rating judicial nominees, the ABA has increasingly waded into fraught political matters. In recent years, the ABA has endorsed gun control, federal funding of abortions, universal health care provided by the federal government, and affirmative action.[26] In an area where its political bias overlaps with its members' financial interests, the ABA dutifully opposes virtually all tort reform, including "loser pays" laws, caps on product liability damages, and eliminating joint-and-several liability.[27]

While tempting to consider the ABA's political bias as a concern only for the legal community, the truth is that the ABA greatly influences American life, albeit indirectly. Lawyers play a unique and prominent role in government and politics,[28] and ABA accredited law schools constitute the first filter through which budding lawyers must pass. Indeed, one of the more traditional paths to political office is law school. Moreover, some important political offices are open only to lawyers, such as those of prosecutors and judges. Accordingly, the ABA's accreditation monopoly should be of concern not just to the bar, but to society at large. The ABA dictates the structure and substance of legal education, which must have at least some influence on the views of students matriculating through law schools. The situation is more stark when one considers that the ABA only counts a small fraction of the nation's lawyers among its members, approximately 14 percent in 2018. Though the ABA purports to speak on behalf of the bar, it actually is unrepresentative of the vast majority of lawyers.

The conventional wisdom that lawyers, as a class, are skewed to the political left, is conventional for a reason: it is true.

The conventional wisdom that lawyers, as a class, are skewed to the political left, is conventional for a reason: it is true. Several rigorous studies by political scientists confirm this leftward inclination,[29] At least in the modern era. However, it is not obvious that there is anything inherent about the study and practice of law that either disproportionately attracts political liberals, or that it takes a population featuring a normal political distribution and shifts it to the left. Empirical data is difficult to come by, but study of American history produces examples of eras where conservatives dominated the ranks of the legal profession, even controlling the organized bar. The pages of the Oklahoma Bar Journal during the Roosevelt presidency, for example, rail against the New Deal with a gusto that indicates the authors were preaching to a receptive audience.[30] It is difficult to make the case the American Founders were of the political left in any sense that we understand the term today, and yet their ranks were dominated by men of the law.

Therefore, it is worth considering whether the ABA's stranglehold over law school accreditation is producing a certain type of law school that is in turn attracting and/or producing a certain type of law student. Again, anecdotal evidence abounds. It is well known that American law schools are dominated by political liberals. A so-called "conservative" law school is only designated as such in legal circles because it might include a few prominent conservative scholars on faculty in a sea of reliably liberal professors. It is unlikely that conservatives are in the majority at any major law school in the country.[31]

The ABA's Flawed Accreditation Standards

For most lawyers, ABA accreditation serves as a sort of shorthand indicating that a law school meets a certain standard of quality, but in reality, it is a poor indicator of the quality of the education received by law students. The ABA's process is often arbitrary and focuses predominantly on inputs, like physical facilities and faculty-to-student ratios, rather than educational outputs.[32]

Procedurally, the accreditation process is extremely cumbersome and expensive. A law school may not become accredited until it has been in operation for at least three full years.[33] First, a school applies for provisional approval, which entails submitting lengthy reports and plans, and enduring tedious site evaluations.[34] A school may not apply for provisional approval until it has been in operation for one year.[35] To receive provisional approval, the school must establish it is already in "substantial compliance with each of the [ABA] Standards and present a reliable plan for bringing the law school into full compliance with the Standards within three years."[36] If the school manages to achieve full compliance with ABA Standards, it must maintain this full compliance for two years before it is eligible for full approval.[37]

Accordingly, the shortest time to accreditation is three full academic years, and the process could conceivably take six years (one year of substantial compliance, three years to reach full compliance, and two years maintaining full compliance to receive full approval). Naturally, this task is made more difficult by the need to persuade students to enroll despite the risk that their degree will worthless upon graduation, as accreditation is not guaranteed.

