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SUPREME JUDICIAL COURT

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Judicial Branch testimony against LD 738,
An Act to Remove Barriers to Becoming a Lawyer by Establishing a Law Office Study Program

Senator Carney, Representative Kuhn, members of the Joint Standing Committee on Judiciary, I am Chief Justice Valerie Stanfill of the Maine Supreme Judicial Court, and I represent the Judicial Branch. I would like to provide the following testimony against LD 738, An Act to Remove Barriers to Becoming a Lawyer by Establishing a Law Office Study Program.

An analysis of the issue of regulation of attorneys "must begin with recognition that at the foundation of our form of government there are three co-equal branches; and that our form of government, at the state as well as the federal level, embraces the doctrine of the separation of powers." *Board of Overseers of the Bar v. Lee*, 422 A.2d 998 (Me. 1980). Article III of the Maine Constitution states:

> Section 1. The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial.
>
> Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

The three "departments" are independent and co-equal, and they are "severally supreme within their legitimate and appropriate sphere of action." *Ex parte Davis*, 41 Me. 38, 53 (1856).

In the area of the admission of attorneys to the practice of law, "the judicial branch of the government, acting through the courts, has exclusive jurisdiction and the legislative branch, acting through the Legislature, can in no way limit this inherent power and authority of the court." *In re Feingold,* 296 A.2d 492, 496 (Me. 1972). *See also Board of Overseers of the Bar v. Lee,* 422 A.2d 998, 1002 (Me. 1980) ("The power to define and regulate the practice of law naturally and logically belongs to the judicial department."); *In re Husson Univ. Sch. of L.*, 2010 ME 16, ¶ 11, 989 A.2d 754, 756

("[A]mong the three branches of government, it is the Judicial Branch, specifically this Court, that has the inherent authority and exclusive jurisdiction over the admission of attorneys to the practice of law in this state.")

The Legislature has enacted statutes which regulate attorneys; 4 M.R.S. § 803 is such a statute. But,

> [W] e have enforced statutes designed to regulate the licensure of attorneys—a subject squarely within the realm of judicial interest and authority—"as a matter of comity, but not in surrender of [the judiciary's] inherent power." [*Bd. Of Overseers of the Bar v. Lee*, 422 A.2d 998] at 1003 (*citing In re Feingold,* 296 A.2d 492, 496 (Me.1972) ("Courts ... may and frequently do honor implementing legislation, but clearly are not bound to do so.")).

In re Dunleavy, 2003 ME 124, ¶¶ 36-37, 838 A.2d 338, 352–53 (J. Levy, concurring.) *See also Application of Hughes*, 594 A.2d 1098, 1100 (Me. 1991) (The Court "has inherent authority to admit attorneys to the bar that cannot be limited by legislation.")

Thus, statutes purporting to regulate the admission of attorneys to the practice of law in Maine

> are not exclusive. Such provisions are in aid of the authority and power inherent in the court. . . . But, in this area, the judicial branch of the government, acting through the courts, has exclusive jurisdiction and the legislative branch, acting through the Legislature, can in no way limit this inherent power and authority of the court. Courts, however, may and frequently do honor implementing legislation, but clearly are not bound to do so.

In re Feingold, 296 A.2d at 496.

In short, attorney licensure falls within the exclusive authority of the Judicial Branch. That said, principals of comity support, within the Court's discretion, upholding statutes on attorney licensure "unless an enactment substantially interferes with the administration of justice or constitutes an unreasonable burden on judicial authority." *Dunleavy*, 2003 ME 14 ¶ 37, citing *Lee*, 422 A.2d at 1003.

Bar Admission Rule 2 provides that the bar admission rules "are intended to provide fair and efficient procedures and standards for determining the qualifications

to practice law of applicants for admission to the bar." The admission requirements included in the rules, aside from the need for good character, include criteria designed to show an appropriate level of legal proficiency. *Cf. Feingold*, 296 A.2d at 499 (noting that "high standards of qualification" may be imposed, including "proficiency in [the state's] law"), citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-89 (1957).

