

Embracing Our Public Purpose: A Value-Based Lawyer-Licensing Model

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I. INTRODUCTION

As innovation disrupts the legal services industry,¹ lawyer-licensing entities must adapt to continue to make the best decisions about admission requirements and standards in a rapidly changing professional landscape. In a broader context, the legal services industry must answer the question of who—either within or outside the profession—will provide legal services in this changing landscape. Lawyer-licensing entities, as key decision makers,² will be in a better position to respond if they have evaluated their own licensing scheme and organizational values using a model that incorporates the legal profession’s core values. That model would value clarity, accessibility, transparency, and fairness, as well as endorse recommended practices that promote these core values. In constructing such a model, this Article allows lawyer-licensing entities across jurisdictions to assess their current practices and learn about other jurisdictional practices with high efficacy.

Creating a value-based model sets the stage for further inquiry about the trajectory of the licensing function within the larger scheme of lawyer self-regulation and admission to the profession. To retain

1. See RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 66–71 (2015).

2. See, e.g., N.C. GEN. STAT. ANN. § 84-24 (2011) (granting the North Carolina Board of Law Examiners independent rulemaking authority, allowing the Board to promulgate “rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession”).

the privilege of self-regulation,³ the legal profession, as a group, must act in a way that is democratically sound both in composition and action. Lawyer-licensing entities that fall far short of such a theoretical model risk losing their democratic legitimacy and the public trust necessary for their continued existence as an integral part of a self-regulated profession.

This Article aims to enable lawyer-licensing entities to evolve by applying practices and strategies in the adoption of a culture of engagement with the public, which will allow these entities to broaden their own purpose in alignment with the highest purposes of the legal profession, thus allowing these entities to help maintain the privilege of self-regulation.

Some professions come and go. Lamplighters and log-drivers are no longer part of the labor force.⁴ But law is here to stay, because it serves an essential public purpose. Accordingly, lawyers, for the time being, maintain a presence within the professional service market.⁵ Importantly, lawyers have always been the foot soldiers who defend against governmental abuse of power.⁶ As such, lawyers hold

3. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 20 (1986) (“The profession of law throughout its existence has been regulated in a variety of ways, in recent centuries chiefly through courts allied with bar associations. That system [is] often call[ed] self-regulation . . .”).

4. Lamplighters lit the wicks of streetlamps; log drivers guided timbered trees down rivers to processing sites. Today, streetlamps are solar- or electricity powered, with the ability to automatically turn on at dusk and off at dawn; logging trucks transport timbered trees to lumber mills. See generally, e.g., Katie Dowd, *In Honor of Labor Day, Here Are 16 Jobs That Don’t Exist Anymore*, S.F. GATE (Sept. 3, 2016, 3:19 AM), <http://www.sfgate.com/weird/article/careers-jobs-that-dont-exist-anymore-obsolete-9198294.php#photo-5979210>.

5. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 6 (AM. BAR ASS’N 2014) (“[M]indful of deficiencies in the administration of justice and of the fact that the poor . . . cannot afford adequate legal assistance. . . . [A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for . . . those who because of economic or social barriers cannot afford or secure adequate legal counsel.”).

6. See *id.* ¶ 13 (“Lawyers play a vital role in the preservation of society.”); see also Olivia Becker, *Fighting Back: How Volunteer Lawyers Inside JFK Airport Helped Families Affected by Trump’s Refugee Ban*, VICE NEWS (Jan. 29, 2017) <https://news.vice.com/story/how-volunteer-lawyers-inside-jfk-airport-fought-back-against-trumps-refugee-ban> (describing JFK’s airport terminal that transformed into a “makeshift legal office” where approximately thirty volunteer lawyers met with

significant responsibility in maintaining our democratic society.⁷ But the professional landscape has shifted, and the question of who will provide legal services demands attention, because pressure continues to mount from those outside the profession to provide services that have for decades been reserved for licensed lawyers.⁸ Lawyer-licensing entities, as the gatekeepers of the profession, play a pivotal role in determining who becomes a licensed lawyer. The questions of who receives a law license and how the jurisdiction administers the licensing process remain important as innovation continues to disrupt the legal services industry.⁹

The ubiquity of information and consumers' ever-increasing ability to access it have reshaped the professional landscape of law. Technology and globalization also contribute to the heightened pressure on the legal profession to respond to consumer demands for

family members of detained travelers and filed legal petitions on behalf of the detainees based on President Trump's travel ban); *cf.* 42 U.S.C. § 1988(b) (2012) (allowing federal district courts discretion in awarding attorney fees to prevailing civil rights plaintiffs to incentivize lawyers to represent them).

7. MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 10–11, 13 (AM. BAR ASS'N 2014) (stating that “the legal profession is unique . . . because of the close relationship between the profession and processes of government and law enforcement;” that self-regulation “helps maintain the legal profession's independence from government domination . . . [and a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice;” and that lawyers must appreciate “their relationship to our legal system”).

8. *See, e.g.*, OSB FUTURES TASK FORCE, OR. STATE BAR, THE FUTURE OF LEGAL SERVICES IN OREGON 8 (2017) http://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Summary.pdf (noting that, in a June 2017 final report, an Oregon Bar task force recommended the creation of a “paraprofessional licensing program” that would allow for limited legal service technicians); *see also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3–4 (1981) [hereinafter Rhode, *Policing*] (noting the growing market for “do-it-yourself legal publications and lay services” and numerous groups forming to advocate for reducing the use of lawyers).

9. *See generally* COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR. ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (recommending improvements to the delivery and access of legal services).

changes in the delivery of legal services.¹⁰ Social media and internet resources that offer more convenient vehicles for information attainment and distribution have fostered a culture of consumer access-to-information, changing consumers' abilities to obtain information and expectations for the delivery of professional services.¹¹ Consumers' ability to obtain and distribute information quickly and across geographic borders affects the legal profession in terms of lawyers' marketing and delivery of legal services, as well as consumers accessing such services.¹² The American Bar Association ("ABA") devotes an entire website page to addressing social media as it relates to the legal profession.¹³ The rise of the internet and social media have changed the way we structure our lives, and structures within the legal profession must adapt.

Historically, public safety and promoting the general welfare of society have served as primary justifications for state regulation of

10. See, e.g., *ABA Commission on Ethics 20/20: About Us*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Feb. 27, 2018) (describing the creation of the ABA Commission on Ethics 20/20 to update the Model Rules of Professional Conduct in response to "advances in technology and global legal practice developments").

11. Brian Solis, *Digital Darwinism: How Disruptive Technology Is Changing Business for Good*, WIRED, <http://www.wired.com/insights/2014/04/digital-darwinism-disruptive-technology-changing-business-good> (last visited Feb. 27, 2018) (discussing how technology and the digital age is changing behaviors, expectations, and values). Roughly a decade ago, only 5% of American adults used social media. *Social Media Fact Sheet*, PEW RES. CTR., <http://www.pewinternet.org/fact-sheet/social-media> (last updated Feb. 5, 2018). As of 2018, almost 70% of this same cohort use social media to obtain and disseminate information. *Id.*

12. See, e.g., *ABA Rolls Out New Fact Check Website to Help Separate Legal Fact from Fiction*, AM. BAR ASS'N (Aug. 28, 2017), http://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_rolls_out_newfa.html (describing the purpose of the ABA Legal Fact Check website as helping to sort factual information from non-factual information in the information age). The Legal Fact Check website is available at www.abalegalfactcheck.com. *Id.*

13. *Social Media for Lawyers*, AM. BAR ASS'N, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/social_media.html (last visited Nov. 4, 2017).

licensed occupations.¹⁴ Professions that require government-issued licenses enjoy privileges and market protections that shield professionals within a workspace from the pressures of a bureaucratic regime or capitalistic market.¹⁵ In enjoying these protections,¹⁶ some professionals, like lawyers, take on an additional obligation of serving a public purpose.

The legal profession's public obligation corresponds with lawyers' claim to the privilege of self-regulation.¹⁷ Lawyers need a protected workspace at times to best serve their public role.¹⁸ Lawyers need to be distant enough from governmental forces and influences such that they do not fear retaliation when making unpopular arguments or arguments that run contrary to the law as it currently stands.¹⁹ We cannot fairly ask lawyers to do the difficult work of

14. See, e.g., *Dent v. West Virginia*, 129 U.S. 114, 121–22 (1889) (stating a state's police power extends to providing for the general welfare of its citizens, which includes ensuring that certain skilled professionals possess the requisite competence and skill before being able to practice such professions within state borders).

15. See ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* 72–73 (2001).

16. “Practitioners have sought licensure ‘always on the purported ground that it protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers.’” Rhode, *Policing*, *supra* note 8, at 96 (quoting Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976)).

17. Self-regulating professions, as organized groups, “exercise relatively rigid control over other group members. Often the control is exerted in the form of a code of ethics.” WOLFRAM, *supra* note 3, at 15. Distinctively, members of a self-regulated profession control “ejection” of a member from the occupation; unlike a boss who fires an employee in a free-market system, a lawyer whom colleagues eject from the profession ceases to be a part of that occupational group. See FREIDSON, *supra* note 15, at 72–73; see also Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1244 (2003) (noting that lawyers have “peerless success . . . in developing and maintaining a relatively undisturbed and self-contained system of ‘self-regulation’”).

18. For an example of a response to lawyers being required to work within an unprotected work space, see Nat’l Ass’n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 03–04 (2003) (“[I]t is unethical for a criminal defense lawyer to represent a person accused before . . . military commissions [in Guantanamo] because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”).

19. See, e.g., Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL’Y 6, 12–

recalibrating the law if lawyers must take an anti-government stance and simultaneously fear retaliatory government action—including the revocation of a government-issued occupational license. Thus, at times, lawyers need some insulation from the government when they are called to be loyal and diligent to issues that run counter to current governmental positions.

Some have touted the notion that “self-regulation is good regulation”²⁰ as a means of validating that privilege. But self-regulation can pose significant ethical and legal challenges in specific practical situations.²¹ Self-regulation, in breeding insularity, can allow lawyers to abuse this privilege, autonomously distancing the profession from public regulation or adequate oversight.²² In essence, self-regulation, at its worst, leaves lawyers to their own devices. For self-regulation to continue to be good regulation within the legal profession, the profession, in all its constituent parts, must uphold the highest values of the legal profession.

Sociologist Eliot Freidson, a renowned expert on professions, would agree that self-regulation is good regulation *when* professions can serve their public purpose.²³ In the view of this Article, that public purpose includes preserving constitutional liberties, protecting against governmental abuse of power, and furthering the community’s full

13 (1994) (claiming that ending the legal profession’s tradition of self-regulation and moving toward a client-oriented lawyer-disciplinary scheme “threatens the lawyer’s independence from government influence”); *Senate Leader Defends Deep Cuts to AG’s Office*, WRAL (June 22, 2017), <http://www.wral.com/senate-leader-defends-deep-cuts-to-ag-s-office/16779130/> (reporting that a state senator defended a \$10 million cut to the North Carolina Department of Justice budget because the North Carolina Attorney General did not serve North Carolina’s elected representatives to their satisfaction).

20. L. Thomas Lunsford II, *Lest We Be Misunderstood*, 20 N.C. STATE B.J. 6, 7 (2015).

21. See, e.g., Bobbi Jo Boyd, *Mapping Inter-Organizational Boundary Bureaucracy and the Need for Oversight*, 45 SW. L. REV. 631, 686–91 (2016) [hereinafter Boyd, *Mapping*] (describing how an occupational licensing entity for a self-regulating profession operated for decades in a somewhat private mode, lacking transparency and adequate oversight).

22. See *id.*

23. FREIDSON, *supra* note 15, at 127; Ray Worthy Campbell, *A Comparative Look at Lawyer Professionalism: Contrasting Search Engine Optimization, Lawyering, & Law Teaching*, 50 U.S.F. L. REV. 401, 410 (2016).

democratic participation in public life by following substantive and procedural rules of law.²⁴ Lawyers should continue to self-regulate when it comes to upholding these fundamental rights, privileges, and values because of the distinctly positive public role that lawyers play in so doing.

A recent example sheds light on the insularity that self-regulation can incur in the context of lawyer-licensing entities, however, and its implications for frequent misunderstandings of protocol and procedural legitimacy. The North Carolina Board of Law Examiners voted to adopt the Uniform Bar Examination and to require applicants to complete a state-specific component requiring applicants to be familiar with state law prior to receiving a license to practice law.²⁵ Subsequent to its decision to create state-specific content, the Board, through its members, invited practicing lawyers and law school representatives to a meeting to enlist their help in creating the content.²⁶ During this meeting, one of the invited lawyers asked Board members whether the meeting participants, in being involved with creating the state-specific content, were operating under any structure or procedures at all, or if they should be.²⁷ The practicing lawyer's question brought to light the ad hoc, obscure nature of the lawyer-licensing entity meeting, reflecting a disregard of standard procedures.²⁸ The fact that the invited lawyer had to raise this question demonstrates the insularity with which lawyer-licensing entities can function. While this kind of failure to adhere to standard procedures

24. FREIDSON, *supra* note 15, at 127.

25. Cody Davis, *The Uniform Bar Exam, Next Stop: North Carolina*, CAMPBELL L. OBSERVER (Feb. 6, 2017), <http://campbelllawobserver.com/the-uniform-bar-exam-next-stop-north-carolina/>; Notes from North Carolina Board of Law Examiners Meeting, Raleigh, N.C. (Oct. 27, 2016) (on file with author). The Board exercised this rulemaking power without prior notice or an opportunity to make public comment, as the lawyer-licensing entity withdrew its standard rulemaking procedures in 1977 and has operated in a somewhat private mode since then. See Boyd, *Mapping*, *supra* note 21, at 658–67.

26. Notes from North Carolina Board of Law Examiners Meeting, Greensboro, N.C. (Apr. 6, 2017) (on file with author). The Board's inclusion of outsiders deserves commendation.

27. *Id.*

28. *Id.* The Board did not open its meeting in a way that acknowledges its status as a public body or entity that is subject to the state's open meetings law or ethics in government act. *Id.*

may not be intentional, the placement of the lawyer-licensing process within and its identification with the judicial branch of government have cemented this insularity.²⁹

As part of the judicial branch of government, lawyer-licensing entities counterintuitively lack procedural standards that inhere in other types of occupational-licensing entities.³⁰ Standards and procedural safeguards, like state administrative procedure acts, as well as government-in-the-sunshine laws,³¹ have had limited and inconsistent influence in the development of lawyer-licensing entity practices.³² This can be particularly true in those jurisdictions that take a strict view of the separation of powers doctrine.³³ Claiming the exclusive power to regulate lawyers may stifle the legal profession's ability to adapt to the changing professional landscape by remaining

29. WOLFRAM, *supra* note 3, at 29 (claiming that “[a]s a permanent fixture of a state’s jurisprudence, the [inherent powers] doctrine . . . limits the possibilities for reform of the legal profession” because in its negative form, it prevents other branches of government from affecting change related to lawyer licensing or lawyer regulation).

30. *See, e.g.*, State Bd. of Psychological Exam’rs v. Norman, 679 P.2d 1263, 1264 (Nev. 1984) (“The [State] Board [of Psychological Examiners] is an agency within the meaning of the [Nevada] Administrative Procedure Act and must comply with its provisions.”).

31. *See* Judy Nadler & Miriam Schulman, *Open Meetings, Open Records, and Transparency in Government*, MARKKULA CTR. FOR APPLIED ETHICS (Oct. 23, 2015), <http://www.scu.edu/ethics/focus-areas/government-ethics/resources/what-is-government-ethics/open-meetings-open-records-transparency-government> (defining “sunshine laws” as laws mandating that “all government business be conducted in open meetings to which the public has access”).