Substantively, the ABA Standards involve nearly every conceivable aspect of running a law school, and yet are stated sufficiently broadly so as to provide little assurance to applicants as to what steps will gain ABA approval.[38] This approach is both extremely costly and also risky for applicants. The Standards touch on curriculum, finances, facilities (such as the law library collection), faculty-to-student ratios, course-of-study credit hour requirements, and much more.[39]

Despite the extensive array of requirements in the Standards, the ABA retains flexibility for itself by including general statements subject to capricious enforcement. For example, Standard 202, regarding "Resources for Program," provides "The current and anticipated financial resources available to the law school shall be sufficient for it to operate in compliance with the Standards and to carry out its program

of legal education."[40] The ABA can—and does—use such broad standards as a cudgel to prevent approval of schools that have otherwise complied with the Standards.[41]

As noted, the Standards place too much emphasis on inputs rather than educational outcomes. These inputs—for example, the number of books in the law library collection[42]—tend to needlessly raise the cost of compliance with no real connection to the quality of education received at the school. The deans of some of America's top law schools, including Harvard and Stanford, made this precise criticism nearly thirty years ago. In an open letter to the deans of every ABA accredited law school, they stated:

> We find the current process overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollar costs to schools. . .
>
> It is this sense of responsibility that gives rise to our concern that the accreditation process for law schools is heading in the wrong direction. Our varied visions of legal education focus on the results of the educational process, on the outputs of legal education—about the sort of graduates we produce, about the sort of lives they will lead, about the consequences of our writing and teaching. In contrast, the ABA's accreditation process increasingly concentrates on inputs . . .[43]

The ABA has done little to address these issues with its accreditation process in the years since the deans' letter.[44]

It is unclear that ABA accreditation bears any relation to quality of results. Consider the extreme difference in bar passage rates between the ABA accredited law schools with the highest and lowest passage rates. In 2020, Marquette University had a 100 percent first-time bar passage rate, and Clarke School of Law at the University of the District of Columbia had a 38.5 percent bar passage rate.[45] Yet both schools have the same status under the ABA Standards—accredited. Oklahoma's three ABA-approved law schools are closer, but there are still significant gaps, with the University of Oklahoma (94.9 percent) and University of Tulsa (95.2 percent) ahead of Oklahoma City University (76.7 percent).[46] As a result, ABA accreditation is not serving its supposed purpose, ensuring quality legal education. To a prospective student—the consumer—arguably the most important metric in evaluating the quality of law school is the school's record in preparing students to become licensed to practice law. On this score, a school's ABA accreditation provides no useful information to the consumer. Why then, do states persist in making graduation from an ABA-approved school a prerequisite for licensure?

A Proposal for Oklahoma to Lead the Nation in Innovative Legal Education

Ultimately, the ABA's sclerotic accreditation process favors established law schools and stifles innovation. It is no coincidence that the establishment of the ABA accreditation monopoly in the middle part of the 20th century ushered in an era of law school homogenization, increased costs, and reduced competition.[47] What else could be expected from the ABA's government-enforced hegemony?

It is no coincidence that the establishment of the ABA accreditation monopoly in the middle part of the 20th century ushered in an era of law school homogenization, increased costs, and reduced competition.

The future is bright, however, for states willing to leave ABA accreditation behind. Oklahoma is positioned to be a leading innovator in the delivery of legal education. Oklahoma's legal community is relatively small and the state has only one public law school, giving the market room for experimentation. A necessary first step is to remove the state's requirement that students must graduate from an ABA approved law school to be admitted to practice, thus opening the state to innovative newcomers who are interested in delivering alternative models of legal education. If coupled with reforms to Oklahoma's bar exam, the state could spark innovation and have more assurance that only competent lawyers are becoming licensed to practice.

Eliminating ABA Accreditation in Oklahoma

Eliminating the ABA accreditation requirement can be accomplished either by rule of the Oklahoma Supreme Court, or more likely, will require legislation. A handful of states permit students from law schools not accredited by the ABA to sit for the bar exam, but a far better option would be to repeal any formal education requirement and rely only on an enhanced bar exam that better measures competency, as proposed in the next section. If students value certification of law schools, competing private accreditors will emerge to meet the demand. Moreover, law schools would need to demonstrate real value to students to remain open.

