Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?

KEITH W. RIZZARDI*

ABSTRACT

In most regulated professions, a degree of transparency exists. When administrative agencies and boards issue licensing decisions, they comply with public records laws, open meetings laws, and on-the-record adjudication. The judicial branch, including the courts and organized state bar entities, also engages in transparency by publishing opinions and agendas, holding public meetings and hearings, and allowing access to records. These transparency tools allow citizens to become reasonably informed about the actions of its government officials. Yet when it comes to the bar examiners who regulate licenses and admission to the legal profession—the administrative agencies within the judiciary—an excessively broad doctrine of confidentiality applies.

Considering the laws and actions of all fifty states, this article contrasts the confidentiality rules used by the state bar examiners with many other laws governing transparency for administrative agencies and the judiciary. Although every state embraces the theory of judicial transparency, in practice, the bar examiners often defy transparency and operate in secrecy. Florida arguably ranks as the worst offender because, despite a clear constitutional expectation of judicial transparency, it declares all its meetings and documents wholly confidential. Conversely, Texas operates in a more transparent manner, allowing for open meetings and access to agendas and public records.

Reasonable arguments exist to support some degree of confidentiality, especially on matters associated with the integrity of bar examination questions and personal applicant privacy. Otherwise, the agents of the judiciary should adhere to the laws that govern the judiciary. The bar examiners can and should affirmatively provide information, respond to public record requests, and permit public comment or participation in the decision-making process.

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* Keith W. Rizzardi is a Professor of Law at St. Thomas University School of Law, where he teaches and writes about professional responsibility, civil procedure, and administrative and environmental law. A member of the Florida Bar, he has served on its Standing Committee on Professionalism and the Professional Ethics Committee, and he earned Board Certification in State and Federal Government and Administrative Practice. The author thanks his legal research assistants at St. Thomas University, including Dean Ibrahim (for his meticulous state-by-state research efforts) and Layla Nguyen and Keith Thomson (for their diligent public records requests and record keeping efforts). The author also thanks the Georgetown University law student editors at the GJLE, particularly Megan Lipsky and Olivia O'Hea, whose questions, editorial scrutiny, and suggestions dramatically improved this article.

Bar examiners, in their efforts to govern and protect the public, demand candor and full disclosure from applicants. Applicants and the public can rightly demand reciprocity and a degree of candor and partial disclosure from the bar examiners. State judiciaries should order the bar examiners to reform their confidentiality and transparency rules to conform with administrative law, judicial transparency, notions of ethics and professionalism, and our foundational constitutional principles.

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INTRODUCTION: REGULATING WITHOUT PUBLIC SCRUTINY

When the Florida Board of Bar Examiners and Florida Supreme Court cancelled the August 2020 Bar Examination, they shocked the bar applicants and the community of stakeholders. Just two days before the test, officials issued a webpage announcement:

> The Florida Board of Bar Examiners, with the approval of the Supreme Court of Florida, announces that the bar examination that was scheduled for Wednesday, August 19, will not go forward. Despite the board's best efforts to offer a licensure opportunity in August, it was determined that administering a secure and reliable remote bar examination in August was not technically feasible.[1]

To become a licensed attorney, bar applicants must pass this examination.[2] For months, aspiring Florida lawyers had endured the challenge of the coronavirus pandemic while studying for one of the most difficult tests of their lives. They poured years of effort, and sometimes more than $100,000, into their education.[3] Then, just hours before the exam, with neither a public meeting nor meaningful explanation, the Florida Board of Bar Examiners delayed their careers.[4]

Reasonable minds may differ over substantive decisions of whether and how to administer an examination during a pandemic.[5] But hard questions can and should be asked, and at a minimum, a thorough explanation is needed. A reporter uncovered disturbing evidence suggesting that the software company responsible

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1. *Florida Board of Bar Examiners Postpones August 2020 Bar Exam*, FLA. SUPREME COURT (Aug. 17, 2020), https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Board-of-Bar-Examiners-postpones-August-2020-Bar-Exam [https://perma.cc/7VXW-6LC2]. An email had gone out the night before.

2. *See* Fla. Bd. of B. Exam'rs, Rules of the Sup. Ct. Relating to Admission to the B. R. 1-15 (2020), https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-15 [https://perma.cc/Y3QM-STFC] (stating that the purpose of the Florida Bar Examination is to demonstrate "minimum technical competence," and further providing that a recommendation of admission to the bar is contingent upon "passing scores on the examination" and possessing the requisite character and fitness).

3. According to U.S. News, the average law student debt exceeded $100,000 at some Florida law schools, including: Ave Maria School of Law ($152,847); Stetson University ($132,441); Nova Southeastern University ($157,230); Florida Coastal School of Law ($179,558); and University of Miami ($139,492). *See Which law school graduates Law School Graduates Have the Most Debt?* U.S. NEWS AND WORLD REP. (2020), https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings. [https://perma.cc/V8J8-K7G9].

4. In contrast, when Alabama, Arizona, Arkansas, Delaware, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, and Wyoming delayed or cancelled their July bar examinations, they also provided special temporary rules or provisional licenses allowing untested bar applicants to engage in limited or supervised forms of the practice of law. *See Which States are Delaying the July 2020 Bar Exam and Offering a Fall Bar Exam Instead?*, JD ADVISING, https://www.jdadvising.com/which-states-are-delaying-the-july-2020-bar-exam/ [https://perma.cc/J5N6-TA4P] (last visited Feb. 3, 2021).

5. *See Law grads 'left hanging' Grads 'Left Hanging' After Bar exam called Exam Called Off*, OCALA STAR BANNER (Aug. 17, 2020), https://www.ocala.com/news/20200817/law-grads-rsquoleft-hangingrsquo-after-bar-exam-called-off [https://perma.cc/RDC6-E92S] ("Some advocates have faced backlash for suggesting that the exam should be waived this year. Critics accuse the law-school graduates of using COVID-19 to skip out of taking the test.").

for administering the cancelled examination had benefitted from insider relationships with the Bar Examiners.[6] Other state bar examiners had previously terminated their relationship with that same company due to concerns and technical flaws.[7]

The public may never find out what happened. The public cannot attend Florida's bar examiner meetings, nor read Florida's bar examiner documents. By rule, everything is confidential. Yet the consequences, for many aspiring lawyers, are significant. As one lawyer argued after the cancellation of the bar examination, state leaders had demonstrated a "failure of foresight, transparency, and execution at the highest levels."[8]

In most regulated professions, when boards exist to issue licensing or regulatory decisions, the board has procedures to allow for transparency and public scrutiny. Administrative and regulatory agencies normally function within a framework of administrative procedure that includes public records and open meetings laws and procedures allowing public participation, including notice and comment rulemaking.[9] While individual adjudications may be private, various boards of architecture,[10] dentistry,[11] or medicine[12] conduct publicly noticed meetings, with agendas and supporting material available for all to see. Such transparency serves an important role because professional regulation involves layers of policy decisions, and budgets, contracts, and regulations can all affect individual rights and the greater public interest.

Nationwide, each state operates a board or committee to decide the fate of people who hope to become lawyers. Collectively referred to as the "bar examiners" throughout this article,[13] these organizations are akin to regulatory administrative

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6. *See* Alan Gassman, *Over 1,000 Young Lawyers Are Stranded As Florida Bar Exam Is Canceled On 72 Hours Notice*, FORBES (Aug 17, 2020), https://www.forbes.com/sites/alangassman/2020/08/17/over-1000-young-lawyers-are-stranded-as-florida-bar-exam-is-canceled/?sh=23734c42b420 [https://perma.cc/8YFF-EQA4] (observing, based on LinkedIn data, that an executive working for ILG Technologies had previously served as the Director of Administration for the Florida Board of Bar Examiners, and encouraging FBBE to disclose "whether there is any direct financial relationship between the FBBE and this individual").

7. *See* Daniel Figueroa IV, *As states States Ditch ILG, Florida moves Moves Forward with Company for virtual bar Virtual Bar Exam*, WMNF (Aug. 14, 2020), https://www.wmnf.org/as-states-ditch-ilg-florida-moves-forward-with-company-for-virtual-bar-exam/ [https://perma.cc/R6DN-W4D7]; *see also* In Re Matter of the July 2020 Nev. State Bar Exam. (Sup. Ct. Nev. Aug. 5, 2020), https://images.law.com/contrib/content/uploads/documents/292/71902/Nevada-Bar-Exam-order-1.pdf [https://perma.cc/M3ZK-7L46] (explaining how Indiana and Nevada had uncovered problems with the ILG software).

8. Gassman, *supra* note 6 (quoting Tallahassee lawyer G.C. Murray II).

9. *See, e.g.*, Adam Candeub, *Transparency and the Administrative State*, 51 HOUSTON L. REV. 385 (2013).

10. *See, e.g.*, Architecture & Interior Design, FLA. DEP'T OF BUS. & PROF'L REG., DIV. OF PROFS, http://www.myfloridalicense.com/DBPR/architecture-and-interior-design/board-meeting-information/ [https://perma.cc/2RYG-3358] (last visited Feb. 4, 2021).

11. Upcoming Meeting Notices, Agendas & Public Books, FLA. DEPT. OF HEALTH, FLA. BD. OF DENTISTRY, https://floridasdentistry.gov/meeting-information/ [https://perma.cc/8ZNW-VA25] (last visited Feb. 4, 2021).

12. *See, e.g.*, Upcoming Meeting Notices, Agendas & Public Books, FLA. DEPT. OF HEALTH, FLA. BD. OF MED., https://flboardofmedicine.gov/meeting-information/ [https://perma.cc/G69U-VUXZ] (last visited Feb. 4, 2021).

13. In general, this article uses the phrase "bar examiners" to refer generally to all bar admissions entities. But some states actually separate the examination process from the character and fitness proceedings. *See, e.g.*, N.J. Board of Bar Exam'rs, Regs. Governing the Comm. on Character, Reg 102 (October 1, 2002).

agencies. Theoretically, as government agents, bar examiners should adhere to principles of transparency and "government in the sunshine" laws to ensure citizen understanding and accountability.[14] Fairness and impartiality are indispensable values of a judicial system that relies on public trust.[15] And the bar examiners make policy decisions that affect individuals and the public by proposing and creating rules and policies (often with the approval of their state supreme courts).[16] They discuss and decide which subjects to test,[17] how and when to conduct testing,[18] where to host the examinations,[19] what character flaws to investigate,[20] and whether to place conditions on admission.[21]

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14. *See* Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 492 (Fla. 2d Dist. Ct. App. 1990) ("An open government is crucial to the citizens' ability to adequately evaluate the decisions of elected and appointed officials."); s*ee also* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 80 (2012) ("The core purpose of these transparency initiatives was to strengthen the accountability of governmental agencies and to ensure 'that persons with public responsibilities [are] answerable to "the people" for the performance of their duties.'") (citing Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006)).

15. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS'N 2010) ("An independent, fair and impartial judiciary is indispensable to our system of justice."); MODEL CODE OF JUDICIAL CONDUCT at R. 2.2, cmt. 1 ("[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.").

16. *See generally, infra,* notes 56–123 (discussing the bar examiners' confidentiality rules, budget decisions, and public comment procedures throughout thethe fifty states).

17. Florida's law school deans sent a letter to the Florida Supreme Court encouraging changes to the Florida Bar Examination. The Florida Supreme Court then ruled, *sua sponte,* on the matter. In effect, the Supreme Court engaged in an administrative rulemaking process, without any public notice, nor any opportunity to be heard, for many stakeholders. *See Supreme Court Removes Two Topics From Bar Exam Part A,* Florida Bar News (Jan. 29, 2020), https://www.floridabar.org/the-florida-bar-news/supreme-court-removes-two-topics-from-bar-exam-part-a/ [https://perma.cc/AF9X-9VD7]; *see also, e.g.*, Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002); Mary Campbell Gallagher & Carol A. Buckler, *Alternatives for Scheduling the Bar Exam*, 85 N.Y. ST. B. ASS'N J. 28 (2013); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N. U. L. REV. 47 (2015); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002); Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. L. REV. 721 (1996); James E. Moliterno, *And Now a Crisis in Legal Education*, 44 SETON HALL L. REV. 1069 (2014).

18. *See Florida Board of Bar Examiners Cancels In-Person July Exam; Moves to an Online Format in August*, THE FLORIDA BAR (July 1, 2020), https://www.floridabar.org/the-florida-bar-news/florida-board-of-bar-examiners-cancel-in-person-july-exam-move-to-an-online-format-in-august/ [https://perma.cc/7X3A-4BZP].

19. *See* Dara Kam, *Florida Bar exams moved online after Exams Moved Online After Outcry*, TAMPA BAY BUS. J. (July 2, 2020), https://www.bizjournals.com/tampabay/news/2020/07/02/florida-bar-exams-moved-online-after-outcry.html [https://perma.cc/LEY3-QY5H].

20. *See, e.g.*, Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L. J. F. 759 (2019); Annie Legomsky, *Law Student Debt + Public Interest Career = Character and Fitness Fail*, 46 WASH. U. J. L. POL'Y 305 (2014); Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 BYU L. REV. 775 (2014); Tim Gallagher, *Innocent Until Proven Guilty? Not for Bar Applicants*, 31 J. LEGAL PROF. 297 (2007); Mitchell M. Simon, *What's Remorse Got to Do, Got to Do With it? Bar Admissions for Those with Youthful Offenses*, 2010 MICH. ST. L. REV. 1001 (2010); Diane Van Aken, *Unraveling the Mystery of the Character & Fitness Process*, 83 MICH. B. J. 25 (2004).

21. *See* Keith W. Rizzardi, *Victims of Disorganized Thinking: When Law Students with Mental Health Issues Confront Florida's Unconstitutional Barriers*, 4 MENTAL HEALTH & POL'Y J. 87, 89 (2015) (analyzing Bar Admissions Rules and critiquing the applicant questionnaire and conditional admissions process).

The bar examiners' decisions have policy and personal implications.[22] Even though bar admission may be characterized as privilege, and not a right,[23] the withholding of that privilege is still an exercise of governmental power, with potential for abuse.[24] Newly graduated students seeking bar admission lack the information, funds, and temerity to challenge the actions of the regulators who control their fate.[25]

Perhaps emboldened by a lack of a powerful opposition, the bar examiners in forty-four states operate within a system of rules that make many of their actions confidential.[26] Tension exists between the interests of the government and the interests of the regulated citizens. As the United States Supreme Court has bluntly recognized, the exercise and expansion of government power triggers parallel concerns about government secrecy:

> The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power.[27]

In 2015, the author published an article discussing questions about mental health in the bar admissions process.[28] That same year, the Florida Board of Bar Examiners sent a letter to bar applicants announcing that the questions related to mental health in the Florida Bar Application had been reconsidered and revised.[29] In a public records request, the author asked for materials reviewed by the Board of Bar Examiners or its staff as part of the mental health rule amendments, including documents discussed at a November 2014 formal session, and at the Florida Supreme Court's approval of that decision.[30] Although the inquiry explicitly

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22. *See, e.g.*, Justin Mattingly, *Virginia panel Scraps Mental Health Question After Law School Student Push*, RICHMOND TIMES-DISPATCH (Feb 8, 2019), https://www.richmond.com/news/local/virginia-panel-scraps-mental-health-question-after-law-school-student/article_36ece9b3-078c-5e12-b748-762555b8f081.html [https://perma.cc/9TC4-A7MQ] (discussing the controversial nature of mental health questions).

23. *See, e.g.*, *ex rel* Mcmahan, 944 So.2d 335 (Fla. 2006) ("The evaluation here falls far short of the expectations for those having the privilege of admission to The Florida Bar.").

24. *See* Schware v. Bd. of Bar Exam'rs of State of New Mexico, 353 U.S. 232, 251 n.5 (1957) ("Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.").

25. *See generally* Carol M. Langford, *Barbarians at the Bar: Regulations of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193 (2008).

26. *See infra,* Part I.B.

27. Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979).

28. *See generally* Rizzardi, *supra* note 22.

29. Letter from Michele A. Gavigni, Fla. Bd. of Bar Exam'rs, to author (April 13, 2015) ("The Florida Board of Bar Examiners undertakes periodic review of the Florida Bar Application. While in formal session at its November 2014 meeting, the board considered and decided to make certain revisions to its mental health inquiries. These changes were approved by the Supreme Court of Florida in January 2015.").

30. Letter from Keith Rizzardi, Professor of Law, St. Thomas Univ. School of Law, to Fla. Bd. of B. Exam'rs (April 23, 2015) ("Dear Florida Board of Bar Examiners, I respectfully request the following public records in electronic format: a blank version of the Florida Bar application, for the period from 2010 to the present, including all questions related to mental health[;] All materials reviewed by the Board of Bar Examiners or

disclaimed any interest in personal applicant information,[31] the Board's General Counsel denied the request. The responsive letter cited Florida's confidentiality rule, which states as follows:

> All information maintained by the board in the discharge of the responsibilities delegated to it by the Supreme Court of Florida is confidential, except as provided by these rules or otherwise authorized by the court.[32]

In the Sunshine State, known for its commitment to open government,[33] the agents of the judiciary operate in the shade. Court systems usually disclose information in accordance with rules of judicial administration, rules of ethics, and professionalism principles.[34] Bar examiners disregard both the letter and spirit of these legal rules and principles. Excess confidentiality among bar examiners is the national norm.

Part I of this article discusses the application process and the role of the bar examiners, acknowledging the sensitivity of individual privacy and examination integrity, while explaining how bar examiners make policy and public business decisions that lack such sensitivities. Part II considers competing principles that qualify and limit confidentiality, including government in the sunshine and public records laws, laws of administrative procedure, principles of on the record judicial review, judicial rules of administration, ethical rules, and principles of professionalism. Part III recommends reforms, explaining how the judiciary, acting through the bar examiners, should follow its own rules by proactively informing the public, responding to public records requests, providing forums for public feedback, and rewriting overreaching confidentiality clauses. Part IV concludes that bar examiners who demand candor from their applicants must reciprocate with truthful disclosures of their own. The appendix includes an example of how the Florida Supreme Court could begin to order reforms, and summaries of judicial transparency and bar examiner confidentiality in each state.

In the absence of bar examiner reform, the public remains uninformed. The bar applicants, law schools, legal community, and public at large cannot truly understand the bar examiners' intentions, nor its decision-making process. Experts who might otherwise positively contribute to the bar examiner process lack the

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its staff related to its mental health inquiries, including materials discussed at the November 2014 formal session[;] All documents demonstrating the approval of the Board's action by the Florida Supreme Court in January 2015. Please note: I respect the privacy of the applicants to the Florida Bar. I am not requesting documents related to individual applicants. Sincerely, Keith W. Rizzardi.").

31. *Id.*

32. Rules of the Sup. Ct. Relating to Admission to the B. R. 1–61 (2020), FLA. BD. OF B. EXAM'RS, https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-61 [https://perma.cc/7992-PYDS]. The board's lawyer did provide a copy of a blank bar application with the new questions related to mental health.

33. Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 245 (2008).

34. *See infra* Part II.B.

information or opportunity to do so. The bar examiners, who purportedly serve the public interest, should not be allowed and empowered to ignore the public.

I. THE POWER OF THE BAR EXAMINERS AS A JUDICIAL AGENCY

The bar examiners possess consequential regulatory powers.[35] Recognized by the states as a regulatory administrative agency,[36] they ensure the competence of future lawyers by considering their educational credentials and their character and fitness.[37] Realizing that attorneys can cause harm to clients and the legal system, bar examiners otherwise serve as a "safeguard between the attorney aspirants and the public."[38] Typically, these bar examiners implement rules or orders adopted by the state's highest court.[39] In fact, the bar examiners are part of the judiciary and exercise judicial power. In forty-two states, the regulation of bar admissions is an exclusively judicial exercise.[40] In the other eight states where the legislative or executive branches contribute to the bar's laws and procedures,

35. *See, e.g.*, *Who Are We,* WASH ST. B. ASS'N, https://www.wsba.org/about-wsba/who-we-are [https://perma.cc/RQ8S-75T8] (last updated Sep. 22, 2020) (remaining especially honest about the regulatory responsibilities of bar admission, and explaining that "[a]s a regulatory agency, the WSBA administers the bar admission process, including the bar exam; provides record-keeping and licensing functions; and administers the professional discipline system").

36. *See, e.g.*, Rules of the Sup. Ct. Relating to Admission to the B. R. 1-13 (2020), FLA. BD. OF B. EXAM'RS, ("The Florida Board of Bar Examiners is an administrative agency of the Supreme Court of Florida created by the court to implement the rules relating to bar admission"); *Rulebook* (2019), TEX. BD. OF L. EXAM'RS PREFACE, https://ble.texas.gov/txrulebook [https://perma.cc/6H2X-67AR] ("The Texas Board of Law Examiners is an agency of the Texas Supreme Court"); *see generally* Richard J. McKinney, *Federal Administrative Law: A Brief Overview*, LAW LIBRARIANS' SOCIETY OF WASHINGTON DC, https://www.llsdc.org/federal-administrative-law-a-brief-overview [https://perma.cc/5W6T-C273] (last updated Sept. 5, 2019) (discussing a wide range of administrative agencies).

37. *See* Rules of the Sup. Ct. Relating to Admission to the B. R. 1-14.2 (2020), FLA. BD. OF B. EXAM'RS, https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-142 [https://perma.cc/928E-XNYG]; Fla. Bd. of B. Exam'rs, Rules of the Sup. Ct. Relating to Admission to the B. R. 1-15.1 (2020), https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-151 [https://perma.cc/9E75-V2HE].

38. *See generally* Thomas A. Pobjecky, *The Florida Board of Bar Examiners: The Constitutional Safeguard between the Attorney Aspirants and the Public*," 18 NOVA L. REV. 1313 (1994).

39. In most states, the state rules related to bar examiners are not part of the state judiciary's rules of evidence or rules of procedure, and thus these sources are cited as an internet source that is an authenticated or official document in accordance with Bluebook Rule 18.2. In some states, where the bar admissions rules are actually part of the state rules of evidence or rules of procedure, the sources are cited in accordance with the blue pages of the Bluebook, Rule BT-2.2. Finally, if state legislation or state executive materials are involved, citations applied Bluebook Rule T-1.3, as appropriate. Hyperlinks are provided.

40. As the analysis in Appendix I and III shows, most states consider the bar examiners to be performing a judicial function. *See, e.g.* Fla. Const. art. V, § 15 (noting admission of attorneys to the practice of the profession of law is a judicial function); FLA. BD. OF BAR. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. 1-11 and 1-12 (noting the bar examiners are agents of the Florida Supreme Court); IND. RULES OF CT., RULES FOR ADMISSION TO THE B. AND THE DISCIPLINE OF ATT'YS Rule 3 § 1 (noting that the Supreme Court shall have exclusive jurisdiction to admit attorneys to practice in Indiana); MINN. ST. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE B. 3 (stating that a State Board of Law Examiners is appointed by the Minnesota Supreme Court to implement its rules on admission); Ohio Const. art. IV, § 2(B)(1)(g) (granting the Supreme Court of Ohio exclusive jurisdiction to regulate admission to the practice of law in Ohio).

the judicial branch performs a leading role, so the bar examiners perform a partially judicial function.[41]

Throughout the bar admission process, the bar examiners acquire a substantial amount of personal information about the bar applicants who eventually hope to take the Oath of Attorney.[42] At times, the bar examiners declare applicants' information, as well as the examiners' own actions and documents, confidential. But bar examiners also have other powers that have nothing to do with individuals. An understanding of the powers of bar examiners, and the secrecy in which bar examiners operate, reveals the importance of greater transparency.

A. BAR APPLICANTS AND SENSITIVE INFORMATION

Aspiring lawyers are held to high standards. The precise structure and rules of bar admission vary from state to state, but generally, newly admitted lawyers must have a record of conduct that justifies the trust of clients, adversaries, courts, and others.[43] Applicants for a bar license must show legal knowledge, logical reasoning, and an ability to comply with deadlines, communicate with others, manage finances, and avoid improper acts.[44] Bar examiners must attempt to discern whether applicants meet these criteria, typically using at least two types of reviews.

First, bar examiners evaluate each applicant's technical knowledge of the law. They review educational qualifications to ensure each applicant graduated from an appropriate institution for legal education or met alternative practical experience requirements.[45] Bar examiners create, administer, and grade a bar examination to test an applicant's minimum technical competence,[46] including multiple

41. In eight states, including Alabama, Connecticut, Maine, Massachusetts, Michigan, Nevada, North Carolina and Virginia, the legislative or executive branches contribute/ to the formation or operation of the bar examiners, but the judicial branch still retains an essential role. *Compare,* Nev. Rev. Stat. § 7.030 (legislation governing bar admission) and *See* NEV. SUP. CT. R. (declaring regulation of lawyers and admission to be an inherently judicial function that does not necessitate legislation) https://www.leg.state.nv.us/Division/Legal/LawLibrary/CourtRules/SCR.html. [https://perma.cc/SKU8-9EVZ] (last visited Feb. 7, 2021).

42. When the bar examiners grant the privilege to practice law, newly admitted bar applicants must take an Oath of Attorney, Florida's version of which begins as follows: "I do solemnly swear: I will support the Constitution of the United States and the Constitution of the State of Florida; I will maintain the respect due to courts of justice and judicial officers to the Florida Bar." FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. 5-11 (requiring an oath, and stating "[i]f the court is satisfied with the qualifications of each applicant recommended, an order of admission will be made and entered in the minutes of the court . . . [and t]he court will designate the manner that applicants will take the oath."); *Id.* at 5-13.1 ("An executed copy of the Oath of Attorney must be filed with the board. Upon receipt of the oath, the board will certify the applicant and the date of admission to the Supreme Court of Florida and The Florida Bar.").

43. *Id.* at 3-10.

44. *Id.* at 3-10.1.

45. *Id.* at 4-13.1 (educational qualifications include receiving the degree of bachelor of laws or doctor of jurisprudence from an accredited law school); *id.* at 4-13.4 (alternative educational qualification requirements involving 10 years or more of work experience).

46. *Id.* at 1-15.1; *see also id.* at 4-11 ("The Florida Bar Examination will consist of a General Bar Examination and the [MPRE]."); *id.* at 4-30 (requiring applicants to take the Multistate Professional Responsibility Examination, developed by the National Conference of Bar Examiners).

choice and essay questions covering a wide array of subject matters.[47] Bar examiners must also engage in discussions about what subjects to test, and their rules about those topics are eventually made public.[48] To ensure the validity of the examination process, the actual questions must be kept secret.

Second, bar examiners explore each applicant's personal history. Personal references, fingerprints, and waiver forms are required. Bar examiners ask about past residences, education, employment, finances, law enforcement encounters, military service, past lawsuits, and mental health.[49] If the investigation yields past information that adversely reflects on the bar applicant's character and fitness for admission to the bar, the bar examiners might consider the applicant's present-day character[50] to determine whether the applicant can prove that he or she has been rehabilitated.[51]

Based on these two reviews of competence and character, and the bar applicant's entire record, the bar examiners decide whether a person is "fit to perform the obligations and responsibilities of an attorney."[52] Applicants waive doctor-patient privilege,[53] disclose mental health issues,[54] and endure investigations of

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47. *Id*. at 4-20.

48. *Id*. at 4-22 (citing the Florida Rules of Civil and Criminal Procedure; the Florida Rules of Judicial Administration; Florida constitutional law; federal constitutional law; business entities; wills and administration of estates; trusts; real property; evidence; torts; criminal law; constitutional criminal procedure; juvenile delinquency; contracts; Articles 3 and 9 of the Uniform Commercial Code; family law and dependency; Chapter 4, Rules of Professional Conduct of the Rules Regulating The Florida Bar; Chapter 5, Rules Regulating Trust Accounts of the Rules Regulating The Florida Bar; and professionalism).

49. *Checklist to File Bar Application*, FLA. BD. OF BAR EXAM'RS, https://www.floridabarexam.org/__85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/0c7a2e6a8a1cc31285257c0c006fcf0e [https://perma.cc/DC9J-ZG7J] (last visited February 7, 2021).

50. FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. 3-12 (considering the following factors associated with prior bad acts: "a. age at the time of the conduct; b. recency of the conduct; c. reliability of the information concerning the conduct; d. seriousness of the conduct; e. factors underlying the conduct; f. cumulative effect of the conduct or information; g. evidence of rehabilitation; h. positive social contributions since the conduct; i. candor in the admissions process; and j. materiality of any omissions or misrepresentations.").

51. *Id. at* 3-13 (considering the following factors for clear and convincing evidence of rehabilitation: "a. strict compliance with the specific conditions of any disciplinary, judicial, administrative, or other order, where applicable; b. unimpeachable character and moral standing in the community; c. good reputation for professional ability, where applicable; d. lack of malice and ill feeling toward those who, by duty, were compelled to bring about the disciplinary, judicial, administrative, or other proceeding; e. personal assurances, supported by corroborating evidence, of a desire and intention to conduct one's self in an exemplary fashion in the future; f. restitution of funds or property, where applicable; and, g. positive action showing rehabilitation by occupation, religion, or community or civic service").

52. *Id*. at 2-12 (stating that, among other requirements, "[a]ll applicants seeking admission to The Florida Bar must produce satisfactory evidence of good moral character").

53. *See, e.g.,* Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489 (S.D. Fla. 1994) (challenging waiver of doctor-patient privilege on bar application); Rules Governing Admission to the Mississippi Bar, R. V § 2 ("By making application for registration as a law student or examination an applicant waives his right to confidentiality of medical/psychological communication, record, evaluations and any other pertinent medical/psychological information touching on the applicant's fitness to practice law as determined by the Board or Committee.").

54. Alyssa Dragnich, *Have You Ever. . .? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOKLYN L. REV. (2015), available at: https://brooklynworks.brooklaw.edu/blr/vol80/iss3/2 [https://perma.cc/PGB3-9CZN] (last visited February 7, 2021).

their character.[55] Earning a law license thus requires revealing vast amounts of personal information.

B. CONFIDENTIALITY RULES IN THE FIFTY STATES

From the perspective of the agency, the bar application and admission process generates at least two categories of sensitive information that clearly raise the need for confidentiality. First, some information about the bar examination must be preserved,[56] because test takers cannot have access to questions or answers.[57] Keeping examination information confidential protects the integrity of the testing process. Second, the privacy of individual applicants may need to be protected under state laws and constitutional provisions.[58] Confidentiality of applicant files enhances candor in the evaluation process.[59]

Still, confidentiality can be reasonably limited. While the examination materials and information related to individual character and fitness decisions may need some degree of confidentiality to protect personal privacy, many actions taken by the bar examiners involve public business that need not be confidential. Many states have well-established laws providing for the transparency of administrative agencies and the judiciary. Acknowledging these competing concepts of confidentiality and transparency, the National Conference of Bar Examiners advises all states to adopt a balanced confidentiality rule: "[e]ach jurisdiction should adopt a rule respecting confidentiality of records and sources that balances the need to protect the applicant, the sources, and the public."[60]

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55. *See* Langford, *supra* note 25.