The purpose of a legal proficiency requirement is to protect the public and to ensure the fair and efficient administration of justice.[1] Because these are shared concerns between the Legislative and Judicial Branches, the Court may, based on comity principles, respect, as *minimum* standards, statutory qualifications that the Legislature deems are needed to meet these objectives. The Legislature cannot, however, establish an *alternative* to the requirements set by the Court. *See Opinion of the Justs.*, 279 Mass. 607, 611, 180 N.E. 725, 727 (1932) (statutes regarding qualifications to practice law "will be regarded as fixing the minimum and not as setting bounds beyond which the judicial department cannot go."); In Re Bailey (1926) 30 Ariz 407, 248 P 29.[2]

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[1] As one State Supreme Court explained:

> The justification for excluding from the practice of law persons who are not admitted to the bar and for limiting and restricting such practice to licensed members of the legal profession is ... the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control.... The licensing of lawyers is not designed to ... serve the public right to protection against unlearned and unskilled advice and service in relation to legal matters.

W.Va. State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420, 435 (1959).

[2] The Arizona Court stated in relevant part:

> The requirements prescribed by the legislature are merely restrictive of the rights of the applicant, and that they do not, and cannot, compel the courts to admit anyone to practice. ... The courts are, of course, a separate and independent division of the government, and, within their constitutional rights, not subject to control by the legislature. ... The legislature may, and very properly does, provide from time to time that certain minimum qualifications shall be possessed by every citizen who desires to apply to the courts for permission to practice therein, and the courts will require all applicants to comply with the statute. This, however, is a limitation, not on the courts, but upon the individual citizen, and it in no manner can be construed as compelling the courts to accept as their officers all applicants who have passed such minimum standards, unless the courts are themselves satisfied that such qualifications are sufficient. ... In other words, they may not accept less, but may demand more, than the legislature has required.

Bailey, 30 Ariz. at 413.

LD 738 contains little in the way of guardrails ensuring any level of legal proficiency. It may be that an alternative to graduation from an ABA-accredited school can be developed that could provide the Court with confidence in that alternative. Many studies of alternatives both to this requirement and to the bar exam are currently underway. The National Conference of Bar Examiners has substantially re-vamped the bar exam with an intent to improve focus on needed attorney skills, and its new "NextGen" exam is about to be launched. The Court is closely following these developments. It is within the Court's exclusive jurisdiction to determine if and when any such alternatives have been sufficiently identified, tested and reviewed to ensure the protection of the public and the fair and efficient judicial operations. Until the Court has gained such confidence, any alternative proposed by the Legislature would substantially interfere with the administration of justice and impose an unreasonable burden on the Court.

Putting aside the separation of powers issue and turning to the substance of the bill, I also note some significant practical concerns. It would be difficult for a "supervising attorney," as described in the bill, to cover the breadth of topics that are offered in law school in the depth that they need to be covered. A divorce case, for example, often includes issues involving custody and child support, but may also implicate real estate, income taxes, retirement funds, health and life insurance, and estate issues. Failure to address any one of these could cause negative consequences for a client. In a criminal matter, failure to spot issues could have serious results such as increased jail time or deportation. Assisting a small business may involve issues of the Uniform Commercial Code, secured transactions, commercial paper, and the like. In these days of increasing specialization, few solo practitioners or small law practices are broad enough to cover all topics and provide the necessary training.

We note that the role of supervising attorney is a significant commitment of time and resources to training and teaching a prospective attorney as described in the bill. Because lawyers make their livings by charging for their time, it is not clear that anyone would be willing to undertake this role without being compensated for the effort. LD 738 is devoid of any mention of compensation. This situation could lead to supervisees being exploited or charged fees for an inferior course of study that fails to provide them with the necessary knowledge needed to pass the bar exam.

It is also unclear whether anyone will take advantage of this process to become a licensed attorney. We note that our current statute does not require that one graduate from law school; a person can be eligible to take the bar exam if the person completes two out of three years of law school and works with a supervising attorney for the third year. This provision has been in the law since at least 1985, and we are not aware that anyone has completed their training in this manner.

Finally, we note that implementation of this provision would require significant time by the Maine Board of Bar Examiners to oversee the supervision requirements. Without a robust program of oversight, people may spend years "studying in the law" only to discover they are woefully unprepared to pass the bar examination or practice law. Members of the Board, appointed pursuant to 4 M.R.S. § 801 and M. Bar Admission R. 3, serve as volunteers. Fees paid for admission to the bar provide for the limited paid secretarial and administrative personnel, M. Bar Admission R. 6A. Both the fees and staff would presumably need to increase for a process that may not be used. It is up to the Supreme Judicial Court to determine the fees for Bar admission. The Supreme Judicial Court would consider the cost of implementing this program in considering whether to adopt the program.

In sum, I urge that the Judiciary Committee vote Ought Not To Pass on this bill.