The idea of admitting lawyers to practice who have never been to law school may sound unusual to modern ears, but it was the norm in the United States for most of its history. Many of America's great lawyers and political figures, like Abraham Lincoln, did not have formal legal training, instead "reading the law" and apprenticing. The lawyer founding fathers, to a man, lacked the type of formal legal education now mandated. This includes the most important figures shaping American constitutional law, men like James Madison and Alexander Hamilton. As recently as 1954, the United States Supreme Court had at least one justice who had not completed law school.

While the three existing law schools in the state would likely initially maintain their ABA accreditation, space would be opened for new law schools catering to students who only desire to practice law in Oklahoma. Already, a strong majority (61 percent in 2018) of students graduating from OU Law School are employed within the state after graduation,[48] and a majority of students who attend law school in Oklahoma are from the state. The next preferred state of employment for OU law graduates was Texas, with approximately 17 percent.[49] This indicates that a healthy population of those attending law school in Oklahoma are either

from the state or interested in practicing only in Oklahoma, or both. The licensing requirements of other states are irrelevant to these students' decisions about where to obtain their legal education. This is not the case in many other states, where students come from out-of-state and seek to return home upon graduation, necessitating a degree that meets the requirements of their home state's licensing regime. In other words, they need an ABA-approved degree.

By eliminating the ABA accreditation requirement, there likely would be great opportunity for lower cost, more innovative providers to enter the Oklahoma market. New law schools might break free from the ABA-imposed requirement of three years of formal academic coursework, favoring instead a year or two of academic training coupled with an apprenticeship focused on practical skills. Others might seek to be the lowest cost provider, utilizing online instruction to bring down costs. Still others could cater to specific niches in the market. For example, a school could structure its curriculum around a particular subject matter, such as criminal law or trial practice, and become the go-to school for a student who wants to pursue a career in that practice area.

The result would be (1) lawyers more prepared to practice law upon completion of their degree, (2) a much lower cost, and debt-burden, to students, (3) through apprenticeships, the opportunity for employers to hire low-cost, but high-quality skilled labor, bringing down the costs of legal services for consumers, and (4) better job prospects for matriculating law school graduates.

In short, repealing the ABA accreditation requirement for a law license would allow the free market to operate, leading to the same results (low prices, high quality) seen in other areas where a robust market takes hold.

Reforming the Bar Exam

In conjunction with alternative accreditation, Oklahoma should change its bar exam to better evaluate lawyer competency. The Oklahoma bar exam, like all state bar exams, covers a wide variety of topics and is tested in a timed, one-off written examination. Moreover, students typically study for and take the exam within a period of a few months between graduation and beginning their first job, so they are forced to "cram" to be prepared. This exam structure encourages the "shot gun" approach—students cast projectiles in a general direction and hope they hit something. The information is forgotten as soon as the exam is over, and the real education in a lawyer's practice area takes place in the first years of his employment.

A far better approach would be to divide the exam into multiple parts, each dealing with a few subject areas. The exam could be completed over the course of several years, with examinees advancing to subsequent exams only on passage of the prior. During this testing phase, examinees could be provisionally licensed, with more circumspect privileges, but still with the ability to be employed and earning a living. Other occupations with examinations undergo a similar process, such as certified public accountants and medical doctors. The state could also allow licenses limited to specific practice areas, such as estate planning or real estate title law, obtained after passage of an exam testing competence only in that subject. Other occupations, such as securities brokers and oil and gas landmen, have similar certification tiers.

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Conclusion

More than seven decades of homogenized legal education, conflicted self-dealing, and partisan politics has stultified legal education in this country. More importantly, it has damaged the quality of the legal system, artificially inflated the cost of legal services, and likely improperly tilted the political scales in important government functions. The necessary first step to reversing these destructive forces is to break the ABA's cartel. Oklahoma should boldly lead the way.

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