56. *See generally*, Kalhan Rosenblatt, *College Board issues statement in response to rumors of SAT test leak from Asia*, NBC NEWS (Aug. 28, 2018), https://www.nbcnews.com/news/education/college-board-issues-statement-response-rumors-sat-test-leak-n904411 [https://perma.cc/8XB3-RZFW].

57. *See, e.g.,* FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. 4-51.4 ("Applicants must not remove any multiple-choice, machine-scored examination questions from the examination room or otherwise communicate the substance of any of those questions to persons who are employed by or associated with bar review courses.").

58. *See* National Conference of State Legislatures, *Privacy Protections in State Constitutions* (listing provisions for the constitutions of 11 states—Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina and Washington—relating to a right to privacy.) Of note, Florida strikes a balance between privacy rights and government transparency, with a clear preference for transparency of public records and public meetings, by stating:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein . . . This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Fla. Const. art. 1, § 23.

59. Fla. Bd. of Bar Exam'rs, 581 So. 2d 895, 897 (Fla. 1991) ("The Court is concerned that unless the Board's investigative files are held in confidence, many of those from whom the Board seeks information concerning applicants would be unwilling to candidly respond . . . [and] by its promulgation of Article I, Section 14, the Court made a calculated decision that the Board's records should be confidential except under certain limited circumstances.").

60. *Comprehensive Guide to Bar Admission Requirements* viii, NAT'L CONF. OF B. EXAM'RS (2019), http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf [https://perma.cc/7XAK-KPDB]

Despite this recommendation of balance, many states adopted sweeping confidentiality rules for bar examiners. Rules in nine states—Maryland,[61] Michigan,[62] New Jersey,[63] New Mexico,[64] North Dakota,[65] Pennsylvania,[66] Rhode Island,[67] Tennessee,[68] and Utah[69]—broadly declare nearly everything from their state bar

(last visited February 7, 2021). *Cf.* William Funk, Public Participation and Transparency in Administrative Law – Three Examples as an Object Lesson, 61 AMERICAN L. REV. 171 (2009) (discussing the failures of some major federal laws to strike a balance between confidentiality and transparency in the Federal Advisory Committee Act, Government in the Sunshine Act, and the Negotiated Rulemaking Act).

61. MD. R. 19-105(a) states as follows:

> Except as provided in sections (b), (c), and (d) of this Rule, the proceedings before the Accommodations Review Committee and its panels, a Character Committee, and the Board, including related papers, evidence, and information, are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure."

See also, MD. R. 19-105(d)(4)(appellate records are confidential), https://www.courts.state.md.us/sites/default/files/import/ble/pdfs/baradmissionrules.pdf. [https://perma.cc/AY2Y-XPRL] (last visited February 7, 2021).

62. MICH. SUP. CT, BD. OF L. EXAM'RS, RULES, STATUTES, AND POL'Y STATEMENTS 600.928-1 ("Board meetings are not open to the public."); *id*. at 600.928-2 ("Due to the requirements of applicant confidentiality and because the agendas contain the Executive Director's and/or Assistant Secretary's recommendations as in-house counsel, agendas are privileged, not matters of public record, and not available for inspection."); *id*. at 600.928-3 ("Board minutes contain privileged and otherwise confidential information and are not open to the public and are not available for inspection."); Rule 1(A)("All materials filed are confidential."); Policy Statement 2C-2 (character and fitness hearings are confidential proceedings). (https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLE_Rules_Statutes_Policy_Statements.pdf) [https://perma.cc/R9HU-7SSL] (last visited February 7, 2021).

63. N.J. BD. OF B. EXAM'RS, REGULATIONS GOVERNING THE COMMITTEE OF CHARACTER 401, https://www.njbarexams.org/committee-on-character-regulations [https://perma.cc/XX9L-S2XF] (last visited February 7, 2021) (all records of the Committee on Character are confidential).

64. *Rules Governing Admission to the B. 15-401(D)(2)*, N.M. BD. OF B. EXAM'RS, http://www.nmexam.org/about/rules/ [https://perma.cc/D7B2-XV3U] (last visited February 7, 2021) (noting unless otherwise determined by the state Supreme Court, "All records maintained by the board regarding applications for admission and reinstatement to the state bar and all proceedings by the board, including board meetings and meeting minutes, shall be confidential" and stating if a dispute over admission reaches the Supreme Court, all records including "supporting documents" become public records).

65. *N.D. Admission to Practice Rules 13*, N.D. R. CT., https://www.ndcourts.gov/legal-resources/rules/admissiontopracticer/13 [https://perma.cc/D22K-HT5M] (last visited February 7, 2021) ("All records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules.").

66. *B. Admission Rules 402*, PA. BD. OF L. EXAM'RS, https://www.pabarexam.org/bar_admission_rules/402.htm [https://perma.cc/6ZMP-GSZC] (last visited February 7, 2021) ("General Rule. Except as otherwise prescribed in these rules, the actions and records of the Board are confidential and shall not be disclosed or open to inspection by the public.")

67. *Bd. of B. Exam'rs rules of Practice Governing Admission to Examination and by Transferred Uniform B. Examination Score 5.e*, R.I. JUDICIARY BD. OF B. EXAM'RS, https://www.courts.ri.gov/AttorneyResources/baradmission/PDF/Board_of_Bar_Examiners-Rules_of_Practice.pdf. [https://perma.cc/X2FF-FFJG] (last visited February 7, 2021) (except as otherwise set forth, "the actions and records of the Board shall be confidential and shall not be disclosed or open to inspection by the public.").

68. TENN. SUP. CT. R. 7 §§ 10.05(i), 12.11, https://www.tnble.org/?page_id=56 [https://perma.cc/4WVT-3VAY] (last visited February 7, 2021) (declaring confidential not only applicant information, but also all "correspondence and/or electronic transmissions to and from the Board, its members and staff, minutes of Board meetings and its deliberations").

69. *Rules Governing the Utah St. B. 14-720*, SUP. CT. RULES OF PROF'L PRACTICE, https://www.utcourts.gov/resources/rules/ucja/#Chapter_14 [https://perma.cc/AFC7-UY6Y] (last visited February 7, 2021) (broadly

examiners exempt from public inspection. Another eight states – Hawaii,[70] Illinois,[71] Indiana,[72] Minnesota,[73] Nebraska,[74] South Carolina[75] and Oregon,[76] and Washington[77] – generally declare bar examiner documents to be confidential but acknowledge that the courts or laws can declare otherwise. Florida law broadly provides that "all information maintained" by the bar examiners is confidential,[78] but with narrow exceptions to benefit the bar examiners investigations

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defining confidential information as "all records, documents, reports, letters and sources whether or not from other agencies or associations, relating to admissions and the examination and grading process").

70. RULES OF THE SUP. CT. OF THE ST. OF HAW. 1.3(g)(5), https://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm#1.3 ("Unless otherwise ordered by the supreme court, the files, records and proceedings of the Board are confidential. . ."); HAW. BD. OF B. EXAM'RS R. OF P. § 1.12, https://www.courts.state.hi.us/docs/court_rules/rules/hbbe.htm#Section_1.12 [https://perma.cc/U2F3-9Y3X] (last visited February 7, 2021).

71. ILL. SUP. CT. R. 797 ("All files, records and proceedings of the Board must be kept confidential, and may not be disclosed except (a) in furtherance of the duties of the Board, (b) upon written request and consent of the persons affected, (c) pursuant to a proper subpoena duces tecum, or (d) as ordered by a court of competent jurisdiction.") http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/default.asp. [https://perma.cc/2BQ8-JGVG] (last visited February 7, 2021).

72. IND. RULES OF CT., RULES FOR ADMISSION TO THE B. AND THE DISCIPLINE OF ATT'YS, https://www.in.gov/judiciary/rules/ad_dis/. [https://perma.cc/84SC-2UHZ] (last visited February 7, 2021) (Rule 19, Section 1: "All information and all records obtained and maintained by the Board of Law Examiners in the performance of its duty under these rules and as delegated by the Supreme Court of Indiana shall be confidential, except as otherwise provided by these rules, or by order of (or as otherwise authorized by) the Supreme Court of Indiana.").

73. *Rules for Admission to the B.,* MINN. ST. BD. OF L. EXAM'RS, https://www.ble.mn.gov/rules/. [https://perma.cc/N6WX-2F8V] (last visited February 7, 2021) ("14(B) 'The Board's work product shall not be produced or otherwise discoverable. . .' and 14(F) ' Subject to the exceptions in this Rule, all other information contained in the files of the office of the Board is confidential and shall not be released to anyone other than the Court except upon order of the Court.'")

74. Nebraska bar examiners are required to keep minutes. NEB. SUP. CT. R. § 3-105 (2020), https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-Spractice-law/article-1-admission-requirements-practice [https://perma.cc/B4MS-Z5MW]. However, unless there is an appeal to the State Supreme Court, "[t]he records, papers, applications, and other documents containing information collected and compiled . . . are held in official confidence for all purposes other than cooperation with another bar licensing authority." *Id.* at § 3-106.

75. S.C. APP. CT. R. 402(m)(1) (2016), https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=402.0&subRuleID=&ruleType=APP [https://perma.cc/V8FJ-QQD4] (last visited March 22, 2021) (all files and records related to "applications for admission, examinations, and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee, or the Clerk of the Supreme Court to carry out their responsibilities").

76. *Or. St. Bd. of B. Exam'rs*, SUP. CT. OF THE ST. OF OR. RULES FOR ADMISSION OF ATT'YS 2.15 (2021) https://www.osbar.org/_docs/rulesregs/admissions.pdf [https://perma.cc/VEY9-CCJM] ("Unless expressly authorized by the Court or by these rules, the Board shall not disclose any of its records, work product or proceedings in carrying out its duties.").

77. *Admission and Practice R. 1(d)*, WASH. CTS., http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=apr [https://perma.cc/J3VE-TML7] (last visited February 7, 2021) (declaring confidential, unless expressly authorized by the Supreme Court, even the "[p]reliminary drafts, notes, recommendations, and intra-Board memorandums in which opinions are expressed or policies formulated or recommended").

78. *Rules of the Sup. Ct. Relating to Admission to the Bar B.1-61*, FLA. BD. OF BAR EXAM'RS (2020), https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-61 [https://perma.cc/35KE-5X2D] ("All information maintained by the board in the discharge of the responsibilities delegated to it by the Supreme Court of Florida is confidential, except as provided by these rules or otherwise authorized by the court.").

and operations.[79] Another seven states follow a similar approach, with a default to confidentiality, and a specific list of exceptions from confidentiality.[80] Finally, Colorado[81] and Idaho[82] also have broad confidentiality clauses, but affirmatively acknowledge the rights of bar applicants to access documents or waive confidentiality. Thus, across the nation, a majority of twenty-seven states broadly declare bar examiner documents and communications to be confidential, with narrow exceptions, if any.[83]

Rather than broadly declaring bar examiner documents or communications to be confidential, other states place conditions or limits upon the scope of bar examiner

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79. Although the Florida rules do contain specific exemptions from confidentiality, public transparency is not the purpose of these exemptions. Rather, these exemptions from confidentiality reflect the bar examiners' desire to provide access to information for self-serving policy reasons. For example, some exemptions allow limited public access to information about whether someone is seeking admission to the bar. *Id*. at 1-63.1 ("On request, the staff will confirm if a person has filed a Registrant Bar Application, Examination application, or Bar Application with the board, and will provide the date of admission of any attorney admitted to The Florida Bar."); *Id*. at 1-63.9 ("Following the board's recommendation under rule 5-10 and the court's approval for an applicant's admission to The Florida Bar, the applicant's name and mailing address is public information.").

Some exemptions allow bar examiners to share information so that they can conduct their own investigations. *See id*. at 1-63.2 ("The name, date of birth, Social Security number, and date of application will be provided for placement in a national data bank operated by, or on behalf of, the National Conference of Bar Examiners."); *id*. at 1-63.4 (allowing certain information to be provided upon written request from the National Conference of Bar Examiners or other similar agencies, and with a release); *id*. at 1-63.8 ("The board may divulge the following information to all sources contacted during the background investigation: a.name of applicant or registrant; b. former names; c. date of birth; d. current address; and e. Social Security number.").

Other exemptions benefit investigations by other disciplinary and law enforcement officials. *Id*. at 1-63.3 ("On written request from the Florida Bar for information relating to disciplinary proceedings, reinstatement proceedings, or unlicensed practice of law investigations, information will be provided unless otherwise confidential or restricted by law."); 1-63.7 ("On service of a subpoena issued by a Federal or Florida grand jury, or Florida state attorney, in connection with a felony investigation only, information will be provided with the exception of any information that is otherwise restricted by law.").

Finally, some exemptions benefit the applicants, allowing them limited access to the otherwise confidential information in their own files. *Id*. at 1-63.5 ("On written request from registrants or applicants for copies of documents previously filed by them, and copies of any documents or exhibits formally introduced into the record at an investigative or formal hearing before the board, and the transcript of hearings, copies will be provided."); *id*. at 1-63.6 ("On written request from registrants or applicants, copies of documents filed on their behalf, or at the request of the board with the written consent of the party submitting the documents, will be provided."); *id*. at 1-65 ("Unless otherwise ordered . . . nothing in these rules prohibits any applicant or witness from disclosing the existence or nature of any proceeding under rule 3, or from disclosing any documents or correspondence served on, submitted by, or provided to the applicant or witness.").

80. *See* Appendix I and III shows bar examiner rules in Arkansas, Delaware, Georgia, Kansas, Louisiana, New Hampshire and Wyoming.

81. *See Rules Governing Admission to the Practice of Law* 203.1, 211.1, COLO. SUP. CT. OFFICE OF ATT'Y REGULATION (2019), http://www.coloradosupremecourt.com/PDF/BLE/201%20-%20Rules%20Governing%20Admission%20to%20Practice%20Law%20in%20Colorado.pdf [https://perma.cc/Q458-MNJ4] (Bar examiner documentation related to character and fitness, hearings, and applicant files are confidential, unless the hearing is made public by the applicant).

82. *See Bar Commission Rules* 212, 223, IDAHO STATE BAR (2010), https://isb.idaho.gov/wp-content/uploads/ibcr_sec02_admissions.pdf [https://perma.cc/QP8G-5FDZ] (Rule 212 addresses the confidentiality of conditional admissions documents and Rule 223 states "all documents, records and hearings relating to Applications shall be confidential and not disclosed unless the Applicant waives such confidentiality").

83. The specific provisions of these states are compared with the judicial transparency rules in Appendix III.

confidentiality. California,[84] Connecticut,[85] Kentucky,[86] Montana,[87] Nevada,[88] Ohio,[89] Oklahoma,[90] South Dakota,[91] and Texas[92] protect the confidentiality of information in the specific context of matters related to applicant privacy or examination concerns. Maine,[93] West Virginia[94] and Wisconsin[95] also protect the confidentiality of information related to conditional admission. And five states—

84. *See Rule of the State Bar 4.4*, ST. B. OF CAL (2008), http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf [https://perma.cc/YP74-3GK6] ("Applicant records are confidential unless required to be disclosed by law.").

85. *See Commission Regulations RT. VI-9(C)*, CONN. BAR EXAM (2016), https://www.jud.ct.gov/cbec/regs.htm [https://perma.cc/GVA5-JNUN] ("Records and testimony regarding the applicant's fitness shall otherwise be kept confidential in all respects.").

86. *See R. 2.008,* KY. SUP. CT. RULES (2020), https://govt.westlaw.com/kyrules/Document/NB3297CF0A91C11DA8F5EE32367A250AE?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1 (limiting confidentiality to "information with respect to the character and fitness or the examination results").

87. *See Rules of Admission to the Bar of Montana Part IX*, STATE BAR OF MONT. (2015), https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=127056 [https://perma.cc/P4XT-BXLF] (Bar admission application files and bar examination materials are confidential).

88. *See Nevada Supreme Court Rule 49(8)(a)*, NEV. SUP. CT. (2020), https://www.leg.state.nv.us/CourtRules/SCR.html [https://perma.cc/YQ6D-NQTH] (allowing for policies to ensure timely, accurate, fair and confidential administration of the bar examination); *id.* at Rule 50 ("investigations may be classified confidential"); *id.* at Rule 50.5 (allowing for agreement on conditional admission confidentiality); *id.* at Rule 70.5 (providing for confidentiality of the contents of any application for admission, the results of any investigation, transcripts of any hearing, documentation regarding the applicant, and the grades of an individual applicant); *id.* at Rule 72 (character and fitness reports are "reduced to writing and submitted to the court for its confidential information").

89. *See Supreme Court Rule for the Government of the Bar of Ohio § 15*, SUP. CT. OF OHIO (2019), http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf [https://perma.cc/KJD6-UY2Y] ("All information, proceedings, or documents relating to the character and fitness investigation of an applicant for admission . . . shall be confidential. ").

90. *See Rule Governing Admission to the Practice of Law in the State of Oklahoma 14*, OKLA. BD. OF BAR EXAM'RS, http://www.okbbe.com/Resources/Docs/OKBBE-Rules-Governing-Admission.pdf [https://perma.cc/49BV-CH88] (last visited March 23, 2021) (discussing confidentiality only in the context of character and fitness records).

91. *See Rules and Regulations for Admission to Practice Law in South Dakota 16-16-15*, BD. OF B. EXAMR'S SOUTH DAKOTA (2019), https://ujs.sd.gov/uploads/barexaminers/RReg.pdf [https://perma.cc/LJN7-UE52] (confidentiality of character, fitness, and qualification reports).

92. *See Rules Governing Admission to the Bar of Texas R. 1(e)*, TEX. BD. OF L. EXAM'RS (2019), https://ble.texas.gov/rule01 [https://perma.cc/CS2L-RL8A] (Rule 1(e) stating "The Board must not disclose to any third party any information obtained with respect to the character or fitness of any Applicant, Declarant"); *Id.* at Rule 7(a) (confidentiality of examination materials).

93. *See Maine Bar Admission R. 7*, ME. BD. OF BAR EXAM'RS, https://mainebarexaminers.org/wp/wp-content/uploads/2017/09/Fully-amended-MBAR-0517-TOC-amended-0917.pdf [https://perma.cc/ZEY5-7PRV] (last visited March 23, 2021) (favoring disclosure of information to the applicant); *id.* at Rule 9(d) (providing confidentiality of applicant hearings); *id.* at Rule 9A (protecting confidentiality of information related to conditional admission).

94. *See Rules for Admission to the Practice of Law 7.1*, W. VA. BD. OF LAW. EXAM'RS (2013), http://www.courtswv.gov/legal-community/board-of-law-examiners.html [https://perma.cc/2XAT-P85E] (last visited March 23, 2021) (addressing confidentiality in the context of conditional admission).

95. *See Supreme Court Rule 40.075*, WIS. CT. SYS., https://www.wicourts.gov/sc/rules/chap40.pdf [https://perma.cc/6TU7-5GFU] (last visited March 23, 2021) (confidentiality of conditional admission) and 40.12 (The application files of an applicant and all examination materials are confidential)(2019).

Alabama,[96] Arizona,[97] Iowa,[98] Mississippi,[99] and Vermont[100]—explicitly acknowledge the tension between confidentiality and transparency by mentioning potentially applicable public records laws. In sum, although approaches vary widely, seventeen states acknowledge a more limited form of bar examiner confidentiality.

Just six states – Alaska,[101] Massachusetts,[102] Missouri,[103] New York,[104] North Carolina[105] and Virginia[106] – have rules that stay silent on the matter. Nevertheless, collectively, this analysis shows that the judiciary or the bar examiners in forty-four states adopted legal rules related to bar examiner confidentiality, and only a minority of them are narrow in scope.

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96. *See Rules Governing Admission to the Alabama State Bar IV(C)*, ALA. STATE BAR, https://www.alabar.org/assets/2021/01/2021-AdmitRule4.pdf/ [https://perma.cc/FV4F-39JV] (last visited March 23, 2021) ("The Secretary . . . shall preserve in his or her office said application with the papers attached thereto, and other records in connection with the said application, all of which shall be kept on file until the examination is completed . . . for investigation and examination of the record by any person entitled thereto.").

97. *See A.R.S. Supreme Court Rules, Rule 37(c),* ARIZ. SUPREME COURT RULES (2021), https://govt.westlaw.com/azrules/Document/N5CF1874103C711EBB7D2EFD913AE744C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) [https://perma.cc/TX2V-DN9F] (establishing confidentiality of bar examiner applicant records and allowing for destruction of records, while enumerating exceptions for access and cross-referencing public access requirements in Rule 29).

98. *See Admission to the Bar, Iowa Court Rule 31.2*, BOARD OF LAW EXAM'RS (2020), https://www.legis.iowa.gov/docs/ACO/CR/LINC/12-31-2020.chapter.31.pdf [https://perma.cc/BWC7-3MG6] (last visited March 23, 2021) ("The board may designate data submitted as a confidential record. Any confidential data must be segregated by the board and the assistant director from the portion of the registration filed as a public record.").

99. *See Rules Governing Admission to the Mississippi Bar V § (4)(F)(1)*, MISS. BD. OF BAR ADMISSIONS (2010), https://courts.ms.gov/research/rules/msrulesofcourt/rules_admission_msbar.pdf [https://perma.cc/4YBP-QU7W] (acknowledging the possibility of applicable public records laws despite the confidentiality rule, by stating "[p]ublic [r]ecords of the Board will be available for inspection and copying").

100. *See Rules of Admission to the Bar of the Vermont Supreme Court*, VT. SUP. CT. (2017), https://www.vermontjudiciary.org/sites/default/files/documents/900-00014.Rules_.Admission.Bar_.pdf [https://perma.cc/9F4Y-XNPX] (last visited March 23, 2021) (acknowledging public records laws despite its confidentiality rule by stating "[t]o efficiently and effectively perform their duties, the Board and the Committee may utilize various computer-networking options to share information . . . [and w]hen using those networks, all reasonable efforts are made to maintain the confidentiality of the shared information").

101. *See generally* ALASKA RULES OF CT., ALASKA BAR RULES PART I, (2020), https://public.courts.alaska.gov/web/rules/docs/bar.pdf [https://perma.cc/3QCP-9UZQ] (last visited March 23, 2021) (lacking confidentiality provisions that exist in other areas of state bar rules).

102. *See generally Supreme Judicial Court Rule 3:01*, MASS. SUP. JUD. CT. (2010), https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-rule-301-attorneys [https://perma.cc/PLV2-Z8CE].

103. *See generally Rules Governing Admission to the Bar in Missouri*, *Rules 8.01-8.15*, MO. BD. OF LAW EXAM'RS, https://www.mble.org/rule-8 [https://perma.cc/3QCP-9UZQ] (last visited March 23, 2021).

104. *See generally Rules of the Court*, N.Y. STATE BD. OF LAW EXAM'RS, https://www.nybarexam.org/Rules/Rules.htm [https://perma.cc/WUF3-7C28] (last visited March 21, 2021).

105. *See generally Rules Governing Admission to the Practice of Law*, BD. OF LAW EXAM'RS FOR THE STATE OF N.C., https://www.ncble.org/rules-governing-admission-to-the-practice-of-law-nc [https://perma.cc/PJ8X-RG63] (last visited March 23, 2021).

106. *See generally Rules of the Virginia Board of Bar Examiners*, VA. BD. OF BAR EXAM'RS, https://barexam.virginia.gov/pdf/VBBERules.pdf [https://perma.cc/5XUE-3CLA] (last visited March 23, 2021).

C. BUDGETS, POLICIES, AND THE CONDUCT OF PUBLIC BUSINESS

While bar examiners' confidentiality is defensible in the context of examination integrity or individual privacy, confidentiality need not apply to *all* forms of public business. Like all other administrative agencies, bar examiners make policy decisions that involve public business of a non-individualized and non-adjudicatory nature.[107] They engage in rulemaking, adopting prospective rules and policies and criteria that they later apply to individuals.[108] Furthermore, bar examiners have board members, staff, or other personnel who help them manage budgets varying in size from $776,000 in Vermont[109] to $1.4 million in Massachusetts[110] and Washington State[111] to $20 million in California.[112] (Searches of the other state bar examiner webpages reveal a dearth of financial information.[113])

Although budget information is not readily available, the Lone Star State offers an otherwise noteworthy exception to the usual rule of confidentiality. Texas

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107. *See generally* Charles H. Koch Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005).

108. *See generally* Appendix III (citing to bar examiners rules for the fifty states).

109. *See* VT. JUDICIAL BRANCH, FY 2019 BUDGET SUMMARY (2019) (discussing attorney admissions licensing fund).

110. *Governors Budget FY2019 0321-0100 - Board of Bar Examiners*, COMMONWEALTH OF MASSACHUSETTS, https://budget.digital.mass.gov/bb/h1/fy19h1/brec_19/act_19/h03210100.htm [https://perma.cc/4F2C-TPTP] (last visited Mar. 24, 2021).

111. *Spec. Rep. on the Fiscal Year 2020 Budget Summary*, WASH. STATE BAR ASS'N, https://www.wsba.org/docs/default-source/about-wsba/finance/2019aup.pdf?sfvrsn=7f5c0ef1_0 [https://perma.cc/85PD-HBNY] (last visited Mar. 24, 2021).

112. *See 2019 Adopted Final Budget*, ST. B. OF CAL., (Feb. 27, 2019) http://www.calbar.ca.gov/Portals/0/documents/reports/2019_Budget_and_Summary.pdf [https://perma.cc/5AHM-QVGP] (last visited Mar. 24, 2021).

113. For this article, the author attempted to uncover information about the annual revenues or expenses of the bar examiners, particularly by searching for the word "budget" in the webpages for the bar examiners of each state. Limited information could be found online. As discussed *infra*, four states—California, Massachusetts, Vermont, and Washington—provided some information about their bar examiner budgets online. But the bar examiner pages in nine states—Arizona, Kentucky, Louisiana, Mississippi, New York, Oklahoma, South Carolina, South Dakota, and Wyoming—had no search feature, nor any obvious links to budgetary information about the bar examiners. Internal searches using the designated search feature on the state bar examiner pages in another sixteen states—Alabama, Florida, Georgia, Illinois, Indiana, Maine, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, Utah, and Virginia—also found no results and often produced a result stating "There are no matches to your query" or "No results found." In twenty-one states—Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maryland, Michigan, Montana, Nevada, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Rhode Island, West Virginia, and Wisconsin—the bar examiner webpages were contained within the court system or the state bar organization, but searches did not reveal budgets specifically associated with the state bar examiners. Wisconsin explained that "[t]he bar admissions portion of BBE responsibilities is entirely self-funded with fees authorized by the Court." *Board of Bar Examiners,* WISC. CT. SYS., https://www.wicourts.gov/courts/offices/bbe.htm [https://perma.cc/S2WE-TPUW] (last visited Mar. 24, 2021); *see also State Court System Expenditures*, WISC. ST. CT. SYS., https://www.wicourts.gov/courts/overview/docs/expenditures.pdf [https://perma.cc/GQV6-74CC] (last visited Mar. 24, 2021) (discussing support of the bar examiners without providing an itemized budget).

rules maintain confidentiality for examination[114] and privacy concerns,[115] and the Texas Board of Law Examiners expressly acknowledges a right of public access and participation for other matters of public interest:

> The Board's business meetings and final decisions in character and fitness hearings are conducted in open sessions with public notice under the Texas Open Meetings Act. Board records are subject to the Public Information Act, except where confidentiality is required by statute or order of the Supreme Court. At every public meeting of the Board, time is allotted for interested persons to address the Board on matters of public interest and concern.[116]

The Texas Board's meeting minutes reveal the range of policy decisions made by the state bar examiners. For example, in April and May of 2020, the Texas Board of Law Examiners discussed accounting reports, a supervised law practice rule, operations during the COVID epidemic, the number of online credits that would be allowed for educational competence, the risk of malware attacks, and the use of video conferences for character and fitness interviews.[117] When these meetings involved confidential information, the minutes noted a brief explanation without detail, such as acknowledging a discussion of character and fitness investigations, or holding an executive session on pending litigation.[118] During these meetings, the Texas Board listened to public comment.[119] Supporting documentation and presentations addressed the use of masks, social distancing, and screening measures during testing.[120] In other public records, the Texas Board described its plan to use remote technology for its bar examination.[121]

Transparency has public benefits. Florida acted in secrecy, and its applicants were blindsided by a potentially avoidable cancellation of the bar exam. In contrast, one day after Florida cancelled its online exam,[122] the Texas Board publicly reassured its examinees that it did not expect to experience similar difficulties:

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114. *Rules Governing Admission to the B. of Tex. 7(a)*, TEX. BD. OF L. EXAM'RS, [https://perma.cc/LXW9-WQZK] (last visited Mar. 24, 2021) (exemption from public records laws for examination information).

115. *Rules Governing Admission to the B. of Tex. 1(e)*, TEX. BD. OF L. EXAM'RS, https://ble.texas.gov/rule01 [https://perma.cc/DE3N-PE3V [] (last visited Mar. 24, 2021) ("The Board must not disclose to any third party any information obtained with respect to the character or fitness of any Applicant or Declarant.").

116. *About the Board*, TEX. BD. OF L. EXAM'RS, https://ble.texas.gov/about [https://perma.cc/W3EJ-7QEF] (last visited Mar. 24, 2021).

117. *Minutes of the Meeting of the Board of Law Examiners*, TEX. BD. OF L. EXAM'RS (April 17, 2020), https://ble.texas.gov/Board_Mins_20200417 [https://perma.cc/3ZN3-F7P4]; *Minutes of the Meeting of the Board of Law Examiners*, TEX. BD. OF L. EXAM'RS (May 22, 2020), https://ble.texas.gov/Board_Mins_20200522 [https://perma.cc/72NJ-EFBY] (last visited Apr. 4, 2021).

118. *Minutes of the Meeting of the Board of Law Examiners*, TEX. BD. OF L. EXAM'RS (May 22, 2020), https://ble.texas.gov/Board_Mins_20200522 [https://perma.cc/72NJ-EFBY] (last visited Apr. 4, 2021).

119. *Id.*

120. *Id.*

121. *September 2020 Bar Exam (in person) and October 2020 Bar Exam (online),* TEX. BD. OF L. EXAM'RS (July 27, 2020), https://ble.texas.gov/faq.action#1045 [https://perma.cc/GLZ5-Z9MP] (last visited Apr. 4, 2021).