32. *See* Bobbi Jo Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices for Lawyer-Licensing Entities*, 70 U. ARK. L. REV. 609, 647 (2017) [hereinafter Boyd, *Sunshine*] (finding that twenty-three of fifty-one lawyer-licensing entities regularly hold meetings that are open to the public, with only seventeen of those entities doing so pursuant to express authority, much of which is expressed in court rules rather than through state legislation).

33. *See, e.g.*, Hanson v. Grattan, 115 P. 646, 646–47 (Kan. 1911) (concluding strictly that courts have exclusive power to set bar admission standards and the power to disbar a practicing attorney). *See generally* WOLFRAM, *supra* note 3, at 20–21, 29 (describing argument that the regulation of the legal profession is best suited for lawyers, lawyer-judges, and the judicial branch).

too insulated from other regulatory and market forces.³⁴ Decades of privileged assumptions have reinforced the insular nature of both lawyer-licensing entities and the legal profession itself.³⁵

Because of these privileges, lawyer-licensing entities lack awareness of how insular they are and what consequences can result.³⁶ As evidenced in the lawyer-licensing entity meeting described above, structure and procedures were afterthoughts rather than primary, functional features.³⁷ Without procedural frameworks, lawyers and the licensing entities who empower them have rational incentives to misuse power precisely in a way that undercuts their professional purpose.³⁸ In the situation of lawyer licensing, this problem gathers more tension as it implicates who may access the highly influential body and administration of the legal system.³⁹

Lawyer-licensing entities face new challenges within the context of technological change and bipartisan pushback against restrictive occupational licensing regulation.⁴⁰ Such entities should

34. See WOLFRAM, *supra* note 3, at 29; SUSSKIND & SUSSKIND, *supra* note 1, at 33–37 (2015).

35. See SUSSKIND & SUSSKIND, *supra* note 1, at 30–31 (questioning the soundness of the claim that the act of licensing lawyers is necessarily part of the inherent powers doctrine).

36. Cf. Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76, 83 (2013) (stating implicit biases operate under the “radar,” and, “[a]s a result, individuals are not aware that implicit biases may be affecting their behaviors and decisions”).

37. Notes on North Carolina Board of Law Examiners Meeting, Greensboro, N.C. (Apr. 6, 2017) (on file with author).

38. See, e.g., Boyd, *Mapping*, *supra* note 21, at 686–91, 717–18 (showing how one lawyer-licensing entity operated for decades without providing advance notice of public meetings).

39. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *6–7 (W.D. Wash. Feb. 3), *aff’d*, 691 Fed. Appx. 834 (9th Cir. 2017) (demonstrating the capability of a federal district court judge to enter a nationwide temporary restraining order to enjoin specific sections of a presidential order affecting United States residents in areas of “employment, education, business, family relations, and freedom to travel”).

40. See, e.g., U.S. DEP’T TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, (2015) http://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; Press Release, Inst. for Justice, “Natural Hair Braiding Protection

evaluate their structures and operations against a value-based model because this evaluation increases their democratic legitimacy and realigns the profession with fulfilling its public obligations. Such an evaluation also contributes positively to the image of the profession and shapes lawyers in a more value-oriented way. Thresholds set the stage for future action: how lawyers are welcomed into the legal profession—including the processes associated with examinations, character and fitness inquiries, and licensing—affects their perspective and sets the tone as they become practitioners. Finally, if lawyer-licensing entities evaluate their practices, it will help entities manage risk and exposure to liability—a risk that has spiked in recent years across professions.⁴¹

This Article proposes a model lawyer-licensing entity that is characterized by a set of four values: clarity, accessibility, transparency, and fairness. The model elaborated here describes the structures, features, and practices of an ideal lawyer-licensing entity with the intention of implementation and adaptation. This model comprises existing law and ideal practices, combining extensive research of lawyer-licensing entities across jurisdictions.⁴² Other movements and developments within lawyer licensing support the model.⁴³ Those developments include the snowballing number of jurisdictions that are adopting the Uniform Bar Examination,⁴⁴ an

Act” Now Law in Arkansas (Mar. 19, 2015), <http://ij.org/press-release/natural-hair-braiding-protection-act-now-law-in-arkansas>.

41. See, e.g., N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1110 (2015) (denying sovereign immunity for anti-competitive conduct to the North Carolina Board of Dental Examiners for want of active state supervision); *Craig v. Miles*, 312 F.3d 220, 228–29 (6th Cir. 2002) (finding a regulation prohibiting the sale of funeral caskets by anyone not licensed as a funeral director was unconstitutional because it was intended to protect licensed funeral directors from market competition and did not otherwise satisfy rational basis review).

42. See Boyd, *Sunshine*, *supra* note 32, at 635–48 (providing an overview of the processes used by lawyer-licensing entities across the United States).

43. See *infra* notes 44–46.

44. Diane F. Bosse, *A Uniform Bar Examination: The Journey from Idea to Tipping Point*, THE BAR EXAMINER 19 (2016), http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-Bosse-850316.pdf.

increase in liability exposure for occupational-licensing entities,⁴⁵ and a growing national trend for jurisdictions to review state occupational licensing entities for all professions, including their number, structure, and practices.⁴⁶ Consistent with this national trend, this Article recommends that lawyer-licensing entities reflect and evaluate their current practices based on the value-based model described herein.

Part II gives background information and identifies relevant principles of law and outlines the historical landscape of lawyer-licensing entities and how they function; Part III proposes a model based on four democratic values, including clarity,⁴⁷ accessibility,⁴⁸ transparency,⁴⁹ and fairness;⁵⁰ and Part IV concludes by reflecting on the importance of accountability and fidelity as characteristics that

45. In the past decade, an uptick in both litigation and scholarly discourse concerning antitrust liability for occupational licensing entities that licensed, actively participating members profession govern has emerged. *See, e.g., Craigmiles*, 312 F.3d at 221; Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1131–45 (2014); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. PUB. POL'Y 931, 984–1006 (2014). For example, the Supreme Court of the United States recently held that the North Carolina Board of Dental Examiners was not entitled to a sovereign immunity defense in defending an antitrust suit by the Federal Trade Commission. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110. The Court rejected the licensing entity's claim that it was a part of the sovereign state of North Carolina because the Board lacked adequate state supervision, and a majority of the Board members were active market participants. *Id.* In other words, the Board members were practicing members of a profession—the same profession for which they served as gatekeepers for admission. *Id.*

46. *See, e.g., N.C. GEN. ASSEMBLY, OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED 1* (2014), http://www.ncga.state.nc.us/PED/Reports/documents/OccLic/OccLic_Report.pdf; Tom McLaughlin, *FTC Takes On Economic Liberty with Introduction of New Task Force*, AM. LEGIS. EXCHANGE COUNCIL (May 15, 2017), <http://www.alec.org/article/ftc-takes-on-economic-liberty-with-introduction-of-new-task-force> (listing “Connecticut (SB191), Mississippi (HB1425), West Virginia (HB2984), Nebraska (LB299) and Indiana (HB1221, HB1243 and HB1394)” as states in the process of reforming their licensing boards).

47. *See infra* Section III.A.

48. *See infra* Section III.B.

49. *See infra* Section III.C.

50. *See infra* Section III.D.

arise from model behavior and relate to the highest values of the legal profession.

II. BACKGROUND

A. *Relevant Principles of Law*

This Section describes principles of law applicable to the model lawyer-licensing entity characterized by the values of clarity, accessibility, transparency, and fairness. Relevant legal principles include constitutional provisions that protect individual liberties, as well as state statutes, such as government-in-the-sunshine laws and administrative procedure acts, that help foster democratic ideals. These principles show that legal frameworks exist within which to practice the democratic values elaborated here. Notably, however, not all features associated with the values of clarity, accessibility, transparency, and fairness operate within a legal framework, as some key features connect with behavior that requires acting in a way that extends beyond minimum standards set forth by law.⁵¹ This proposed structural framework will allow governmental entities to function within a space that allows for members of the public to engage with governmental entities to negotiate their rights and obligations and fosters behavior of legal professionals that will further these values using self-regulation.

Our Constitution guarantees due process,⁵² and due process jurisprudence has played a constant and integral part in maintaining our democratic society. Standard due process protections have become a cornerstone in the American governmental system and the foundation of administrative agency practice.⁵³ The two primary features of due process are advance notice and an opportunity to be

51. See, for example, *infra* Section III.C.3 on the feature of being forthcoming, which is associated with the value of transparency.

52. U.S. CONST. amends. V, XIV.

53. See generally PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 48–64 (2d ed. 2002) (describing the procedural aspects of the due process of law guaranteed by the federal Constitution in the context of administrative agency law).

heard.⁵⁴ These two features facilitate the values of clarity in standards as well as accessibility in engagement.⁵⁵ Clarity in standards relates to the due process requirement of having advance notice of existing rules within which stakeholders must operate.⁵⁶ Accessibility in engagement refers to due process protections that set up a structural framework that allows for advance notice of rule changes and an opportunity to be heard.

In exercising rulemaking power, administrative agencies comply with due process guarantees and foster clarity in standards and accessibility in engagement by producing rules through notice-and-comment rulemaking procedures.⁵⁷ Rulemaking procedures like these provide advance notice of potential rule changes and solicit comments from the public and experts.⁵⁸ Even small units of local government provide notice of rule changes and accept public comment.⁵⁹

Another way our democracy has promoted agencies to operate within procedural due process frameworks is to enact uniform administrative procedure acts.⁶⁰ In addition to outlining notice-and-

54. See RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 618 (4th ed. 2010).

55. See *id.*

56. Clarity in existing rules is a necessary part of due process because, without clarity of rules, those who must obey the rules must also guess as to each rule's meaning. Guessing about a rule means one lacks advance notice of what the rule permits, prohibits, or requires. A lack of such notice violates due process because citizens cannot easily comply with rules that they cannot understand. See *supra* note 52 and accompanying text.

57. See, e.g., TENN. CODE ANN. §§ 4-5-203 to -204 (2015) (setting forth the procedures for advance notice of administrative agency rule changes and an express avenue for soliciting public comment before making such changes); see also TENN. CODE ANN. § 4-5-216 (2015) ("Any agency rule not adopted in compliance with [Tennessee's Uniform Administrative Procedures Act] shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose.").

58. See TENN. CODE ANN. §§ 4-5-203 to -204 (2015).

59. E.g., *Participation and Comment at Council Meetings*, TOWN OF CHAPEL HILL, <http://www.townofchapelhill.org/town-hall/government/comment-at-council-meetings> (last visited Mar. 1, 2018).

60. See, e.g., N.Y. A.P.A. LAW § 100 (West, Westlaw through 2018) (providing that "[t]he legislature hereby finds and declares that the administrative rulemaking, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the

comment rulemaking procedures, administrative procedure acts typically mandate that agencies act in conformity with other procedural safeguards.⁶¹ Having an express avenue for outsiders to petition for rule changes is one such procedure.⁶² Petition allows outsiders to have a voice in how the agency administers its policy directives.⁶³ Another common provision within administrative procedure acts is the duty to keep records of agency operations.⁶⁴ Complying with record-keeping duties promotes transparency of agency operations.⁶⁵ Other provisions of standard administrative procedure acts that are relevant to this Article include requirements that agencies provide an express avenue for outsiders to seek declaratory relief regarding the meaning or validity of a particular

public” and the enactment of the administrative procedure act “guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law”); *see also* TENN. CODE ANN. §§ 4-5-101 to -404 (2015) (codifying the Uniform Administrative Procedures Act); *Chastain v. Tenn. Water Quality Control Bd.*, 555 S.W.2d 113, 116 (Tenn. 1977) (“The obvious purpose of the [Uniform Administrative Procedures Act] is to bring together in one place the rules and regulations of all state administrative agencies to facilitate their convenient inspection by interested citizens.”).

61. *See, e.g.*, TENN. CODE ANN. § 4-5-220 (2015) (detailing procedures for agencies with respect to publication of their adopted rules, as well as publication of their notices of rulemaking hearings and other agency actions); TENN. CODE ANN. § 4-5-222 (2015) (describing standards for agencies with respect to their duty to keep records when exercising rulemaking authority).

62. *See, e.g.*, MINN. STAT. § 14.09 (West 2013) (“Any person may petition an agency requesting the adoption, amendment, or repeal of any rule.”); 42 R.I. GEN. LAWS § 42-35-6 (West, Westlaw through Ch. 480 of Jan. 2017 Sess.) (“Any person may petition an agency to promulgate a rule.”); TEX. GOV’T CODE ANN. § 2001.021(a) (West 2016) (providing any “interested person . . . may request the adoption of a rule” by petitioning the state agency).

63. *See supra* note 62.

64. *See, e.g.*, TENN. CODE ANN. § 4-5-222 (2015) (describing record keeping duties with respect to exercising agency rulemaking authority); TENN. CODE ANN. § 4-5-319 (2015) (describing record keeping duties with respect to exercising adjudicatory authority for contested cases).

65. *See, e.g.*, ALA. CODE ANN. § 41-22-4(a)(3), (4) (2000) (requiring agencies to make available for public inspection and copying at cost all rules, policy statements, and interpretations, as well as final orders, decisions, and opinions).

agency rule,⁶⁶ state reasons in support of rule changes,⁶⁷ and regularly review agency regulations to ensure that rules are necessary and up-to-date.⁶⁸ In this way, administrative procedure acts facilitate notions of due process and allow agencies to function more democratically within the American system of government.

Without due process safeguards, administrative agencies could function in a non-democratic way, as agency leaders are often not elected and can maintain their positions for unregulated periods of time.⁶⁹ Due process procedures limit government power across a broad spectrum of public life. Specifically, due process enables individuals to attend school, work in a trade, live in prison, and receive care.⁷⁰ Due process procedures level the playing field of engagement, allowing anyone who participates in public life to be recognized, and as importantly, to be heard. Without due process safeguards, stakeholders without inside connections have no other recourse and cannot participate fully in public life. Due process is a form of negotiation in which the law provides the governed with avenues to negotiate their rights and responsibilities as members of a public community. This negotiation is a vital aspect of equal participation in a democratic society.

66. See, e.g., ARK. CODE ANN. § 25-15-207 (2002) (providing potential plaintiffs with an express avenue for declaratory relief to seek a judgment on the validity or applicability of an agency rule).

67. See, e.g., WASH. REV. CODE § 34.05.325(6)(a) (West 2003) (“[A]n agency shall prepare a concise explanatory statement . . . [i]dentifying the agency’s reasons for adopting the rule.”).

68. See, e.g., NEV. REV. STAT. § 233B.050(1)(d)–(e) (LexisNexis 2013) (requiring agencies to review rules of practice at least once every three years and to review its regulations at least once every ten years).

69. See, e.g., *Fred Parker to Retire; Lee Vlahos to Head NCBLE*, NABE NEWS (Nat’l Ass’n Bar Execs., Chicago, Ill.), Mar. 2013, <http://www.nabenet.org/mpage/NABENewsMarch2013> (noting the retirement of Fred P. Parker, III, after serving as Secretary of the North Carolina Board of Law Examiners for more than 40 years, from 1973–2013).

70. See, e.g., *Washington v. Harper*, 494 U.S. 210, 256–258 (1990) (finding a fundamental right for prisoners to be free from the involuntary administration of psychotropic drugs and requiring procedural due process of 24 hours of advance notice and an opportunity to be heard); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (concluding suspension from school constitutes a deprivation of liberty for which a student must be afforded procedural due process).

Further supporting full participation in public life are government-in-the-sunshine laws. These laws open meetings of public bodies to members of the community as well as ensure that community members have access to public records.⁷¹ A typical open meeting law provides “that the formation of public policy and decisions is public business and shall not be conducted in secret.”⁷² A standard public-records act provides that members of a community “shall have the right to examine and copy a public record and to publish or otherwise disseminate” it.⁷³ Federal and state governments have enacted government-in-the-sunshine laws, which routinely apply to administrative agencies.⁷⁴

In addition to citizens’ ability to fully participate within their communities, other constitutional provisions allow citizens to move

71. See, e.g., IND. CODE ANN. § 5-14-1.5-1 (LexisNexis 2006) (stating a purpose of the statute is to ensure that all public agencies conduct their business in meetings open to the public); MINN. STAT. § 14.001 (West 2013) (stating purposes of the Minnesota Administrative Procedure Act as “to provide oversight of . . . administrative agencies” and “to increase public participation in the formulation of administrative rules”); TENN. CODE ANN. § 10-7-503 (2012 & Supp. 2017) (providing for open inspection of public records).

72. TENN. CODE ANN. § 8-44-101(a) (2016).

73. IOWA CODE ANN. § 22.2(1) (West 2010) (setting forth Iowa’s right to examine public records statutory policy).

74. Regularly, however, lawyer-licensing entities claim to be or are found exempt from the requirements of state-enacted government-in-the-sunshine statutes. In Kentucky, for example, the Kentucky Open Meetings of Public Agencies law applies to “public agencies,” but the statute neither expressly includes nor excludes judicial entities. See KY. REV. STAT. ANN. § 61.805(2) (West, Westlaw through Ch. 4 of 2018 Reg. Sess.). Indeed, the Public Records law is the only statute in Kentucky that defines “public agencies” in a way that includes courts. See KY. REV. STAT. ANN. § 61.870(1)(e). The Kentucky Supreme Court has heard cases questioning this statute’s constitutionality, including the placement of “local court or judicial agency” within the definition of “public agency.” See *Ex parte Farley*, 570 S.W.2d 617, 624–26 (Ky. 1978); accord *Ex parte Auditor of Pub. Accounts*, 609 S.W.2d 682, 688 (Ky. 1980). See also VT. STAT. ANN. tit. 1, § 312(e) (2010) (“Nothing in [Vermont’s right to attend meetings of public agencies statute] shall be construed as extending to the Judicial Branch of the Government of Vermont or of any part of the same”); VT. BD. OF BAR EXAM’RS, RULES OF ADMISSION TO THE BAR OF THE VERMONT SUPREME COURT § 1 (2017) [hereinafter VT. ADMISSION RULES], https://www.vermontjudiciary.org/sites/default/files/documents/900-00014.Rules_Admission.Bar_.pdf (noting that Vermont’s Board of Bar Examiners is established by the Vermont Supreme Court).

from one community to another without losing their ability to participate in public life and pursue a vocation of their choosing. Our federal constitution, through its Privileges and Immunities Clause, prohibits states from discriminating against citizens of other states.⁷⁵ The landmark case in the context of lawyer licensing is *Supreme Court of New Hampshire v. Piper*, in which a resident desiring to practice in a neighboring state applied to take the New Hampshire bar and passed, but the New Hampshire Supreme Court ultimately denied her application.⁷⁶ In this case, all three levels of federal courts affirmed that the New Hampshire Supreme Court's denial violated the Privileges and Immunities Clause.⁷⁷

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects privileges like the right to pursue a chosen profession within a community from state discriminatory regulation.⁷⁸ Thus, the Equal Protection Clause prohibits occupational-licensing entities from discriminating based on protected classes, including race, gender, and alienage.⁷⁹ The landmark lawyer-licensing case to confirm the right of equal protection

75. U.S. CONST. art. IV, § 2, cl. 1 (prohibiting a state from discriminating against citizens of another state, thus providing citizens a right to participate in public life across state political borders).

76. 470 U.S. 274, 276 (1985).

77. *Id.* at 277–78, 288.

78. U.S. CONST. amend. XIV.

79. *See, e.g., In re Griffiths*, 413 U.S. 717, 718, 729 (1973) (subjecting alienage-based classification to strict scrutiny and invalidating a rule prohibiting non-U.S. citizens from taking a bar examination); *accord* *Graham v. Richardson*, 403 U.S. 365 (1971) (adopting the view that alienage-based classifications are subject to heightened review and invalidating a regulation denying welfare benefits to non-citizen residents who had lived within the United States for less than fifteen years). *But see* *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (carving out an exception to the general rule of subjecting alienage-based classifications to strict scrutiny and using rational basis review for alienage-based classifications pertaining to public functions—resulting in a New York regulation requiring New York police officers to be citizens to pass constitutional muster). *Cf. Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (confirming that “[a]s a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny” and invalidating a Texas state requirement of United States citizenship to become a public notary).

under laws is *In re Griffiths*.⁸⁰ In *Griffiths*, the State of Connecticut had adopted a rule prohibiting non-citizens from being admitted to the Connecticut bar.⁸¹ This prohibition applied notwithstanding the fact that a non-citizen was also a lawful resident within the state of Connecticut.⁸² In holding that Connecticut had not met its burden and that the rule violated the Equal Protection Clause, the Supreme Court stated: “[T]he Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients. Nor would the possibility that some resident aliens are unsuited to the practice of law be a justification for a wholesale ban.”⁸³

While these landmark cases flesh out the legal framework within which administrative agencies must uphold the values of clarity, accessibility, transparency, and fairness, their existence is part of a jurisprudential track record showing that occupational licensing agencies in general, and lawyer-licensing entities in particular, have needed the intervention of the Supreme Court of the United States, as well as other law enforcement entities. The following section describes the track record of lawyer-licensing entities.

B. *The Track Record of Lawyer-Licensing Entities*

History demonstrates that, without adequate oversight, occupational licensing agencies can overstep individual rights. The track record for lawyer-licensing entities is replete with corrective court and law enforcement actions.⁸⁴ Given the scope of their power

80. See *In re Griffiths*, 413 U.S. at 729 (invalidating a state requirement that bar examinees must be citizens as violating the Equal Protection Clause of the Fourteenth Amendment).

81. *Id.* at 718–19.

82. *Id.*

83. *Id.* at 724–25. “Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.” *Id.* at 722.

84. See, e.g., *Cord v. Gibb*, 254 S.E.2d 71, 73 (Va. 1979) (reversing a trial court’s order in which the trial court refused to issue a certificate of “honest demeanor and good moral character” to an applicant seeking admission to the Virginia bar based on the fact that the female applicant was cohabiting with a man with whom she was not married).

to assess applicants' character and fitness, state supreme courts entrust lawyer-licensing entities with a significant amount of discretion to exclude applicants from admission. Character-and-fitness assessments have excluded applicants based on a variety of subjective reasons that ostensibly show that applicants lack the requisite character and fitness.⁸⁵ Examples of some of these subjective reasons have included political affiliation, marital status, and health diagnoses.⁸⁶

The infamous case of *Schware v. Board of Bar Examiners of New Mexico* illustrates the need for corrective court action based on a lawyer-licensing applicant's prior political affiliations.⁸⁷ The landmark case demonstrates that the legal profession's claim to self-regulation is not unlimited. In *Schware*, the Supreme Court of the United States found that the State of New Mexico had exceeded those limits when it denied Mr. Schware admission to its state bar because he had previously been affiliated with a communist-party organization and, therefore, lacked the requisite moral character and fitness to become a licensed lawyer.⁸⁸ The Supreme Court held that New Mexico's conclusion that Mr. Schware did not possess the high moral character and requisite fitness for an attorney lacked factual support and was not an appropriate assertion of state power.⁸⁹ As such, New Mexico's discriminatory action violated the Equal Protection Clause of the federal Constitution.⁹⁰ The case recognized one danger of self-

85. See, e.g., *In re King*, 136 P.3d 878, 886 (Ariz. 2006) (denying admission to an applicant who had been admitted to practice in Texas and had practiced in Texas since 1994 without being the subject of a grievance or sanction because the applicant had been convicted of attempted murder 28 years prior).

86. See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 56 (1961) (holding denial of admission appropriate for applicants who failed to answer bar application question regarding applicant's political group affiliations); *Cord*, 254 S.E.2d at 72 (recounting an initial denial of admission to a female applicant seeking admission based on the fact that she was cohabiting with a man with whom she was not married); Melody Moezzi, *Lawyers of Sound Mind?*, N.Y. TIMES (Aug. 5, 2013), <http://www.nytimes.com/2013/08/06/opinion/lawyers-of-sound-mind.html> (noting a Connecticut bar applicant's initial denial of admission based on a mental health diagnosis of bipolar disorder and a subsequent nine year conditional bar admission period requiring physician certifications of fitness twice each year).

87. *Schware v. Bd. of Bar Examr's*, 353 U.S. 232 (1957).

88. *Id.* at 238-39.

89. *Id.*

90. *Id.*

regulation, namely that choosing who is allowed to join a group is a process that often includes discrimination and bias.⁹¹

Discrimination and bias have both excluded applicants seeking admission to the bar and hindered and obstructed the licensing process for other disadvantaged groups. For example, in one bar admission dispute, a lawyer licensed in another jurisdiction sought admission to the Virginia State Bar, but it denied her initial application because she was living with a man out of wedlock.⁹² Again, a bar applicant needed corrective court action to allow for her admission and remove the obstructive character and fitness assessment.⁹³

More recently, discrimination that hindered and obstructed the licensing process for applicants with certain health diagnoses required corrective action from the United States Department of Justice.⁹⁴ Problematically, lawyer-licensing entities have been very slow to conform their fitness-to-practice-law application questions to the Americans with Disabilities Act (“ADA”) requirements.⁹⁵ For twenty years, scholarly discourse has critiqued the way in which bar application fitness questions violate the ADA.⁹⁶ The National

91. *Id.* at 239.

92. *See* Cord v. Gibb, 254 S.E.2d 71, 72–73 (Va. 1979).

93. *See id.* at 73.

94. *See* Press Release, U.S. Dep’t of Justice, Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities (Aug. 15, 2014) [hereinafter Press Release, DOJ Agreement], <https://www.justice.gov/opa/pr/departments-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates> (resolving federal investigation concerning alleged violations of the Americans with Disabilities Act and its implementing regulation regarding its practices concerning applicants seeking bar admission with mental health disabilities). The settlement can be found at https://www.ada.gov/louisiana-supreme-court_sa.htm.

95. *See generally* Jon Bauer, *Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 101–25 (2001) (recounting stories of individual mental health screenings for purposes of admission to practice in Connecticut).

96. *See, e.g.*, Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147 (1994); Ann Hubbard, *Improving the Fitness Inquiry of the North Carolina Bar Application*, 81 N.C. L. REV. 2179, 2183 (2003); Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirement*, 2014 BYU L. REV. 775, 778 (2014); Keith

Conference of Bar Examiners failed to take initiative to address the problems of these application questions, including sample application questions published by conference leadership.⁹⁷ Only after the Department of Justice wrote a thirty-four page threat-to-sue letter to the Supreme Court of Louisiana about the failings of its application questions⁹⁸ did widespread reform occur.⁹⁹

The letter prompted Louisiana to revise its application questions, which had previously called for mental-health-diagnosis disclosures, regardless of whether applicants seeking admission to the Louisiana Bar had experienced any behavioral symptoms associated with the diagnosis that would impact their fitness to practice law.¹⁰⁰ The threat-to-sue letter prompted the National Conference of Bar Examiners to change its sample character-and-fitness application questions, as well, which other jurisdictions use as models.¹⁰¹ The

Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character Requirement*, 82 ST. JOHN'S L. REV. 1037 (2008).

97. For example, the January 15, 2013 version of the Standard National Conference of Bar Examiners Request for Preparation of a Character Report posed the following question to applicants: "Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" See Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice Civil Rights Div., to Honorable Bernette J. Johnson, Chief Justice, La. Supreme Court, The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (Feb. 5, 2014), <http://www.ada.gov/louisiana-bar-lof.pdf>.

98. *Id.*

99. See *infra* note 102.

100. See Press Release, DOJ Agreement, *supra* note 94.

101. See AM. BAR ASS'N, RESOLUTION OF THE HOUSE OF DELEGATES 102 (2015) [hereinafter ABA RESOLUTION], <https://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/102.pdf>. Prior to the Department of Justice's 2014 threat-to-sue letter, a majority of jurisdictions asked applicants about their diagnosis status related to mental health disorders. See *infra* note 102. The question at issue was either identical or substantially similar to the following question: "Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" This question appeared on the National Conference of Bar Examiners Standard Request for Preparation of a Character Report. See Letter from Jocelyn Samuels, *supra* note 97, at 5. In August 2015, the American Bar Association adopted a resolution to urge the elimination of any questions on bar applications that ask "about mental health history, diagnoses, or treatment, and instead use questions that focus on conduct or behavior that impairs an

Department of Justice threat-to-sue letter correlates with at least twenty-five jurisdictions changing one or more fitness-to-practice-law application questions associated with applicants' mental-health histories.¹⁰² Most jurisdictions now ask applicants questions that steer

applicant's ability to practice law" Grant Killoran, *American Bar Association House of Delegates Update*, AM. BAR ASS'N (Jan. 12, 2016), <http://apps.americanbar.org/litigation/committees/health/articles/winter2016-0116-aba-house-delegates-update.html>.

102. Before the threat-to-sue letter, twenty-eight out of forty-three jurisdictions asked the question at issue (eight jurisdictions were inaccessible to research). *See* ALA. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE ALABAMA BAR (2013) (on file with author); BD. OF BAR EXAM'RS OF THE DEL. SUPREME COURT, APPLICATION FOR ADMISSION TO THE DELAWARE BAR (2013) (on file with author); GA. OFFICE OF BAR ADMISSIONS, APPLICATION FOR ADMISSION TO THE GEORGIA BAR (2013) (on file with author); IDAHO STATE BAR, APPLICATION FOR EXAMINATION AND ADMISSION TO THE IDAHO STATE BAR (2013) (on file with author); IND. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE INDIANA BAR (2013) (on file with author); KAN. BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION TO THE BAR OF THE STATE OF KANSAS BY WRITTEN EXAMINATION (2013) (on file with author); LA. SUPREME COURT COMM. ON BAR ADMISSIONS, APPLICATION FOR ADMISSION TO THE LOUISIANA BAR (2013) (on file with author); MD. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MARYLAND BAR (2013) (on file with author); MASS. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MASSACHUSETTS BAR (2013) (on file with author); MISS. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MISSISSIPPI BAR (2013) (on file with author); MONT. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MONTANA BAR (2013) (on file with author); NEB. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE NEBRASKA BAR (2013) (on file with author); N.J. BD. OF BAR EXAM'RS, CHARACTER AND FITNESS QUESTIONNAIRE (2013) (on file with author); BD. OF LAW EXAM'RS OF THE STATE OF N.C., APPLICATION FOR ADMISSION TO THE NORTH CAROLINA BAR EXAMINATION (2013) [hereinafter 2013 N.C. BAR APPLICATION] (on file with author); N.D. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE NORTH DAKOTA BAR (2013) (on file with author); OHIO BD. OF BAR EXAM'RS, APPLICATION TO THE BAR OF OHIO (2013) (on file with author); OKLA. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE OKLAHOMA BAR (2013) (on file with author); S.C. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE SOUTH CAROLINA BAR (2012) (on file with author); S.D. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE SOUTH DAKOTA BAR (2013) (on file with author); TEX. BD. OF LAW EXAM'RS, GENERAL APPLICATION FOR ADMISSION TO THE BAR OF TEXAS (2012) (on file with author); UTAH STATE BAR, APPLICATION FOR ADMISSION (2013) (on file with author); W. VA. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE WEST VIRGINIA BAR (2013) (on file with author).