122. *See supra* Introduction.

> The [Board of Law Examiners] is aware of the cancellation of the online Florida bar exam due to difficulties in ensuring reliable and secure remote connections. The in-person Texas Bar Exam scheduled for September remains in place and will be administered using software that has a proven track record. The online Texas Bar Exam scheduled for October remains scheduled, and the BLE is studying Florida's experience to see what implications—if any—there may be for Texas examinees.[123]

II. LIMITING AGENCY POWER THROUGH TRANSPARENCY

The transparency of Texas may stand out as unusual compared to other bar examiners, but in fact, all bar examiners are a bit unusual. On the one hand, bar examiners are regulatory administrative agencies, which seems like a traditionally executive function; on the other hand, they are located within the judicial branch.

In many ways, the bar examiners operate outside the well-established laws and norms of the nation. Bar examiners cross over the constitutional boundaries by making law, implementing law, and adjudicating legal disputes, and they deviate from basic democratic norms and constitutional principles. Bar examiners are unbounded by the open government and administrative procedure laws governing the executive branch. Perhaps most remarkably, the bar examiners are exempted from the laws and principles of judicial transparency, too. In other words, when it comes to the bar examiners, basic notions of checks and balances, or transparency and accountability, simply do not apply.

A. FOUNDATIONAL CONSTITUTIONAL PRINCIPLES AND THE INFORMED PUBLIC

In its traditional role, the judiciary oversees regulatory administrative agencies by interpreting statutes adopted by the legislature[124] or rules adopted by the executive branch.[125] The courts also resolve disputes brought by individuals or organizations against regulatory administrative agencies to ensure constitutional compliance.[126] Across the fifty states, the judiciary performs a traditional role as a check and balance upon the executive branch, while contributing to the state's special role as a "laboratory of democracy."[127]

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123. *New Announcements*, TEX. BD. OF L. EXAM'RS, https://ble.texas.gov/news.action?id=2122 [https://perma.cc/N8HP-NZGL] (last visited Mar. 24, 2021).

124. *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

125. *See generally* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012), https://repository.law.umich.edu/mlr/vol111/iss3/2 [https://perma.cc/A2JY-RNPF].

126. Eric Berger, *Individual Rights, Judicial Deference, And Administrative Law Norms In Constitutional Decision Making*, 91 BOSTON U. L. REV. 2029 (2011).

127. Patrick McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions* (Feb. 7, 2019), available at https://ssrn.com/abstract=3331200 [https://perma.cc/62LL-MDJ5].

Through its bar admissions activities, the judiciary adopts a different role. The judiciary makes the laws, implements the laws, and adjudicates the laws—a consolidation of power that James Madison called "the very definition of tyranny."[128] In a legislative manner, bar examiners pass rules that govern their decision-making processes; in an executive manner, they conduct investigations and hearings involving individuals; in a judicial manner, they may provide for some form of review of their own decisions.[129] Traditional executive branch administrative agencies are subject to review by a different branch of government.[130] In contrast, when it comes to the bar examiners, the decisions by the judiciary are appealed to the judiciary.[131] The courts review themselves, and broad confidentiality rules shield their actions from public scrutiny.[132] This operation deviates from the constitutional system of checks and balances that usually protects the people from misguided actions on behalf of the government.[133]

To ensure public faith in the bar examiners' unprecedented combination of legislative, executive, and judicial power, greater public awareness is necessary. As Alexander Hamilton explained in Federalist Paper No. 27, respect for government is earned through the public's knowledge and understanding of the government's competent conduct:

> [T]he more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs

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128. THE FEDERALIST NO. 47 (James Madison) (warning that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny"); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, 1748, available at https://sourcebooks.fordham.edu/mod/montesquieu-spirit.asp [https://perma.cc/B4XG-DFUN] ("Again, there is no liberty, if the judiciary power be not separated from the legislative and executive . . . [w]ere it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator . . . [w]ere it joined to the executive power, the judge might behave with violence and oppression . . . [and t]here would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."); *see also* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017).

129. *See, e.g.*, *Rules of the Sup. Ct. Relating to Admission to the B. 2-30.2*, FLA. BD. OF B. EXAM'RS ("Any applicant or registrant who is dissatisfied with an administrative decision of the board that does not concern character and fitness matters may, within 60 days after receipt of written notice of that decision, file a petition with the Supreme Court of Florida for review of the action.").

130. *See, e.g.,* 5 U.S.C. § 706 (2018).

131. *See, e.g.*, *id.* at 3-40 (Petition for Court Review).

132. *See supra* Part I.B.

133. THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.") (Lillian Goldman Law Library, 2008), https://avalon.law.yale.edu/18th_century/fed51.asp [https://perma.cc/8HKG-TKZG].

> of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community.[134]

In Hamilton's view, when citizens are informed and see their government in action, government earns the citizens' respect and democracy thrives. But when government operates in secrecy, suspicions arise, and surprises occur. To prevent such surprises, James Madison wrote that "people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[135] He offered a word of warning as well, declaring a popular government without popular information to be a "Farce or a Tragedy, or perhaps both."[136] His fellow Virginian, Thomas Jefferson, similarly cautioned that an inattentive public allows the government officials to "become wolves."[137]

Ultimately, our founding fathers recognized the importance of an informed public as a tool to ensure proper scrutiny of our government. While the founding fathers may not have envisioned the precise need for bar examiners,[138] they also recognized that institutions change, and that the laws applicable to the institutions must evolve.[139] The rules, policies and decisions of the bar examiners, and the frequent invocation of confidentiality, should be reconsidered in the context of these foundational constitutional principles of democratic governance.

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134. THE FEDERALIST NO. 27 (Alexander Hamilton) (Lillian Goldman Law Library, 2008), https://avalon.law.yale.edu/18th_century/fed27.asp [https://perma.cc/J9A7-TZX8].

135. Letter from James Madison to W. T. Barry, August *4* (Aug. 4, 1822), https://www.loc.gov/item/mjm018999/ [https://perma.cc/RJ9H-Y2A3] (last visited Apr. 4, 2021) (calling for the people to be their own governors by empowering themselves with information, stating "[a] popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both . . . [and k]nowledge will forever govern ignorance . . . [a]nd a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").

136. *Id.*

137. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787) (emphasizing the need for an educated public to prevent governmental abuses, stating "[w]e have the greatest opportunity the world has ever seen, as long as we remain honest—which will be as long as we can keep the attention of our people alive. If they once become inattentive to public affairs, you and I, and Congress and Assemblies, judges and governors would all become wolves"); *see also* Letter from Thomas Jefferson to William Jarvis (1820) ("I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education . . . [and t]his is the true corrective of abuses of constitutional power.").

138. *Cf.* Charles Francis Adams, *The Works of John Adams, Second President of the United States, Vol. II*, (Charles C. Little & James Brown ed., 1856), https://oll.libertyfund.org/titles/adams-the-works-of-john-adams-vol-2-diary-notes-of-debates-autobiography [https://perma.cc/T2PV-XPWR] (last visited Apr. 4, 2021) (complaining about the "dirty dabblers" in the law).

139. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (noting institutions must advance to keep pace with the times, stating "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind[, w]e might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors").

B. TRANSPARENCY PRINCIPLES FROM ADMINISTRATIVE AGENCIES

In the executive realm, open government laws related to public records and open meetings help to protect the public by exposing regulatory agencies and their advisors to public scrutiny.[140] In addition, laws governing administrative procedure ensure that agencies are subjected to meaningful judicial review,[141] which in turn creates democratic accountability and protects basic human rights.[142] These concepts of administrative law and transparency in the executive branch could be applied to the bar examiners as well.

1. CONCEPTS OF OPEN GOVERNMENT

Every state in the union has a public records law.[143] As the Supreme Court explained in *Cox Broadcasting Corporation v. Cohn*, the availability of public records is essential to democracy:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[144]

Public records laws bestow upon citizens and groups a right to request records. The laws define the records that are subject to and exempt from disclosure, provide guidance on allowable fees that may be charged to the person requesting the records, identify procedures for enforcement of the law, and establish sanctions for noncompliance.[145]

When Congress passed the Freedom of Information Act in 1966, the Bill's sponsor, Representative John Moss, explained that "our system of government is based on the participation of the governed," which requires a American public "adequately equipped to fulfill the evermore demanding role of responsible citizenship."[146] When President Lyndon Johnson endorsed that legislation, his

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140. *See, e.g.*, Judy Nadler & Miriam Schulman, *Open Meetings, Open Records, and Transparency in Government*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIVERSITY (Oct. 23, 2015), https://www.scu.edu/government-ethics/resources/what-is-government-ethics/open-meetings-open-records-transparency-government/ [https://perma.cc/HXX6-282Z].

141. *See, e.g.,.* 5 U.S.C. § 706.

142. Robert G. Vaughn, *Transparency in the Administration of Laws: The Relationship Between Differing Justifications for Transparency and Differing Views of Administrative Law*, 26 AM. U. INT'L L. REV. 969, 969–74 (2011).

143. *See Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2018), http://www.rcfp.org/open-government-guide [https://perma.cc/XGF4-MEC6].

144. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975).

145. *See Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2018), http://www.rcfp.org/open-government-guide [https://perma.cc/XGF4-MEC6].

146. Clarifying and Protecting the Public's Right to Know, 112 Cong. Rec. 13007, 13640 (June 20, 1966) (Statement by Rep. Moss) https://nsarchive2.gwu.edu/nsa/foia/Housedv66.pdf [https://perma.cc/ZL2A-3BLQ].

signing statement recognized the need for non-disclosure of documents related to national security and personnel files but noted that FOIA "springs from one of our most essential principles: a democracy works best when people have all the information that the security of the nation will permit."[147] A few years later, when the Supreme Court interpreted that law, it emphasized its purpose to "permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."[148]

Governmental agencies in the executive branch also comply with "open meeting" laws to ensure that decisions by collegial boards can be witnessed in a public setting.[149] These laws require a public announcement of the time, place, and subject matter of the meeting, and also address whether the public attendance is allowed.[150] The federal version of the law,[151] with ten specified exemptions, ensures that "every portion of every meeting of an agency shall be open to public observation."[152] As the University of Florida's Brechner Center for Freedom of Information has explained, "[i]nformation about our government provides one of the cornerstones of our democracy," and citizens need this information "to hold our elected officials accountable, understand their decision-making process and make decisions about where to live or how to prioritize our community's concerns."[153]

The bar examiners generally do not adhere to the transparency principles of these public records and open meetings laws. In many states, these laws simply do not apply to the judiciary.[154] Instead, confidentiality rules allow bar examiners to withhold their documents and close their meetings.[155] Defenders of this approach argue that the bar examiners' actions are still subject to some form of

147. Press Release, Office of the White House Press Secretary, Statement by the President upon Signing S.1160 (July 4, 1966) https://nsarchive2.gwu.edu//NSAEBB/NSAEBB194/Document%2031.pdf [https://perma.cc/9TML-SUST].

148. EPA v. Mink, 410 U.S. 73, 80 (1973).

149. *See generally* Ann Taylor Schwing, *Open Meeting Laws 3d Edition*, OPEN MEETING LAWS, http://www.openmeetinglaws.com/ [https://perma.cc/K423-QS7S] (providing open meeting law reference for the fifty states) (last visited Apr. 23, 2019).

150. *See id.*

151. *See* Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (Sept. 13, 1976).

152. 5 U.S.C. § 552b(b).

153. *Florida Government in the Sunshine: A Citizen's Guide*, U. OF FLA. BRECHNER CTR. FOR FREEDOM OF INFO., http://brechner.org/wp-content/uploads/2017/09/citizen-guide-2006.pdf [https://perma.cc/5LU5-5PKG] (last visited Apr. 3, 2021).

154. The federal APA and FOIA does not apply to the federal judiciary, and state equivalents of the APA and FOIA may not apply to state judiciaries. *See generally What Records are Available Under FOIA*, BERKMAN CTR. FOR INTERNET AND SOC'Y, DIGITAL MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/what-records-are-available-under-foia [https://perma.cc/7XF6-FMDB] (last visited Apr. 3, 2021); Katrina Hoch, *Judicial transparency: communication, democracy and the United States federal judiciary*, UC SAN DIEGO ELECTRONIC THESES AND DISSERTATIONS (2009), https://escholarship.org/uc/item/44g491tk [https://perma.cc/WM6G-V4NT].

155. *See* Appendix III, explaining, for each state, the role of the bar examiners within the judicial branch.

scrutiny, because they fall under the supervision of the highest court in each state.[156] That argument, however, concedes that bar examiners are akin to an advisory committee, serving the state supreme courts. Accordingly, consideration of the transparency principles in the Federal Advisory Committee Act (FACA),[157] another law affecting executive branch administrative agencies, is also appropriate.

FACA was passed in the 1960s to ensure public knowledge of, and access to, the meetings and reports through which stakeholders and experts advised federal agencies on policy matters.[158] As Congress recognized, receipt of information from experts could be useful to the governmental decisionmakers:

> The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.[159]

Through FACA, Congress required that the public "should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees".[160] In fact, Section 10 of FACA establishes specific procedures to ensure the transparency of advisory committee meetings. Interested persons may "attend, appear before, or file statements" with the advisory committee.[161] If specific exceptions from the Freedom of Information Act do not apply, then the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents" must be made available for public inspection and copying.[162] Detailed minutes of each meeting of each advisory committee must be kept.[163] If any portion of a meeting is kept confidential or closed to the public, then the agency must produce a written determination and explanation.[164] FACA, in sum, ensures transparency and an informed public.

Using Executive Orders and memoranda, Presidential administrations have also emphasized the importance of an informed public with access to records and meetings. President Barack Obama, for example, emphasized the need for transparency, public participation, and collaboration to strengthen our democracy and promote efficiency and effectiveness in Government, while emphasizing the need for both proactive publication of information and public feedback:

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156. *Id.*
157. 5 U.S.C. app. § 2(a).
158. *See, e.g.*, Amendment of Executive Order No. 10501, Exec. Order No. 11097, 27 C.F.R. 1875 (1962).
159. 5 U.S.C. app. § 2(a).
160. *Id.* at § 2(b)(5).
161. *Id.* at § 10(a)(3).
162. *Id.* at § 10(b).
163. *Id.* at § 10(c).
164. *Id.* at § 10(d).

> Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. . . . Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public. [165]

President Donald Trump also offered support for the notion of transparency. In an executive order on transparency related to health care information, his administration emphasized the policy of the Federal Government to ensure that patients are engaged with their healthcare decisions, to provide them with the price and quality of information needed to choose their healthcare, and to eliminate the potential for surprise medical bills.[166] A separate executive order, in the context of civil administrative enforcement and adjudication, declared that "[t]he rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions."[167]

These laws and actions related to public records, open meetings, and public access provide examples of transparency tools. The concepts in these laws could readily be applied to the bar examiners. Yet, with only a few exceptions, they are not. Even on matters of policy and other public business, the bar examiners who serve the judiciary often fail to provide records, meeting minutes, explanations of their decisions, or opportunities for public input or scrutiny.

2. CONCEPTS OF ADMINISTRATIVE PROCEDURE

Bar examiner confidentiality, coupled with the lack of public records or open meetings, creates compounding consequences. The public simply does not know what it does not know. Uninformed about the activities of the bar examiners, the public also lacks the opportunity to submit meaningful feedback or to seek meaningful judicial review. The absence of an engaged and informed public further flouts the basic principles of administrative law set forth in the federal and state administrative procedure acts, which generally include both notice and comment rulemaking, and meaningful on-the-record judicial review.[168]

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165. Transparency and Open Government Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009).

166. Improving Price and Quality Transparency in American Healthcare to Put Patients First, Exec. Order No. 13877, 84 C.F.R. 30849 (2019).

167. Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13892, 84 C.F.R. 55239 (2019).

168. *See* 5 U.S.C. § 551; *see also State administrative procedure acts*, BALLOTPEDIA, https://ballotpedia.org/State_administrative_procedure_acts [https://perma.cc/A9LU-DVF5] (last visited Apr. 3, 2021) (creating a list of and hyperlinks to all state administrative procedure acts as part of its "administrative state project").

When administrative agencies engage in rulemaking,[169] they engage in a process[170] to develop prospective criteria[171] that are later applied to particular facts. Transparency and public participation are commonly part of the rulemaking process.[172] Proposed documents are published in draft forms,[173] public comment is encouraged,[174] agencies consider the comments,[175] and respond with an explanation.[176] Technology dramatically increases the potential for participation and agency accountability.[177] Such transparency is popularly supported, and Americans generally hope that open data can improve government accountability.[178]

To increase agency accountability, administrative law typically provides judicial review of agency action based on review of a record.[179] Federal judicial review is based on the full administrative record that was before the decisionmaker at the time of the decision.[180] A complete record helps inform the public of an agency's actions and often serves as a significant source of factual information.[181] Upon review of that record, the public can challenge the administrative agency's decisions, and the judiciary can consider whether the agency action is "arbitrary or capricious," as the Supreme Court has explained:

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169. Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855 (2011).

170. *See, e.g.*, 5 U.S.C. § 551(5) (defining rulemaking as an "agency process for formulating, amending, or repealing a rule").

171. *Id.* at § 551(4) (defining a rule as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

172. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927 (2009); Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 832, 839 (1975).

173. *See, e.g.*, 5 U.S.C. § 553(b) (providing for proposed rules published in the Federal Register).

174. *See, e.g.*, 5 U.S.C. § 553(c) (giving "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments").

175. *Id.* ("After consideration of the relevant matter presented.").

176. *Id. ("*[T]he agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

177. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79 (2012).

178. John B. Horrigan & Lee Rainie, *Americans' Views on Open Government Data*, PEW RESEARCH CENTER (April 21, 2015), https://www.pewresearch.org/internet/2015/04/21/open-government-data/ [https://perma.cc/XQD9-CYGK].

179. *See, e.g.,* 5 U.S.C. § 706 (providing for judicial review based on the "whole record"); Fla. Stat. § 120.68, ("Judicial review of any agency action shall be confined to the record transmitted."). *See generally* Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707 (2011).

180. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

181. *See, e.g.,. Revised Guidance on Compiling Administrative Records for CERCLA Response Actions*, U.S. ENVIRONMENTAL PROTECTION AGENCY (Sept. 20, 2010) https://www.epa.gov/sites/production/files/2013-11/documents/admin-record-mem-rev.pdf [https://perma.cc/GYA5-XP5B].

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[182]

With bar examiners, this type of public scrutiny and judicial review is impossible. State administrative procedure acts generally do not apply to bar examiners, and states vary in whether they acknowledge the rights of an applicant to access the record.[183] Moreover, there is a limited record to review, because confidentiality rules mean that documents need not be disclosed, and bar examiner reasoning need not be articulated. In fact, some bar examiners sometimes extend their confidentiality clause to preclude the rights of the applicant to access the information in their *own* files.[184] An official 2007 study of the Florida Board of Bar Examiners noted concerns about how excessively broad assertions of confidentiality interfered with applicants' individual rights, preventing applicants from accessing the evidence used against them.[185] By the standards of administrative law, and like the now-defunct Interstate Commerce Commission in another benchmark administrative law case, the bar examiners operate like a monster of modern government:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern

182. Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983).

183. *See supra*, notes 81 and 82 (discussing Colorado and Idaho).

184. *See, e.g.*, Fla. Bd. of Bar Exam'rs, 581 So. 2d 895, 897 (Fla. 1991) ("The rules do not entitle an applicant to any records relied upon by the board in conducting an investigative hearing."); *see also* MINN. ST. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE B. 14 ("An applicant may review the contents of his or her application file with the exception of the work product of the Board and its staff."); ME. BD. OF B. EXAM'RS, ME. B. ADMISSION RULES 7 ("Except as a Justice of the Supreme Judicial Court, for good cause shown, may order, the Board shall disclose to the applicant any information in the applicant's file."); *cf.* FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. at 1-63.5 and 1-63.6 (defining limited circumstances when applicants can request documents from their own files).

185. *Final Report and Recommendations of the Supreme Court Select Committee to Study the Florida Board of Bar Examiners*, FLA. BD. OF B. EXAM'RS, https://www.flcourts.org/content/download/218257/1975488/report.pdf [https://perma.cc/WBU3-NJ82] (last visited Apr. 18, 2021) ("[Q]uestioning a 1991 case finding that applicant records were confidential, and suggesting that the Supreme Court should reconsider a past recommendation that applicants be provided with an opportunity to respond to evidence used against them, stating "[t]he Supreme Court should revisit this issue to consider whether to recede from its opinion in Florida Board of Bar Examiners . . . 581 So. 2d 895 (Fla. 1991) and implement the recommendation of the Bench/Bar Commission").

> government, can become a monster which rules with no practical limits on its discretion."[186]

Even if bar examiners' business comes into public view at the end of a decision making process, the absence of information precludes meaningful public scrutiny. Consider, for example, the four new rules and twenty-one amendments proposed by the Florida Board of Bar Examiners in 2011. When presented to the state Supreme Court,[187] the process generated just one public comment.[188] The publication of a proposed final rule, without any access to the underlying information, left the public ill-equipped to offer insight or critique the facts found and the choices made.[189] The public was presented with a *fait accompli*. If bar examiners were held to the same standards that apply elsewhere in administrative law, then this example of confidential decision making and lack of a meaningful record and explanation might have been considered arbitrary and capricious.

C. TRANSPARENCY PRINCIPLES FROM THE JUDICIARY

Application of traditional administrative law principles to the bar examiners reveals serious concerns, yet, the fact remains that bar examiners are agencies within the judicial branch, and some courts have resisted the application of executive branch transparency concepts to the judiciary. Mississippi courts have flatly asserted that state statutes directing executive branch transparency cannot be applied to the separate and co-equal branch that is the judiciary.[190] Nevada courts assert authority to engage in rule making related to bar admission without legislation as an inherently judicial function.[191] Michigan bar examiners, asserting even greater independence, have adopted their own rules and policies, with neither legislative nor judicial imprimatur.[192]

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186. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) (quoting New York v. United States, 342 U. S. 882, 884 (dissenting opinion)).

187. *In re* Amend.'s to R. of the Sup. Ct. Relating to Admissions to the Bar, 52 So. 3d 652 (Dec. 16, 2010).

188. *Id*. at 653–54.

189. *Burlington Truck Lines*, 371 U.S. at 168 (1962); *see generally* Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661 (2016); *The Public's Role in Administrative Law*, THE REG. REV. (2017), https://www.theregreview.org/2017/09/25/scalia-public-role-administrative-law/ [https://perma.cc/H4BV-YKG6] (last visited Apr. 4, 2021).

190. MISS. SUP. CT., STATEMENT OF POL'Y REGARDING OPENNESS AND AVAILABILITY OF PUBLIC RECS. § 1 (Aug. 27, 2008) ("[T]he public interest is best served by open courts and by an independent judiciary . . . [but t] he judiciary of the State of Mississippi, as a separate and equal branch of the government, is not subject to the Mississippi Public Records Act.").

191. *See* NEV. SUP. CT. RULES, https://www.leg.state.nv.us/Division/Legal/LawLibrary/CourtRules/SCR.html [https://perma.cc/5GQL-6F5L] (last visited Apr. 3, 2021) (explaining in the preface to the rules its inherent rulemaking power).

192. In Michigan, the bar examiners assert authority to independently interpret statutes and implement rules and policies. MICH. SUP. CT, BD. OF L. EXAM'RS, RULES, STATUTES, AND POL'Y STATEMENTS 600.928-1 states:

> These Policy Statements do not constitute legal advice and are not officially sanctioned by the Michigan Supreme Court. They implement the Rules of the Board of Law Examiners, statutory

The judiciary, however, has its own separate history of embracing transparency with which the bar examiners should comply. Protecting the notion of judicial transparency in 1893, the Supreme Court of California required courts to operate in public, explicitly rejecting any suggestion that the institution could deny the public access:

> In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea. . .[193]

Similarly, the Supreme Court of Florida has held that "*all* trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions." [Emphasis in original.][194] And the federal judicial system acknowledges the importance of accountability and transparency, because "[o]versight mechanisms work together to hold judges and Judiciary staff responsible for their conduct as government officials and for the management of public resources."[195] To achieve that oversight, the federal judiciary allows for cameras in courtrooms; publishes judicial statistics; allows for submission of emails to trigger investigations of waste, fraud or abuse;[196] and implements a strategic plan that strives to "[i]mprove the sharing and delivery of information about the judiciary."[197]

These principles of open government are frequently embraced in a variety of rules and norms adopted by the judiciary, and they are not limited to the courtroom. State bar organizations, which also exercise judicial powers, follow published rules and allow public access to the meetings and documents associated with their governing boards. The ethical rules and law governing lawyers, while respecting the importance of confidentiality, also recognize the need for public disclosures. Judicially adopted standards of professionalism emphasize the importance of public understanding of the legal system. And, to that end, courts frequently engage in public awareness efforts through the press. In other words, the

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mandates, and the practices, policies, and procedures of the Board of Law Examiners. They do not confer any procedural or substantive due process rights and are subject to change at any time without notice.

193. *In re* Shortridge, 99 Cal. 526, 530–31, 34 P. 227, 228–29 (1893).

194. Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988).

195. *Administrative Oversight and Accountability*, U.S. COURTS https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability [https://perma.cc/FNN9-9J6T] (last visited Mar. 21, 2021).

196. *Id*.

197. *Issue 7: Enhancing Public Understanding, Trust, and Confidence*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/issue-7-enhancing-public-understanding-trust-and-confidence [https://perma.cc/2W5Y-9YPF] (last visited Mar. 21, 2021).

judiciary routinely engages in transparency and public education—except when it involves the bar examiners.

1. JUDICIAL LAWS REGARDING OPEN GOVERNMENT

The courts have long recognized the need for openness, because the court system serves as a forum to redress public grievances against the government.[198] In Florida, the state constitution contains a public records law and an open meeting law that applies to the judiciary,[199] and Florida's courts have determined that sunshine laws should be liberally construed for the public benefit.[200] Similarly, forty states have an explicit constitutional requirement of open access to the courts: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[201]

Evincing this commitment to openness, the decisions, orders, and rules of the courts of the fifty states are routinely published.[202] Courts also have recognized the existence of common law rights to other judicial records.[203] As the Supreme Court held, "It is clear that the courts of this country recognize a general right to

198. Fla. Const. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

199. Fla. Const. art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . [and t]his section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."); *id.* at art. 1, § 24(b) ("All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.").

200. *See, e.g.*, Bd. of Pub. Instruction of Broward Cty. v. Doran, 224 So. 2d 693, 699 (Fla. 1969) ("Statutes enacted for the public benefit should be interpreted most favorably to the public.").

201. *See* Ala. Const. art. I, § 13; Ariz. Const. art. II, § 11; Ark. Const. art. II, § 13; Colo. Const. art. II, § 6; Conn. Const. art. I, § 10; Del. Const. art. I, § 9; Fla. Const. art. I, §21; Ga. Const. art. I, § 1; Idaho Const. art. I, § 18; Ill. Const. art. I, § 12; Ind. Const. art. I, § 12; Kan. Const. Bill of Rights, § 18; Ky. Const. § 14; La. Const. art. I, §22; Me. Const. art. I, § 19; Md. Const. Decl. of Rights, art. 19; Mass. Const. pt. I, art. 11; Minn. Const. art. 1 § 8; Miss. Const. art. III, § 24; Mo. Const. art. I, § 14; Mont. Const. art. II, § 16; Neb. Const. art. I, § 13; N.H. Const. pt. I, art. 14; N.C. Const. art. I, § 18; N.D. Const. art. I, § 9; Ohio Const. art. I, § 16; Okla. Const. art. II, § 6; Or. Const. art. I, § 10; Pa. Const. art. I, § 11; R.I. Const. art. I, § 5; S.C. Const. art. I, § 9; S.D. Const. art. VI, § 20; Tenn. Const. art. I, § 17; Tex. Const. art. I, § 13; Utah Const. art. I, § 11; Vt. Const. ch. I, art. 4; Wash. Const. art. I, § 10; W. Va. Const. art. III, § 17; Wis. Const. art. I, § 9; Wyo. Const. art. I, § 8; *see also* Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1161 (N.M.1988) (interpreting New Mexico Constitution).

202. *See, e.g.*, West Publishing Co., Atlantic Reporter (A. & A.2d), North Western Reporter (N.W. & N.W.2d), North Eastern Reporter (N.E. & N.E.2d), Pacific Reporter (P., P.2d, & P.3d), Southern Reporter (So., So.2d, & So.3d), South Eastern Reporter (S.E. & S.E.2d), South Western Reporter (S.W., S.W.2d, & S.W.3d).

203. Diane Apa, *Common Law Right of Public Access - The Third Circuit Limits Its Expansive Approach to the Common-Law Right of Public Access to Judicial Records*, 39 VILL. L. REV. 981 (1994), available at https://digitalcommons.law.villanova.edu/vlr/vol39/iss4/7 [https://perma.cc/7BQP-UEBJ].

inspect and copy public records and document, *including judicial records and documents*."[204] [Emphasis added.]

To codify these principles of openness and transparency, state judiciaries all have procedural laws governing public access to judicial records. The rights are granted in a wide variety of ways, including state constitutional clauses;[205] state statutes;[206] an order by the supreme court[207] or the chief justice;[208] court rules[209] or other administrative rules or orders enacted by the judiciary,[210] sometimes called rules of judicial administration;[211] rules of public access;[212] or open records policies.[213]

Every one of the fifty states clearly expresses a commitment to judicial transparency, and codifies the basic policy principle of transparency, with a right of access to judicial documents set forth in a law, rule, or order.[214] Implementing these principles with some precision, all but six states have codified supplemental

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204. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

205. *See, e.g.*, Fla. Const. art. I, § 24.

206. *See, e.g.*, 204 PA. CODE § 213.81 (2020), WIS. STAT. 19.31 (2020) ("The denial of public access generally is contrary to public interest, and only in an exceptional case may access be denied.").

207. *See, e.g.*, *In re* N.M. Judiciary Case Access Pol'y for Online Ct. Recs., No. 17-8500-001 (Feb. 20, 2017), https://cms.nmcourts.gov/uploads/FileLinks/bf47e4f8e3af491d807778f067df1917/Order_17_8500_001_Approving_Online_Court_Records_Case_Access_Policy__2_20_17_v1.1.pdf [https://perma.cc/VE9R-39JN].

208. *See, e.g.* COLO. JUD. DEP'T. CHIEF JUSTICE DIRECTIVE 05-01, https://www.courts.state.co.us/Courts/Supreme_Court/Directives/05-01_Amended%202016%20Oct18%20Web.pdf [https://perma.cc/F3PU-V4UH] (last visited Mar. 21, 2021); N.Y. ST. UNIFIED CT. SYS., RULES OF THE CHIEF ADMINISTRATIVE JUDGE PT. 124, http://ww2.nycourts.gov/rules/chiefadmin/124.shtml [https://perma.cc/859C-7D8B] (last visited Mar. 21, 2021).

209. *See, e.g.*, WASH. R. GEN. APPLICATION GR 31.1(a) (Jan. 1, 2016), https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_31_01_00.pdf [https://perma.cc/DN4P-WZBF] (last visited Apr. 3, 2021) ("A presumption of access applies to the judiciary's administrative records."); W. VA. JUDICIARY TRIAL CT. RULES 10.04(a), http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-1.html#rule10 [https://perma.cc/B7KJ-BPQP] (last visited Mar. 21, 2021) ("All persons are, unless otherwise expressly provided by law or excepted by Rule 10.03, entitled to full and complete information regarding the operation and affairs of the judicial system.").

210. *See, e.g.,* IDAHO CT. ADMIN. RULES 32, https://isc.idaho.gov/icar32 [https://perma.cc/L67E-FDZV]] (last visited Mar. 21, 2021); IND. CT. ADMIN. RULES 9, https://www.in.gov/judiciary/rules/admin/#_Toc12006055 [https://perma.cc/3NDF-9DWZ]; ST. OF ME. JUD. CT. ADMIN. ORDER JB-05-20, https://www.courts.maine.gov/adminorders/jb-05-20.pdf [https://perma.cc/4AQ5-AE26]] (last visited Mar. 21, 2021).

211. *See, e.g.,* TX. R. JUD. ADMIN. 12, http://www.txcourts.gov/media/1444629/rules-of-judicial-administration-updated-with-amendments-effective-september-1-2019.pdf [https://perma.cc/QK88-76VM] (last visited Mar. 21, 2021); FLA. R. JUD. ADMIN. 2.420, https://www.flcourts.org/content/download/219096/1980522/RULE-2-420-Jan2014.pdf [https://perma.cc/V9WP-T7X7] (last visited Mar. 21, 2021).

212. *See, e.g.,* MINN. RULES OF PUB. ACCESS TO RECS. OF THE JUD. BRANCH 2, http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/pub_access_rules.pdf [https://perma.cc/K42R-MXJJ] ("Records of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying.") (last visited Mar. 21, 2021).

213. *See, e.g. Open Records Policy of the Administrative Office of the Courts*, KY. CT. RULES, https://govt.westlaw.com/kyrules/Browse/Home/Kentucky/KentuckyCourtRules/KentuckyStatutesCourtRules?guid=NFFB52390349911E5A4EAD9CB0F4DCFE9&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default) [https://perma.cc/WA5M-YZ3P] (last visited Mar. 21, 2021).

214. *See infra*, App. III.

procedures explaining how to request judicial records.[215] Offering an additional layer of commitment to transparency, thirty one states had procedures to appeal a denial of access to judicial records.[216] In fact, a majority of twenty-eight states have laws, rules, or orders explicitly codifying all three of these transparency metrics: a right of public access to judicial documents, a process to make requests, and a process to appeal denials of requests for information.[217]

Thus, an obvious logical disconnect or contradiction exists all across the nation. Fifty state judiciaries espouse openness and transparency, while forty-four state bar examiners emphasize confidentiality. A majority of states insist on broad transparency for the judiciary, yet a majority of states insist on broad confidentiality for bar examiners. Admittedly, states are not uniform in their approaches, as the state-by-state analysis in Appendix I and III shows. Nevertheless, an inescapable conclusion emerges: the confidentiality rules embraced by the state bar examiners cannot be reconciled with the transparency rules regulating the state judiciaries.

In Florida, the juxtaposition of the state constitution, the rules of judicial administration, and the rules governing bar admission highlights the bar examiners' longstanding and stubborn insistence on confidentiality. The Sunshine State's constitution provides that bar admission in Florida is a judicial function,[218] and the judiciary is subject to transparency laws.[219] However, when Florida's constitutional amendment requiring open public meetings and access to public records was added in 1992, it included a grandfather clause allowing pre-existing judicial branch rules that limited access to public records to remain in force until repealed.[220]

Thereafter, in 1995, and in response to the constitutional amendment, the Florida Supreme Court amended Rule 2.420 of the Rules of Judicial Administration, governing public access to judicial branch records.[221] The rule acknowledged bar examiners as a judicial branch entity[222] while providing that

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215. *Id.* Although Connecticut, Georgia, Indiana, Louisiana, South Carolina, and Tennessee all did have a codified rights of access to judicial records, they did not have clear procedures for making the requests.

216. *Id.*

217. *See infra* App. III.

218. Fla. Const. art. V, § 15.

219. Fla. Const. art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . [and t]his section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.").

220. *See* Fla. Const. art. I, § 24(d) ("All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed . . . [and r]ules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.").

221. FLA. R. JUD. ADMIN. 2.420.

222. *Id.* 2.420(b)(2) (Judicial branch "means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice."); *see also Rules of the Supreme Court Relating to the*

"records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar" shall be confidential.[223] However, in 2002, 2005 and 2007, Rule 2.420 was amended or commented upon, and court commentary from 2002 suggests that the public access rule should apply to the bar examiners: "It is anticipated that *each judicial branch entity* will have policies and procedures for responding to public records requests."[224] [Emphasis added.] Moreover, another section of the rule, governing memoranda that related to administration of the court, required a balancing of the public right of access and other needs, and encouraged openness unless confidentially is specifically necessary:

> Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest.[225]

In other words, Florida's state constitutional policy favors transparency, and later enacted changes to the Rules of Judicial Administration undermine any claim that a grandfather clause should apply. For nearly two decades, Florida law has required that judicial branch entities should allow access to public records, and apply confidentiality principles no broader than necessary. Instead, and without any stated justification, the Florida Board of Bar Examiners insists that *all* information maintained by the board is confidential, including even interoffice memoranda.[226]

As noted throughout this article, the Florida Board of Bar Examiners is not alone in their defiance of the laws that usually govern the judiciary. Nevertheless, deviations from transparency should be the exception, not the rule. Less restrictive means are available to protect the bar examiners' concerns for individual privacy or bar examination integrity, and the bar examiner should honor and comply with the principles that apply to the rest of the judicial branch.

2. ETHICAL RULES OF CONFIDENTIALITY

Within the regulation of the legal profession, confidentiality has a special place. The American Bar Association's Model Rules of Professional Conduct

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Admission to the Bar, 1-11–1-12, FLA. BD. OF B. EXAM'RS (recognizing the bar examiners as agents of the Florida Supreme Court.).

223. FLA. R. JUD. ADMIN. 2.420 (c)(8).

224. *Id*. at 2.420, 2002 Court Commentary.

225. *Id*. at 2.420(c)(2).

226. *Rules of the Supreme Court Relating to the Admission to the Bar 1*-60, FLA. BD. OF B. EXAM'RS (broadly stating confidentiality of "all information maintained by the board"); *id*. at 1–62 (categorizing the types of records held by the Board of Bar Examiners, to include, but not limited to, "registrant and applicant files, investigative reports, examination materials, and interoffice memoranda").

acknowledge confidentiality as a hallmark of the lawyer client relationship, creating trust between the lawyer and client.[227] Yet, even this hallmark principle has limits.[228]

The confidentiality of lawyer communications does not apply to *every* document or statement. Rather, confidentiality generally exists to protect the interests of a client, under specific circumstances. As the Restatement (Third)of the Law Governing Lawyers explains, the duty of confidentiality applies when "there is a reasonable prospect that doing so will adversely affect a material interest of the client."[229] A client can consent to the disclosure of otherwise confidential information.[230] When a lawyer communicates with a non-client, the communication is probably not made in confidence,[231] or confidentiality is waived.[232] When a lawyer files a brief in court, it is a public record, unless specifically sealed.[233]

In some circumstances, however, confidentiality is considered *improper*, and lawyers must breach confidentiality. For example, some lawyers must reveal otherwise confidential information to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another.[234] Sometimes, disclosures of confidential information are required by investigations or judicial proceedings,[235] with conditions to ensure fairness in the legal process.[236] Disclosures of information may also be impliedly authorized,[237] necessary to mitigate harms,[238] or otherwise required by laws.[239] And within the context of organizational

227. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2018) [hereinafter MODEL RULES] (allowing the client "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter").

228. *Cf.* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 341 (2014) ("The American legal profession today overvalues confidentiality, secrecy, and information asymmetries, at the cost of focusing on the merits of a case, the capabilities of counsel, and the courage to advocate with candor.").

229. *See* RESTATEMENT 3D, THE LAW GOVERNING LAWYERS, § 60.

230. *See* RESTATEMENT 3D, THE LAW GOVERNING LAWYERS, § 62 ("A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure").

231. *Id.* at §71.

232. *See* RESTATEMENT 3D, THE LAW GOVERNING LAWYERS, §79 ("The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication."). *But see, e.g.,* FLA. STAT. §44.405 ("However, Statements made during mediation conferences may still be confidential").

233. *See, e.g.,* Public Access to Court Electronic Records, https://pacer.uscourts.gov/ [https://perma.cc/9FKN-2L3S] (last visited Apr. 3, 2021); *see also,* discussion of sealing records, *infra* notes 240–245.

234. *See, e.g.*, THE FLA. B., RULES REGULATING THE FLA. B., RULES OF PROF'L CONDUCT 4-1.6(b) (requiring mandatory disclosure of confidential information in certain circumstances).

235. MODEL RULES R. 1.6 cmt. 16.

236. MODEL RULES. R. 3.4.

237. MODEL RULES. R. 1.6 cmt. 16 ("[T]he disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.").

238. MODEL RULES. R. 1.6(b)(1) ("A lawyer may reveal information . . . to prevent reasonably certain death or substantial bodily harm); *id.* at R. 1.6(b) (2)–(3) (allowing disclosure to prevent certain types of crimes or frauds affecting finances or property).

239. MODEL RULES. R. 1.6(b)(6).

representation, lawyers may reveal otherwise confidential information "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."[240]

Within the rules governing the legal profession, attorney-client confidentiality is sacrosanct, yet it has limits. Limits must be imposed on bar examiner confidentiality, as well. Arguably, except for matters involving personal privacy of the applicants, or the integrity of the examination, bar examiners have even less reason for confidentiality than the rest of the legal profession.

3. PROFESSIONALISM LIMITS AND EXPECTATIONS

By insisting upon excess secrecy, the bar examiners arguably commit an act of unprofessionalism, too. Codified principles of professionalism describe the highest aspirations of the legal profession.[241] Professionalism can even be a bar tested subject.[242] As the American Board of Trial Advocates states in its Code of Professionalism, professionalism means more than mere compliance with law.[243] It also means that a lawyer "shall. . . [h]onor the spirit and intent, as well as the requirements of applicable rules or codes of professional conduct, and shall encourage others to do so."[244]

For bar examiners to honor the spirit of the laws, they must conduct themselves in a manner consistent with longstanding spirit and intent of open government. Professionalism requires compliance with the norms of democracy, including access to public records and judicial transparency.[245] And of special relevance to the bar examiners, professionalism emphasizes the need for an educated public:

> "[L]awyer professionalism is . . . enhancing the legal system's reputation by educating the public about the profession's capabilities and limits, specifically about what the legal system can achieve and the appropriate methods of obtaining those results."[246]

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240. *See generally,* RESTATEMENT 3D, THE LAW GOVERNING LAWYERS, § 73; MODEL RULES R. 1.13.

241. *See* THE FLA. B., HENRY LATIMER CT. FOR PROFESSIONALISM, 2017-2019 PROFESSIONALISM HANDBOOK iv (Aug. 2017), https://www-media.floridabar.org/uploads/2017/04/ADA-2017-19-Professionalism-Handbook-FINAL.pdf [https://perma.cc/3MNB-TUMG] ("Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession.").

242. *See, e.g. Rules of the Supreme Court Relating to the Admission to the Bar 4-22 Pt. A(o),* FLA. BD. OF B. EXAM'RS (including professionalism as one of many tested subjects on the Florida Bar Examination).

243. AM. BD. OF TRIAL ADVOCS., CODE OF PROFESSIONALISM, https://www.abotamiami.com/code-of-professionalism/ [https://perma.cc/TFS7-8NHX] (last visited July 25, 2020).

244. *Id.*

245. *See supra* Part III.

246. *See, e.g.,* FLA. B. STANDING COMM. ON PROFESSIONALISM, PROFESSIONALISM EXPECTATIONS pmbl. Given Florida's own professionalism documents, and the state constitution requiring open government from the judiciary, *see supra* note 198, the Florida Board of Bar Examiners insistence upon absolute confidentiality is especially unprofessional. *But see* Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 FLA. ST. U. L. REV. 691 (2018), https://ir.law.fsu.edu/lr/vol44/iss2/6 [https://perma.cc/T5XS-SQCU] (last visited Apr. 3, 2021) (criticizing the Professionalism Expectations document because it blurs the distinctions between ethical mandates and professionalism's aspirations).

This educational quote describing the importance of professionalism comes from a document formally approved by the Florida Supreme Court.[247]

Excessively broad confidentiality rules do not conform with public education. Secrecy cannot enhance the legal system's reputation. As agents of the judiciary, state bar examiners should stop using overbroad confidentiality clauses. Reforming the rules would be an act of professionalism.

4. THE INFORMED CITIZEN AND THE PRESS

In democracies, an informed press is another important part of how governments ensure an informed citizenry. In the famous "Pentagon Papers" case, in which the Supreme Court rejected efforts to prevent the New York Times from publishing information about the Vietnam War, the Court quoted James Madison to declare the freedom of the press inviolable as "one of the great bulwarks of liberty":[248]

> In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.[249]

The judiciary routinely embraces the press as part of its effort to inform society. For example, in addition to publishing its opinions and allowing public attendance at oral arguments, the United States Supreme Court proactively uses a public information office to keep the media informed through orders, opinions, calendars, transcripts, audio files, and periodic updates.[250] To improve accuracy, it publishes "A Reporter's Guide" to carefully explain the court's procedures.[251] State supreme courts have similar mechanisms for public education.[252]

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247. *In re* Amends. to Code for Resolving Professionalism Complaints, 174 So. 3d 995 (Fla. 2015) (approving the Professionalism Expectations).

248. N.Y. Times Co. v. United States, 403 U.S. 713, 716 (1971) (citing 1 Annals of Cong. 434).

249. *Id*. at 717.

250. U.S. SUP. CT., THE PUB. INFO. OFF., https://www.supremecourt.gov/publicinfo/PIOServices.pdf [https://perma.cc/DAR4-V54V] (last visited July 23, 2020).

251. U.S. SUP. CT., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUP. CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/NX3R-HXA7] (last visited July 23, 2020).

252. *See, e.g., Access Guide to Public Records*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Administration/Section.cfm?Section=pubacag [https://perma.cc/K4JF-2LFC] (last visited Mar. 25, 2021); *Publ. Info. Off*., FLA. SUP. CT., https://www.floridasupremecourt.org/About-the-Court/Departments-of-the-Court/Public-Information [https://perma.cc/L5AB-HH7M] (last visited Mar. 25, 2021); *Media*, SUP. CT. OF GA., https://www.gasupreme.us/court-information/media/ [https://perma.cc/8DF2-T2GJ]; *Cameras in the Courtroom*, ILL. CT., http://illinoiscourts.gov/Media/Extended_Media/extended_media.asp [https://perma.cc/V45W-HB5E] (last visited Mar. 25, 2021).

Just as courts engage in media outreach, so do state bar organizations. In many states, a board of governors is the main decision-making body for the state bar.[253] Actions by these boards of governors,[254] like boards of bar examiners, can be sensitive. Confidentiality is maintained for matters involving the identity of people requesting ethics opinions,[255] investigations associated with disciplinary proceedings,[256] or evidence of a lawyer's treatment or counseling for dependency or other medical reasons.[257] But despite this confidentiality, state bar boards of governors also operate with a degree of transparency. Meeting dates, locations and agendas are announced.[258] Minutes of meetings are published.[259] Internal policies of the board of governors are published online.[260] And when a policy decision is controversial, the board of governors makes members aware of the issues.[261] In fact, at least *twenty* different state bars embrace online publication: sixteen states provide easy access to the minutes of the meetings for the board of governors by posting information online,[262] and four more states provide "members only" or searchable

253. Adrienne B. Koch, *The Case for Bar Associations: Why they matter*, A.B.A. JOURNAL (Feb 4, 2019), https://www.abajournal.com/voice/article/the-case-for-bar-associations [https://perma.cc/ZF53-S5SQ] (explaining many states have mandatory bar membership for their lawyers, with a powerful "integrated" or "uniform" state bar organization responsible for implementation of various laws governing lawyers); *cf.* Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994) (concluding there are no longer any advantages to a unified bar).

254. *See, e.g.*, THE FLA. BAR, RULES REGULATING THE FLA. B., BYLAWS OF THE FLA. B. 2-3.1 (July 20, 2020), https://www-media.floridabar.org/uploads/2020/07/Ch-2-2021_01-JUL-RRTFB-7-20-2020.pdf [https://perma.cc/C4FE-XL6T] (last visited Apr. 3, 2021) ("The board of governors shall be the governing body of The Florida Bar . . . [and] shall have the power and duty to administer the Rules Regulating The Florida Bar, including the power to employ necessary personnel . . . [and] shall be vested with exclusive power and authority to formulate, fix, determine, and adopt matters of policy concerning the activities, affairs, or organization of The Florida Bar.").

255. *Id.* at 2-9.4.

256. *Id.* at 3-7.1.

257. *Id.* at 3-7.10(g).

258. *See Board of Governors Agenda and Meetings*, THE FLA. B., https://www.floridabar.org/about/bog/bog-master-agenda/ [https://perma.cc/MR6F-CLEW] (last visited May 15, 2019).

259. *Meeting Summaries Index*, FLA. B., https://www.floridabar.org/about/bog/bog005/ [https://perma.cc/BJP5-VWRT] (last visited May 25, 2021); FLA. B., BD. OF GOVERNORS MINUTES, https://www.floridabar.org/about/bog/bog006/ [https://perma.cc/62FZ-JPHB] (last visited Mar. 25, 2021).

260. *Standing Board Policies*, FLA. B., https://www.floridabar.org/rules/policies/ [https://perma.cc/2FRL-7FHD] (last visited Mar. 25, 2021).

261. *Id.* at 1.6(d) (soliciting and encouraging public comment on proposed rules or policy amendments affecting its members by stating "[a] summary of each proposed amendment must be published in the bar News or on the bar website at least 2 weeks before final action is taken . . . [and] should adequately identify the matter under consideration and . . . [b]ar members and groups are encouraged to submit comments").

262. *See, e.g.*, *Past Meetings & Minutes*, ALA. ST. B., https://www.alabar.org/about/board-of-bar-commissioners/board-minutes/ [https://perma.cc/4YZD-N56L] (last visited July 23, 2020); *Meetings, Agendas, Action*, ALASKA B. ASS'N, https://alaskabar.org/for-lawyers/board-of-governors/meetingsagendasaction/ [https://perma.cc/W2FV-VK8S] (last visited July 23, 2020); *Board of Trustees Meeting Archive*, ST. B. CA., https://board.calbar.ca.gov/archive.aspx [https://perma.cc/V3VE-JRZM] (last visited July 23, 2020); *Meeting Schedule & Minutes*, WYO. ST. B., https://www.wyomingbar.org/about-us/meeting-minutes/ [https://perma.cc/2YY7-VM53] (last visited July 23, 2020).

access to records.[263] State bar organizations, as an agent of the judiciary, operate in a manner that respects judicial transparency.

In Florida, the Board of Legal Specialization and Education, another judicial agent and subset of the Florida Bar, shows precisely how the bar examiners could engage the media. "Board Certification" is a special credential that allows a lawyer to promote themselves as an expert in a niche within the practice of law.[264] The process parallels bar admission. Applicants for a bar license endure character and fitness investigations and a bar examination, whereas applicants for board certification withstand a peer review process and a specialization exam.[265] In contrast to the Board of Bar Examiners insistence upon absolute confidentiality, the Florida board certification process uses a limited approach to confidentiality: "All matters including but not limited to applications, references, tests and test scores, files, reports, investigations, hearings, findings, and recommendations shall be confidential so far as consistent with the effective administration of this plan, fairness to the applicant, and due process of law."[266]

This provision retains the reasonable concern for individual privacy and the integrity of the peer review and certification exam process.[267] Otherwise, when these testing and investigative concerns are not at stake, the Board of Legal Specialization and Education pursues transparency. Information is published online.[268] Public feedback is also encouraged.[269] A meeting calendar is maintained, meeting minutes are recorded.[270] When debates over certification policy occur in the Florida Bar, transparency *increases*, and the media is intentionally engaged in the process. Debates over rule changes, budgets, and other controversies appear in the media,[271] and a published annual report summarizes the

263. *See Board of Governors Minutes and Agendas*, ILL. ST. B. ASS'N, https://www.isba.org/leadership/bog/minutes [https://perma.cc/L7KC-YLJQ] (last visited July 23, 2020); *Board of Governors Meeting Schedule and Documents*, MD. ST. B. ASS'N, https://www.msba.org/about/leadership/board-of-governors/bog/ [https://perma.cc/P5TL-R9Y3] (last visited July 23, 2020); *Board of Governors Meeting Minutes*, N.H. B. ASS'N (Feb. 15, 2018), https://www.nhbar.org/wp-content/uploads/February-15-2018-DRAFT-Minutes-for-posting-1.pdf; *Sections & Committees*, N.Y. ST. B. ASS'N, https://archive.nysba.org/A01000/ [https://perma.cc/CS9L-MZZC] (last visited July 23, 2020).

264. THE FLA. B., RULES REGULATING THE FLA. B. 4-7.14 cmt. ("A lawyer can only state or imply that the lawyer is 'certified,' a 'specialist,' or an 'expert' in the actual area(s) of practice in which the lawyer is certified.").

265. THE FLA. B., RULES REGULATING THE FLA. B., LEGAL SPECIALIZATION & EDUC. PROGRAMS 6-3.5.

266. *Id.* 6-3.12.

267. The Florida Bar successfully fought for and preserved the confidentiality of peer review documents. *See, e.g.*, Zisser v. Fla. Bar, 630 F.3d 1336 (11th Cir. 2011), aff'g 747 F. Supp. 2d. 1303 (M.D. Fla. 2010).

268. THE FLA B., STANDING POL'YS OF THE BD. OF LEGAL SPECIALIZATION & EDUC. (2017), https://www-media.floridabar.org/uploads/2018/12/BLSE-Standing-Policies12-18.pdf [https://perma.cc/68J9-J54B].

269. *Id.* at 2.03 (encouraging a "poll of the appropriate section(s), division(s), and substantive law committee(s) of The Florida Bar for input" and a process to allow interested parties to respond).

270. *Id.* at 1.02.

271. *See, e.g.,* Jim Ash, *Board Amends Standards for Business Litigation Certification*, FLA. B. NEWS (Nov. 15, 2018) https://www.floridabar.org/the-florida-bar-news/board-amends-standards-for-business-litigation-certification/ [https://perma.cc/84QH-VBFG]; *Should the Bar Evaluate Third-Party Rating Services?*, FLA. B. NEWS, (Oct. 15, 2018) https://www.floridabar.org/the-florida-bar-news/should-the-bar-evaluate-third-party-

committee's work.[272] The Florida Bar operates both a newspaper and a journal, and its communications policy is committed to "publish member comments on matters of concern to the legal profession"—"even though they may involve controversial subjects or unpopular points of view."[273]

The courts respect the need for an informed press. The state bar organizations do, too. Only the bar examiners, it seems, insist on a sweeping doctrine of confidentiality.

III. BALANCING CONFIDENTIALITY AND TRANSPARENCY

Evidence from the states proves that bar examiners do not need rigid confidentiality to function. Courts have previously modeled the type of self-scrutiny needed to achieve reforms. Legislators have also engaged in confidentiality reforms. Bar examiners can and should rewrite their rules, using proactive measures to inform the citizenry, and narrowing confidentiality to be consistent with judicial principles, laws, and precedents.

A. JUDICIAL INTROSPECTION (OR LEGISLATIVE INVESTIGATION)

To ensure an informed citizenry, the state judiciaries should undertake self-scrutiny and seek greater candor and compliance from bar examiners. Precedent exists for such judicial introspection.

In a 2007 decision to amend the Florida Rules of Judicial Administration, the Supreme Court of Florida acknowledged the excessive misuse of confidentiality by the judiciary. At the time, the *Miami Herald* had uncovered evidence of more than 100 hidden cases and secret dockets, a practice that became known as "supersealing."[274] Acknowledging the errors that had been made, the Supreme Court launched an effort to amend its own rules.[275] Admitting that its practices "were clearly offensive to the spirit of laws and rules that ultimately rest on Florida's well-established public policy of government in the sunshine,"[276] the Florida Supreme Court issued an order to restrict future misuse of the judicial dockets that emphasized its

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rating-services/ [https://perma.cc/KAX8-V8U5]; Jim Ash, *Proposal Addresses Who May Call Themselves An 'Expert'*, FLA. BAR NEWS (Apr. 15, 2018), https://www.floridabar.org/the-florida-bar-news/proposal-addresses-who-may-call-themselves-an-expert/ [https://perma.cc/7KEP-C5P7]; Gary Blankenship, *BLSE Opposes Expanding The Use Of 'Specialist'*, FLA. B. NEWS (Mar. 15, 2014) https://www.floridabar.org/the-florida-bar-news/blse-opposes-expanding-the-use-of-specialist/ [https://perma.cc/L4AA-35Y9].

272. *Annual Reports of Committees of the Fla. Bar*, 92 FLA. B. J. 6, 70 (June 2018), available at https://www.floridabar.org/the-florida-bar-journal/annual-reports-of-committees-of-the-florida-bar-7/ [https://perma.cc/8V7X-Q8Q9].

273. *Standing Board Policies, Operational Policies of the Florida Bar, 13.10(e)*, FLA. B., https://www-media.floridabar.org/uploads/2021/03/2021_09-MAR-SBPs-3-5-2021.pdf [https://perma.cc/3J5L-E826] (last visited Mar. 27, 2021).

274. Patrick Danner & Dan Christensen, *Broward Court Cases Hidden From The Public*, MIAMI HERALD (February 27, 2008), https://www.miamiherald.com/latest-news/article1928858.html [https://perma.cc/Y57H-NRNW].

275. *In re* Amends. to Fla. R. of Jud. Admin. 2.420, 954 So.2d 16 (Fla. 2007).

276. *Id*. at 17.

commitment to transparency: "These procedures, which are intended for use in noncriminal cases, are adopted in the same spirit of openness and transparency that has informed the Court's case law and rules of procedure throughout its modern history."[277]

Adopting a commitment to transparency, Florida's judicial rules now *discourage* confidentiality: "To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential."[278]

When the Florida Supreme Court made these changes, it praised the media for exposing the problem:

> We conclude with an observation. This Court would never have learned of the concerns we seek to address here had it not been for the media. For that, Florida's media are to be commended. The pioneering broadcast journalist Edward R. Murrow is reported to have observed that the two things that truly distinguish a free society from all others are an independent judiciary and a free press. In this instance, the free press has shown its value to the people of Florida by helping the judiciary identify and quickly correct unintended practices that tended to undermine public trust and confidence in our courts.[279]

This article is written in a similar spirit, seeking to expand transparency to allow the correction of unintended practices.[280] The bar examiners instinctive insistence upon confidentiality is akin to the discredited supersealing of judicial dockets.

Secrecy does not prevent mistakes. California accidently revealed the tested subjects on an upcoming examination.[281] Bar applicants in the District of Columbia,[282] Georgia[283] and Ohio[284] received incorrect scores. Hackers breached

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277. *Id*. at 18.

278. FLA. R. JUD. ADMIN. 2.420.

279. *Id*.

280. *See, e.g.,* Tamara Tabo, *When Bar Scores Plummet, Who Will Examine the Examiners?,* ABOVE THE LAW (Nov 7, 2014), https://abovethelaw.com/2014/11/when-bar-scores-plummet-who-will-examine-the-examiners/ [https://perma.cc/YPB6-5GNH]; Jon Bolls, *Virginia Bar Exam: Lack Of Transparency*, JON BOLLS (Jan. 16, 2017), http://jonathanbolls.blogspot.com/2017/01/virginia-bar-exam-lack-of-transparency.html [https://perma.cc/3TR3-JWTY] (describing Virginia bar applicant complaints about essay scoring, but their inability to obtain any information).

281. *California State Bar Accidentally Releases Details of July Exam*, CBS SACRAMENTO (July 29, 2019), https://sacramento.cbslocal.com/2019/07/29/california-state-bar-exam/ [https://perma.cc/48KZ-TGFF].

282. Justin Wm. Moyer, *'Shock': 13 who thought they passed D.C. bar exam learn that they failed*, WASHINGTON POST (Jan. 25, 2019), https://www.washingtonpost.com/local/public-safety/shock-13-who-thought-they-passed-dc-bar-exam-learn-they-actually-failed/2019/01/24/d08541e4-1b41-11e9-afe1-7bd2532c9988_story.html [https://perma.cc/E64D-KVCH].

283. Karen Schwartz, *Georgia Bar Exam Mistake Takes Toll on 90 Law Students*, A.B.A. JOURNAL (Jan. 1, 2017), https://www.abajournal.com/magazine/article/georgia_bar_exam_mistake [https://perma.cc/4PZ6-46MK]; Steve King, *Local man suing company for incorrect bar exam results*, WJCL (Sept. 17, 2016), https://www.wjcl.com/article/local-man-suing-company-for-incorrect-bar-exam-results/3317129 [https://perma.cc/QT3J-SCDR] (describing complaints of bar examiner errors by false reporting failing scores have led to class action lawsuits).