Since the Department of Justice sent its threat-to-sue letter, twenty-five jurisdictions have changed their character and fitness application questions to no longer contain the offending question. *See* ALA. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE ALABAMA BAR (2017), <https://admissions.alabar.org/browseapplication.action?id=1> (last visited Mar. 4, 2018); BD. OF BAR EXAM'RS OF THE DEL. SUPREME COURT, APPLICATION FOR ADMISSION TO THE DELAWARE BAR (2017), <https://courts.delaware.gov/bbe/docs/Sample2017BarApplication.pdf>; GA. OFFICE OF BAR ADMISSIONS, APPLICATION FOR ADMISSION TO THE GEORGIA BAR (2017), <https://www.gabaradmissions.org/browseprintform.action?formId=1> (last visited Mar. 4, 2018); IDAHO STATE BAR, APPLICATION FOR EXAMINATION AND ADMISSION TO THE IDAHO STATE BAR (2018), https://isb.idaho.gov/wp-content/uploads/web_be_application.pdf; IND. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE INDIANA BAR (2017), <https://myble.courts.in.gov/browseprintform.action?formId=8> (last visited Mar. 4, 2018); KAN. BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION TO THE BAR OF THE STATE OF KANSAS BY WRITTEN EXAMINATION (2017), <http://www.kscourts.org/appellate-clerk/Board-of-Law-Examiners/PDF/ApplicationByWrittenExamination.pdf>; LA. SUPREME COURT COMM. ON BAR ADMISSIONS, APPLICATION FOR ADMISSION TO THE LOUISIANA BAR (2016) (on file with author); MD. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MARYLAND BAR (2016) (using standard NCBE form); MASS. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MASSACHUSETTS BAR (2017), <http://www.mass.gov/courts/docs/forms/sjc/first-time-applicants.pdf>; MISS. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MISSISSIPPI BAR (2016) (using standard NCBE form); MONT. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE MONTANA BAR (2016) (on file with author); NEB. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE NEBRASKA BAR (2017), https://supremecourt.nebraska.gov/sites/default/files/Administration/blank_applicationnebraska.pdf; N.J. BD. OF BAR EXAM'RS, CHARACTER AND FITNESS QUESTIONNAIRE (Sept. 2017), <https://www.njbarexams.org/browseform.action?applicationId=1&formId=2> (last visited Mar. 4, 2018); BD. OF LAW EXAM'RS OF THE STATE OF N.C., APPLICATION FOR ADMISSION TO THE NORTH CAROLINA BAR EXAMINATION (2017) [hereinafter 2017 N.C. BAR APPLICATION], <https://accounts.ncbex.org/php/ea/pdf/ncgeneral.pdf>; N.D. BD. OF BAR EXAMINERS, APPLICATION FOR ADMISSION TO THE NORTH DAKOTA BAR (2016) (using standard NCBE form); OHIO BD. OF BAR EXAM'RS, APPLICATION TO THE BAR OF OHIO (2016), https://www.supremecourt.ohio.gov/AttySvcs/admissions/Bar_Exam/ (last visited Mar. 4, 2018); OKLA. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE OKLAHOMA BAR (Feb. 2016) (using standard NCBE form); S.C. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION TO THE SOUTH CAROLINA BAR (Sept. 2017), <https://barapplication.sccourts.org/Documents/SamplePartB.pdf>; S.D. BD. OF BAR

clear from soliciting only disclosures of a mental health status or diagnosis¹⁰³ and instead seek disclosures from applicants about their current and prior behaviors, conditions, or impairments that interfere with their fitness and ability to competently and diligently practice law.

Ideally, the law review articles published more than a decade prior to the Department of Justice's threat-to-sue letter would have affected change in a more efficient way. This longstanding, non-eficacious practice in the face of fundamental critiques demonstrates the extremely problematic insularity of a self-regulating profession in general and of the legal profession in particular. In fact, the necessary intervention of a federal entity to restore adherence to basic values of democracy, on which the profession of law depends, further highlights the need for value-based practices that promote clarity, accessibility, transparency, and fairness. Adhering to these values will allow licensing entities to adapt to changing norms in a reasonable period of time.¹⁰⁴

The three cases set forth above are a few examples of many of their kind, as the track record for lawyer-licensing entities confirms that bias and discrimination can be common pitfalls of subjective and broad inquiries like an assessment of one's character and fitness.¹⁰⁵ If granted unchecked power in deciding who enters the profession, lawyer-licensing decision makers are more likely to err by choosing to license those applicants with whom they most closely identify.¹⁰⁶ They may also give preference to normative recognized or hidden cultural and ethnic values, traits, and tendencies¹⁰⁷—in spite of them having no true moral right or superiority to do so.

As gatekeepers, licensing entities set the stage for professional life. Entry into an imbalanced profession shrouded in fear, skepticism,

EXAM'RS, APPLICATION FOR ADMISSION TO THE SOUTH DAKOTA BAR (Feb. 2016) (using standard NCBE form).

103. See *supra* note 102.

104. Furthermore, licensing practices and procedures that comply with state and federal laws benefit not only applicants seeking admission, but other stakeholders as well. Those stakeholders include practicing attorneys who appear before licensing boards, active community members, law professors, and judges.

105. Swisher, *supra* note 96.

106. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951–52 (2006).

107. *Id.*

and mystery produces negative effects that can be pervasive and long-lasting.¹⁰⁸ Culture affects behavior,¹⁰⁹ and the legal profession is no exception. If lawyers are the foot soldiers who re-calibrate current law that becomes no longer functional or relevant according to evolving standards and culture, it is logically inconsistent to remain insular and resist minority perspectives in professional governance, since lawyers' highest purposes are to defend against these very provincialisms. In the face of these challenges, it is possible for lawyer-licensing entities to simultaneously protect the public and promote other values of the legal profession. Having examined the track record of lawyer-licensing entities, the next section provides a brief overview of current lawyer-licensing entities' structures and purposes.

C. Current Structures of Lawyer-Licensing Entities

Administrative agencies, including occupational-licensing agencies, have evolved as primary institutions that negotiate public rights and responsibilities. In this role, occupational licensing agencies have amassed significant power that affects the ability of citizens to pursue the vocational calling of their choice. Judicial decisions that affirm agency action and defer to presumed agency expertise have increased agencies' power.¹¹⁰ In addition to deferring to agency expertise, judicial decisions have also carved out a significant portion of occupational-licensing agency actions that do not provide traditional procedural safeguards.¹¹¹

108. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 493–95 (1985) (setting out a timeline that illustrates a lack of practicality and oversight of the formal character requirements in the legal profession).

109. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 199–213 (Robert L. Nelson et al. eds., 1992).

110. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (explaining that, when confronted with statutory ambiguity, an agency's interpretation of the statute must prevail if it is "reasonable").

111. For example, Section 553(b) of the Administrative Procedures Act creates an exception to the notice-and-comment requirements of Section 553. See 5 U.S.C. § 553(b)(3) (2012) ("[T]his subsection does not apply (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;

Within occupational licensing agencies, carve-outs that do not have to comply with rulemaking procedural safeguards include drafting application questions, setting passing scores for entrance examinations, developing guidance documents, drafting codes of conduct, and answering frequently asked questions.¹¹² Thus, much of what occupational-licensing agencies do can skirt oversight measures necessary to maintain fair avenues of negotiation between the government and the public. The agency has the upper hand as well as a responsibility for preserving public trust. As a result, agencies—including lawyer-licensing entities—should reflect and self-evaluate. Lawyer-licensing entities in particular bear this obligation because of the values they purport to uphold.¹¹³

Currently, the structure of lawyer-licensing entities differs from other occupational-licensing agencies and also varies greatly across jurisdictions.¹¹⁴ Most, but not all, jurisdictions house lawyer-licensing entities under their state judicial branch of government.¹¹⁵ Some state judiciaries delegate admission and licensing power to subordinate entities, while other state judiciaries retain and exercise admission and licensing power themselves.¹¹⁶ Key historical events that shape a

or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”). Section 553(b)’s exception exists because interpretative rules are not legally binding and function in effect like “press releases” of how an agency interprets a statute. WILLIAM F. FUNK & RICHARD H. SEAMON, *ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS* 154 (4th ed. 2009). In effect, the agency’s interpretation of a rule does not carry legal weight, and issuing them thus does not warrant adherence to the formalities of rulemaking procedures. *Id.*

112. FUNK & SEAMON, *supra* note 111.

113. See MODEL RULES OF PROF’L CONDUCT pmbl. ¶¶ 10–11, 13 (AM. BAR ASS’N 2014).

114. For a useful overview of the current structures and practices of lawyer-licensing entities, refer to the prior Article in this series, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*. See Boyd, *Sunshine*, *supra* note 32.

115. Compare S.C. CONST. art. V, § 4 (“The [South Carolina] Supreme Court shall have jurisdiction over the admission to the practice of law . . .”), with N.C. GEN. STAT. § 84-23 (2011) (creating the North Carolina State Bar and Board of Law Examiners as an agency of the state).

116. Compare VA. CODE ANN. § 54.1-3919 (2009) (“The Board of Bar Examiners shall be responsible for the examination of applicants and otherwise

jurisdiction's approach to lawyer licensing contribute to producing this structural variety.¹¹⁷ Authorities that shape lawyer-licensing entity structure and practices include state constitutions, court rules, state statutes, case law, attorney general opinions, and administrative regulations.¹¹⁸ Furthermore, whether the procedural processes that

ascertaining the qualifications of applicants for admission to the bar . . .”), with WYO. STAT. ANN. § 33-5-104 (2013) (stating the “board shall report its proceedings in the examination of applicants to the supreme court with their recommendation” and that the court then determines whether the applicant is qualified to be admitted into the bar).

117. See generally Boyd, *Mapping*, *supra* note 21, at 641–49 (detailing how North Carolina’s lawyer-licensing entity was shaped by key historical events in the 1920s and 1930s). Briefly, in 1932, the North Carolina Bar Association—a voluntary, non-governmental trade association—lobbied the North Carolina General Assembly to create the North Carolina State Bar and the North Carolina Board of Law Examiners as agencies of the state. *Id.* at 645–48. Compare PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION, 34 REPORTS N.C. BAR ASS’N 1, 199, 213 (H. M. London ed., 1932) (setting forth the Bar Association’s proposed legislation), with Act of Apr. 3, 1933, ch. 210, 1933 N.C. Sess. Laws 313 (evidencing an adoption of an amended version of the Bar Association’s proposed legislation) (codified as amended at N.C. GEN. STAT. §§ 84-15 to -38 (2011)), and PROCEEDINGS FIRST ANNUAL MEETING: NORTH CAROLINA STATE BAR, 1–4 N.C. STATE BAR 1, 5–6 (H. M. London ed., 1934) (noting success in achieving self-regulation through 1933 legislation after eight years of effort and “continuous doubt” as to the outcome of their effort). For 50 years, each agency developed without adequate oversight. See Boyd, *Mapping*, *supra* note 21, at 649–667, 684–702. To this day, the governmental branch to which these legislatively created entities belong is an unresolved question and has resulted in confusion, unnecessary costs, and problems. See Boyd, *Mapping*, *supra* note 21, at 633–37, 676–82, 686–94.

118. See, e.g., VT. CONST. ch. 2, § 37 (providing in its state constitution that the Vermont Supreme Court “shall make and promulgate all rules relating to the practice and procedure in all courts”); HAW. SUP. CT. R. 1.2(d) (stating in a supreme court rule that Hawaii’s lawyer-licensing entity “shall promulgate procedural rules within the scope of its powers and authority, subject to the [court’s] approval”); N.D. CENT. CODE § 27-11-02 (1991) (announcing in a state statute originally enacted in 1891 that “[t]he power to admit persons to practice as attorneys and counselors at law in the courts of this state is vested in the supreme court”); *In re Day*, 54 N.E. 646 (Ill. 1899) (holding, in a frequently cited case, that bar admission is an exclusively judicial function); N.D. Att’y Gen. Op. 2005-O-19 (Nov. 22, 2005), <https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/2005-O-19.pdf> (stating in an attorney general opinion that North Dakota’s open-meeting law applies to the State Bar Board even though courts are exempt); 27 N.C. ADMIN. CODE 01C.0105

lawyer-licensing entities follow are expressly written or codified is sporadic.¹¹⁹

Because of the sheer variety of lawyer-licensing entity structures, as well as the unique position from which lawyer-licensing entities operate, the value-based model elaborated below proposes ideal practices that jurisdictions with diverse organizational structures can tailor and implement. In addition, it is important to acknowledge that jurisdictions need not apply this ideal model in its totality. Rather, every adjustment that promotes democratic engagement between lawyer-licensing entities and the public is a positive step. These steps toward embracing the legal profession's public purpose contribute to improving both the function and the image of the legal profession.

III. ANALYSIS

Four values characterize a model lawyer-licensing entity: clarity, accessibility, transparency, and fairness. For the model lawyer-licensing entity, the value of clarity captures ideal substantive rules, while the value of accessibility captures ideal procedural practices. The latter two values of transparency and fairness embody ideal lawyer-licensing entity actions and behaviors. This Part of the Article elaborates upon each of these four values, describes their key features, and provides examples of specific, existing practices or suggested reforms that embody them.

(2017) (describing in a regulation within the North Carolina Administrative Code an approval of law school requirements for applicants seeking admission to the North Carolina State Bar).

119. Compare ALASKA BAR R. 62(5), (7) (requiring thirty days advance notice before implementing proposed lawyer regulation rule changes, allowing interested parties a period of time to comment on the proposed changes), with Order Adopting Proposed Amendments to Rule 46, No. M-252-15 (D.C. Feb. 4, 2016), https://www.dccourts.gov/sites/default/files/2017-04/M-252-15_notice.pdf (providing notice of proposed rule changes and an avenue for comment where all evidence suggests that promulgating rules according to notice-and-comment procedures is done out of voluntary compliance rather than adherence to express requirements).

A. *The Value of Clarity*

Clarity means the quality of being coherent or intelligible.¹²⁰ Clarity allows others to see, hear, and therefore understand concepts by providing a substantive foundation from which people can act and make decisions. The value of clarity in the context of occupational-licensing agencies refers primarily to the substantive rules and parameters of an agency's authority. When an agency's rules of engagement are clear, citizens possess the information that they need to effectively negotiate their rights, perform and uphold their responsibilities, and engage with the agency in a meaningful way. Meaningful engagement leads to citizens' full participation in public life. In order to facilitate such participation, the rules of engagement need to be easy to understand and straightforward. For lawyer-licensing entities, clarity involves creating substantive standards that are specific, instructive, and cohesive, as well as complete. The following elaboration of these four features of clarity offers lawyer-licensing entities guidance for practical application of this value.

1. Specific

A "specific" standard identifies detailed substantive requirements with which citizens can engage. In the context of occupational licensing, this type of standard could apply to the requirement for applicants to possess the requisite amount of moral character for admission to a profession. A vague and ambiguous requirement such as "good moral character" invites highly subjective interpretation or application.¹²¹ Speaking about "good moral character," Justice Hugo Black noted:

[t]he term . . . has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited

120. *Clarity*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

121. *See, e.g.*, *Konigsberg v. State Bar*, 353 U.S. 252, 263–64 (1957) (discussing whether a lawyer-licensing applicant who was at one time a member of or involved with the communist party possessed the requisite "good moral character" for admission to the California bar).

number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.¹²²

Accordingly, evaluating “good moral character” calls for appropriately specific standards. Ideally, specificity adds a measure of objectivity, cultivating fairness for decisions about matters that are prone to highly subjective judgments.