284. Michael Higgins, *Scoring error skews bar-exam results*, CHI. TRIB. (May 9, 2003), https://www.chicagotribune.com/news/ct-xpm-2003-05-09-0305090108-story.html [https://perma.cc/5C9D-A6PS].

test taking software in Michigan,[285] and software failures have occurred in 43 states.[286] Florida bar examiners were accused of civil rights violations.[287] Perhaps some errors by the bar examiners can be explained and excused,[288] but excessive confidentiality marks a counterproductive policy that prevents inquiry and that undermines the bar examiners' own objectives of continuous improvement.[289]

Contrasting with the bar examiners' confidentiality focus, the judiciary often allows public observation and participation. State constitutional provisions guarantee an open court system.[290] Countless briefs filed in court can be viewed online.[291] During litigation, outsiders can intervene in the proceedings,[292] and interested persons may submit briefs to the courts as amicus curiae.[293]

Judicial transparency exists outside the context of litigation, too. Every state proclaims a right of access to judicial records.[294] Before adopting rules, in nearly every area of federal judicial rulemaking, the federal court system seeks public

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285. David Jesse, *Michigan Online Bar Exam Crashes in Middle of Testing; Hacking Attempt Blamed*, DET. FREE PRESS (July 28, 2020), https://www.freep.com/story/news/education/2020/07/28/michigan-online-bar-exam-crashes-test-examsoft/5526919002/ [https://perma.cc/57MM-E7ZD].

286. *See ExamSoft To Pay $2.1M To Settle 'Bar Exam Disaster' Claims*, LAW360, (May 6, 2015), https://www.law360.com/articles/652561/examsoft-to-pay-2-1m-to-settle-bar-exam-disaster-claims [https://perma.cc/653E-PFNY] (explaining how software failed to function properly during a bar examination, leading to a lawsuit and $2.1 million settlement); Elizabeth Olson, *After Glitches in Test, Law Graduates Who Took Bar Exam Offered a Small Consolation*, N.Y. TIMES (May 20, 2015), https://www.nytimes.com/2015/05/21/business/dealbook/after-glitches-in-test-law-graduates-who-took-bar-exam-offered-a-small-consolation.html [https://perma.cc/7MBJ-ZVTM].

287. *See* Stephanie Francis Ward, *ADA lawsuit about Florida bar examiners' mental health requirements allowed to proceed*, A.B.A J. (July 9, 2018), http://www.abajournal.com/news/article/ada_lawsuit_about_florida_bar_examiners_mental_health_requirements [https://perma.cc/L3NP-R5Z8] (describing suits over alleged Americans with Disabilities Act violations related to mental health inquiries have been filed in Louisiana and Florida).

288. Karen Sloan, *Everybody Goofs. More Bar Exam Blunders for the Ages*, LAW.COM (July 29, 2019), https://www.law.com/therecorder/2019/07/29/move-over-california-more-bar-exam-blunders-for-the-ages-403-37609/ [https://perma.cc/F2W2-86W7].

289. *Rules of the Supreme Court Relating to Admission to the Bar 1-33*, FLA. BD. OF B. EXAM'RS, https://www.floridabarexam.org/web/website.nsf/rule.xsp [https://perma.cc/M3PR-FWPB] (last visited Apr. 18, 2021) (mandating continuous improvement by stating "[a] board member should be conscientious, studious, thorough, and diligent in learning the methods, problems, and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration, and requirements for admission to the bar").

290. *See* discussion *supra* Part II.C.

291. *See, e.g.* Public Access to Court Electronic Records, https://pacer.uscourts.gov/ [https://perma.cc/HG42-KRKC] (last visited Mar. 25, 2021); *cf.* Natalie Gomez-Valez, *Internet Access to Court Records - Balancing Public Access and Privacy*, 51 LOY. L. REV. 365 (2005).

292. *See, e.g.*, FED. R. CIV. P. 24.

293. *See, e.g.*, FED. R. APP. P. 29; *cf.* Helen Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361 (2014–2015).

294. *See* Appendix III.

input through the Advisory Committees on Appellate, Bankruptcy, Civil Procedure, Criminal Procedure, and Evidence Rules.[295]

The judiciary need not use the same decision making or rulemaking systems as the executive branch,[296] and transparency procedures applied to the bar examiners can be customized and well-designed. Transparency can and should strive to eliminate public ignorance of the bar examiner process without subjecting the bar examiners to mass email campaigns[297] or an information overload.[298] Appendix II offers a proposed order that could begin that process of public engagement in Florida. The goal should be to create opportunities for meaningful, quality public scrutiny and input so that concerns can be identified beforehand and additional options and solutions can be found. Nevertheless, citizens can be partners with the government, and public participation is the essence of good governance.[299]

Embracing its history, the judiciary should restore its spirit of openness to the bar examiners. The highest courts in each state should direct the bar examiners of their states to pursue reforms and to implement transparency measures.[300] In each state, they should carefully compare the rules governing their bar examiners with the rules governing transparency in the rest of the judiciary, as summarized in Appendix I, and as explained in detail in Appendix III.[301]

If the judiciary does not implement reforms, then the state legislatures should act. Although constitutional disputes related to separation of powers may arise,[302] some state laws have already confronted these issues.[303] State legislatures can also pursue

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295. *See, e.g.,* 28 U.S.C. §2074 (Rules Enabling Act, authorizing the United States Supreme Court to engage in rulemaking to create procedural rules for the judiciary); *see generally How the Rulemaking Process Works*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/V5B7-V3K2] (last visited Mar. 25, 2021).

296. *See, e.g.*, Jeffrey Parness & Christopher Manthey, *Public Process and Ohio Supreme Court Rulemaking*, 28 CLEV. ST. L. REV. 249 (1979).

297. *See generally* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23–53 (2009).

298. *See generally,* Cynthia R. Farina, Paul Miller, Mary J. Newhart, Claire Cardie, Dan Cosley & Rebecca Vernon, *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 383 (2011).

299. *See generally* CITIZENS AS PARTNERS: OECD HANDBOOK ON INFORMATION, CONSULTATION AND PUBLIC PARTICIPATION IN POLICY-MAKING (2011) http://www.internationalbudget.org/wp-content/uploads/Citizens-as-Partners-OECD-Handbook.pdf [https://perma.cc/H932-3ZFH] (last visited Apr. 3, 2021).

300. *See generally* Appendix I.

301. *See infra* Appendix III.

302. MISS. SUP. CT., STATEMENT OF POL'Y REGARDING OPENNESS AND AVAILABILITY OF PUBLIC RECS. § 1 (Aug. 27, 2008) ("[T]he public interest is best served by open courts and by an independent judiciary . . . [but t]he judiciary of the State of Mississippi, as a separate and equal branch of the government, is not subject to the Mississippi Public Records Act."); *see also Separation of Powers—Legislative—Judicial Relations* , NAT'L CONF. ST. LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/legislative-judicial-relations.aspx [https://perma.cc/6W65-3CY7] (last visited Mar. 25, 2021).

303. *See infra* Appendix III (showing how legislative or executive branches contribute to the formation or operation of the bar examiners in Alabama, Connecticut, Maine, Massachusetts, Michigan, Nevada, North Carolina, and Virginia).

investigations[304] or engage in budgetary actions[305] to supervise or modify judicial conduct. Regardless of whether the call for action comes from the justices or the legislators, the result should be the same: increased bar examiner transparency.

B. LEARNING FROM TRANSPARENCY LEADERS

Bar examiner transparency is achievable. Justice Oliver Wendell Holmes observed long ago that the life of the law is not logic, but experience.[306] And when it comes to transparency laws, "experience" is now discoverable online, where government information is made readily available.[307] Accordingly, the author, aided by student researchers, evaluated the webpages of the fifty state bar examiners and sent public records requests across the nation. The evidence shows that, in a minority of states, bar examiner transparency exists, and that bar examiners can proactively share information with the public, respond to the public, and engage the public.

1. INFORMING THE PUBLIC

Based on a review of bar examiner webpages, five states distinguished themselves by using the internet to proactively communicate with the public about the activity of the bar examiners.

California, Connecticut, and Texas gave advance notice of the meetings and provided meeting minutes. California also provides the backup material reviewed by the board members at their meetings. In addition, although Arizona's webpages exclude the workings of the Committee of Character and Fitness and the Committee of Examinations, the Arizona Regulation Advisory Committee completes a periodic review of the entire bar admissions process, including an annual report,[308] and publishes its meetings, minutes, and workings online. Similarly, the Oregon State Board of Bar Examiners used online information to inform the

304. Gary Blankenship, *Senators question First DCA judges*, FLA. B. NEWS (Feb. 1, 2011) https://www.floridabar.org/the-florida-bar-news/senators-question-first-dca-judges/ [https://perma.cc/9S5E-XDQQ] (last visited Apr. 1, 2021).

305. Legislative Assaults on State Courts – 2019, BRENNAN CTR. FOR JUSTICE (Jan. 24, 2020) https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019 [https://perma.cc/4UGB-QJM6] (last visited Apr. 1, 2021).

306. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

307. Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277 (1998).

308. *See, e.g.*, Fla. Stat. § 25.382 (requiring an annual report on the recruitment, selection, promotion, and retention of minorities and outlining progress, problems, and corrective actions); Fla. Stat. § 29.0085 (annual statement of certain revenues and expenditures); *see also 2019 Year-End Report on the Federal Judiciary*, U.S. SUP. CT., (2019) https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf [https://perma.cc/973N-NJWL]; *Arizona Judiciary Annual Report Fiscal Year 2019*, ARIZ. JUD. BRANCH https://www.azcourts.gov/Portals/38/AnnualReportFY19.pdf [https://perma.cc/J7NL-W52A] (last visited Mar. 25, 2021); *Annual Report of The Nevada Judiciary Fiscal Year 2019*, NEV. JUDICIARY https://nvcourts.gov/Supreme/Reports/Annual_Reports/2019_Annual_Report/ [https://perma.cc/QJ5V-5M77] (last visited Mar. 25, 2021).

public of its Fitness Task Force seeking reform of its character and fitness process.[309] Unsurprisingly, all five of these states demonstrated a firm commitment to judicial transparency in their legal rules.[310]

Examples of State Bar Examiner Online Transparency						
State Bar Agency	**Public Notice**	**Meeting Agendas**	**Meeting Minutes**	**Backup Materials**	**Public Meetings**	**Annual Report**
Arizona Regulation Advisory Committee[311]	Yes	Yes	Yes	No	Yes	Yes
State Bar of California Committee of Bar Examiners[312]	Yes	Yes	Yes	Yes	Yes	No
Connecticut Bar Examining Committee[313]	Yes	Yes	Yes	No	Yes	No
Oregon State Board of Bar Examiners Task Force[314]	No	Yes	Yes	Yes	No	No
Texas Board of Law Examiners[315]	Yes	Yes	Yes	No	Yes	No

The affirmative publication of information online, such as meeting agenda, minutes, and supporting documents with explanations of the non-confidential matters, demonstrates a commitment to transparency. These types of disclosures are also the same types of information that Congress required administrative

309. *BBX Fitness Task Force*, OR. ST. B. TASK FORCE, https://taskforces.osbar.org/bbx-fitness-task-force/ [https://perma.cc/U7WA-3V8U] (last visited Mar. 25, 2021).

310. *See infra* Appendix I and Appendix III (noting that Connecticut does not have a clear process for making requests, but otherwise all these states embraced a right of access to information, a codified procedure for exercising that right of access, and an appellate process).

311. *Attorney Regulation Advisory Committee,* ARIZ. JUDICIARY BRANCH (2021), https://www.azcourts.gov/arc [https://perma.cc/X5P8-A4T8]; *Meetings,* Attorney Regulation Advisory Committee, ARIZ. JUDICIARY BRANCH (2001), https://www.azcourts.gov/arc/Materials [https://perma.cc/D22V-WWM6].

312. *Committee of Bar Examiners, Who We Are*, ST. B. OF CAL. (2021) http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Committee-of-Bar-Examiners [https://perma.cc/7TD4-L7LZ].

313. *Connecticut Bar Examining Committee*, CONN. JUD. BRANCH, https://www.jud.ct.gov/CBEC/ [https://perma.cc/6YAG-5Q5F] (last visited Mar. 25, 2021).

314. BBX Fitness Task Force, *supra* note 308.

315. *Home*, TEX. BD. OF LAW EXAM'RS (2021), https://ble.texas.gov/home [https://perma.cc/8A39-MR77] (last visited Apr. 3, 2021).

agencies to disclose in the Federal Advisory Committee Act.[316] As an additional benefit, by affirmatively and proactively publishing this material for the public, the bar examiners can reduce the need for public records requests.[317]

2. ANSWERING THE PUBLIC

For bar examiners that did not publish material online, the author sent a public records request asking for "a copy of the meeting agenda and backup materials" from the last two meetings.[318] The request stated that it did not seek "information regarding an individual's decision or test results."[319] In response, seven states sent some responsive materials: Alaska, Alabama, Colorado, North Carolina, Ohio, Texas, and Wisconsin.[320] Of note, both North Carolina and Texas provided substantial documentation, including backup material from their board meetings.[321]

Admittedly, responding to public records requests requires at least some staff time. That fact might explain why twenty-five states did not respond to the request at all.[322] (Other states denied the request or required additional follow

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316. Pursuant to FACA, 5 U.S.C. app. § 10(b), public records, reports, and meeting agendas should be maintained and made available to the public. In addition, detailed minutes of each meeting must be kept. *Id.* at § 10(c). If any portion of a meeting or record is kept confidential or closed to the public, then the agency must produce a written determination and explanation. *Id.* at § 10(d).

317. *See, e.g.*, St. of Fla. Exec. Order No. 07-01 (Jan 2, 2007) https://www.fdle.state.fl.us/Open-Government/Documents/EO0701outline.aspx [https://perma.cc/CL9K-MXSQ] (last visited Apr. 3, 2021) (issuing this Executive Order as his first action, former Fla. Governor Charlie Crist declared his commitment to a Code of Ethics and Personal Responsibility and compliance with ethics, public records, open meetings and personnel laws); *see also* Memorandum from Peter R. Orszag, Dir., Off. of Mgmt. and Budget, to Heads of Exec. Dep'ts and Agencies, Open Gov't Directive 1, 8 (Dec. 8, 2009), https://obamawhitehouse.archives.gov/open/documents/open-government-directive [https://perma.cc/CA2V-ZNVN] (last visited Apr. 3, 2021) (emphasizing the commitment of the Obama Administration to transparency).

318. The author and his research team sent a public records request to many of the state bar examiners, as follows:

> This message is a request for records regarding the State's Board of Bar Examiners procedure/processes in making decisions regarding an examinee's admission to the bar. Please send us a copy of the meeting agenda and backup materials (policy decisions for discussion) from meetings within the last two meetings. Please note that we are not requesting confidential information regarding an individual's admission decision or test results. In this request, we do not need physical copies if it is available in digital format. We thank you for your help in this matter.

319. *Id.*

320. *See* Email from April M. McMurrey, Colorado Supreme Court, Office of Attorney Regulation to barexaminersproject@gmail.com (April 23, 2019) (on file with author); Email from Allison Parks Bradley, North Carolina Board of Law Examiners to barexaminersproject@gmail.com (March 22, 2019) (on file with author); Letter from Tiffany Kline, Surpeme Court of Ohio (April 26, 2019) (on file with author); Email from Allan K. Cook, Texas Board of Law Examiner to bareexaminersproject@gmail.com (Mar. 27, 2019) (providing backup materials from the "board book"); Email from OnlineAdmissions@wicourts.gov, State of Wisconsin Board of Bar Examiners to barexaminersproject@gmail.com (Apr 10, 2019) (attaching open session agendas). According to the author's records, Alaska and Alabama sent a responsive letter and records in writing by U.S. mail, but the documents were inadvertently destroyed.

321. *Id.*

322. According to the author's records, bar examiners from Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New

up.)[323] While public records laws can be abused by mischievous citizens sending countless public records requests,[324] well-crafted rules can allow for public records requests, while also creating procedures to address the potential misuse of the public records process.[325] Appropriate exceptions to the public records laws can also limit the need to provide some materials and ensure that information in the applicant's files, and questions on the bar exam, are not public records.[326] Still, transparency is a basic principle of governance, and the evidence shows that bar examiners can respond to a reasonable request.

Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, and Washington did not respond to the public records request.

323. Email from Nancy Vincent, State of Illinois Board of Admissions to the Bar to barexaminersproject@gmail.com (denying request); email from Barry Garrison, State of Kansas Board of Law Examiners to barexaminersproject@gmail.com (Mar. 21, 2019) ("K.S.A. 45-221(a) (1) provides the authority to deny your KORA request under Kansas Supreme Court Rule 702."); email from Elizabeth S. Feamster, State of Kentucky Office Bar Admissions to barexaminersproject@gmail.com (Mar. 18, 2019) (denying request); email from Maudine G. Eckford, State of Mississippi Board of Bar Examiners to barexaminersproject@gmail.com (Apr. 16, 2019) (denying request); email from Andrea Spillars, J.D., State of Missouri Board of Law Examiners to barexaminersproject@gmail.com (Mar. 17, 2019) ("The materials requested are not public records pursuant to Missouri Supreme Court Operating Rules 20.02 and 2.02, as the Missouri Board of Law Examiners operates in a judicial capacity."); email from Brian Kunzi, State Bar of Nevada, to barexaminersproject@gmail.com (Mar. 27, 2019) (referring to procedures set forth in state rules); email from Sophie Martin, State of New Mexico Board of Bar Examiners to barexaminersproject@gmail.com (Feb. 27, 2019) (denying request); email from Penny Miller, State of North Dakota Board of Law Examiners to barexaminersproject@gmail.com (Apr. 9, 2019) (denying request); email from BLE.Administrator@tncourts.gov, State of Tennessee Board of Law Examiners to barexaminersproject@gmail.com (Mar. 26, 2019) (denying request); email from Madeleine Jaeck, State of West Virginia Board of Law Examiners to barexaminersproject@gmail.com (Mar. 27, 2019) (denying request); email from Cathy Duncil, State of Wyoming Judicial Branch to barexaminersproject@gmail.com (Mar. 26, 2019) (providing weblink to the Wyoming Supreme Court's Rules and Procedures Governing Admission to the Practice of Law, and stating that "The other documents you have requested are not available to the public"). According to the author's records, letters denying the request were also received from the State of New York Board of Law Examiners (denying request by letter dated Apr. 9, 2019) and State of Pennsylvania Board of Law Examiners, (denying request by letter dated Apr. 9, 2019), but these documents were inadvertently destroyed.

324. *See* Keith W. Rizzardi, *Sunburned: How Misuse Of The Public Records Laws Creates An Overburdened, More Expensive, And Less Transparent Government*, 44 STETSON L. REV. 425, 429 (2015) (summarizing public records laws and their misuses) (explaining how abuses of government in the sunshine laws can lead to "sunburn" because public records laws can: chill collegial decision-making and cause fewer meetings and less documentation, leading to reduced efficiency; encourage an overreliance on individual staff, force disclosure of sensitive information, and create barriers to honesty and compromise; and in the worst cases, reward the scofflaw who ignores the law, create large volumes of work for the scrupulous official who tries to precisely comply with the law, and ultimately breed contempt for the law). The Florida legislature amended the state public records laws, and requests filed for an improper purpose create the risk of attorney's fees. FLA. STAT. §119.12(3).

325. *Cf.* Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002) (discussing court's inherent authority to sanction bad faith conduct during litigation); *see also* Sarah Rissman Taitt, *Fla. Public Records Law: The Battle Over Attorney's Fees*, 91 FLA. B. J. 30 (March 2017), available at https://www.floridabar.org/the-florida-bar-journal/florida-public-records-law-the-battle-over-attorneys-fees/ [https://perma.cc/WK34-X99H] (last visited Apr. 3, 2021) (describing state laws that address bad faith conduct and attorney's fees).

326. *See, e.g.*, FLA. STAT. § 119.071 (2020) (listing exemptions to public records laws).

3. ENGAGING THE PUBLIC

To improve transparency, the bar examiners can also directly engage the public, especially by allowing for public input. Texas, as noted earlier, routinely allows for public input at its meetings, and has even provided livestream broadcasts of its discussions on YouTube with a special Zoom link for people seeking to speak at meetings.[327] Three more states deserve mention for their alternative approaches to engaging the public. Illinois allows bar examiners to hear the perspective of legal educators by including a law school dean as an ex officio member of the board.[328] (Florida expressly rejects this idea, alleging the potential for conflicts of interest.[329]) In both Arizona[330] and Minnesota,[331] the bar examiners allow for broader public input through a bar admissions advisory council. And in Minnesota, Nevada, Washington, and Utah, the state supreme courts respected, responded to, and sometimes solicited public comments and petitions seeking to replace bar admissions rules with a diploma privilege for law school graduates during the COVID pandemic.[332] This type of public input process need not be limited to specific events.

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327. *Emergency Board Meeting*, Comment to *All Announcements*, TEX. BD. OF LAW EXAM'RS, https://ble.texas.gov/news.action?id=201 [https://perma.cc/3UCS-LKND] (last visited Jan. 31, 2021).

328. ILL. SUP. CT. R. 702(a) ("[T]he Supreme Court shall appoint a dean of a law school located in Illinois as a nonvoting, ex officio member of the Board. The law school dean ex officio member shall serve a single term of three years.").

329. FL. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. r. 1-34 (viewing input from legal education professionals as tainted by conflicts of interest, stating that "[b]oard members should not have adverse interests, conflicting duties, inconsistent obligations, or improper considerations that will in any way interfere or appear to interfere with the proper administration of their functions . . . [and a] member of the board or a board member emeritus may not serve as . . . a regular or adjunct professor of law; an instructor, advisor or in any capacity related to a bar review course, or in other activities involved with preparation of applicants for bar admission; or as a member of the governing or other policy-making board or committee of a law school or the university of which it is a part).

330. Order for Establishment of the Attorney Regulation Advisory Committee and Appointment of Members (Ariz. May 4, 2011) (No. 2011-44).

331. MINN. ST. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE B. 19(A) ("There shall be an Advisory Council consisting of representatives of the Minnesota State Bar Association and of each of the Minnesota law schools to consult with the Board on matters of general policy concerning admissions to the bar, amendments to the Rules, and other matters related to the work of the Board.").

332. Order Denying Petition For Proposed Temporary Waiver Of Bar Examination Requirement And Provision Of Emergency Diploma Privilege (July 14, 2020) (No. ADM10-8008), https://www.ble.mn.gov/wp-content/uploads/2020/07/Administrative-Order.pdf [https://perma.cc/8Y9Q-YNXY]; Order *In Re* Matter of the July 2020 Nevada State Bar Bar Exam (Nev. Aug. 5, 2020) (No. ADKT 0558) https://images.law.com/contrib/content/uploads/documents/292/71902/Nevada-Bar-Exam-order-1.pdf [https://perma.cc/8APN-P2HU]; Karen Sloan, *Utah Becomes First State to Let Law Grads Skip Bar Exam Amid COVID-19* (April 22, 2020), LAW.COM https://www.law.com/2020/04/22/utah-becomes-first-state-to-let-law-grads-skip-bar-exam-amid-covid-19/#:~:text=Utah%20has%20officially%20become%20the,amid%20the%20COVID%2D19%20pandemic [https://perma.cc/2QE5-S3NA]; Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak, *In re*: Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar, (Utah April 21, 2020) https://images.law.com/contrib/content/uploads/documents/292/Utah-Bar-Exam-order.pdf [https://perma.cc/Z4EB-Y8DJ]; Karen Sloan, *Second State Lets Law Grads Skip the Bar Exam Amid COVID-19*, LAW.COM (June 15, 2020) https://www.law.com/2020/06/15/second-state-lets-law-grads-skips-the-bar-exam-amid-covid-19/ [https://perma.cc/5QKJ-2WGR]; Order Granting Diploma Privilege and Temporarily Modifying

The Supreme Court in Arizona, for example, has specifically encouraged public input to help its overall effort to enhance professionalism and to supervise the legal profession:

> The Committee shall review rules governing attorney examination, admissions, reinstatement, and the disability and disciplinary process and make recommendations to the Supreme Court on how these rules of the attorney regulation system can be revised to reinforce lawyer competency and professionalism and strengthen the Supreme Court's oversight of the regulation and practice of law in this state. The Committee may meet, conduct research, gather information, and hear public comment as it deems necessary to carry out this purpose.[333]

Once again, the evidence shows that transparency is possible. Bar examiners in Arizona, Illinois, Minnesota, and Texas have all found ways to receive feedback from the public, and state supreme courts have considered public comment related to the bar examiners. Secretive, closed door sessions need not be the norm.

C. REWRITE THE CONFIDENTIALITY RULES

The bar examiners' inward-oriented self-scrutiny, and outward efforts to inform, answer and engage the public, should be accompanied by a wholescale reform of a culture of secrecy. When revising the confidentiality rules, the bar examiners should consider Florida's history of modifications to its state public records law.

When Florida's public records laws became overburdened by an overabundance of exemptions, the Legislature passed the Open Government Sunset Review Act, and set forth four broad criteria to determine whether various exemptions from disclosure should be kept or eliminated.[334] All exemptions needed to serve an identifiable public purpose.[335] Next, an exemption allowing records to be confidential or otherwise exempt from public records act disclosures must be effective and efficient for the government.[336] In addition, justifiable

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Admission & Practice Rules, In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency (Wash. June 12, 2020) (No. 25700-B-630) http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%20Granting%20Diploma%20Privilege%20061220.pdf [https://perma.cc/H3Y4-DH23].

333. Order for Establishment of the Attorney Regulation Advisory Committee and Appointment of Members, *supra* note 329, at 1.

334. FLA. STAT. § 119.15 (2012).

335. *Id.* at § 119.15(6)(b) (emphasizing the need for a public purpose in support of any public records exemption, while requires those exemptions to be no broader than necessary, Florida law states: "An exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption").

336. *Id.* at § 119.15(6)(b)(1) (requiring that an exemption "[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption").

exceptions must be beneficial for individual privacy.[337] Finally, exemptions may be appropriate to protect a specific public interest or business process.[338] A review of bar examiner confidentiality could revisit and apply these same concepts:

Recommendation #1. Narrow the scope of bar examiner confidentiality. Not every action by the bar examiners should be confidential. Any assertions of exemptions from public access should be reevaluated to determine whether they are overbroad. The fundamental goal of the bar examiners – to protect the public – may at times require input from the public.

Recommendation #2. Use existing laws to shape effective and efficient governance. The transparency laws, rules, orders, and policies that exist elsewhere in the judiciary should be consulted. Every one of the 50 states claims to support judicial openness and transparency. Accordingly, the mandates and exemptions created by the bar examiners should be measured against the laws and policies that apply elsewhere.

Recommendation #3. Protect individual privacy. Any investigation of whether an individual with a blemished past should be admitted to the bar will produce documents that invade individual privacy. These documents reasonably necessitate confidentiality, but can be narrowly tailored. Again, existing laws show how privacy and public access can be balanced and protected.

Recommendation #4. Design exemptions to protect essential business processes related to investigations and examinations. In addition to privacy concerns, the bar examiners may need to retain confidentiality for its character and fitness investigations, or information related or examination questions. Once more, the existing laws, rules, and orders cited throughout this paper can inform the effort to provide appropriate exemptions from public access.

CONCLUSION: RECIPROCAL CANDOR

George Washington once observed that concealment of facts can bias a well-meaning mind, whereas "truth will ultimately prevail where pains [are] taken to bring it to light."[339] Bar examiners, echoing Washington, also describe painful truth as essential:

> A word of advice – an applicant's lack of candor can turn what might have been seen as a folly of youth or momentary lapse of judgment into a present,

337. *Id.* at § 119.15(6)(b)(2) ("Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.").

338. *Id.* at § 119.15(6)(b)(3) ("Protects information [such as] a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.").

339. Letter from George Washington to Charles Mynn Thruston, NAT'L ARCHIVES (Aug. 10, 1794), https://founders.archives.gov/documents/Washington/05-16-02-0376 [https://perma.cc/F6J5-KDYG].

> material issue of credibility and trustworthiness. No matter how embarrassing or trivial an event may seem, report it and tell the truth.[340]

If the public interest requires bar examiners to demand truth, candor, and full disclosure from the applicants, then the public interest can also demand reciprocal truth, candor, and partial disclosure from the bar examiners – no matter how embarrassing. In Florida, members of the board of bar examiners are encouraged to be "conscientious, studious, thorough, and diligent" in their efforts to "improve the [bar] examination, its administration, and requirements for admission to the bar."[341] Meanwhile, that same board insists upon secrecy and confidentiality that is, by definition, uninformed, cursory, and neglectful. The absolute exclusion of the public cannot improve the bar admission process. A modest degree of transparency—call it translucency—is achievable.

The bar examiners are not uniquely special. They are just another regulatory administrative agency, responsible for licensing a group of professionals. In the context of regulating the financial sector, Justice Louis Brandeis famously wrote that "[s]unlight is said to be the best of disinfectants."[342] The regulation of bar admission needs sunlight, too.

All fifty states acknowledge the bar examiners as serving a judicial role.[343] All fifty states acknowledge a right of access to judicial records.[344] Forty state constitutions ensure open access to the courts.[345] Courts and state bar organizations routinely use publications and public information officers to raise citizen awareness.[346] The bar examiners can and should be held to these transparency standards. In fact, the Texas Board of Bar Examiners achieves them, by proactively publishing material online, responding to public records requests, encouraging public input at meetings, and narrowly tailoring confidentiality rules to focus on the character or fitness of any applicant.

In contrast, the opacity of the Florida Board of Bar Examiners stands out as especially egregious.[347] Nearly thirty years ago, the people amended Florida's

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340. *Fla. Bar Admissions Process*, FLA. BD. OF B. EXAM'RS, https://www.floridabarexam.org/__85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/7d48930b13621e2c85257c0700752662 [https://perma.cc/R28E-AT68] (last visited April 1, 2020).

341. FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. r. 1-33 (2020) ("A board member should be conscientious, studious, thorough, and diligent in learning the methods, problems, and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration, and requirements for admission to the bar.").

342. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 103–05 (Frederick A. Stokes Co. 1914) (urging greater disclosure in the regulation of the financial industry).

343. *See supra* note 27 and accompanying text, and Appendix III.

344. *See infra* Appendix II, Column 2, and Appendix III.

345. *See supra* note 200 and accompanying text.

346. *See supra* Part III.B., III.C.3, and IV.B.

347. Oregon also deserves mention for its exemplary commitment to judicial transparency yet broad insistence that all bar examiner documents are confidential. Compare Or. Rev. Stat § 192.314(1) ("Every person has a right to inspect any public record of a public body in this state."), with *id.* at § 192.311(6) ("State agency means any state officer, department, board. . . or court."), with OR. ST. BD. OF B. EXAM'RS, SUP. CT. OF THE ST.

state constitution to mandate a right of access to records and expressly included the judiciary.[348] And nearly twenty years ago, the Florida Supreme Court amended its own Rules of Judicial Administration, and instructed each judicial branch entity to develop policies to respond to public records requests.[349] Florida's courts have declared open government crucial to its citizens,[350] and the Florida Bar and its board of governors engage in transparency.[351] Unbowed, the Florida Board of Bar Examiners still insists that nearly *everything* is confidential.