An example of a “specific” standard related to “good moral character” would be a rule that requires a lawyer-licensing applicant to provide the licensing entity with the names of *four* people willing to attest to the applicant’s good moral character, as well as *eight* additional people willing to be listed as character references.¹²³ All twelve identified character references cannot be relatives, current law students, fellow bar examinees, or current or former work supervisors.¹²⁴ In contrast, a vague standard would include a rule that required an applicant to provide a *sufficient* amount of character references to establish the requisite moral character for becoming an attorney and counselor-at-law.¹²⁵

Specificity promotes clarity and facilitates the efficient judicial review of agency action.¹²⁶ While rules and standards need to be specific in order to be clear, they also need to be instructive so that stakeholders, such as lawyer-licensing applicants, can fulfill their obligations and duties regarding bar admission matters.

122. *Id.* at 262–63.

123. *See* 2017 N.C. BAR APPLICATION, *supra* note 102, at 25–26 (requiring the applicant in Question 29 to identify four character references and requiring the applicant in Question 30 to identify an additional eight character references, for a total of twelve persons willing to attest to the applicant’s character).

124. *Id.*

125. *Cf. In re Applicants for License*, 55 S.E. 635, 635 (N.C. 1906) (considering an argument made by petitioners who opposed three applicants seeking bar admission because the applicants lacked sufficient “good moral characters”).

126. *See, e.g., United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (holding that the Administrative Procedure Act requires agencies to issue a statement of basis and purpose with any final rule to show interested parties and reviewing courts that the agency fully ventilated major policy concerns).

2. Instructive

An “instructive” standard is more procedural than substantive in nature and provides stakeholders with needed information about how to engage with and follow substantive rules. Instructive standards thus go beyond specificity by offering practical guidance and scaffolding for action. In the context of lawyer licensing, this means directing applicants to complete tasks related to their admission requirements for entrance into the profession. Instructions are the “how to” manual of a licensing entity’s admission requirements.

Continuing with the character reference letter example, an ideal instructive rule would provide applicants with detailed information about how to complete the character reference letter task.¹²⁷ Included instructions would be the *address* to which recommenders should submit character reference letters, as well as the accepted *format and objectives* for such letters, including the questions to be answered and details such as whether the letter needs to be notarized. Instructive standards prompt appropriate action by clearly indicating how applicants and other application contributors can comply with specific standards. Conversely, a non-instructive standard is incomplete in its directives, lacking sufficient information for applicants to reliably and efficiently complete the admission requirement task.

When standards are not only specific, but also instructive, they promote the value of clarity for a licensing entity’s substantive rules. Yet, for the value of clarity to be more fully realized, standards that are specific and instructive must also be logically integrated in a cohesive way.

3. Cohesive

Standards that are “cohesive” are not merely specific and instructive in themselves, but also complementary to one another. Cohesion refers to the relation of various parts with respect to a whole.¹²⁸ A cohesive standard facilitates engagement with a licensing

127. See, e.g., *Letter of Recommendation Guidelines*, MASS.GOV, <https://www.mass.gov/service-details/letters-of-recommendation-guidelines> (exemplifying idyllic letter of recommendation instructions) (last visited Mar. 13, 2018).

128. See *Cohesion*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

entity's required procedures by anticipating and preventing confusion, contradiction, and other disadvantages of inconsistently presented requirements and instructions. Cohesive standards promote clarity by keeping rules internally consistent. Furthermore, cohesion offers integrated and non-contradictory parameters regarding what a lawyer-licensing entity's substantive rules, guidelines, and codes of conduct permit, prohibit, or require.¹²⁹ Cohesion substantively synthesizes standards in diversely ranging materials and documents in order to give people a unified understanding of how to negotiate their rights, as well as perform and uphold their responsibilities. We have all experienced frustration, and even paralysis, when faced with conflicting rules, standards, or instructions.¹³⁰ This frustration intensifies in high-stakes situations, including those of applicants seeking admission to the legal profession. In the context of lawyer-licensing entities, rules, regulations, orders, guidance documents, application questions, codes of conduct, letters addressed to applicants, and FAQs all work together to create standards. These long materials, requirements, and instructions must form a unified whole.

Continuing with the character-reference-letter example above, a cohesive standard would state that, while you need *twelve* references in total, *eight* people need to fill out only a short form, while *four* people need to complete a longer questionnaire; moreover, *none of*

129. Cf. *supra* note 127.

130. For example, the changes the North Carolina Board of Law Examiners made in April 2015 to its rules, regulations, and code of conduct for bar examinees exhibits poor cohesion and dysfunctional organization. See Proposed Amendments to Rules Governing the Admission to Practice Law in the State of North Carolina (red-lined version on file with author) (denominating tax as a testable subject despite the fact that tax law has not been tested on the North Carolina Bar Examination in decades); see also N.C. BD. OF LAW EXAM'RS, BAR EXAMINATION CODE OF CONDUCT [hereinafter N.C. BAR CODE OF CONDUCT], <http://ncble.org/wp-content/uploads/codeofconduct.pdf> (last visited Mar. 4, 2018); N.C. BD. OF LAW EXAM'RS, POLICY MANUAL (on file with author) (last updated June 2015). Notwithstanding a new regulation prohibiting scarves, a preexisting regulation that permits bar examinees to "wear a lightweight outer garment, WITH NO POCKETS OF ANY KIND, into the examination room" remains. N.C. BAR CODE OF CONDUCT, *supra*, at 2. Neither the regulation prohibiting scarves nor the regulation permitting light-weight outer garments with no pockets cross-referenced each other. See *id.* The code thus requires examinees to use sophisticated canons of statutory construction to discern the parameters of the rules.

these reference providers should overlap with other application contributors.¹³¹ In this example, the standard accounts for all twelve letters without omission of necessary information or inclusion of confusing or outdated information.

Technological advances present a challenge to cohesion, in that information is now more accessible in more places, and often in fragmented form. The link-driven internet allows piecemeal access to possibly decontextualized or outdated information.¹³² When outdated standards that conflict with current standards remain in circulation, they create confusion as stakeholders have no clear indication of which standards prevail.¹³³ In this context, attention to the cohesive presentation of information is particularly important.

These features—specificity, instructiveness, and cohesion—foster clarity in a lawyer-licensing entity’s substantive standards, allowing for successful and equitable applicant engagement with licensing requirements. In addition to providing clear substantive standards, lawyer-licensing entities, like other administrative agencies, need to clearly delineate the parameters of their authority.

4. Complete

Completeness in the context of this Article describes the delineation of a lawyer-licensing entity’s authority. Being complete enables a lawyer-licensing entity to sustain the quality of clarity by making the boundaries of their authority visible, thus preventing the agency’s abuse of power and promoting applicants’ comprehension in their interactions with the licensing entity. Substantive standards at times lack clarity because the licensing entity does not expressly state

131. See *supra* note 123.

132. See DAVID NICHOLAS ET AL., DIGITAL HEALTH INFORMATION FOR THE CONSUMER: EVIDENCE AND POLICY IMPLICATIONS 121 (2007), http://ciber-research.eu/download/2007-Digital_Health_Information.pdf (finding that a high percentage of users surveyed about a health website found the website of no use because the search system was “fragmented and confusing and resulted in poor or misleading searches”); see also GEORGE B. DELTA & JEFFREY H. MATSUURA, THE LAW OF THE INTERNET § 3.03 (4th ed. 2017) (“The continuing online presence of old information can . . . lead to user confusion”).

133. See NICHOLAS ET AL., *supra* note 132; see also DELTA & MATSUURA, *supra* note 132.

both which actions are required of applicants and which are excluded.¹³⁴

To illustrate the need for express statements about the parameters of a licensing entity's authority, consider two statements in a prior version of North Carolina's bar admission application.¹³⁵ The first statement provides that applicants must be completely candid and forthright in answering application questions, that honesty is a crucial admission criterion, and that a failure to be candid is grounds for the denial of admission.¹³⁶ A second statement requests that applicants disclose prior conduct and reads, "Have you EVER IN YOUR LIFE been arrested, given a written warning, or taken into custody, or accused, formally or informally, of the violation of a law for an offense other than traffic violations?"¹³⁷ These two statements, when taken together, appear to be specific, instructive, and cohesive. But the statements are not complete, because they do not expressly identify the

134. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING* 37–38 (2d ed. 2008) (explaining that one function of rule illustrations is to illustrate the parameters of a rule and to "eliminate the possible erroneous interpretations").

135. This example concerns disclosure requirements for expunged criminal-record histories. Notably, lawyer-licensing entity disclosure requirements vary across jurisdictions. Some lawyer-licensing entities do not acknowledge statutory non-disclosure benefits conferred by expunction statutes, but other lawyer-licensing entities do. *Compare, e.g.,* N.H. BD. OF BAR EXAM'RS, PETITION AND QUESTIONNAIRE FOR ADMISSION TO THE NEW HAMPSHIRE BAR 5 (on file with author) (allowing omission of offenses for which the record of your arrest, conviction, or sentence was annulled after a petition brought by you pursuant to statute was granted), *with* 2013 N.C. BAR APPLICATION, *supra* note 102, at 16 (allowing the omission of references to any arrest, charge, or conviction that has been expunged by a duly entered order of expunction), *and* BD. OF LAW EXAM'RS OF THE STATE OF TEX., APPLICATION FOR ADMISSION TO THE TEXAS BAR EXAMINATION 9 (2018) (on file with author) (allowing the omission of matters expunged pursuant to Texas Code of Criminal Procedure Art. 55.02, or pursuant to another state's statute with the same force and effect), *and* VA. BD. OF BAR EXAM'RS, CHARACTER AND FITNESS QUESTIONNAIRE 12 (2017) (on file with author) (allowing omission only when the charge has been expunged or sealed in accordance with the applicable state law).

136. N.C. BD. OF LAW EXAM'RS, RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW §.0603 (2015) [hereinafter N.C. ADMISSION RULES], <http://ncble.org/wp-content/uploads/2015/09/rules.pdf>.

137. BD. OF LAW EXAM'RS OF THE STATE OF N.C., APPLICATION FOR ADMISSION TO THE NORTH CAROLINA BAR EXAMINATION 16 (2012) [hereinafter 2012 N.C. BAR APPLICATION] (on file with author) (specifically Question 19(a)).

limits of the lawyer-licensing entity's authority vis-a-vis state statutory law that bestows privileges on those with judicially expunged criminal record histories. Further, consider the purpose of North Carolina's expunction remedy:

to clear the public record of any entry of any arrest, criminal charge, or criminal conviction that has been expunged so that (i) the person who is entitled to and obtains the expunction may omit reference to the charges or convictions to potential employers and others and (ii) a records check for prior arrests and convictions will not disclose the expunged entries.¹³⁸

The expunction remedy relates directly to an occupational licensing applicant's ability to exercise the statutory privilege conveyed with this remedy.¹³⁹ Under North Carolina's expunction statute, state agencies "who request disclosure of information concerning any arrest, criminal charge, or criminal conviction of the applicant shall first advise the applicant that State law allows the applicant to not refer to any arrest, charge, or conviction that has been expunged."¹⁴⁰

The two bar admission application statements alongside the statutorily granted expunction privilege conflict. Specifically, the standard to be candid in responses and disclose prior arrests conflicts with the statutory promise that those with expunged criminal record histories need not disclose such entries of record to employers, government agencies, or educational institutions.¹⁴¹ Thus, the

138. N.C. GEN. STAT. § 15A-153(a) (West, Westlaw through 2017 Reg. Sess.).

139. N.C. GEN. STAT. § 15A-153(d) (West, Westlaw through 2017 Reg. Sess.) ("Agencies, officials, and employees of the State and local governments who request disclosure of information concerning any arrest, criminal charge, or criminal conviction of the applicant shall first advise the applicant that State law allows the applicant to not refer to any arrest, charge, or conviction that has been expunged.").

140. *Id.* ("An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning charges or convictions that have been expunged. Such application shall not be denied solely because of the applicant's refusal or failure to disclose information concerning any arrest, criminal charge, or criminal conviction of the applicant that has been expunged.").

141. *Compare* N.C. ADMISSION RULES, *supra* note 136 (describing consequences for failure to fully disclose information reflecting on the applicant's character), *with* 2012 N.C. BAR APPLICATION, *supra* note 137, at 16 (requesting

incomplete standard would confuse an applicant with a judicially expunged record of arrest. Given the scope of the disclosure requirement¹⁴² and rule of candor,¹⁴³ the applicant will not know whether the disclosure requirement mandates the applicant to disclose the entry of record for the judicially expunged prior arrest.

Compare these bar application statements—disclosure requirements and rules of candor—to an adjusted version of that lawyer-licensing entity’s application.¹⁴⁴ The adjusted application includes a third statement that clarifies the ambiguity among the disclosure requirement, the rule for candor, and the statutory privilege associated with judicially expunged criminal records. The statement reads: “North Carolina allows you to omit reference to any arrest, charge or conviction that has been expunged by a duly entered order of expunction pursuant to . . . the General Statutes of North Carolina.”¹⁴⁵ This complete set of instructions clarifies the parameters of this Board of Law Examiners’ authority. This clarification focuses the application process on legitimate licensing standards, such as competency, character, and fitness, rather than on the applicant’s ability to navigate manipulative logic or tricky rhetoric. Thus, completeness in delineating the parameters of a lawyer-licensing entity’s authority helps maintain focus on licensing requirements as

applicants in Question 19(a) to disclose prior arrests), *with* N.C. GEN. STAT. § 15A-153 (West, Westlaw through 2017 Reg. Sess.) (conveying a statutory promise to those with judicially expunged criminal records that they need not disclose expunged criminal record histories).

142. *See supra* note 137.

143. *See* N.C. ADMISSION RULES, *supra* note 136.

144. *Compare* 2012 N.C. BAR APPLICATION, *supra* note 137, at 16 (specifically Question 19), *with* 2013 N.C. BAR APPLICATION, *supra* note 102 (specifically Question 19). The applications are virtually the same except that applications before 2013 did not mention expunction and contained no instructions as to what the extent of the disclosure requirements were for applicants with expunged criminal record histories. Applications dated in 2013 or later reflect the statutory directive from General Statutes of North Carolina section 15A-153(d) that all government agencies “shall first advise [an] applicant that State law allows the applicant to not refer to any arrest, charge, or conviction that has been expunged.” N.C. GEN. STAT. § 15A-153(d) (West, Westlaw through 2017 Reg. Sess.).

145. *See* 2017 N.C. BAR APPLICATION, *supra* note 102, specifically Question 19.

opposed to interpretations of what those licensing requirements might be.

Any jurisdiction may deny bar admission applicants who are not fully candid and forthright in answering application questions,¹⁴⁶ and admission authorities may view a failure to disclose a prior incident as a culpable omission showing a lack of honesty and candor on the applicant's part.¹⁴⁷ For high-stakes decisions, like whom to allow into a profession, a lack of clear and complete standards poses real danger.¹⁴⁸ Accordingly, the value of clarity, at times, requires lawyer-licensing entities to be complete by expressly stating the limits of their delegated authority.¹⁴⁹

In summary, being complete, as well as being specific, instructive, and cohesive, fosters the value of clarity and breeds applicant success in completing requirements for admission into the legal profession. When making changes to substantive rules, lawyer-licensing entities should embrace the value of clarity and these four features that support it. In addition to valuing clarity, the model lawyer-licensing entity is characterized by the value of accessibility, which is described in the section below.