As many lawyers, law students, professors, and schools will attest, the unprecedented COVID pandemic has transformed legal education and to an extent, the entire legal profession. Yet self-serving declarations of confidentiality continue to immunize the bar examiners from inquiry, leaving the public uninformed about policy decisions, budgetary expenditures, conflicts of interest, and countless other potential concerns. Secretive meetings and procedures can no longer be justified, and debates over diploma privilege and the timing of the bar examination should be just the beginning. The justices of the state supreme courts, as supervisors of the bar admissions process, or the state legislatures, if necessary, should subject bar examiners to reasonable public scrutiny.

Government exists with the consent of the governed.[352] At a minimum, bar examiners should adhere to the same transparency laws and principles that govern the rest of our judiciary. To serve and empower an informed public, they should embrace the tools of transparency: public notice of meetings, with agendas and minutes; public attendance at meetings with public comment; annual reports and online information; responses to public records requests; advisory committees; and decisions based on an administrative record subject to meaningful review. Confidentiality should be narrowly tailored to focus upon the compelling interests of personal privacy and examination integrity. To maintain the trust of the legal community and the public as a whole, the bar examiners' excessive confidentiality rules must be repealed and reformed.

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of Or. Rules for Admission of Att'ys 2.15(1), https://www.osbar.org/_docs/rulesregs/admissions.pdf [https://perma.cc/TQF2-Z3V8] (last visited Mar. 30, 2021) ("Unless expressly authorized by the Court or by these rules, the Board shall not disclose any of its records, work product or proceedings in carrying out its duties.").

348. FLA. CONST. art. I, § 24.

349. FLA. R. JUD. ADMIN. 2.420; 2002 Commentary, https://www.flcourts.org/content/download/219096/1980522/RULE-2-420-Jan2014.pdf [https://perma.cc/8NHU-2CR3] (last visited Mar. 30, 2021).

350. *See* Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 492 (Fla. 2d Dist. Ct. App. 1990); *see also* Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1207 (Fla. 1st Dist. Ct. App. 2009); Miami Herald Media Co. v. Sarnoff, 971 So. 2d 915, 917 (Fla. 3d Dist. Ct. App 2007).

351. *Id.*

352. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 154 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("Thus we may see how probable it is that people that were naturally free, and by their own consent, either submitted to the government of their father, or united together, out of different families, to make a government, should generally put the rule into one man's hands, and choose to be under the conduct of a single person, without so much, as by express conditions, limiting or regulating his power, which they thought safe enough in his honesty and prudence . . . [a]nd thus much may suffice to show that, as far as we have any light from history, we have reason to conclude that all peaceful beginnings of government have been laid in the consent of the people.").

APPENDIX I: STATE-BY-STATE SUMMARY OF JUDICIAL AND BAR EXAMINER TRANSPARENCY

STATE	Judicial Transparency			Bar Examiner Transparency		Observations
	Right of Access	Codified Process	Right of Appeal	Assertion of Confidentiality in Rules	Published Online or Provided Records	
High levels of codified judicial transparency, some bar examiner disclosure						
Arizona, Ohio, Texas	Yes	Yes	Yes	Conditional	Yes	Bar examiners in populous or fast growing states can provide some transparency.
California, Oregon*	Yes	Yes	Yes	Broad	Yes	
Alaska, North Carolina	Yes	Yes	Yes	Silent	Yes	
Lower levels of codified judicial transparency, some bar examiner disclosure						
Alabama* Colorado	Yes	Yes	No	Conditional	Yes	Despite lower levels of judicial transparency, these states responded to requests for bar examiner records.
Connecticut	Yes	No	Yes	Broad	Yes	
High levels of codified judicial transparency, lower levels of bar examiner transparency						

STATE	Judicial Transparency			Bar Examiner Transparency		Observations
	Right of Access	Codified Process	Right of Appeal	Assertion of Confidentiality in Rules	Published Online or Provided Records	
Arkansas, Florida, Hawaii, Kansas, Maine, Maryland, Minnesota, New Jersey, Nevada North Dakota, Pennsylvania, Utah, Washington	Yes	Yes	Yes	Conditional	No	Despite judicial laws that strongly favored public access, these state bar examiners either did not respond or refused to disclose records in response to a request.
Delaware, Idaho, Kentucky, Missouri, Mississippi, West Virginia, Wyoming	Yes	Yes	Yes	Broad	No	
New York	Yes	Yes	Yes	Silent	No	

STATE	Judicial Transparency			Bar Examiner Transparency		Observations
	Right of Access	**Codified Process**	**Right of Appeal**	**Assertion of Confidentiality in Rules**	**Published Online or Provided Records**	
Lower levels of codified judicial transparency, and lower bar examiner transparency						
Iowa, Montana,* Oklahoma*, South Dakota, Vermont, Wisconsin*	Yes	Yes	No	Conditional	No	Although these states codified a right of access to some judicial records, and even though some engage in online publication of other types of judicial documents, their state bar examiners did not disclose records.
Illinois, Michigan, Nebraska, New Hampshire, New Mexico,* Rhode Island	Yes	Yes	No	Broad	No	
Massachusetts, Virginia	Yes	Yes	No	Silent	No	
Indiana, South Carolina	Yes	No	Yes	Broad	No	
Georgia, Louisiana, Tennessee	Yes	No	No	Broad	No	

* The asterisk for Alabama, Montana, New Mexico, Oklahoma, Oregon, and Wisconsin indicates that the state laws, rules or orders in these states include a reference to an online system that provides public access to judicial records.

Appendix III, available online at http://www.publishlinkhere.org provides citations and analysis for the specific legal provisions related to judicial transparency and bar examiners confidentiality in all fifty states.

APPENDIX II: A PROPOSED ORDER FOR THE SUPREME COURT OF FLORIDA

_____

No. SC__-____

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IN RE: RULES GOVERNING ADMISSION TO THE BAR

[Date]

The Florida Constitution provides for access to the courts, public meetings, and access to judicial records. Fla. Const. art. I, §§ 21, 23, and 24. In 2002, in its commentary to amendments of Rule 2.420, Rules of Judicial Administration, this court stated that "*each judicial branch entity* will have policies and procedures for responding to public records requests." Accordingly, the Supreme Court of Florida recognizes that these principles of governmental transparency should be applied to its judicial agents:

> In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare.

Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 116-117 (1988), *quoting In re Shortridge* (1893) 99 Cal. 526, 532 [34 P. 227]

This Court hereby instructs the Board of Bar Examiners to hold public meetings to discuss the Rules Regulating Admission to the Florida Bar, to advertise the meetings in the Florida Bar News, and to invite bar applicants, representatives from the law school communities, members of the state bar, and members of the public to attend or submit written comments. This public process should evaluate how the Board of Bar Examiners can provide notice of meetings, publish its agendas and documents, allow greater opportunity for public comment, and otherwise enhance transparency. After receiving public input, the Board of Bar Examiners shall propose changes to Rule 1-60, Rules of the Supreme Court Relating to Admissions to Bar. The proposed rules shall be no broader than necessary to protect the compelling governmental interests of protecting private personal information and the integrity and reliability of the bar examination.

The records generated by the Board of Bar Examiners during this process shall be made accessible to the public, and the public will be invited to submit comments about the proposed transparency rules to this Court before final rules are adopted.

APPENDIX III: JUDICIAL TRANSPARENCY AND BAR EXAMINER CONFIDENTIALITY IN THE UNITED STATES

The following pages analyze the judicial transparency laws and bar examiner confidentiality rules in each of the fifty United States. For each state, the analysis begins with a statement describing the bar examiners relationship to the judicial branch, and ends with a statement about the applicable bar examiner confidentiality rule for that state. In between those two points, it evaluates the judicial transparency laws of that state based on three categories: right of access, the process for making document requests, and the right of appeal. These three categories were measured as a (+) or a (-) for transparency. A positive (+) rating suggests that the relevant laws have a provision encouraging transparency, whereas a negative rating (-) suggests that the judiciary in those states may be less transparent. More specifically, States that had judicial rules showing a right of public access to judicial were given a positive rating (+), but earned a negative rating (-) if rules were silent on a right to access or otherwise extremely narrow. Similarly, states that provided procedures for exercising rights of access and making requests earned a positive rating (+); but states with no meaningful explanation of how to obtain records earned a negative rating (-). Finally, states with a process for seeing review or appeal of a denial of information earned a positive rating (+), but states with no review process, or extremely limited appellate rights, earned a low rating (-). When the analysis below was summarized in Appendix I, a (+) rating was listed as a "Yes" and a (-) rating was listed as a "No." In addition, the laws, rules or orders in some states include a specific reference to an online system that provides public access to judicial records, and this was captured both in the analysis text, and as an asterisk (*) next to the name of each state. Ultimately, this document shows that in every state, the bar examiners perform a wholly or partly judicial function, and that a right to judicial records exists. Nevertheless, forty-four states adopted provisions declaring the bar examiners actions and documents to be partly or wholly confidential.

Alabama (+ + -)*

In Alabama, the Alabama Board of Bar Examiners was created by the Legislature, and the members of the Board of Bar Examiners shall hold office at the pleasure of the Board of Commissioners of the Alabama State Bar. Ala. Code § 34-3-2 (1975); *see also* ALA. ST. B., RULES GOVERNING ADMISSION TO THE ALA. ST. B. 6a https://admissions.alabar.org/rule-6a. Those state bar members, in turn, are officers of the court irrespective of the fact that the state bar was created under the aegis of legislation. Alabama State Bar, *History of the Alabama State Bar,* https://www.alabar.org/about/culture/; *see also,* Ala. Ethics. Op. RO-2009-01, Ethical Obligations of a Lawyer When His Client Has Committed or Intends to Commit Perjury (discussion role of lawyers as officers of the court). The right of access to judicial records is addressed by the Alabama Public Records Law,

Ala. Code § 36-12-40 (1975), and Alabama earned a + for this category because the right is well-defined and presumptively allows access. *See* Ala. Code § 36012-40 (1975) ("Every citizen has a right to inspect and take a copy of any public writing of this state.") The procedure for access is addressed by the Alabama Rules of Judicial Administration, and Alabama earned a + in this category. *See* Ala. R. Jud. Admin. 33(C) ("The exclusive means of access . . . shall be through registration and subscription to programs created by or for the [Administrative Office of the Courts] . . . AlaCourt, AlaFile, AlaPay and AlaVault."). For this, Alabama earned a * for online judicial records. For the third category, Alabama earned a – because it has no process for appealing the denial of a record request. The rules for bar examiners in Alabama are largely silent on the issue of confidentiality and transparency, but do acknowledge the need for the retention of records and the possibility of review of those records. ALA. ST. B., RULES GOVERNING ADMISSION TO THE ALA. ST. B. IV(C), https://www.alabar.org/admissions/ (The Secretary . . . shall preserve in his or her office said application with the papers attached thereto, and other records in connection with the said application, all of which shall be kept on file until the examination is completed . . . for investigation and examination of the record by any person entitled thereto.").

Alaska (+ + +).

Bar admissions in Alaska is a judicial function. ALASKA CT. R., ALASKA B. RULE 9 (licensing the practice of law is a continuing proclamation by the Supreme Court, implemented by the Alaska Bar Association). The right of access to judicial records is addressed by. rules 37.5-37.8 of the Rules of Administration, and Alaska earned a + for this category because the right is well-defined and presumptively allows access. *See* Alaska R. of Admin 37.5 (d)(1) ("Court records are accessible to the public, except as provided . . . below."). The Alaska law further establishes a well-defined procedure for public access because it establishes well written guidelines, earning Alaska a + in this category. *See id.* at 37.5(f) ("Court records . . . shall be open to inspection at all times during regular office hours of the court."). For the third category, Alaska also earned a + because it has a well-defined process for appeal that involved judicial supervision, and did not require the immediate filing of an entirely new lawsuit. *See id*. at 37.7 ("Any request to allow access must be made in writing to the court and served on all parties to the case."). The rules related to bar examiners in Alaska are silent on confidentiality. ALASKA CT. R., ALASKA B. RULES Part I. Other rules related to lawyer regulation, however, provide for confidentiality of state bar documentation, the possibility of contempt for breaches of confidentiality, and a limited acknowledgement of a right to waiver or to allow public access. Id. at Rules 6, 7, 8, 21, 30 (https://public.courts.alaska.gov/web/rules/docs/bar.pdf.

Arizona (+ + +)

Bar admission in Arizona is a judicial function. ARIZ. R. SUP. CT. 33 (establishing and implementing the Rules for Admission of Applicants to The Practice of Law In Arizona through the Committee on Examinations, Committee on Character and Fitness); The right of access to judicial records is addressed by Rule 123 of the Rules of the Supreme Court of Arizona, and Arizona earned a + for this a well-defined right that presumptively allows access. *See* Ariz. R. Sup. Ct. 123(c)(1) ("[T]he records . . . of the judicial department . . . are presumed to be open to any member of the public."); *id.* at 123(d) ("All case records are open to the public.") https://govt.westlaw.com/azrules/Document/NFC83A66025C811E3A3DDB79419D1C223?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default). The Arizona law also establishes a well-defined procedure for public access because it allows for both oral and written requests, and also provides procedure for remote access, earning Arizona a + in this category. *See id.* at 123(f)(1) ("A request to inspect or obtain copies of records that are open to the public shall be made orally or in a written format acceptable to the custodian."); *id.* at 123(g)(1) ("A court may provide remote electronic access to case records as follows."). For the third category, Arizona also earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 123(f)(5) ("Any applicant who is denied access to or copies of any record . . . shall be entitled to an administrative review of that decision by the presiding judge . . . [and a]ny party aggrieved by the decision of the presiding judge or designee may seek review . . . pursuant to the Rules of Procedure for Special Actions."). Bar examiner applicant records are confidential in Arizona, but the rules enumerate exceptions and cross-reference public access requirements in Rule 29. ARIZ. R. SUP. CT. 37(c) https://govt.westlaw.com/azrules/Document/N446AD9E0E5A611E093C5850EDF8B51B5?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

Arkansas (+ + +)

Bar admission in Arkansas is a judicial function. ARK. ST. BD. OF L. EXAM'RS, ARK. RULES GOVERNING ADMISSION TO THE B 1 (creating and implementing Rules Governing Admission to The Bar through the State Board of Law Examiners); The right of access to judicial records is addressed by Administrative Order 19, and Arkansas earned a + for this category because the right is well-defined and presumptively allows access. *See* Ark. Admin. Order 19 § IV.A. ("Public access shall be granted to court records subject to the limitations . . . of this section."). The Arkansas law also establishes a well-defined procedure for public access because it allows for in-person, as well as remote access, and Arkansas earned a + in this category. *See id.* at § IX.A. ("Court records that are publicly accessible will be available . . . in the courthouse during regular business hours."). For the third category, Arkansas also earned a + because it has a well-

defined process for appeal that involved judicial supervision, and did not require the immediate filing of an entirely new lawsuit. *See id.* At § VIII ("Any requestor may make a verified written request to obtain access to information in a case . . . to which public access is prohibited . . . to the court having jurisdiction over the record."). Despite the emphasis upon judicial transparency, the bar examiners in Arkansas broadly assert confidentiality, with few exceptions. ARK. ST. BD. OF L. EXAM'RS, ARK. RULES GOVERNING ADMISSION TO THE B. III (broadly providing for confidentiality, while specifying limited circumstances for release of information and destruction of records), https://rules.arcourts.gov/w/ark/rules-governing-admission-to-the-bar.

California (+ + +)

Bar admission in California is a judicial function. ST. B. OF CALI., RULES OF THE ST. B. 4.1 (exercising inherent jurisdiction over the practice of law in California, including the Committee of Bar Examiners);The right of access to judicial records is addressed by Rule 10.500 of the California Rules of Court, and California earned a + for this category because the right is well-defined and presumptively allows access. *See* Cal. R. Ct. 10.500(e)(1)(A) ("A judicial branch entity must allow inspection and copying of judicial administrative records."). In fact, the right is broadly construed. *Id.* at 10.500(a)(2) ("This rule clarifies and expands the public's right of access to judicial administrative records and must be broadly construed."). The California law further establishes a well-defined procedure for public access because it provides the address and instruction to send a request, earning California a + in this category. *See id.* at 10.500(e)(3) ("A judicial branch must make available . . . [a]t a minimum, the procedure . . . to which requests are to be addressed, to whom requests are to be directs, and the office hours of the judicial branch entity."). For the third category, California also earned a + because it has a well-defined process for appeal that involved judicial supervision, and did not require the immediate filing of an entirely new lawsuit. *See id.* at 10.500(j) ("Any person may institute proceedings for . . . relief . . . in any court of competent jurisdiction to enforce his or her right to . . . record[s] under this rule."). Although state laws emphasize judicial transparency, all bar examiner records in California are confidential unless required to be disclosed by evidentiary or other laws. ST. B. OF CALI., RULES OF THE ST. B. 4.4 ("Applicant records are confidential unless required to be disclosed by law.") (citing EVID. CODE § 1040, BUS. & PROF. CODE §§ 6044.5, 6060.2, 6060.25, 6086, 6090.6), https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf.

Colorado (+ + -)

Bar admission in Colorado is a judicial function. COLO. SUP. CT., OFF. OF ATT'Y REG. COUNS., RULES GOVERNING ADMISSION TO THE PRACTICE OF L. 1 (supervising the Office of Attorney Admissions, Law Committee, and Board of

Law Examiners). The right of access to judicial records is addressed by the Chief Justice Directive (CJD) 05-01, and Colorado earned a + because the right is well-defined and presumptively allows access. *See* Colo. Jud. Dep't. Chief Justice Directive 05-01, Pub. Access to Ct. Recs. § 4.10 ("Information in the court record is accessible to the public.") https://www.courts.state.co.us/Courts/Supreme_Court/Directives/05-01_Amended%202016%20Oct18%20Web.pdf. The Colorado law also establishes a well-defined procedure for public access, and Colorado earned a + in this category. *See id.* at § 5.00(b) ("Court records will be available for public access in the courthouse during hours established by the court."). However, Colorado has no process for appealing denials of records, and earned a – in this category. Bar examiner documentation related to character and fitness, hearings, and applicant files are confidential, unless the hearing is made public by the applicant. COLO. SUP. CT., OFF. OF ATT'Y REG. COUNS., RULES GOVERNING ADMISSION TO THE PRACTICE OF L. 203.1, 211.1, http://www.coloradosupremecourt.com/PDF/BLE/201%20-%20Rules%20Governing%20Admission%20to%20Practice%20Law%20in%20Colorado.pdf

Connecticut (+ - +)

In Connecticut, bar admission includes a statutory requirement, but is a judicial function. CONN. GEN. STAT. §51-81b, (persons are admitted as attorneys in Connecticut by the judges of the Superior Court), ST. OF CONN. JUD. BRANCH, CONN. B. EXAMINING COMM., (the Connecticut Bar Examining Committee is part of the judicial branch) https://www.jud.ct.gov/CBEC/.A right of access to judicial records is protected by the its Freedom of Information Act, and Connecticut earned a + because the right is well-defined, and it preempts any agency rule that may be in conflict. *See* CONN. GEN. STAT. § 1-210(a) ("[A]ll records maintained or kept on file by any public agency . . . shall be public records . . . [a]nd [a]ny agency rule or regulation, or part thereof, that conflicts . . . or diminishes curtails in any way the rights granted by this subsection shall be void.") https://portal.ct.gov/-/media/FOI/The_FOI_ACT/2019FOIAincluding2019amendments.pdf. The Connecticut law, however, has no defined procedure for access, earning it a - in this category. *See id.* at § 1-212 ("Any person applying in writing shall receive, promptly upon request, a plain facsimile, electronic or certified copy of any public record."). For the third category, Connecticut earned a + because it had a well-defined process for appeal that involved review by an independent commission. *See id.* at § 1-206(b)(1) ("Any person denied the right to inspect or copy records . . . may appeal therefrom to the Freedom of Information Commission."). In Connecticut, although bar examiner records can be used for hearings, "Records and testimony regarding the applicant's fitness shall otherwise be kept confidential in all respects." CONN. B. EXAMINATION COMM., REGS. OF THE CONN. B. EXAMINING COMM. ART. VI-9, https://www.jud.ct.gov/cbec/regs.htm.

Delaware (+ + +)

Bar admission in Delaware is a judicial function. BD. OF B. EXAM'RS OF THE SUP. CT. OF DEL., RULES OF THE BD. OF B. EXAM'RS OF THE ST. OF DEL. 51-55 (creating and implementing the Rules of the Board of Bar Examiners). The right of access to judicial administrative records is addressed in the Administrative Office of the Courts Policy on Public Access to Administrative records, but records relating to cases is addressed by other authorities depending on the case type. *See* Del. Admin. Off. of the Ct. Pol'y on Pub. Access to Admin. Recs. Part I ("This policy applies to public access to administrative records of the [AOC] . . . [i]t does not apply to records of the Supreme Court, or other Court."); *id.* at III.A ("Requests for case records or case-related information shall be submitted directly to the applicable court or courts and not to the AOC."). https://courts.delaware.gov/help/docs/AOCPublicAccessPolicy.pdf. In all instances, the right of access is well-defined and presumptively allows access, earning Delaware a + in this category. *See, e.g., id.* at Part III.B. ("Administrative records of the AOC are open to the public except the following."); Admin. Dir. No. 2007-2, Pol'y on Pub. Access to the Ct. of Common Please Jud. Recs. Part I ("Generally, all case records and information are open to the public except as follows.") https://courts.delaware.gov/forms/download.aspx?id=56448; Justice of the Peace Ct. Pol'y on Pub. Access to Ct. Recs., Pol'y Dir. 14-250 ("It is the policy of the Justice of the Peace Court to support the presumption of open public access to court records.") https://courts.delaware.gov/help/recordaccess.aspx; Justice of the Peace Ct. Pol'y on Pub. Access to Admin. Recs., Pol'y Dir. 14-249 Part I ("Generally, all administrative records are open to the public except the following.") https://courts.delaware.gov/help/recordaccess.aspx; Pol'y on Pub. Access to Super. Ct. Jud. Recs., Admin. Dir. No. 2000-5 Part I ("Generally all case records are information open to the public except as provided herein.") https://courts.delaware.gov/Superior/pdf/AdministrativeDirective2000-5.pdf; Pol'y on Pub. Access to Sup. Ct. Admin. Recs., Admin. Dir. No. 167 Part III ("Administrative court records are open to the public except the following.") https://courts.delaware.gov/Supreme/AdmDir/ad167.pdf. The various laws also provide a well-defined procedure for access, and Delaware earned a + in this category. *See, e.g.,* Pol'y on Pub. Access to Sup. Ct. Admin. Recs., Admin. Dir. No. 167 Part IV.A.1 ("A request to inspect or obtain copies of administrative court records that are open to the public shall be made in writing addressed as follows."); Pol'y on Pub. Access to Super. Ct. Jud. Recs., Admin. Dir. No. 2000-5 Part III.1 ("A request to inspect or obtain copies of records that are open to the public shall be made to the custodian of the records in writing or orally."). For the third category, Delaware earned a + because the various rules provide a well-defined procedure for appealing the denial of access to public records. *See, e.g.,* Pol'y on Pub. Access to Super. Ct. Jud. Recs., Admin. Dir. No. 2000-5 Part III.5 ("If the custodian denies a request to inspect records, the denial may be appealed in writing to the Resident judge."); Pol'y on Pub. Access to Sup. Ct. Admin. Recs., Admin. Dir. No. 167 Part IV.C

("Appeals from decisions denying access to information shall be made to the Delaware Supreme Court within 10 business days from the date of that decision."). While Delaware state law emphasizes judicial transparency, the bar examiners documents are broadly deemed to be confidential. BD. OF B. EXAM'RS OF THE SUP. CT. OF DEL., RULES OF THE BD. OF B. EXAM'RS OF THE ST. OF DEL. 52 ("The Board shall keep confidential all information, documents and Board meetings or hearings concerning persons who apply for admission to the Bar. . ." but otherwise providing a narrow list of exceptions), https://courts.delaware.gov/forms/download.aspx?id=28408.

Florida (+ + +)

Bar admission in Florida is a judicial function. Fla. Const. art. V, § 15 (noting admission of attorneys to the practice of the profession of law is a judicial function); FLA. BD. OF BAR. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. 1-11 and 1-12 (noting the bar examiners are agents of the Florida Supreme Court); In Florida, the right of access to judicial records is addressed by rule 2.420 of the Florida Rules of Judicial Administration, and Florida earned a + for this category because the right is well-defined and presumptively allows access. *See* FLA. R. JUD. ADMIN. 2.420(a) ("The public shall have access to all records of the judicial branch of government.") https://www.flcourts.org/content/download/219096/1980522/RULE-2-420-Jan2014.pdf. The Florida law further establishes a well-defined procedure for public access, and Florida does not require the requestor to state the reasons for the request, earning Florida a + in this category. *Id.* at2.420(m) ("If the request is denied, the custodian shall state in writing the basis for the denial.") In fact, Florida provides comprehensive explanations for exclusions from public access, and also provides detailed procedure for how confidentiality is determined. *See id.* at 2.420(d). For the third category, Florida earned a + for its well-defined process for appeal that involved judicial supervision. That process did not require the immediate filing of an entirely new lawsuit. *Id.* at 2.420(j) ([B]y filing a written motion which must: identify the particular court record . . . specify the bases . . . set forth the specific legal authority . . . and contain a certification that the motion was made in good faith."). Despite the state's commitment to judicial transparency, the Florida Board of Bar Examiners considers all records to be confidential, with only selected documents being available. FLA. BD. OF B. EXAM'RS, RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE B. Rule 1-60 ("1-61 Confidentiality. All information maintained by the board in the discharge of the responsibilities delegated to it by the Supreme Court of Florida is confidential, except as provided by these rules or otherwise authorized by the court."); *see also* 1-61.

Georgia (+ - -)

Bar Admission in Georgia is a judicial function. SUP. CT. OF GA., OFF. OF B. ADMISSIONS, RULES GOVERNING ADMISSION TO THE PRACTICE OF L. (Rules promulgated by the Supreme Court of Georgia create two separate and distinct boards, the Board to Determine Fitness of Bar Applicants and the Board of Bar Examiners, and a member of the Court serves as Chair of the Bar Examiners.), The right of access to judicial records is addressed by Rule 21 of the Superior Court Uniform Rules, and Georgia earned a + for this category because the right is well-defined and presumptively allows access. Super. Ct. of the St. of Ga. Uniform Rules 21 ("All court records are public and are to be available for public inspection unless public access is limited by law.") https://www.cobbsuperiorcourtclerk.com/wp-content/uploads/2018/02/Superior-Court-Uniform-Rules-2017.pdf. Georgia has no defined procedure for public access, leaving the implementation of the right of access uncertain, earning it a – in this category. *See id.* For the third category, Georgia also earned a – because its process for review only allows the parties to a civil suit to appeal denials. *See id.* at 21.4 ("An order limiting access may be reviewed by interlocutory application to [our] Supreme Court."). The bar examiners in Georgia broadly assert confidentiality, with few exceptions. SUP. CT. OF GA., OFF. OF B. ADMISSIONS, RULES GOVERNING ADMISSION TO THE PRACTICE OF L., PART F § 4 (establishing confidentiality of applicant files and declaring that a limited group of documents, "and no others, shall be maintained as public records"); also noting a limit to public information on appeal in Part F §8 ("Although the bar admissions file shall be a confidential record during the appeal process, the docketing information shall be a public record."), https://www.gabaradmissions.org/rules-governing-admission.

Hawaii (+ + +)

Bar admission in Hawaii is a judicial function. HAW. BD. OF B. EXAM'RS RULES OF P. (adopting and promulgating the Hawai'i Board of Bar Examiners Rules of Procedure), https://www.courts.state.hi.us/docs/court_rules/rules/hbbe.pdf. The right of access to judicial records is addressed by rule 10 of the Hawaii Court Records Rules, and Hawaii earned a + for this category because the right is well-defined and presumptively allows access. *See* Haw. Ct. Rec. R. 10.1 ("[R]ecords shall be accessible during regular business hours.") https://www.courts.state.hi.us/docs/court_rules/rules/hcrr.pdf. Additionally, the Hawaii law has well-defined procedures for public access, earning Hawaii a + in this category. *See id.* at 10.2 ("Electronic case management systems . . . may be made available . . . without compromising the integrity of the [systems] and data bases."). For the third category, Hawaii also earned a + because it has a well-defined procedure for appealing the denial of public access. *See id.* at 10.15 ("A person may seek review of a denial . . . by petitioning to the supreme court, in accordance with Rule 21 of the Hawaii Rules of Appellate Procedure."). Despite the requirements of judicial transparency, the bar examiners in Hawaii make broad assertions of

confidentiality. RULES OF THE SUP. CT. OF THE ST. OF HAW. 1.3(g)(5), https://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm#1.3 ("Unless otherwise ordered by the supreme court, the files, records and proceedings of the Board are confidential. . ."); HAW. BD. OF B. EXAM'RS REOF P. § 1.12, https://www.courts.state.hi.us/docs/court_rules/rules/hbbe.htm#Section_1.12.

Idaho (+ + +)

Bar admission in Idaho is a judicial function. IDAHO B. COMM'N, RULES GOVERNING ADMISSION TO PRACTICE AND MEMBERSHIP IN THE IDAHO ST. B. (promulgating these rules by the Board of Commissioners of the Idaho State Bar and adopted by Order of the Supreme Court of the State of Idaho) https://isb.idaho.gov/wp-content/uploads/ibcr_sec02_admissions.pdf. The right of access to judicial records is addressed by Idaho Court Administrative Rule 32, and Idaho earned a + for this category because the right is well-defined and presumptively allows access. *See* IDAHO CT. ADMIN. RULES 32(a) ("The public has a right to access the judicial department's declaration of law and public policy, and to access the records of all proceedings open to the public.") https://isc.idaho.gov/icar32. The Idaho law also establishes a well-defined procedure for public access, because the rule gives the public various ways to access records, earning Idaho a + in this category. *See id.* at 32(j) ("Any person desiring to inspect, examine or copy physical records shall make an oral or written request to the custodian."). For the third category, Idaho further earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 32(j)(7) ("If a custodian denies a request for the examination or copying of records, the aggrieved party may file a request for a ruling by the custodian judge."). Despite the state commitment to judicial transparency, the legal rules for the bar examiners in Idaho declare all documents confidential unless waived by the applicant. IDAHO B. COMM'N, RULES GOVERNING ADMISSION TO PRACTICE AND MEMBERSHIP IN THE IDAHO ST. B. Rule 212 (confidentiality of condititional admissions documents), Rule 223 ("all documents, records and hearings relating to Applications shall be confidential and not disclosed unless the Applicant waives such confidentiality"), https://isb.idaho.gov/about-us/governance/ibcr/.

Illinois (+ + -)

Bar admission in Illinois is a judicial function. ILL. SUP. CT. R. 701, 702 (noting that persons may be admitted or conditionally admitted to practice law in Illinois by the Supreme Court). A right of access to judicial records exists, so Illinois earned a + for this category because the right is well-defined and presumptively allows access. *See* Elec. Access Pol'y for Cir. Ct. Recs. Of the Ill. Ct. § 4.10(a) ("Information in the electronic court record is accessible to the public, except as provided by [law].") https://courts.illinois.gov/SupremeCourt/Policies/Pdf/PubAccess.pdf. Illinois has procedures for public access, too, and allows for

additional local rules, earning it a + in this category. *See id.* at § 4.3(a) ("Requests for inspection must be made in person at the office of the Clerk of Court."); *id.* at § 5.0 ("(Electronic court records under this policy will be available as established by local rule, subject to unexpected technical failures."). For the third category, however, Illinois earned a - because it had no form of process for appeals of denials of public access. Despite the state's emphasis upon judicial transparency, the bar examiners in Illinois broadly assert confidentiality, with limited exceptions. ILL. SUP. CT. R. 797 ("All files, records and proceedings of the Board must be kept confidential, and may not be disclosed except (a) in furtherance of the duties of the Board, (b) upon written request and consent of the persons affected, (c) pursuant to a proper subpoena duces tecum, or (d) as ordered by a court of competent jurisdiction.") http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/default.asp.

Indiana (+ - +)

Bar admission in Indiana is a judicial function. IND. RULES OF CT., RULES FOR ADMISSION TO THE B. AND THE DISCIPLINE OF ATT'YS Rule 3 § 1 (noting that the Supreme Court shall have exclusive jurisdiction to admit attorneys to practice in Indiana). The right of access to judicial records is addressed by the Rules on Access to Court Records, and Indiana earned a + for this category because the right is well-defined and presumptively allows access. *See* Rules on Access to Ct. Recs. 2(A) ("All persons have access to Court Records as provided in this rule."); *id.* at 4(A) ("A Court Record is accessible to the public except as provided in Rule 5.") https://www.in.gov/judiciary/rules/records/index.html#_Toc27580962. The Indiana law has no defined procedure for public access, leaving the implementation of the right of access uncertain, earning it a – in this category. For the third category, Indiana further earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 9(A) ("A Court Record that is excluded from Public Access under this rule may be made accessible if . . . ."); *id.* at 9(B) ("A Court Record that is excluded from Public Access under this rule may also be made accessible provided that the following four conditions are met."). The bar examiners in Indiana, however, broadly assert confidentiality, with few exceptions. IND. RULES OF CT., RULES FOR ADMISSION TO THE B. AND THE DISCIPLINE OF ATT'YS Rule 19, Section 1: "All information and all records obtained and maintained by the Board of Law Examiners in the performance of its duty under these rules and as delegated by the Supreme Court of Indiana shall be confidential, except as otherwise provided by these rules, or by order of (or as otherwise authorized by) the Supreme Court of Indiana." https://www.in.gov/judiciary/rules/ad_dis/.

Iowa (+ + -)

Bar admission in Iowa is a judicial function. IOWA CT. RULES 31.11 (stating that the Iowa Board of Law Examiners, appointed by the Iowa Supreme Court,

reviews qualifications of applicants for admission to practice law in Iowa, and the Supreme Court reviews the actions of the board). The right of access to judicial records is discussed in Rule 16.5 of the Iowa Rules of Electronic Procedure, and Iowa earned a + for this category because the right is well-defined and presumptively allows access. *See* Iowa Rules of Elec. Proc. 16.501 ("All filings in the Iowa court system are public unless restricted or filed with restricted access.") https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/16.pdf, Iowa establishes a well-defined procedure for public access, because it directs the public where to go to access court records, and Iowa earned a + in this category. *See id.* at 16.502(4)(a) ("Members of the general public may view electronic documents in public cases at public access terminals."). For the third category. Iowa also earned a – because it has no meaningful process for appealing denials, and the provision relates only to personal privacy protection concerns. *See id.* at .16.601 (2)(c) ("The court will resolve any disagreement on the designation of protected information."). Rules for bar examiners in Iowa leave discretion as to whether documents should be designated as confidential, and acknowledge that some portion of the documents are public records. IOWA CT. RULES 31.2 ("The board may designate data submitted as a confidential record. Any confidential data must be segregated by the board and the assistant director from the portion of the registration filed as a public record."), https://www.legis.iowa.gov/law/courtRules/courtRulesListings.

Kansas (+ + +)

Bar admission in Kansas is a judicial function. KAN. SUP. CT. R. 701B (adopting Rules Relating to Admission of Attorneys, as implemented by an Admissions Review Committee); The right of access to judicial records is addressed by Rule 196 of the Kansas Rules Relating to District Courts, and Kansas earned a + for this category because the right is well-defined and presumptively allows access. *See* Kan. R. Rel. Dist. Ct. 196(c)(1) ("All persons have access to electronic case records provided in this rule.") https://casetext.com/rule/kansas-court-rules/kansas-rules-relating-to-district-courts/post-trial-matters/rule-196-public-access-to-district-court-electronic-case-records. Kansas also has a well-defined procedure for access, earning Kansas another + in this category. *See id.* at 196(b)(3) ("[E]lectronic case records . . . will be available at each respective courthouse through the use of a public access terminal."); *id.* at 196(d)(4) ("Electronic case records will be available . . . in the courthouse during regular business hours."). For the third category, Kansas earned another + because it has a clear process for appealing denials. *See id.* at 196(d)(3) ("A district court may seek authority to provide other information by making a written request to the judicial administrator, who will make a recommendation on the request and forward it to the Supreme Court."). Despite the state emphasis on judicial transparency, the bar examiners in Kansas broadly assert confidentiality, with limited exceptions, and Kansas specifies that only two categories of bar examiners documents are public

records: "(1) With respect to application for admission to the bar, the name, address, and educational achievement of each applicant. (2) With respect to each written examination required for admission to the bar: (i) The names and addresses of persons who passed the examination and have met all the requirements for admission to the bar [and] (ii) Such statistical summaries as may be specifically authorized by the Supreme Court." KAN. SUP. CT. R. 702, https://www.kscourts.org/KSCourts/media/KsCourts/Rules/Website-Rulebook.pdf.

Kentucky (+ + +)

Bar admission in Kentucky is a judicial function. KY SUP. CT. R. 2.000 (noting that the Kentucky Board of Bar Examiners, and the Character and Fitness Committee, subject to the approval of the Supreme Court, have the power to adopt and amend rules and regulations governing the manner in which each carries out its duties). A right of access to court records is addressed by the Open Records Policy of the Administrative Office of the Courts. *See* ADMIN. PROC. OF THE CT. OF JUSTICE, OPEN RECS. POL'Y OF THE ADMIN. OFF. OF THE CT., https://govt.westlaw.com/kyrules/Browse/Home/Kentucky/KentuckyCourtRules/KentuckyStatutesCourtRules?guid=NFFB52390349911E5A4EAD9CB0F4DCFE9&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default). Kentucky earned a + for right of access because it is well-defined and presumptively allows access. *See id.* at Part XVII § 4(1) ("Administrative records . . . are open for public access except the following.").The Kentucky rule also establishes a well-defined procedure for public access, because it specifies that requests must be made according to a specific writing, earning Kentucky a + in this category. *See id.* at § 6 ("All requests for public access to administrative records must be in writing."). For the third category, Kentucky further earned a + because it has a well-defined process for appeal that involved judicial supervision, and did not require the immediate filing of an entirely new lawsuit. *See id.* at § 7 (1) ("A request for reconsideration of a decision denying access . . . may be made to the Chief Justice of Kentucky . . . within 30 days from the date of decision."). The bar examiners, however, retain confidentiality for information with respect to the character and fitness or the examination results. KY SUP. CT. R. 2.008.

Louisiana (+ - -)

Bar admission in Louisiana is a judicial function. LA. SUP. CT. ADMIN. R. PT. B Rule XVII (noting constitutional authority to regulate the admission of qualified applicants to the bar, as administered by the Committee on Bar Admissions of the Supreme Court of Louisiana). A right of access to judicial records is addressed by Title 1 of the Louisiana District Court Rules, and Louisiana earned a + for this category because the right is well-defined and presumptively allows access. *See* La. Dist. Ct. R. 6.4 standard 1.1 ("The court conducts openly its judicial proceedings that are public by law or custom.") https://www.lasc.org/District_Court_Rules?p=TitleI. The Louisiana law, however, has no defined

procedure for access, and Louisiana earned a – in this category. *See id.* at 6.4 standard 2.2 ("The trial court promptly provides required reports and responds to requests for information."). Louisiana also earned a – because the law does not provide the right to appeal the denial of access to public records. The bar examiners in Louisiana broadly assert confidentiality, with limited exceptions. LA. SUP. CT. ADMIN. R. PT. B § 1(G) ("The files of applicants for admission and the internal proceedings of the Committee concerning an applicant for admission shall be kept confidential") with limited exceptions https://www.lasc.org/Supreme_Court_Rules?p=RuleXVII.

Maine (+ + +)

In Maine, bar admission involves both the Executive and Judicial branch. The Board of Bar Examiners consists of seven lawyers of the State licensed to practice law in Maine, appointed by the Governor on the recommendation of the Supreme Judicial Court, and two additional representatives of the public selected by the Governor. ME. BD. OF B. EXAM'RS, ME. B. ADMISSION RULES 3(a), https://mainebarexaminers.org/wp/wp-content/uploads/2017/09/Fully-amended-MBAR-0517-TOC-amended-0917.pdf The right of access to judicial records is addressed through an Administrative Order of the Chief Justice, and Maine earned a + for this category because the right is well-defined and presumptively allows access. *See* ST. OF ME. JUD. CT. ADMIN. ORDER JB-05-20 Part I. ("It is the policy of the Judicial Branch to provide meaningful access to court . . . information to the public.") https://www.courts.maine.gov/rules_adminorders/adminorders/JB-05-20.html. The order also establishes a well-defined procedure for public access, because procedures are in place for both in person access or by mail, and Maine earned a + in this category. *See id.* at Part III(A)(1) ("[R]ecords relating to cases . . . are generally public and access will be provided to a person who requests to inspect them . . . [but d]ue to the risk of misunderstanding . . . it is the policy of the Judicial Branch to carefully limit the release of information by telephone."). For the third category, Maine further earned a + because it had some form of process for appealing the denial of public access to records. *See id.* at Part III(A)(2)("Requests for inspection of confidential materials . . . must be made by motion . . . as provided in the Maine Rules of Civil Procedure."). Although the state emphasizes judicial transparency, bar examiner documents in Maine are generally confidential unless disclosure to the applicant is needed. ME. BD. OF B. EXAM'RS, ME. B. ADMISSION RULES 7 (favoring disclosure of information to the applicant), Rule 9(d) (providing confidentiality of applicant hearings) and Rule 9A (protecting confidentiality of information related to conditional admission), https://mainebarexaminers.org/wp/wp-content/uploads/2017/09/Fully-amended-MBAR-0517-TOC-amended-0917.pdf.

Maryland (+ + +)

Bar admission in Maryland is a judicial function. MD. R. 19-102 (stating that the State Board of Law Examiners coordinates the receipt and filing of

applications for admission to the Maryland bar, and recommends qualified candidates to the Court of Appeals of Maryland). The right of access to judicial records is addressed by Title 16 of the Maryland Rules of Procedure, and Maryland earned a + for this category because the right is well-defined and presumptively allows access. *See* Md. R. 16-902(a) ("Court records . . . are presumed to be open to the public for inspection.") https://mdcourts.gov/sites/default/files/rules/reports/178thsupplementpart1markup.pdf. The rule also establishes a well-defined procedure for public access, because it addressed paper copies, and electronic access, earning Maryland a + in this category. *See id.* at 16-903 ("[A] person entitled to inspect a court record is entitled to have a copy or printout."); *see also id.* at 16-909 ("[A] court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form."). For the third category, Maryland also earned a + because it has a well-defined process for appeal that involved judicial supervision, and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 16-912(a) ("[T]he custodian . . . shall apply in writing for a preliminary judicial determination whether the court record is subject to inspection."). In Maryland, despite the state's usual emphasis on judicial transparency, bar examiner documents are broadly made confidential: "Except as provided in sections (b), (c), and (d) of this Rule, the proceedings before the Accommodations Review Committee and its panels, a Character Committee, and the Board, including related papers, evidence, and information, are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure." MD. R. 19-105(a); see also, 19-105(d)(4)(appellate records are confidential), https://www.courts.state.md.us/sites/default/files/import/ble/pdfs/baradmissionrules.pdf.

Massachusetts (+ + -)

In Massachusetts, state legislation and judicial rules shape the board of bar examiners, who are appointed and supervised by the state judicial court. *See* MASS. GEN. LAWS ch. 221 § 35, https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleI/Chapter221/Section35; MASS. SUP. JUD. CT. R. 3:01 §7, available at https://www.mass.gov/files/documents/2018/01/08/bbe-rules-2018.pdf. The Trial Court Uniform Rules on Public Access to Court Records addresses judicial transparency. *See* UNIFORM RULES ON PUB. ACCESS TO CT. RECS. https://www.mass.gov/files/documents/2018/06/29/trial-court-rule-xiv-july-2018.pdf. The right of access is addressed by Rule 2, and Massachusetts earned a + for this category because the right is well-defined and presumptively allows access. *See id.* at 2(b) ("Any member of the public may submit to the Clerk . . . a request to access a court record."). The Massachusetts law also establishes a well-defined procedure for public access, because it provides for formal and non-formal ways to request, earning Massachusetts a + in this category. *See id.* ("The Chief Justice of each Trial Court Department may determine whether to require a written form for all requests."). For the third category, however, Massachusetts earned a – because it

has no clear process for appealing denials. In Massachusetts, the bar examiners rules are silent on confidentiality. MASS. SUP. JUD. CT. R. 3:01, https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-rule-301-attorneys.

Michigan (+ + -)

In Michigan, the State Legislature created a Board of Law Examiners (BLE), with members nominated by the Supreme Court and appointed by the Governor. See MICH. COMP. LAWS § 600.934 (1961). See also, Mich. Cts., Board of Law Examiners, https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Pages/default.aspx. In Michigan, the right of access to judicial records is addressed by the Michigan Court Rules, and Michigan earned a + for this category because the right is well-defined and presumptively allows access. *See* Mich. Ct. R. 8.119(H) ("A court may provide access to the public case history information through a publicly accessible website . . . however, all other public information in its case files may be provided through electronic means only upon request.") https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/CRs/Ch%208/Court%20Rules%20Book%20Ch%208-Responsive%20HTML5/index.html#t=Court_Rules_Book_Ch_8%2FCourt_Rules_Chapter_8%2FCourt_Rules_Chapter_8.htm. The Michigan law also establishes a well-defined procedure for public access, and Michigan earned a + in this category. *See id.* at 8.119(J)(3) ("The court may provide access to its public case records in any medium authorized by the records reproduction act."). For the third category, Michigan also earned a – because it has no clear process for appealing denials. Michigan broadly declares bar examiner records to be confidential. MICH. SUP. CT, BD. OF L. EXAM'RS, RULES, STATUTES, AND POL'Y STATEMENTS 600.928-1 ("Board meetings are not open to the public."); *id.* at 600.928-2 ("Due to the requirements of applicant confidentiality and because the agendas contain the Executive Director's and/or Assistant Secretary's recommendations as in-house counsel, agendas are privileged, not matters of public record, and not available for inspection."); *id.* at 600.928-3 ("Board minutes contain privileged and otherwise confidential information and are not open to the public and are not available for inspection."); Rule 1(A)("All materials filed are confidential."); Policy Statement 2C-2 (character and fitness hearings are confidential proceedings). https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLE_Rules_Statutes_Policy_Statements.pdf.

Minnesota (+ + +)

Bar admission in Minnesota is a judicial function. MINN. ST. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE B. 3 (stating that a State Board of Law Examiners is appointed by the Minnesota Supreme Court to implement its rules on admission). The right of access to judicial records is addressed by the Minnesota Rules of Public Access to Records of the Judiciary, and Minnesota earned a + for this category because the right is well-defined and presumptively allows access. *See* MINN. RULES OF PUB. ACCESS TO RECS. OF THE JUD. BRANCH

2 ("Records of all courts . . . are presumed to be open to any member of the public.") http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/pub_access_rules.pdf. The Minnesota law also establishes a well-defined procedure for public access, allowing for requests to made orally and in writing, earning Minnesota a + in this category. *See id.* at 7.1 ("A request to inspect . . . records that are [open] to the public shall be made to the custodian . . . orally or in writing".) For the third category, Minnesota further earned a + because it has a well-defined process for appeal that involved judicial supervision, and did not require the immediate filing of an entirely new lawsuit. *See id.* at 9 ("If the custodian, other than a judge, denies a request to inspect records, the denial may be appealed in writing to the state court administrator"). Despite the state's emphasis upon judicial transparency, the bar examiners in Minnesota broadly assert confidentiality, except as ordered by the court. MINN. ST. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE B. 14(B)("The Board's work product shall not be produced or otherwise discoverable. . .) and 14(F)(" Subject to the exceptions in this Rule, all other information contained in the files of the office of the Board is confidential and shall not be released to anyone other than the Court except upon order of the Court.") https://www.ble.mn.gov/rules/.

Mississippi (+ + +)

In Mississippi, the Legislature created a Board to be known as the "Board of Bar Admissions" which shall be appointed by the Supreme Court of Mississippi. MISS. CODE ANN. §73-3-2 (1972); see also MISS. BD. OF B. ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISS. B. V, https://courts.ms.gov/research/rules/msrulesofcourt/rules_admission_msbar.pdf. the right of access to judicial records is address by Supreme Court Administrative Order as directed by statute, and Mississippi earned a + for this category because the right is well-defined and presumptively allows access. *See* MISS. CODE ANN. § 25-61-1; Miss. Sup. Ct. Admin. Order, Statement of Pol'y Regarding Openness and Availability of Pub. Recs. § 1 ("Access to public records in the judiciary in consistent with the Court's policy that the public interest is best served by open courts and by an independent judiciary.") https://courts.ms.gov/publicrecords_policy.pdf. The Mississippi law also establishes a well-defined procedure for public access, because it also provides a detailed fee structure for making copies, and Mississippi scored a + in this category. *See id.* at § 3 ("Records, which are subject to inspection, are maintained by the Clerk of the Court and are open to the general public for inspection and copying during regular business hours . . . except for legal holidays."). For the third category, Mississippi also earned a + because it has a well-defined process for appeals of denials of public access. *See id.* at § 8 ("A person who is denied access to a record may appeal within 14 days of the date of notice of denial by filing a written request for review with the Supreme Court Administrator, Post Office Box 117, Jackson, MS 39205-0117."). Although noting the confidentiality of character and fitness information, the bar

examiners in Mississippi also acknowledge the possible relevance of public records laws. MISS. BD. OF B. ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISS. B. SECTION V(3)("Information and documents concerning an applicant's character and fitness shall be considered confidential.") and V(4)(F)(1), https://courts.ms.gov/research/rules/msrulesofcourt/rules_admission_msbar.pdf (acknowledging the possibility of applicable public records laws despite the confidentiality rule, by stating "[p]ublic [r]ecords of the Board will be available for inspection and copying").

Missouri (+ + +)

Bar admission in Missouri is a judicial function. MO. BD. OF L. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. Rule 8.01 (reminding that the Board of Law Examiners serves at the pleasure of the court). The right of access to judicial records is addressed by the Supreme Court Operating Rules, and Missouri earned a + for this category because the right is well-defined and presumptively allows access. *See* Mo. Sup. Ct. Operating Rules 2.02 ("Records of all courts are presumed to be open to any member of the public."); *see also id.* at 20.02(a) ("All case records of the Supreme Court, including opinions and votes thereon, orders, briefs, and records on appeal, shall be open to the public unless closed by orer of the Supreme Court."). The Missouri law also establishes a well-defined procedure for public access, and it also provides procedure for accessing records regarding court administrative meetings, earning Missouri a + in this category. *See id.* at 2.04(a) ("Public records . . . will be made available upon request only by inquiry of a single case."); *id.* at 2.02(e) ("Minutes of open meetings . . . shall be open to the public for inspection in the clerk's office of the Supreme Court."). For the third category, Missouri further earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 2.09 ("Judicial Records Committee, upon written . . . request, may review any request to information that has been denied."). The rules for bar examiners in Missouri are silent on the issue of confidentiality. MO. BD. OF L. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. IN MO., Part 8, https://www.mble.org/rule-8.

Montana (+ + -)*

Bar admission in Montana is a judicial function. ST. B. OF MONT., RULES FOR ADMISSIONS TO THE B. OF MONT. I.A. (governing admission to the State Bar of Montana is done by the Montana Supreme Court Commission on Character and Fitness and the Montana Supreme Court Board of Bar Examiners). Montana repealed its specific rules or laws on *judicial* transparency, however, the state does have an Open Meetings Law, a Public Records Act, and operates a web page and digital library allowing searches of judicial records that is consistent with that law. Mont. Code Ann § 2-3-201 ("It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly"); *id.* at § 2-3-

203 ("All meetings of governmental bodies, boards, bureaus, commissions, agencies . . . must be open to the public."); *id.* at §2-6-1003 ("Except as provided in subsections (2) and (3), every person has a right to examine and obtain a copy of any public information in the state."); *see also* Mont. Jud. Branch, St. Law Library of Mont. https://courts.mt.gov/Library. Montana received a + for right of access, and a + for a process, but has no right to appeal, and received a – for this category. The state bar examiners documents associated with bar applications and examinations are confidential. ST. B. OF MONT., RULES FOR ADMISSIONS TO THE B. OF MONT. PART IX (Bar admission application files and bar examination materials are confidential) https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=127056.

Nebraska (+ + -)

Bar admission in Nebraska is a judicial function. NEB. SUP. CT. R. § 3-100 (stating that the Supreme Court exercises jurisdiction over all matters involving the licensing of persons to practice law in the State of Nebraska). The right of access to judicial records is addressed by the Nebraska Supreme Court Rules, and Nebraska earned a + for this category because the right is well-defined and presumptively allows access. *See* Neb. Sup. Ct. R. § 1-803 ("Every member of the public may access the same information from the same records.") https://supremecourt.nebraska.gov/supreme-court-rules/chapter-1-administrative-operations/article-8-public-access-electronic-court-records-information. The Nebraska law also establishes a well-defined procedure for public access because it provides detail on access locations and when access is permitted, earning Nebraska a + in this category. *See id.* at § 1-804 ("Information in an electronic court record is accessible to the public . . . through public access terminals at a courthouse."); *id.* at § 1-809(B) ("Electronic court records . . . will be available for access at least during the hours established by the court."). For the third category, however, Nebraska earned a - because it did not provide a process for appeals. The bar examiners in Nebraska declares all bar examiner documents to be confidential unless needed for a bar applicants' appeal: "The records, papers, applications, and other documents containing information collected and compiled by the Commission, its members, the director, Commission employees, agents, or representatives are held in official confidence for all purposes other than cooperation with another bar licensing authority. Provided, however, that an applicant's appeal to the Supreme Court may result in such communications becoming public record."

NEB. SUP. CT. R. § 3-106 https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-1-admission-requirements-practice.

Nevada (+ + +)

In Nevada, the bar admission process includes legislation implemented by the judiciary. However, despite the existence of a bar admissions statute, NEV. REV. STAT. § 7.030, the Nevada Supreme Court declared the regulation of lawyers and admission to be an inherently judicial function that does not necessitate legislation. *See* NEV. SUP. CT. R. (explaining in the preface to the rules its inherent rulemaking power) https://www.leg.state.nv.us/Division/Legal/LawLibrary/CourtRules/SCR.html. The right of access to judicial records is addressed by the Administrative Office of the Courts in its Policy on Public Access to Administrative Records, and Nevada earned a + because the right is well-defined and presumptively allows access. *See* Pol'y on Pub. Access to Admin. Recs. Part III ("Administrative records . . . are open to the public except the following.") file:///C:/Users/Dean/Downloads/AOC%20Records%20Policy%20Revised%2011-19%20(4).pdf. The Nevada law also provides a well-defined procedure for public access, and earned a +, because it provides specific mailing instruction. *See id.* at IV.A.1. ("A request to . . . obtain copies of records that are open to the public shall be made to . . .."). For the third category, Nevada also earned a + because it has a well-defined process for appeal. *See id.* at III.C. ("A request for reconsideration of a decision denying access to information shall be made to the Chief Justice of the Nevada Supreme Court."). Although some bar examiner information is confidentiality in Nevada, the rules allow applicants access to information. NEV. SUP. CT. R. 49(8)(allowing for policies to ensure timely accurate, fair and confidential administration of the bar examination), 50 ("investigations may be classified confidential"), 50.5 (allowing for agreement on conditional admission confidentiality), 70.5 (providing for confidentiality of the contents of any application for admission, the results of any investigation, transcripts of any hearing, documentation regarding the applicant, and the grades of an individual applicant), 72 (character and fitness reports are "reduced to writing and submitted to the court for its confidential information"), https://www.leg.state.nv.us/CourtRules/SCR.html.

New Hampshire (+ + -)

Bar admission in New Hampshire is a judicial function. N.H. SUP. CT. R. 42B (noting all persons who desire to be admitted to practice law must satisfy the Standing Committee on Character and Fitness of the Supreme Court of New Hampshire). The right of access to judicial records is addressed by the Guidelines for Public Access to Court Records, and New Hampshire earned a + for this category because the right is well-defined and presumptively allows access. *See* Guidelines for Pub. Access to Ct. Recs. § I ("It is the express policy of the Judicial Branch of New Hampshire to allow public access to court records."); *id.* at § II ("A presumption exists that all court records are subject to public inspection.") https://www.courts.state.nh.us/rules/misc/misc-8.htm. The New Hampshire law also establishes a well-defined procedure for access, earning New Hampshire

a + in this category. *See id.* at § III ("The right to public access shall generally include the right to make notes and to obtain copies at normal rates."); *see also id.* at § IV ("The clerk of each court . . . shall set reasonable administrative regulations governing the scheduling of access to records."); *id.* at § VII ("Telephone access to court records shall be allowed only at such times and under such conditions as the clerk may establish."). For the third category, New Hampshire earned a – because even though the state does provide a process for appeals of denials of access, the appeal process applies only to litigation in which relief was sought in the Supreme Court. *See* N.H. SUP. CT. R. 12(1)(A) ("In all cases in which relief is sought in the supreme court, all [records] shall be available for public inspection unless otherwise ordered."); *id.* at 12(3) ("A person . . . who seeks access to a case record . . . that has been determined to be confidential shall file a petition with the court requesting access to the record in question."). The bar examiners in New Hampshire broadly declare confidentiality for all board records and exempt themselves from public disclosure requirements. N.H. SUP. CT. R. 42(G)(with limited exceptions, "all minutes and records circulated to members of the board or committee, shall be confidential and shall not be disclosed or open to the public for inspection") https://www.courts.state.nh.us/rules/scr/index.htm.

New Jersey (+ + +)

Bar admission in New Jersey is a judicial function. N.J. CT. R. 1:24-4 (stating applicants may apply for admission to the bar of this State by motion to the Supreme Court). The right of access to judicial records is addressed by the Rules Governing the Courts of the State of New Jersey, and New Jersey earned a + for this category because the right is well-defined and presumptively allows access. *See* N.J. Ct. R. 1:38-1 ("Court records and administrative records. . . within the custody and control of the judiciary are open for public inspection and copying [and e]xceptions shall be narrowly construed in order to implement the policy of open access to records of the judiciary."). The New Jersey law also establishes a well-defined procedure for access, and New Jersey earned a + in this category. *See id.* at 10(a) ("Requests for court records or administrative records . . . shall be directed to the following officers."). For the third category, New Jersey earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 10(b) ("Any person denied access to a court record or administrative record . . . may seek review by the Administrative Director of the Courts under procedures established by the Supreme Court."). Despite the state emphasis on judicial transparency, the bar examiners in New Jersey declare *all* committee documents to be confidential. N.J. BD. OF B. EXAM'RS, REGULATIONS GOVERNING THE COMMITTEE OF CHARACTER 401 (all records of the Committee on Character are confidential) https://www.njbarexams.org/committee-on-character-regulations.

New Mexico (+ + -)*

Bar admission in New Mexico is a judicial function. N.M. BD. OF B. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. 15-102 (stating that the Supreme Court of New Mexico shall determine and prescribe by rules the qualifications and requirements for admission to the practice of law). The right of access to judicial records is addressed on the New Mexico Courts Case Lookup (promulgated by N.M. Supreme Court Order No. 17-8500-001), and the right is well-defined and presumptively allows access. *In re* N.M. Judiciary Case Access Pol'y for Online Ct. Recs., No. 17-8500-001 (Feb. 20, 2017) https://cms.nmcourts.gov/uploads/FileLinks/bf47e4f8e3af491d807778f067df1917/Order_17_8500_001_Approving_Online_Court_Records_Case_Access_Policy__2_20_17_v1.1.pdf; *see also* N.M. Ct. Case Lookup Sys. ("This [website] gives access to New Mexico Supreme Court, Court of Appeals, District Court, Magistrate Court and Municipal Court Data.") https://caselookup.nmcourts.gov/caselookup/app. https://caselookup.nmcourts.gov/caselookup/app New Mexico thus received a + for right of access. In addition, access to criminal case records are governed by the District Court Rules of Criminal Procedure, and the right is well-defined and presumptively allows access. *See* N.M Dist. Ct. R. Crim. P 5-123(A) ("Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule."). New Mexico thus earned a + for having a process to access judicial records. Lacking any right to appeal, however, it earned a – for this third category. The bar examiners in New Mexico broadly assert confidentiality of all records, and its rule expressly notes that meeting minutes will not be disclosed. N.M. BD. OF B. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. 15-401(D)(2)(unless otherwise determined by the state Supreme Court, "All records maintained by the board regarding applications for admission and reinstatement to the state bar and all proceedings by the board, including board meetings and meeting minutes, shall be confidential"), http://www.nmexam.org/about/rules/ (stating if a dispute over admission reaches the Supreme Court, all records including "supporting documents" become public records).