B. The Value of Accessibility

Accessibility is the quality of being readily found or reached.¹⁵⁰ In the context of occupational licensing agencies, accessibility allows public citizens to easily find relevant information and reach agency

146. See, e.g., ID. BAR COMM'N R. 204(a) ("No one shall be licensed who fails to fully disclose to the Board [of Commissioners of the Idaho State Bar] all information requested of an Applicant on the Application or by the Board or [Character and Fitness] Committee.").

147. Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case For Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 79, 108–20 (2014).

148. See *id.*

149. See *supra* notes 134–140 and accompanying text.

150. See *Accessible*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) (defining "accessible" as "able to be reached"); see *infra* Section III.C (setting apart the value of transparency from accessibility's overlapping feature of being findable by noting that transparency in this Article refers to how openly an agency operates and acts, whereas being findable for purposes of this Article means that information is able to be located).

decision makers by using express avenues of engagement. Being findable means that, when agencies produce relevant information, it is easy for outsiders to access. Having findable information promotes efficiency in citizen engagement as well as cultivates public trust. Notably, public trust contributes to an agency's ability to maintain its democratic legitimacy.¹⁵¹

An agency's democratic legitimacy depends on citizens' ability to reach it to obtain services. Being reachable means that any citizen can use an express avenue of engagement to interact with an agency in either its rulemaking or adjudicatory context. While due process and express avenues of engagement are critical aspects of the exercise of adjudicatory power, this Article focuses on ideal avenues of engagement with respect to an agency's rulemaking power.¹⁵² These express avenues of engagement vitally allow for any citizen to reach agency decision makers, which helps those without inside connections to engage with the agency on a more equal footing with those who do.

In exercising the power to promulgate rules, interpret policy, and adopt procedures, the model lawyer-licensing entity embraces the value of accessibility by adopting express rulemaking procedures. Minimum express rulemaking procedures should include promulgating and adhering to the following: (1) notice-and-comment rulemaking procedures; (2) an express avenue for outsiders to petition the lawyer-licensing entity for a rule change; and (3) an express avenue for outsiders to seek declaratory relief about a rule's meaning or validity. In addition, the model lawyer-licensing entity would adopt a procedural practice to keep a mailing list of citizens who were interested in receiving updates on agency actions and operations.

By adhering to the preceding minimum requirements, the model lawyer-licensing entity begins to embody the essential features of being findable and reachable.

151. See David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 620–21 (2012).

152. The phrase "rulemaking power," as used here, refers to agencies promulgating official rules, as well as other standards, interpretations, and procedures that may not necessarily be subject to notice-and-comment rulemaking procedures. See 5 U.S.C. §§ 551(4)–(5) (2012) (defining "rule" and "rule making").

1. Findable

The value of information hinges on findability. People must be able to find relevant information before it can be useful to them.¹⁵³ Lawyer-licensing entities should make information regarding rules, guidelines, application questions, FAQs, announcements, examination fees, and passing scores easily findable.¹⁵⁴ Furthermore, lawyer-licensing entities should locate this information in a centralized place that is intuitive to find and easy to access. As mentioned in the previous section on clarity, fragmented presentation of information (especially in an electronic, link-driven source), can lead to unnecessary and obstructive confusion, giving an inconsistent, incomplete, or obsolete message about relevant information, standards, or procedures.¹⁵⁵ In the modern era of technology and information, this standard translates into compiled links or a single site that coherently gathers relevant materials.

The feature of being findable requires open channels that allow for public access to agency operations and the officials and staff members that direct them.¹⁵⁶ Easily found avenues of engagement guide stakeholders and interested citizens about *how* to participate. An ideal lawyer-licensing entity could offer to maintain a mailing list for those who wish to receive updates of recent and proposed agency action.¹⁵⁷ In today's world, the possibilities for communicating

153. In this global world, agencies should have an email or email form on their websites, a Twitter account that is informative, a phone number, a Facebook page, and a way to access all of these things from their homepage. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.hud.gov> (last visited Mar. 4, 2018). We simply do not access information through the same channels that we formerly used.

154. *See infra* notes 156–157, 162 and accompanying text.

155. *See supra* note 132.

156. *Compare Board of Bar Examiners*, WIS. COURT SYS., <https://www.wicourts.gov/courts/offices/bbe.htm> (last visited Mar. 4, 2018) (exemplifying findable information by including a link near the top of the Board of Bar Examiners' website that links to a list of eleven names of current Board of Bar Examiner members along with their biographical information), *with Contact North Carolina Board of Law Examiners*, BD. OF LAW EXAM'RS OF THE STATE OF N.C., <https://ncble.org/contact-us/> (last visited Mar. 4, 2018) (containing neither a single name of a member of the Board nor its staff).

157. *See, e.g.*, SUP. CT. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *reprinted in* 289 N.C. 735 app. at 752 (1976) (“Any person or

regularly with a list of interested citizens and publishing instructions on how citizens may participate include Facebook, Twitter, email, and website postings.¹⁵⁸ These cost-effective, convenient means makes the feature of prioritizing findable information more economically and practically feasible.¹⁵⁹ Lawyer-licensing entities should acknowledge and use current tools for communication rather than avoiding this responsibility or relying on outdated, obscure, or inefficient forums.¹⁶⁰ Such reluctance to update and present information readily only enforces negative evaluations of the legal profession as exclusivist and closed.¹⁶¹ To combat these perceptions, lawyer-licensing entities should make it easy for people to find and follow guidelines as well as engage effectively with them.

agency desiring to be placed on the mailing list for the Board of Law Examiners' rulemaking notices may file such request in writing, furnishing their name and mailing address"). *But see* SUP. CT. OF N.C., AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *reprinted in* 293 N.C. 760 app. at 761–62 (1977) (repealing this ideal feature of being findable eighteen months later).

158. *See generally* @MNBdLaw, TWITTER, <http://twitter.com/mnbdlaw> (last visited Mar. 4, 2018) (providing relevant information about the Minnesota state bar exam).

159. *See* John C. Bertot et al., *Using ICTs to Create a Culture of Transparency: E-Government and Social Media as Openness and Anti-Corruption Tools for Societies*, 27 GOV'T INFO. Q. 264, 265 (2010), <http://dorkatron.com/docs/CIS720/PPP%20Secondary%20Exam/eGovernance%20-%20Bertot%20Jaeger%20Grimes.pdf>. *See generally* Mir Tajmul Hossain, *Social Media Is a Cheap But Effective Way of Marketing*, LINKEDIN (June 22, 2014), <https://www.linkedin.com/pulse/20140622194829-221106729-social-media-is-a-cheap-but-effective-way-to-marketing>.

160. For example, as of March 2018, the North Carolina Board of Law Examiners has no Twitter or Facebook account, staff and board member names are not listed on its website, and to find North Carolina's passing MPRE score, you have to intuit that it is behind the password-protected character-and-fitness application link located on the National Conference of Bar Examiners website. *See supra* note 132; *infra* notes 163–164.

161. Judge Stephen Dillard of the Court of Appeals of Georgia, a social media enthusiast, stated: “[W]e—especially those of us in the legal profession—need to get past our collective unease with technology and embrace the social media platforms that are increasingly used by those we serve.” Judge Stephen Louis A. Dillard, *#engage: It's Time for Judges to Tweet, Like & Share*, 101 JUDICATURE 11, 11 (2017), https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature_101-1_dillard.pdf.

The cost of the bar examination and the requisite passing score of the Multistate Professional Responsibility Examination (“MPRE”), both of which bar applicants need, remain obscure. Applicants seeking admission to the bar must pay a fee to sit for a state’s bar examination and must pass the national Multistate Professional Responsibility Examination. Examination fees and MPRE passing scores vary by jurisdiction.¹⁶² Thus, applicants must find information about these two numbers directly from a jurisdiction’s lawyer-licensing entity. Ideally, the cost of sitting for a bar examination and a jurisdiction’s passing score for a national test (administered by the national conference of bar examiners) would be information that an applicant, and others, can find easily and quickly on a lawyer-licensing entity’s website. But often this information can be difficult to find. Only people with login credentials can access the documents containing the relevant numbers.¹⁶³ In addition, this information is sometimes only available through a redirecting link, requiring the information seeker to leave the lawyer-licensing entity’s website. Password-protected and redirecting links do not facilitate the desired access that this Article suggests. When applicants cannot access basic information like passing scores and examination costs, problems can ensue. For example, imagine a second-year law student who takes the MPRE and receives a score of eighty-one. Not knowing what the passing score is for her jurisdiction, she turns to the lawyer-licensing entity’s website. She does so without knowing that the information she needs is on an application that is

162. Compare UTAH JUD. ADMIN. CODE R. 14-713 (West, Westlaw through 2018) (stating that a passing score is 86), with *Notice Regarding the MPRE Requirement*, TENN. BOARD OF LAW EXAM’RS, <http://www.tnble.org/tnlaw/first-time/exam-sites-and-schedule> (last visited Mar. 4, 2018) (noting a passing score of 75 for Tennessee’s February 2018 examination). Compare *Admission to Practice Law in South Carolina*, OFFICE OF BAR ADMISSIONS, <https://barapplication.sccourts.org/admissionToPractice.cfm> (last visited Mar. 4, 2018) (providing for an examination fee of \$1,000 for non-attorneys and \$1,750 for licensed attorneys, as well as a late filing surcharge of \$500 for all applicants), with 2017 N.C. BAR APPLICATION, *supra* note 102, at 1 (stating an examination fee of \$700 for non-attorneys and \$1,500 for licensed attorneys, as well as a \$250 late filing fee for all applicants).

163. *NCBE Account*, NAT’L CONFERENCE OF BAR EXAM’RS, https://accounts.ncbex.org/php/ncbe_number/ (last visited Mar. 4, 2018) (requiring a registered account, username, and password to log in and access various jurisdictions’ bar examination applications).

titled “Character and Fitness.”¹⁶⁴ Ultimately, she cannot find what she is looking for on the lawyer-licensing entity website. Her next avenue is to search Google and find a score on *Wikipedia*—information that is not curated and could be outdated, unreliable, or incomplete. This goose chase is problematic and unnecessary.

A related issue involves the obscurity of the test-taking fee itself, which is often a difficult piece of information for an applicant to surmise.¹⁶⁵ Bar examination fees vary by jurisdiction and can be quite costly.¹⁶⁶ Licensing costs should not come as a surprise to applicants

164. *Character and Fitness Investigations*, NAT’L CONFERENCE OF BAR EXAM’RS, <http://www.ncbex.org/character-and-fitness> (last visited Mar. 4, 2018) (denominating the online applications on a website page that is titled “Character and Fitness”).

165. *See, e.g., Application for Registration as a Law Student*, STATE OF MISS. JUDICIARY, <https://courts.ms.gov/newsite2/bar/baradmissions/barappregistration.php> (last visited Mar. 4, 2018) (download document titled “Instructions for Registration as a Law Student”) (stating that the Mississippi Board of Bar Admissions “answers numerous questions concerning the fees which applicants will be required to pay either to this office, . . . the National Conference of Bar Examiners (NCBE), or to the different courts during the swearing-in ceremony”). The Mississippi Board of Bar Admissions’ document lists a schedule of fees in ledger-style format, with the total fee due appearing in a larger, bolded-styled font, set apart from other text at the far right-hand margin of the page. *See id.* at 4–5. But the larger, set-apart fees are inaccurate, as the amounts for the “application” fees do not include the \$25 for the other “application” fee. *See id.* The true “Total fee due for this filing” appears in the paragraph explaining the class of persons to whom the fee applies. *See id.* While “Total fee due” appears in bolded and underlined text, it uses a smaller-sized font than the ledger-style totals at the far-right margin and are not set apart physically from dense text. *See id.* This creates unnecessary confusion for applicants, inviting the submission of erroneous payments, rejection of applications, and additional phone calls for the Board’s office to field. Furthermore, “Additional Investigative Fees” are listed as “DISCRETIONARY,” leaving applicants guessing about the total cost of admission to the bar in Mississippi. *See id.* at 5. Finally, although the schedule of fees refers to court fees, presumably associated with the requirement to petition a chancery court for admission pursuant to Mississippi Code section 73-3-2(8), there is no link or reference provided that would help an applicant find this additional cost. *See id.* at 4–5.

166. *See, e.g., Admission to the Practice of Law in Georgia*, GA. OFFICE OF BAR ADMISSIONS, <https://www.gabaradmissions.org/home> (last visited Mar. 4, 2018) (“Admission to the Practice of Law in Georgia is a two-step process that requires the submission of two separate applications with separate deadlines and fees.”). *Compare* GA. OFFICE OF BAR ADMISSIONS, FITNESS APPLICATION FILING DEADLINES 1, <https://www.gabaradmissions.org/deadlines-and-fees> (last visited Mar. 4, 2018)

trying to budget appropriate funds. The prevailing regimes in many jurisdictions problematically assume that potential applicants will be able to pay. This information should be front-and-center long before a law student reaches his or her third year of law school. Students who struggle to pay such a hefty fee may have to put the payment on a credit card, affecting their debt, which in turn may directly relate to the assessment of their character and fitness to practice law.¹⁶⁷ Many lawyer-licensing entities question applicants about debts, timing of payments, and credit scores.¹⁶⁸ Without the time to budget in advance, applicants have few choices, as missing a filing deadline may trigger late filing fees such as \$400.¹⁶⁹ In sum, passing scores and filing fees are simply numbers that are relevant to many, and lawyer-licensing entities should post them directly and prominently on their websites.

Some may dismissively perceive ministerial functions as trivial, but these services are the bread and butter of the legal profession, sustaining new membership and engagement with the public. Offering information in a findable way can have high value and relates to a broader culture of accessibility. From the perspective of someone seeking admission to the legal profession, the ability to earn a living

(detailing fees that range from \$400 to \$3,500 for character and fitness purposes, as well as a \$400 late fee for applications submitted during the “Final Fitness Application Filing Period,” which opens at 4:01 PM on the same day in which the “Regular Fitness Application Filing Period” closes at 4:00 PM), *with id.* at 4 (providing for a two-day examination application fee of \$442 and a one-day attorneys’ examination application fee of \$378, as well as a \$250 late fee for applications submitted during the “Final Bar Examination Application Filing Period,” which opens at 4:01 PM on the same day in which the “Regular Bar Examination Application Filing Period” closes at 4:00 PM).

167. *See, e.g.*, 2017 N.C. BAR APPLICATION, *supra* note 102, at 13 (directing applicants pursuant to Question 15(a) to “[l]ist all debts over \$200 and indicate status, i.e. [c]urrent or delinquent. Include any active credit cards you have, regardless of whether or not you have a balance due on said credit card”).

168. *See, e.g.*, NAT’L CONFERENCE OF BAR EXAM’RS, REQUEST FOR PREPARATION OF A CHARACTER REPORT, APPLICATION TO THE BAR OF TENNESSEE 12 (2016) <https://accounts.ncbex.org/php/ea/pdf/Tennessee.pdf> (asking applicants about revoked credit cards, debt defaults, late payments on debts in excess of \$500, and filed petitions for bankruptcy).