New York (+ + +)

Bar admission in New York is a judicial function. N.Y. CT. APP. R. 520.1(a) (stating a person shall be admitted to practice law only by an order of the Appellate Division of the Supreme Court upon compliance with these rules); Judicial transparency is addressed by Part 124 of the Rules of the Chief Administrative Judge. *See* N.Y. ST. UNIFIED CT. SYS., RULES OF THE CHIEF ADMINISTRATIVE JUDGE PT. 124http://ww2.nycourts.gov/rules/chiefadmin/124.shtml. New York earned a + for a right of access that well defined and presumptively allows access. *See id*. at § 124.2(1) ("This part sets forth procedures governing public access to the administrative records . . . pursuant to the Freedom of Information Law."); *see also* N.Y. PUB. OFF. LAW § 6-84 (2015) ("[A] free society is maintained when . . . the public is aware of governmental actions . . . [and t]he

more open a government is with its citizenry, the greater the understanding and participation of the public in government."). The New York law also establishes a well-defined procedure for public access, because it expressly describes the exact manner in which the request can be made, and State earned a + in this category. RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 124.5 ("A person wishing to inspect or copy a record . . . shall file a written application with the records access officer."). For the third category, New York earned a + because it has a clear process for appealing denials. *See id.* at § 124.9 ("An applicant whose request . . . has been denied may . . . appeal that determination in writing to the appeals officer at his business address . . . [and t]he appeal shall set forth . . . ."). The rules for bar examiners in New York are silent on the issue of confidentiality and transparency. MASS. SUP. JUD. CT. R. 3:01, https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-rule-301-attorneys.

North Carolina (+ + +)

In North Carolina, the bar admissions process involves legislation, implemented by members of the state bar and review by the judiciary. *See* N.C. GEN. STAT. §84-21 (2014) (creating the Board of Bar Examiners); BD. OF L. EXAM'RS FOR THE ST. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF L. .0104 (Members of the Council of the North Carolina State Bar elect the members of the Board of Bar Examiners, whose decisions are subject to superior court and supreme court review). However, North Carolina law also acknowledges that courts have inherent powers to deal with its attorneys. N.C. GEN. STAT. § 84-36 (2015). A state public records law creates a right of access to judicial records, and North Carolina received a + for this category because the right is well-defined and presumptively allows access. *See* N.C. Gen. Stat § 132-1(b) ("The public records and public information compiled by agencies of North Carolina Government or its subdivisions are the property of the people."). The North Carolina law also provides a well-defined procedure to public access, and North Carolina earned a + in this category. *See id.* at § 132-6(a) ("Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times."); *id.* at § 132-6.1(a) ("Databases . . . containing public records shall be designated and maintained in a manner that does not impair or impede the public agency's ability to permit the public inspection."). For the third category, North Carolina received a + because it has a well-defined process for appeal. *See id.* at § 132-9(a) (Any person who is denied access to public records . . . may apply to the appropriate division of the General Court of Justice for an order compelling disclosure."). Rules for bar examiners in North Carolina are silent on confidentiality. BD. OF L. EXAM'RS FOR THE ST. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF L., https://www.ncble.org/rules-governing-admission-to-the-practice-of-law-nc.

North Dakota (+ + +)

Bar admission in North Dakota is a judicial function. N.D. R. CT., N.D. ADMISSION TO PRACTICE RULES 27-11-02 (vesting power to admit attorneys in the courts of North Dakota in the supreme court). The right of access to judicial records is addressed by its Supreme Court Administrative Rules, and North Dakota earned a + for this category because the right is well-defined and presumptively allows access. *See* N.D. Sup. Ct. Admin. R. 41 § 1(a) (Court records are presumptively open to public access."). https://www.ndcourts.gov/legal-resources/rules/ndsupctadminr/41. The North Dakota law also establishes a well-defined procedure for public access because it addresses requests made remotely, and the locations of public request terminals, earning North Dakota a + in this category. *See id*. at § 10(a) ("Remote access to public records is essentially available at all times."); *id*. at § 10((b)(1) ("A terminal will be available at each county courthouse for public access to court records."); *id*. at § 10(b)(2) ("Any person desiring public access to a court record that is not available on the public access terminal must make an oral or written request to the custodian . . . the clerk of court or the State Court Administrator."). For the third category, North Dakota earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id*. at § 5(f)(2) ("A request to obtain access to information in a case in which access is prohibited may be made to the court by any member of the public . . . [and] the court must consider whether there are sufficient grounds to overcome the presumption of openness."); *id*. at § 5(f)(3) ("The request must be made by a written motion to the court."). Despite the state law emphasis on judicial transparency, the bar examiners in North Dakota broadly assert confidentiality. N.D. R. CT., N.D. ADMISSION TO PRACTICE RULES 13, ("All records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules.") https://www.ndcourts.gov/legal-resources/rules/admissiontopracticer/13.

Ohio (+ + +)

Bar admission in Ohio is a judicial function. Ohio Const. art. IV, § 2(B)(1)(g) (granting the Supreme Court of Ohio exclusive jurisdiction to regulate admission to the practice of law in Ohio). The right of access to judicial records is addressed in the Rules of Superintendence for the Courts of Ohio, and Ohio earned a + for this category because the right is well-defined and presumptively allows access. *See* Rules of Superintendence for the Ct. of Ohio 45(A) ("Court records are presumed open for public access."). The Ohio law has a well-defined procedure for public access, so Ohio earned a + in this category. *See id*. at 45(B)(1) ("A court or clerk or court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time.") *id*. at 45(C)(1) ("A court or clerk of court

may offer remote access to a court record."). For the third category, Ohio earned a + because it had a clear process for appealing the denial of public access. Rule 47(B) ("A person aggrieved by the failure of a court to comply . . . may pursue an action in mandamus."). The rules for bar examiners in Ohio focus on the need for confidentiality associated with character and fitness documents. SUP. CT. RULES FOR THE GOV'T OF THE B. OF OHIO R. 1 § 13, §15 ("All information, proceedings, or documents relating to the character and fitness investigation of an applicant for admission ... shall be confidential"), (http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf.

Oklahoma (+ + -)*

Bar admission in Oklahoma is a judicial function. OKLA. B. ASS'N, RULES GOVERNING ADMISSION TO THE PRACTICE OF L. IN THE ST. OF OKLA. 1 (recommending applicants for admission to the practice of law is a duty of the Board of Bar Examiners, but the Supreme Court is not bound by the recommendations and may take any such action as it deems appropriate). The right of access to judicial records is addressed through a Supreme Court Administrative Directive, and Oklahoma earned a + in this category because the right is well-defined and presumptively allows access. *See* Okla. Stat. tit. 12, § 32.1A (2014) ("The Supreme Court of Oklahoma shall immediately make rules regulating the display of court records online."); *In re* Pub. Access to Elec. Case Info., 271 P.3d 775, 775 (Okla. 2009) ("Public case-by-case access to electronic case information is currently provided through the Oklahoma State Courts Network at oscn.net and through KellPro's On Demand Court Records at odcr.com."). The Oklahoma law provides a public website for access, and Oklahoma earned a + and a * for its procedures because an online search engine is a fast and easy way for the general public to access the records. *See id.* ("Public access to electronic case information is available on a case-by-case basis via the internet through the Oklahoma State Courts Network at oscn.net or KellPro's On Demand Court Records at odcr.com."). For the third category, Oklahoma earned a – because the law does not provide a right to appeal the denial of a records request. The confidentiality of bar examiner documentation in Oklahoma is discussed only in the context of character and fitness records. OKLA. B. ASS'N, RULES GOVERNING ADMISSION TO THE PRACTICE OF L. IN THE ST. OF OKLA. 14 http://www.okbbe.com/Resources/Docs/OKBBE-Rules-Governing-Admission.pdf.

Oregon (+ + +)*

Bar admission in Oregon is a judicial function. OR. ST. BD. OF B. EXAM'RS, SUP. CT. OF THE ST. OF OR. RULES FOR ADMISSION OF ATT'YS 9.60 (noting that the Supreme Court of Oregon reviews and may adopt, modify, or reject the decisions of the Board of Bar Examiners regarding admission to the bar). The right to access to government records is provided by the Public Records Laws, which applies to all public bodies and state agencies, and

state agencies are defined to include courts. See Or. Rev. Stat § 192.314(1) ("Every person has a right to inspect any public record of a public body in this state."); id. at § 192.311(4) ("[]Public body[] includes every state officer, agency, department, division, bureau, board and commission."); id. at § 192.311(6) ("[] State agency[] means any state officer, department, board or court."). Access to court records is provided to the public through a search engine known as the Oregon Administrative Rules Database, which allows the public to search for records without making formal requests or going to their local courthouse, earning Oregon a + and a * in this category. See Or. Jud. Dep't, Online Recs. Search, https://webportal.courts.oregon.gov/portal/. Finally, Oregon has a robust process for review of delays or denials related to public records requests, and earned a + in this category. See id. at § 192.411 ("[A]ny person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection."); id. at §§ 192.401, 192.407, 192.411, 192.415, 192.418, 192.422, 192.427, 192.431. Despite the state's exemplary commitment to judicial transparency, the bar examiners in Oregon broadly assert confidentiality of any records. OR. ST. BD. OF B. EXAM'RS, SUP. CT. OF THE ST. OF OR. RULES FOR ADMISSION OF ATT'YS 2.15 ("Unless expressly authorized by the Court or by these rules, the Board shall not disclose any of its records, work product or proceedings in carrying out its duties.") https://www.osbar.org/_docs/rulesregs/admissions.pdf.

Pennsylvania (+ + +)

Bar admission in Pennsylvania is a judicial function. PA. BD. OF L. EXAM'RS, B. ADMISSION RULES 103, 222 (noting the supreme court's inherent and exclusive power to regulate the admission to the bar and the practice of law in Pennsylvania). The right of access, in the form of a Public Access Policy of the Unified Judicial System of Pennsylvania, has been codified by statute in the Pennsylvania code. *See* 204 PA. CODE § 213.81 (2020) https://www.pacode.com/secure/data/204/chapter213/s213.81.html. For this right of access, Pennsylvania earned a + because the right is well-defined, and presumptively allows access. *See id.* at § 3.0 ("All case records shall be open to the public in accordance with this policy."). In fact, the legislature has even placed restrictions on the judiciary's authority to deviate from these rules. *Id.* at § 2.0(D) ("A court . . . may not adopt more restrictive or expansive access protocols than provided for in this policy."). The Pennsylvania law has a well-defined procedure for public access, and Pennsylvania earned a + in this category. *See id.* at § 4.0 ("[A] member of the public shall make an oral request to the applicable custodian . . . [but] when the information that is the subject of the request is complex or voluminous, the custodian may require a written request"). For the third category, Pennsylvania earned a + because it has a well-defined process for appeal that involved judicial supervision, and that did not require the immediate filing of an entirely new lawsuit.

See id. at § 5.0(D)-(E) ("[R]elief from a custodian's written denial may be sought by filing a motion . . . [and r]elief from a magisterial district court may be sought by filing an appeal with the president judge of the judicial district."). Despite the state commitment to judicial transparency, the bar examiners in Pennsylvania broadly assert confidentiality of all records, and specifically exclude their records from public inspection. PA. BD. OF L. EXAM'RS, B. ADMISSION RULES 402 ("General Rule. Except as otherwise prescribed in these rules, the actions and records of the Board are confidential and shall not be disclosed or open to inspection by the public.") https://www.pabarexam.org/bar_admission_rules/402.htm.

Rhode Island (+ + -)

Bar admission in Rhode Island is a judicial function. R.I. JUDICIARY BD. OF B. EXAM'RS, BD. OF B. EXAM'RS RULES OF PRACTICE GOVERNING ADMISSION ON EXAMINATION AND BY TRANSFERRED UNIFORM B. EXAMINATION SCORE 1(a) (noting that the bar examiners in Rhode Island have authority as bestowed by its Supreme Court). The right of access to judicial records is addressed by the Rhode Island Judiciary Rules of Practice Governing the Public Access to Electronic Case Information, and Rhode Island earned a + for this category because the right is well-defined and presumptively allows access. R.I. Jud. Rules of Prac. Governning Pub. Access to Elec. Case Info. 5(b)(2)(a) ("Members of the public shall have access to all Public Electronic Case Information.") https://www.courts.ri.gov/efiling/PDF/Supreme-Rules-PublicAccess.pdf. The Rhode Island law also establishes a well-defined procedure for public access, because it clearly instructs the public on how to gain access to such information, earning Rhode Island a + in this category. *See id*.at 5(b)(1) ("Each court shall make computer terminals available in the respective clerk's offices in each of the courthouses."). For the third category, Rhode Island earned a - because its process for appeals of denials is very narrow, and only allows appeals for access to medical records. *See id*. at 5 (a)(1) ("A person . . . who can demonstrate a sufficient need for access to non-public medical records . . . may seek such access by submitting a petition to the court."). The bar examiners in Rhode Island broadly assert confidentiality of records, specifically excluding them from public inspection. R.I. JUDICIARY BD. OF B. EXAM'RS, BD. OF B. EXAM'RS RULES OF PRACTICE GOVERNING ADMISSION ON EXAMINATION AND BY TRANSFERRED UNIFORM B. EXAMINATION SCORE 5.e., (except as otherwise set forth, "the actions and records of the Board shall be confidential and shall not be disclosed or open to inspection by the public.") https://www.courts.ri.gov/AttorneyResources/baradmission/PDF/Board_of_Bar_Examiners-Rules_of_Practice.pdf.

South Carolina (+ - +)

Bar admission in South Carolina is a judicial function. S.C. APP. CT. R. 402(c)(8), 402(g)(3), Rule 402(k) (noting all applications for admission are filed with the Clerk of the Supreme Court, the Board of Bar Examiners is appointed by the

Supreme Court, and fitness decisions are subject to review by the Supreme Court). The right of access to judicial records is addressed by its Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 – 30-4-165 (1978), and South Carolina earned a + because the right is well defined and presumptively allows access. *See id.* at § 30-4-15 ("[I]t is vital for a democratic society that public business be performed in an open and public manner . . . [and] provisions of this chapter must be construed so as to make it possible for citizens . . . to learn and report fully the activities of their public officials at a minimum cost or delay."); *id.* at § 30-4-30(A)(1) ("A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body."). The procedure for access, however, is vague, and South Carolina earned a – in this category. *See id.* at § 30-4-30(C) ("Each public body, upon written request for records made under this chapter, shall within ten day . . . of the receipt of the request, notify the person making the request of its determination and the reasons for it."). For the third category, South Carolina earned a + because it had a well-defined process for appeal that involves judicial supervision, and provides for the award of attorney fees. *See id.* at § 30-4-100(A) ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter."); *id.* at § 3-40-100(B) ("If a person or entity seeking relief under this chapter prevails, he may be awarded reasonable attorney's fees."). The bar examiners in South Carolina broadly assert confidentiality. S.C. APP. CT. R. 402(m), (all files and records related to "applications for admission, examinations, and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee, or the Clerk of the Supreme Court to carry out their responsibilities.").

South Dakota (+ + -)

Bar admission in South Dakota is a judicial function. S.D. BD. OF B. EXAM'RS, RULES AND REG. FOR ADMISSION TO PRACTICE L. IN S.D. 16-16-5, 16-16-7.3, 16-16-20 (explaining the Board of Bar Examiners administers the requirements for admission to practice law and has authority to adopt rules and regulations which shall become effective upon approval by the Supreme Court). The state legislature codified the right of access to judicial records in the Unified Judicial System Court Records Rule, S.D. Codified Laws §§ 15-15-A-1 – 15-15A-15 (2013), and South Dakota earned a + for this category because the right is well-defined and presumptively allows access. *See id.* at § 15-15A-5(1) ("Information in the court record is accessible to the public except as prohibited by [law]."). The South Dakota law also establishes a well-defined procedure for public access, because it establishes procedures for electronic as well as paper records, earning South Dakota a + in this category. *See id.* at § 15-15A-14(1) ("Court records will be available . . . for public access in the courthouse during hours established by the court."). For the third category, South Dakota earned a - because it had some form of process for appeals of denials of public access, but only with regards to

financial documents. *See id.* at § 15-15A-10(1) ("Any person may file a motion . . . for access to confidential financial documents."). Bar examiners in South Dakota implement rules that provide for the confidentiality of character, fitness and qualification reports. S.D. BD. OF B. EXAM'RS, RULES AND REG. FOR ADMISSION TO PRACTICE L. IN S.D. 16-16-15, https://ujs.sd.gov/uploads/barexaminers/RReg.pdf.

Tennessee (+ - -)

Bar admission in Tennessee is a judicial function. TENN. SUP. CT. R. 7, Preface (noting the Board of Law Examiners is created as a part of the judicial branch of government by the Supreme Court of Tennessee under its inherent authority to regulate courts, and the Supreme Court controls admission to the practice of law and acts on the basis of the Board's Certificate of Eligibility); The right of access to judicial records is addressed by the Rules of the Supreme Court, and Tennessee earned a + for this category because the right is well-defined and presumptively allows access. *See* TENN. SUP. CT. R. 34(1) ("[T]he public has the right to inspect public records maintained by the courts of this state unless the record is expressly excepted . . . under the Public Record Act."). The Tennessee law has no defined procedure for public access, and no process for appeal of denials, leaving the implementation of the right of access uncertain, and Tennessee earned a – in these categories. The bar examiners in Tennessee broadly assert confidentiality. TENN. SUP. CT. R. 7 §§ 10.05(i), 12.11 (declaring confidential not only applicant information, but also all "correspondence and/or electronic transmissions to and from the Board, its members and staff, minutes of Board meetings and its deliberations") https://www.tnble.org/?page_id=56.

Texas (+ + +)

Bar admission in Texas is a judicial function. TX. BD. OF L. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. OF TX., Rulebook, Preface https://ble.texas.gov/txrulebook (noting that the Supreme Court is ultimately responsible for admitting those applicants certified by the Board as eligible for admission). The right of access to judicial records is addressed by Rule 12 of the Texas Rules of Judicial Administration, and Texas earned a + for this category because the right is well-defined and presumptively allows access. *See* TX. R. JUD. ADMIN.12.4(a) ("Judicial records . . . are open to the general public for inspection and copying during regular business hours.). In fact, the Texas law is broadly construed to allow access. *Id.* at 12.1 ("The rule should be liberally construed to achieve its purpose."). The Texas law also establishes a well-defined procedure for public access, because it is very detailed on how to request records, and Texas earned a + in this category. *See id.* at 12.6("A request to inspect or copy a judicial record must be in writing and must include . . .."). For the third category, Texas earned a + because it has a well-defined process for appeal that involved judicial supervision and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 12.9 ("A person who is denied access to judicial record may appeal denial

by filing a petition for review with the Administrative Director of the Office of Court Administration."). The rules for the bar examiners in Texas limit the scope of confidentiality to matters involving, confidentiality of the character or fitness of any Applicant. TX. BD. OF L. EXAM'RS, RULES GOVERNING ADMISSION TO THE B. OF TX. 1(e) ("The Board must not disclose to any third party any information obtained with respect to the character or fitness of any Applicant, Declarant."), https://ble.texas.gov/rules.

Utah (+ + +)

Bar admission in Utah is a judicial function. SUP. CT. RULES OF PROF'L PRACTICE, RULES GOVERNING THE UTAH ST. B. 14-702 (noting that in accordance with the Supreme Court Rules for Professional Practice, the Board shall recommend and certify applicants to the Supreme Court for admission to the Bar). The right of access to judicial records is addressed in the Utah Code of Judicial Administration, and Utah earned a + for this category because the right is well-defined and presumptively allows access. *See* Utah Code Jud. Admin. R. 4-202.02(1) ("Court records are public unless otherwise classified by this rule."). The Utah law also establishes a well-defined procedure for public access, because it describes the type of writing required, and Utah earned a + in this category. *See id.* at 4-202.04(1) ("A request to access a public court record shall be presented in writing to the clerk of court unless the clerk waives the requirement."). For the third category, Utah earned a + because it has a well-defined process for appeals of denials of public access. *See id.* at 4-202.05(2)(A) ("A request to access a private or protected court record . . . shall be presented in writing to the state court administrator."). Despite the state commitment to judicial transparency, the bar examiners in Utah broadly assert confidentiality of *all* records related to bar admission. SUP. CT. RULES OF PROF'L PRACTICE, RULES GOVERNING THE UTAH ST. B. 14-720, (broadly defining confidential information as "all records, documents, reports, letters and sources whether or not from other agencies or associations, relating to admissions and the examination and grading process.") https://www.utcourts.gov/resources/rules/ucja/#Chapter_14.

Vermont (+ + -)

Bar admission in Vermont is a judicial function. VT. SUP. CT., OFFICE OF THE ST. CT. ADM'R, BD. OF B. EXAM'RS, RULES OF ADMISSION TO THE B. OF THE VT SUP. CT. 1 (serving and protecting the integrity of the Bar of the Vermont, the Supreme Court established a board, known as the Board of Bar Examiners, responsible for examining applicants). The right of access to judicial records is addressed in the Rules for Public Access to Records, and Vermont earned a + for this category because the right is well-defined and presumptively allows access. *See* Vt. Pub. Access Ct. R. 3(a) ("Except as provided [by law], the public may inspect or copy all judicial-branch case and administrative records.") https://casetext.com/rule/vermont-court-rules/rules-for-public-access-to-records. In

addition, the right of access in Vermont is broadly interpreted. *See id.* at 1 ("These rules . . . must be liberally construed."). The Vermont law also establishes a well-defined procedure for public access because it addresses access to physical, as well as electronic records; provides information on public access locations; and provides instructions on how to access records remotely, earning Vermont a + in this category. *See id.* at 4(a) ("Public access to physical case records is provided by request to the custodian in the court office where the record is filed."); *id* at 4(b) ("Public access to electronic case records is provided for individual cases at display terminals located in courthouses and judiciary offices."); *id.* at 4(b)(2) ("Remote access may be provided by . . . ."). For the third category, Vermont earned a - because there is no clear process for appealing denials. Bar examiners in Vermont assert a degree of confidentiality but also recognize the possibility of transparency of information. VT. SUP. CT., OFFICE OF THE ST. CT. ADM'R, BD. OF B. EXAM'RS, RULES OF ADMISSION TO THE B. OF THE VT SUP. CT. 29 ("To efficiently and effectively perform their duties, the Board and the Committee may utilize various computer-networking options to share information . . . [and w]hen using those networks, all reasonable efforts are made to maintain the confidentiality of the shared information") and Rules 16 (waiver of confidentiality during investigations), 17 (need for transcript of a hearing), and 18 (appeals are public record) https://www.vermontjudiciary.org/sites/default/files/documents/900-00014.Rules_.Admission.Bar_.pdf.

Virginia (+ + -)

In Virginia, the bar admissions process involves legislation, but is implemented by the judiciary, and thus involves judicial functions. *See* VA. ANN. CODE § 54.1-3919, 3920, 3922 (Virginia Board of Bar Examiners is established by statute, with its members appointed by the Supreme Court, and the Board is empowered to make rules and grant such certificates to practice law as may be authorized by the Supreme Court.) A right of access to judicial records is also codified in section 17.1-208 of the Code of Virginia, and Virginia earned a + for this category because the right is well-defined and presumptively allows access. *See* Va. Code Ann. § 17.1-208(B) ("[A]ny records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person.") https://law.lis.virginia.gov/vacode/title17.1/chapter2/section17.1-208/. Virginia law also has well-defined procedures for public access, so Virginia earned a + in this category. *See id.* at § 17.1-208(C) ("Requests for copies of nonconfidential court records . . . shall be made to the clerk of the circuit court."). For the third category, Virginia earned a – because there is no procedure for appeals. Rules for bar examiners in Virginia are silent on confidentiality. Virginia rules are silent on the confidentiality of the board of bar examiners. *See* VA. BD. OF B. EXAM'RS, RULES OF THE VA. BD. OF B. EXAM'RS, https://barexam.virginia.gov/pdf/VBBERules.pdf .

Washington (+ + +)

Bar admission in Washington is a judicial function. WASH. R. GEN. APPLICATION APR 1(a) (explaining the Supreme Court's exclusive responsibility and inherent power to establish the qualifications for admission to practice law, and any person carrying out the functions set forth in these rules is acting under the authority and at the direction of the Supreme Court). Judicial transparency in Washington State is determined by Washington Court Administrative Rule 31.1. *See* WASH. R. GEN. APPLICATION GR 31.1(a) ("A presumption of access applies to the judiciary's administrative records."), https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_31_01_00.pdf. Washington earned a + for the right of access because the right is well-defined, and presumptively allows access consistent with state constitutional principles. *See id*. at § 31.1(a) ("Consistent with the principles of open administration of justice as provided in the . . . State Constitution, it is the policy of the judiciary to facilitate access to administrative records . . . [and a] presumption of access applies to the judiciary's administrative records."). The Washington law also provides a well-defined procedure for access, earning Washington a + in this category. *See id*. at § 31.1(c)(1) ("Each court . . . must adopt a policy . . . setting forth its procedures for accepting and responding to administrative records requests . . . [and t]he policy must include . . . ."); *id.* at § 31.1(c)(2) ("Each court and judicial agency must prominently publish the procedures for requesting access to its administrative records . . . [and i]f the court or judicial agency has a website, the procedures must be included there."). For the third category, Washington earned a + because it has a well-defined process for appealing the denial of access to administrative records. *See id.* at § 31.1(d)(3) ("Each court and judicial agency shall provide a method for review by the judicial agency's director, presiding judge, or judge designated by the presiding judge."); *id*. at § 31.1(d)(4) ("Upon the exhaustion of remedies under section (d)(3), a record requester aggrieved by a court or agency decision may obtain further review by choosing between the two alternatives."). While the state laws are committed to judicial transparency, the unusual rules for the bar examiners in Washington broadly assert confidentiality. At first glance, Washington's bar examiners appear to limit confidentiality to "application records, including related investigation files, documents, and proceedings for admission" and also "all examination questions, scoring keys, and other examination data used . . ." WASH. R. GEN. APPLICATION APR 1(d), http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=apr. However, the rule contains an additional clause declaring confidential, unless expressly authorized by the Supreme Court, even the "Preliminary drafts, notes, recommendations, and intra-Board memorandums in which opinions are expressed or policies formulated or recommended." *Id.* Accordingly, Washington is quite broad in its assertion of bar examiner confidentiality.

West Virginia (+ + +)

Bar admission in West Virginia is a judicial function. W. VA. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE PRACTICE OF L. 7.0(b) (instructing an applicant who is eligible for admission to the practice of law to appear before the Supreme Court of Appeals within twelve months of issuance of the certificate of eligibility by the Board of Law Examiners). Judicial transparency in West Virginia is addressed by Rule 10 of the West Virginia Trial Court Rules. *See* W. VA. JUDICIARY TRIAL CT. RULES 10 http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-1.html#rule10.

West Virginia earned a + in the right of access category because the right is well-defined and presumptively allows access. *See id.* at § 10.04(a) ("All persons are, unless otherwise expressly provided by law or excepted by Rule 10.03, entitled to full and complete information regarding the operation and affairs of the judicial system."). The West Virginia law also establishes a well-defined procedure for public access, because it provides the caption and format required when making a request, and West Virginia earned a + in this category. *See id.* at § 10.04(d) ("The custodian . . . shall furnish copies of the requested information . . . in his or her office during usual business hours."). For the third category, West Virginia earned a + because it has a well-defined procedure for appeals. *See id.* at § 10.03 (b) ("An order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person."). The rules for the bar examiners in West Virginia only address confidentiality in the context of conditional admission. W. VA. BD. OF L. EXAM'RS, RULES FOR ADMISSION TO THE PRACTICE OF L. 6.0 ("A record shall be made of the proceedings.") and 7.1 (addressing confidentiality in the context of conditional admission), http://www.courtswv.gov/legal-community/board-of-law-examiners.html.

Wisconsin (+ + -)*

Bar admission in Wisconsin is a judicial function. WIS. SUP. CT. R. 40.02 (stating that a person who meets all of the applicable qualifications shall be admitted to practice law in Wisconsin state by order of the supreme court). The right of access to judicial records is addressed by the Wisconsin's open records law. Wisc. Stat. §§ 19.31-19.39 (2020),and Wisconsin earned a + because the right is well-defined and presumptively allows access. *See id.* at § 19.31 (1)(a) ("Except as otherwise provided by law, any requester has a right to inspect any record."); *see also* § 19.31 ("[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them."). Wisconsin courts also provide public access to records using the Consolidated Court Automation Programs (CCAP) Case Management system, and Wisconsin earned a + and a * in this category. https://wcca.wicourts.gov/. For the third category, Wisconsin earned a – because the law does not provide a right to appeal the denial of access to records. Bar examiners in Wisconsin

maintain the confidentiality of information related to an applicant's file, the examinations, and conditional admission concerns. WIS. SUP. CT. R. 40.075 (confidentiality of conditional admission) and 40.12 (The application files of an applicant and all examination materials are confidential) https://www.wicourts.gov/sc/rules/chap40.pdf.

Wyoming (+ + +)

Bar admission in Wyoming is a judicial function. WYO. ST. B., RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF L. 501 (certifying applicants for eligibility is done by the Wyoming State Board of Law Examiners and the Character and Fitness Committee, and admitting them is done by order of the Wyoming Supreme Court). A right of access is addressed by the Rules Governing Access to Court Records, and Wyoming earned a + for this category because the right is well-defined and presumptively allows access. Rules Governing Access to Ct. Recs. 3 ("Court records are presumed to be open to public access during the regular business hour of the court."). The Wyoming law also establishes a well-defined procedure for public access because it specifies that the request may be oral or written, and describes clearly what the person must identify in the request, earning Wyoming a + in this category. *See id.* at 4 ("Court records shall be available for public access in the court facilities where the records are kept."); *id.* at 5 ("Requests for public access to court records shall be directed to the custodian, and may be oral or written, except that requests for public access to administrative records shall be written."). For the third category, Wyoming earned a + because it has a well-defined process for appeal that involved judicial supervision, and that did not require the immediate filing of an entirely new lawsuit. *See id.* at 10(a) ("Any person denied public access to any court record by the record's custodian may petition the court for an order directing the custodian to grant access.")' *id.* at 10(b) ("Any court order granting or denying public access to a court record . . . shall be sunject to appellate review pursuant to Rule 13 of the Wyoming Rules of Appellate Procedure."). Despite the state commitment to judicial transparency, the bar examiners in Wyoming are required to maintain records, but they are broadly confidentiality unless specific exemptions apply. WYO. ST. B., RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF L. 104, https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES-AND-PROCEDURES-GOVERNING-ADMISSION-TO-THE-PRACTICE-OF-LAW.pdf.