169. *See, e.g.*, GA. OFFICE OF BAR ADMISSIONS, FITNESS APPLICATION FILING DEADLINES 1 (2018), <https://www.gabaradmissions.org/deadlines-and-fees> (noting a \$400 late fee for Georgia bar fitness applications filed at 4:01 PM, one minute after the 4:00 PM deadline).

depends on access to such basic information. Accessing and finding information on passing scores and application fees should not be confused with the actual character and fitness requirements that are necessary for entry into the legal profession. Nor should the applicant's ability to pursue and surmise the facts of inquiry into these requirements be excused as an obscure and arbitrary test of their ability to search out facts or in their ability to persist in an effort of inquiry in the future.

2. Reachable

Being reachable means there are established pathways for communication and engagement. In the context of lawyer-licensing entities, legitimacy depends on avenues of engagement, because these channels include procedural frameworks and safeguards allowing for advance notice of agency action and opportunities to be heard. In context of lawyer-licensing entities, legitimacy depends on avenues of engagement because these channels democratize inherently undemocratic agencies by providing safeguards. These safeguards include establishing procedural frameworks for advance notice of agency action and opportunities for communication and engagement to be heard.¹⁷⁰

Rulemaking procedures have existed since the 1940s, when Congress passed the Federal Administrative Procedure Act to ensure that relevant stakeholders could hold agencies accountable in rulemaking and adjudication.¹⁷¹ Such rulemaking procedures make up the bedrock of accessibility. All lawyer-licensing entities should adopt and faithfully adhere to express rulemaking procedures, including: (1) notice-and-comment rulemaking procedures; (2) an express avenue for outsiders to petition lawyer-licensing entities for rule changes; and (3) an express avenue for stakeholders to seek declaratory relief and the meaning or validity of an existing rule. Express rulemaking procedures make lawyer-licensing entities reachable, maintaining a

170. *E.g.*, MINN. STAT. ANN. § 14.001 (West 2013) (stating purposes of the Minnesota Administrative Procedure Act as “to provide oversight of . . . administrative agencies” and “to increase public participation in the formulation of administrative rules”).

171. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

time-tested framework¹⁷² that sustains accessibility across the agency's life-span. One cannot overstate the value this accessibility provides in its role of preserving the higher democratic aims of the practice of law.

Standard rulemaking procedures create a framework that enables citizens to be heard, understood, and acknowledged as individuals, validating and facilitating their full participation in public life as well as their abilities to pursue the profession of their choice. To the agency's benefit, when outsiders use avenues of engagement created by express rulemaking procedures, they help agencies adapt to changing needs.¹⁷³ In the lawyer-licensing context, outsiders can contribute ideas and offer feedback to agencies about how best to adapt to a changing professional landscape.

Being reachable first entails notice-and-comment rulemaking. Consistent with due process tenets of advance notice and an opportunity to be heard,¹⁷⁴ notice-and-comment rulemaking supports democratic aims when agencies exercise their delegated rulemaking power. Because those who exercise agency authority are non-elected governmental officials, procedural frameworks, like notice-and-comment rulemaking, importantly supply democratic oversight. In this way, a framework that allows outside participation empowers affected parties to hold an agency are held accountable when it changes its rules.

When proposing to change an existing rule, the model lawyer-licensing entity would provide advance notice of the proposed change. The amount of advance notice would be sufficient to allow those outside the agency to become aware of and comment on the proposed

172. *See id.* (evincing a framework of rulemaking procedures that has governed agency actions for more than 70 years).

173. *See, e.g., Net Neutrality: How Open-Internet Activists Won Big*, NBC NEWS (Feb. 26, 2015, 10:45 AM), <https://www.nbcnews.com/tech/internet/techies-score-victory-net-neutrality-n313406> (noting the millions of comments submitted by citizens to the Federal Communications Commission to approve net neutrality rules by reclassifying internet access as a telecommunication service under Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996 and crediting citizens with the victory).

174. *See supra* Part II.

change.¹⁷⁵ Ideally, the lawyer-licensing entity would communicate notice through easily findable information channels. For example, Minnesota's Board of Law Examiners has a Twitter account that it can use to alert followers to a notice of a proposed rule change.¹⁷⁶ Additionally, advance notice of proposed rule changes helps most when such notice contains substantive information about the proposal as well as the reason for the change.

In addition to receiving advance notice of proposed rule changes, notice-and-comment rulemaking contemplates the ability of the public to participate in and comment on proposed changes. Thus, when agencies provide notice of initiating a rulemaking proceeding, the notice would ideally indicate whether the proceeding will include a public hearing, and if so, the date, time, place, and format of such hearing. Notice-and-comment rulemaking procedures include directions instructing outsiders about how to comment on proposed rule changes.¹⁷⁷ Ideal comment instructions indicate how to submit comments, to whom they shall be addressed, and by what time they shall be submitted.¹⁷⁸ An ideal lawyer-licensing entity that maintains a mailing list would send the notice in a timely way to all interested individuals, who could in turn respond to the proposed changes.

Notice-and-comment rulemaking procedures forecast rule changes. Rule changes may come from within or outside of the agency.¹⁷⁹ When those outside lawyer-licensing entities seek to change lawyer-licensing rules, they initiate proposed rule changes by

175. Regardless of which type of rulemaking schedule a lawyer-licensing entity follows, an ideal entity would provide a minimum of 30 days advance notice of proposed changes.

176. @MNBdLaw, TWITTER, <http://twitter.com/mnbdlaw> (last visited Mar. 4, 2018).

177. See, e.g., *Requests for Public Comment*, W. VA. JUDICIARY, <http://www.courts.wv.gov/legal-community/requests-for-comment.html> (last visited Mar. 4, 2018) (including a section on "How to File Public Comments" and noting that "comments on proposed rules must be in writing and filed with the Clerk of Court on or before the deadline set forth in the [court] order . . . [but] receipt of email comments will not be acknowledged.").

178. See *id.*

179. See, e.g., ALASKA BAR R. 62 § 3 (granting any member of the Alaska Bar or the Board of Governors the ability to petition the Board of Governors for a rule change).

filing a petition.¹⁸⁰ A petition is a formal written request to a governmental agency.¹⁸¹ For rulemaking purposes, a petition requests the creation of a new rule or the amendment or deletion of an existing rule. Petition allows for a type of crowdsourcing in which those beyond agency walls can contribute to the expertise of agency operation.¹⁸² Within the lawyer-licensing entity context, citizens, lawyer-licensing applicants, and currently licensed lawyers can contribute to the agency's functioning. This harkens to our country's most basic ideal of government both for *and* by its people.¹⁸³ As with instructions for how to make comments about proposed rule changes, lawyer-licensing entities should also express instructions about how to petition for a rule change. Those wishing to submit a petition need to know how to do so, including the form the petition should take, whether a certain number of signatures on the petition is required to cross a threshold to trigger a public hearing, the required contents of

180. *Indiana Judicial Branch*, COURTS.IN.GOV, <http://www.in.gov/judiciary/iocs/3140.htm> (last visited Mar. 4, 2018) (download "Proposal for Rule Amendments to the Supreme Court Rules Committee" link under "Related Documents") [hereinafter *Indiana Request Form*]. Under Indiana Trial Rule 80(D)(1), "[p]roposed rule amendments shall be presented to the Supreme Court's Chief Administrative Officer (CAO) in a Word compatible format, clearly indicating added or deleted language and must be accompanied by the Form available on the Supreme Court's website." IND. R. TRIAL PROC. 80(D)(1).

181. *Petition*, BLACK'S LAW DICTIONARY (6th ed. 1990).

182. See GILBERT, LLC, A CITIZEN'S GUIDE TO INFLUENCING AGENCY ACTION 1 (2011), <http://www.gotofirm.com/content/uploads/2012/11/CitizensGuide.pdf> ("Whether you're a scientist, an expert in an industry or field, a consumer, or even just someone who sees a problem . . . you can make a valuable contribution[, and t]his guide tells you how to influence agencies through . . . petitions for agency action."); cf. U.S. CONST. amend. I (forbidding Congress from making a law abridging "the right of the people . . . to petition the Government for a redress of grievances"); *Petitions*, WHITEHOUSE.GOV, <https://petitions.whitehouse.gov> (last visited Mar. 4, 2018) (describing for citizens how to petition the White House on issues that matter to them).

183. See, e.g., Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863), https://www.ourdocuments.gov/print_friendly.php?flash=false&page=transcript&doc=36&title=Transcript+of+Gettysburg+Address+%281863%29 (entreating citizens to take up "the great task remaining before [them] . . . that the nation, shall have a new birth of freedom, and that government of the people by the people for the people, shall not perish from the earth").

the petition, the number of copies to be submitted, and to whom they shall be addressed.

An ideal rulemaking procedure about an express avenue to petition for a rule change would also indicate how long the petitioner should expect to wait for a response from the lawyer-licensing entity. To illustrate, a former, short-lived petition procedure for the North Carolina Board of Law Examiners stated:

Within thirty (30) days of submission of a petition, the board will render a final decision. If the decision is to deny the petition, the secretary will notify the petitioner in writing, stating the reasons thereof. If the decision is to grant the petition, the board, within thirty (30) days of submission, will initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in these rules¹⁸⁴

As exemplified here, the rulemaking procedure provision concerning petition should tell the petitioner how long to expect to await a response. The petition procedural rules should also tell the petitioner what the next steps are in the petition process, including whether the agency will schedule a hearing in regard to a suggested rule change. Additionally, the rules regarding petition should tell the petitioner if there are any other instructions about the procedures for the hearing, such as whether there are time limits in giving public oral comment or whether there are any other details the petitioner should know. Furthermore, it would be helpful if the petitioner knew whether the meeting was for other purposes as well.

Two jurisdictions with ideal petition procedures are Alaska and Indiana.¹⁸⁵ According to Alaska's rulemaking procedures, "[a]ny member of either the Alaska Bar or the Board of Governors" may petition the Board of Governors or the annual convention of the Alaska Bar for a rule change.¹⁸⁶ The rule expressly states three requirements with respect to petitions.¹⁸⁷ Specifically, petitions must be in writing,

184. SUP. CT. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, published in 289 N.C. 735, app. at 751 (1976).

185. See ALASKA BAR R. 62(3); IND. R. TRIAL PROC. 80 (D)(1).

186. ALASKA BAR R. 62(3).

187. ALASKA BAR R. 62(3)–(4).

contain language of proposed rule changes, and state a reason for the proposed change.¹⁸⁸ In addition, Alaska's petition rules instruct petitioners with respect to where and to whom to address and submit the petition.¹⁸⁹ Indiana goes one step further, providing its petitioners with a standardized form to complete.¹⁹⁰ The form includes a series of questions to identify the substance and rationale of the proposed rule change.¹⁹¹ The form clearly states at what interval approved rule changes would take effect.¹⁹² This form facilitates channels of communication between the petitioner and the governmental entity.

Accessibility allows for rule changes, but it also relates to engaging with existing rules. The declaratory relief mechanism enables the public to engage with existing rules. Declaratory relief, a form of adjudication, may focus on either the substantive outcomes of the rulemaking process or the procedural safeguards that are a part of creating agency rules.¹⁹³ Thus, an action seeking declaratory relief might seek resolution of substantive ambiguity in a rule vis-à-vis how it applies to a particular applicant's individual case.¹⁹⁴ In other instances, a citizen may seek a declaratory ruling when challenging the sufficiency of rulemaking procedures that otherwise preserve the democratic legitimacy and nature of the rulemaking process.¹⁹⁵ Thus, a declaratory ruling ultimately affects how lawyer-licensing entities interpret and apply existing licensing rules.¹⁹⁶ The declaratory ruling

188. ALASKA BAR R. 62(3)(a)–(b), (4)(a).

189. ALASKA BAR R. 62(4)(a).

190. Indiana Request Form, *supra* note 180.

191. *Id.*

192. *Id.*

193. *See, e.g.*, MINN. STAT. § 14.45 (West 2013) (directing courts to declare agency rules invalid if the court finds the rule “violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures”).

194. *See, e.g.*, N.C. GEN. STAT. § 150B-4(a) (2011) (“[A]n agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency . . . [and] shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.”).

195. *See, e.g.*, *Bring v. N.C. State Bar*, 501 S.E.2d 907, 909–11 (N.C. 1998).

196. *See* SUP. CT. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 289 N.C. 735, app. at 754–55 (1976).

procedure provides a check and balance.¹⁹⁷ Like a petition, it draws its benefits from the input of others, allowing outsiders to help clarify ambiguous rules.¹⁹⁸ Importantly, declaratory relief mechanisms provide needed agency oversight by checking entities with broad, combined governmental powers like rulemaking and adjudication.

All occupational licensing agencies should adopt and adhere to an express rulemaking procedure that outlines how stakeholders can seek declaratory relief. A set of North Carolina Board of Law Examiners rulemaking procedures that existed between 1976 and 1977 partly inspired this Article. The procedures contained an ideal provision on declaratory rulings:

- (a) Any person substantially affected by a statute administered or rule promulgated by the Board of Law Examiners may request a declaratory ruling as to either: whether or how the rule applies to a given factual situation or whether a particular board rule is valid.
- (b) The board will have the power to make such declaratory rulings. All request for declaratory rulings shall be written and mailed to: Executive Secretary, Board of Law Examiners Post Office Box 25427, Raleigh, North Carolina 27611.
- (c) All requests for a declaratory ruling must include the following information: (1) name and address of petitioner; (2) rule to which petition relates; (3) concise statement of the manner in which petitioner is aggrieved by the rule or its potential application to him; (4) a statement for whether an oral hearing

197. See Note, *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 307 (1961) (“Administrative declaratory orders adjudicate the rights of adverse parties and determine questions raised by a party before an agency. They are non-coercive declarations of rights rather than orders imposing penalties or liabilities.” (citations omitted)).

198. See, e.g., N.H. REAL ESTATE COMM’N, DECLARATORY RULING ON THE APPLICABILITY OF RSA 331-A REGARDING THE USE OF ELECTRONIC SIGNATURES 1 (Jan. 15, 2013), <https://www.oplc.nh.gov/real-estate-commission/documents/ruling-electronic-signature.pdf> (declaring the use of electronic signatures permissible on real estate transaction documents).

is desired, and if so, the reasons for such an oral hearing.

(d)

(e) Where a declaratory ruling is deemed appropriate, the board will issue the ruling within sixty (60) days of receipt of the petition.¹⁹⁹

This declaratory relief procedure allows applicants and other stakeholders a forum to engage the lawyer-licensing entity about the meaning or validity of a specific rule. Instructions on how to seek declaratory relief help outsiders answer questions about unclear, conflicting, or invalid rules.

To summarize, accessibility includes the features of being both findable and reachable. Notably, being reachable includes the adoption and adherence to express rulemaking procedures that, at a minimum, include notice-and-comment, petition, and declaratory relief. These procedures help level the playing field between the public and governmental agencies, breaking down barriers of ambiguity and creating a space for dialogue. Ultimately, accessibility sets the table for the values of transparency and fairness.

C. The Value of Transparency

Transparent means being easily perceived or detected.²⁰⁰ The value of transparency as used here refers to how openly an agency operates and acts. When an agency acts and operates transparently, the public can observe and scrutinize the agency's functions and how it exercises its government-sanctioned power. The features of transparency for model lawyer-licensing entities include being open, well-documented, and forthcoming. In practice, this value requires agencies to comply with open meeting laws and public record acts, fully perform their record-keeping duties, and offer information in a proactive and forthcoming manner. Transparency embodies democratic action because it facilitates both public observation and participation.

199. See SUP. CT. OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, published in 289 N.C. 735, app. at 754-55 (1976).

200. *Transparent*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

Open agencies invite the public to observe and, ideally, participate in the decision-making process rather than conduct operations behind closed doors. A *well-documented* agency fully performs its record-keeping duties, thus allowing public observation of past agency action.²⁰¹ Agency records of a decision-making process provide evidence that the agency followed democratic procedures, and the agency can also use them for other broad purposes.²⁰² Observing past actions of agencies can help newcomers become familiar with agency actions, protocols, history, and culture, including those who are working from within and outside agency walls. In the occupational-licensing context, by definition, newcomers are the *raison d'être* of agency operations.²⁰³ Finally, agencies that are *forthcoming* go beyond bare-minimum record-keeping requirements by proactively sharing records and information that stakeholders need. For ideal agencies, these three features of transparency increase the public trust and democratic legitimacy of the agency.

A lack of transparent agency action can cause confusion for those affected by its failure to proactively share its activities. When transparency is missing in the lawyer-licensing context, hopeful newcomers to the legal profession may find it difficult to answer even basic questions, such as what constitutes a jurisdiction's passing score on the MPRE.²⁰⁴ As bar applicants search for answers on social media outlets or among unofficial sources, they may not find answers to their

201. N.C. GEN. STAT. §§ 150B-19.1, -37, -42 (2011).

202. See, e.g., *A Management Guide*, NAT'L ARCHIVES, <https://www.archives.gov/records-mgmt/policy/agency-recordkeeping-requirements.html> (last visited Mar. 4, 2018) ("The availability of complete and accurate documentation allows . . . agencies to: protect the legal and financial rights of the Government and of individuals directly affected by Government activities; preserve institutional memory so that informed decisions are possible and thus facilitate action by agency officials and their successors in office; and be held accountable through the proper scrutiny . . ."); see also Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 459 (2004) (listing fifteen rationales for public participation in the rulemaking process, including "ensur[ing] the legitimacy of the rulemaking and build[ing] confidence among the parties and the process").

203. See *Raison d'être*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) (defining *raison d'être* as "the most important reason or purpose for someone or something's existence").

204. See *supra* Section III.B.1.

questions or, worse, find incomplete or inaccurate information that they then use to make a decision. Outsiders and prospective newcomers, in particular, must guess about the substance of rule changes as well as their pace and trajectory. In short, a lack of transparency erodes public trust.

1. Open

Through earnest compliance with government-in-the-sunshine laws, lawyer-licensing entities can cultivate a culture of openness. A state's meeting-of-public-bodies act is one example of a government-in-the-sunshine law.²⁰⁵ These open-meeting acts direct governmental entities to conduct business during meetings the public can attend.²⁰⁶ This openness allows those outside the agency to attend meetings and ideally engage with agency decision makers. To promote the public's ability to engage with lawyer-licensing entities and observe their operations, a model entity would provide advance notice of meetings and meeting agendas. The model lawyer-licensing entity posts notices of upcoming meetings prominently on its website homepage and includes a link to the meeting agenda. The model entity not only shares agendas on its website, but it also provides copies of meeting agendas to public members who attend open meetings and posts minutes of past regularly scheduled meetings.²⁰⁷ Having meeting agendas available helps outsiders to more effectively observe agency operations and stay abreast of agency actions.²⁰⁸ Behaviors like these promote

205. See, e.g., IND. CODE § 5-14-1.5-1 (2006 & Supp. 2012) (requiring that all public agencies conduct their business in meetings open to the public). At least one jurisdiction has a provision about government-in-the-sunshine and open meetings in its state constitution. See FLA. CONST. art. 1, § 24.

206. See *supra* note 205.

207. Licensing entities could redact such agendas to protect privileged or confidential information when necessary.

208. Maria Manta Conroy & Jennifer Evans-Cowley, *E-Participation in Planning: An Analysis of Cities Adopting On-Line Citizen Participation Tools*, 24 ENV'T & PLAN. C: GOV'T & POL'Y 371, 376 (2006) (noting in a study on e-government and public participation that "[c]itizens could access agendas for upcoming planning meetings at almost half (47%) of the planning websites" and that "[p]roviding meeting minutes on-line, as 36% of the sites did, also allows proceedings to reach more people, for example, those who are hearing and/or visually impaired.").

transparency in operations, which serves to cultivate public trust and maintains clear avenues of engagement.²⁰⁹

In addition to regularly scheduled meetings, some open-meeting acts also apply to ad hoc meetings, such as those prompted by individuals outside the agency who petition the agency for a rule change and request a public hearing.²¹⁰ Consider a jurisdiction that has not yet adopted the Uniform Bar Examination. Ideally, any member of the public could use an express avenue to petition such a lawyer-licensing entity for a rule change,²¹¹ submitting a proposed rule that, if adopted, would result in the jurisdiction implementing the Uniform Bar Examination. Without the procedural mechanism to initiate a rulemaking proceeding and propose a change from the outside, lawyer-licensing entity decision makers, on their own, might continue for years rejecting the adoption of the Uniform Bar Examination,²¹² thus insulating themselves from important input from the very people whom such a decision would most affect. In this way, a lack of transparency enables agencies to operate in a detrimental, self-insulating manner, away from public scrutiny and critique.

The model lawyer-licensing entity would have an express avenue to petition, creating a culture of openness that can foster public participation, leading to better outcomes. Returning to the example of a petition to adopt the Uniform Bar Examination, allowing outside engagement not only affects when a jurisdiction might adopt the

209. See, e.g., Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896 (2006) (noting English philosopher Jeremy Bentham's view that "publicity enables closer relations between the state and its public by securing the confidence of the governed in the legislature").

210. Cf. *Lexington Herald-Leader Co. v. Univ. of Ky. Presidential Search Comm.*, 732 S.W.2d 884, 886 (Ky. 1987) (recognizing the applicability of a state open meeting law to ad hoc committees)

211. A petition is a formal written request to a governmental authority for the redress of a grievance or the request of a favor. *Petition*, BLACK'S LAW DICTIONARY (10th ed. 2014).

212. For those lawyer-licensing entities that do not have express avenues to petition and also do not hold regularly scheduled meetings that are open to public observation and participation, the situation is even worse. Thus, agencies could have made periodic decisions over the past ten years to stall adoption of the Uniform Bar Examination with no external input whatsoever. See Suzanne Darrow-Kleinhaus, *UBE-Shopping: An Unintended Consequence of Portability?*, N.Y. ST. B.J., July/August 2016, at 46, 49.

Uniform Bar Examination, but also leads to more thoughtful decisions regarding the details involved with adopting the examination. Some of the decisions that an entity must make include: (1) what the jurisdiction's passing score will be;²¹³ (2) the time frame for valid transfer of Uniform Bar Examination results;²¹⁴ and (3) whether applicants seeking bar admission must complete a state-specific component of the exam.²¹⁵ Including outsiders in these decision-making processes can provide much-needed expertise and knowledge.²¹⁶ The feature of being open promotes public engagement. To further facilitate such engagement, the model lawyer-licensing entity would fully perform its record-keeping duties, ensuring that agency operations are well-documented.

2. Well-Documented

Consider again a petition for a rule change requesting that a jurisdiction's lawyer-licensing entity adopt the Uniform Bar Examination. A petition and rulemaking proceeding like this implicates an agency's record-keeping duty. The record-keeping duty entails an agency's obligation to thoroughly document not only its

213. See *Jurisdictions That Have Adopted the UBE*, NAT'L CONFERENCE OF BAR EXAM'RS, <http://www.ncbex.org/exams/ube/> (last visited Mar. 4, 2018).

214. See *id.*

215. See *id.*

216. For example, in one lawyer-licensing entity meeting where decision makers had already voted to adopt the Uniform Bar Examination, the licensing entity communicated what the likely passing score would be. North Carolina Board of Law Examiners Meeting, Raleigh, N.C. (Oct. 27, 2017) (notes on file with author). Following that communication, a discussion about passing scores ensued. *Id.* Those outside the agency who attended this discussion, as meeting observers and invited participants, knew more about comparative state-by-state passing score information than the decision-makers themselves. *Id.* Allowing for outside input may indeed have shaped the outcome of the decision-making process. *Id.* A subsequent communication reported that, rather than setting the passing score at 276 as initially proposed, the jurisdiction would set the passing score at 270, more aligned with the median passing score for the Uniform Bar Examination across the nation. *Id.* See *North Carolina Adopts the Uniform Bar Examination (UBE)*, NAT'L CONFERENCE OF BAR EXAM'RS (Nov. 27, 2017), <http://www.ncbex.org/news/north-carolina-adopts-ube/>. As this example shows, transparent processes that are open to outsiders allow interested stakeholders, not just agency members, to see and, in many cases, make contributions to the agency decision-making process.

adjudicatory proceedings, but also its exercise of rulemaking power and its adherence to express rulemaking procedures.²¹⁷ In an ideal agency, record-keeping activities would contribute to transparency by both recording the decision-making processes and preserving them for future observers.²¹⁸

In the context of rulemaking proceedings, the model lawyer-licensing entity would include the original petition for a proposed rule change in its record.²¹⁹ The record would further include all public comments that the agency receives about the proposed rule change, as well as any formal requests for the agency to hold a public hearing on a proposed rule.²²⁰ When public hearings convene, a transcript of the hearing becomes part of the agency's record.²²¹ Rulemaking records further document actual changes to rules and sometimes include a brief statement as to why a rule was altered.²²²

Agencies that conscientiously keep records can better respond to public record requests. Citizens make such requests pursuant to public-records acts, another type of government-in-the-sunshine law that promotes transparency.²²³ Public-record acts direct agencies to share, upon request, information documenting public government actions.²²⁴ Any member of the public, for whatever reason, may request that an agency share public documentation, including minutes of meetings, email exchanges, adjudicatory records, agendas,

217. See, e.g., N.Y. A.P.A. LAW § 204 (West, Westlaw through 2018) (stating that declaratory rulings “shall be made available to the public”).

218. See, e.g., ALASKA SUP. CT. R. 44(f) (providing that rulemaking files are “public information . . . available for review by members of the public upon request”).

219. See, e.g., ALASKA SUP. CT. R. 44(f)(1).

220. See, e.g., ALASKA SUP. CT. R. 44(f)(2) (including in the file “materials considered by the rules committees, including proposal drafts, memoranda submitted to or prepared by the committee, and correspondence”).

221. See, e.g., ALASKA SUP. CT. R. 44(f)(3).

222. See, e.g., ALASKA SUP. CT. R. 44(f)(4).

223. See, e.g., MINN. STAT. ANN. § 14.001 (West 2013) (stating purposes of the Minnesota Administrative Procedure Act as “to provide oversight of . . . administrative agencies” and “to increase public participation in the formulation of administrative rules”). See generally PIERCE, *supra* note 54 at § 6.8 (noting political accountability created by the rulemaking process).

224. See, e.g., N.C. GEN. STAT. § 132-1 (2011).

supplements, and reports.²²⁵ Complete records of an agency's operations provide evidence that it follows democratic processes, serving as an archive of the exercise of agency power. Ideally, by studying an agency's own records, a newcomer or outsider can understand the context and trajectory of the agency's operations and will have a valuable resource for future decision-making processes.

Returning to the example of adoption of the Uniform Bar Examination, being well-documented means that a lawyer-licensing entity would keep a complete record of the proceedings.²²⁶ Containing the petition, the record would include the substantive language of the proposed rule change. The record would also include any amendments to the language of the rule and study reports the petitioner or agency collected in support of the proposal.²²⁷ The rulemaking record would fully document the decision-making process. Ideally, the agency would make that record available to anyone who submitted a public record request, and perhaps even post it on the agency's website. The record would be useful not only to agency members and stakeholders, but also to lawyer-licensing entities in other jurisdictions contemplating adopting the Uniform Bar Exam.

In a jurisdiction in which the lawyer-licensing entity does not follow, or even have, record-keeping procedures, the records may be difficult for members of the public to locate.²²⁸ A public record request in such a jurisdiction may return results that are incomplete, sparse, and therefore cryptic. Only a complete record can provide a coherent picture of how an agency has exercised its authority over time and how

225. Typically, the scope for public record requests is broad. *See, e.g.*, *Swift v. Campbell*, 159 S.W.3d 565, 570–71 (Tenn. Ct. App. 2004) (“The scope and application of the public records statutes are purposefully broad. They are an ‘all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.’” (quoting *Bd. of Educ. of Memphis City Sch. v. Memphis Publ’g Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979))).

226. Such a record would include the petition that a member of the public had submitted in favor of adopting the Uniform Bar Examination; all public comments that had been made in support of or against the proposed rule change; and transcripts of any hearings that had been held to debate the proposal.

227. *See generally* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249–52 (2d Cir. 1977) (demonstrating the importance to litigation of maintaining a thorough record of the rule-making process).

228. *Cf.* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006) (noting the benefits to democracy of record-keeping).

the current rules, regulations, standards, and guidelines have come to be. As important as it is for agencies to comply with transparency practices like record-keeping and performing their obligations under state government-in-the-sunshine laws, the model lawyer-licensing entity would need to go beyond meeting these minimal requirements to embrace the value of transparency. Transparency, thus, requires agencies to be forthcoming in sharing information with the public.

3. Forthcoming

Forthcoming here connotes lawyer-licensing entities' willingness to go above and beyond basic regulatory protocols to bring agency operations into the public eye, provide stakeholders with advance notice of proposed agency action, and afford applicants easy access to needed information. Lawyer-licensing entities certainly handle vast amounts of sensitive and private information that they must keep safe, such as personal applicant information and contents of examinations.²²⁹ For the many other types of information that do not fall into these categories, however, the model lawyer-licensing entity would proactively share needed information with stakeholders in a service-oriented way. Taking applicants' interests into account is consistent with the occupational-licensing agency's charge to protect the public.

Being forthcoming is a salient feature of ideal occupational licensing agencies, including lawyer-licensing entities, because they are ministerial²³⁰ in nature.²³¹ This inherent nature permits lawyer-

229. See, e.g., VT. ADMISSION RULES, *supra* note 74, at § 29, https://www.vermontjudiciary.org/sites/default/files/documents/900-00014.Rules_Admission.Bar_.pdf (“To efficiently and effectively perform their duties, the Board and the Committee may utilize various computer-networking options to share information. When using those networks, *all reasonable efforts are made to maintain the confidentiality of the shared information.*” (emphasis added)).

230. The word “ministerial” comes from the verb “minister,” which means “to serve” or to be “serviceable.” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

231. Courts have used the label “ministerial” when reviewing the actions and authority of lawyer-licensing entities. See, e.g., *Bowens v. Bd. of Law Exam’rs*, 291 S.E.2d 170, 172 (N.C. Ct. App. 1982). In *Bowens*, eleven unsuccessful applicants who had twice-failed the North Carolina Bar Examination brought an action seeking declaratory relief, challenging the constitutionality and validity of the North Carolina General Statute that created the Board of Law Examiners and delegated quasi-

licensing entities to make many decisions outside procedural frameworks like notice-and-comment rulemaking. The ministerial purpose of lawyer-licensing entities is consistent with the service-oriented purposes of the legal profession. Being forthcoming is not only vital to the model lawyer-licensing entity framework but also consistent with occupational licensing entities' ministerial function as well as with principles of due process.

The model lawyer-licensing entity would voluntarily offer advance notice of proposed action, updates on agency operations, and easy access to information such as rules, sample applications, guidance documents, and codes of conduct. When, for example, the model agency changes a rule, it would release not just the new version of the rule, but also an annotated version of the old revision that included deleted language in strike-through text and underlined new language, making it easy for stakeholders to see what has changed.²³² The model lawyer-licensing entity would maintain a mailing list of those outside the agency who want to be informed of upcoming meetings, proposed rulemaking proceedings, changed application questions, and other

legislative power to the Board to make all rules and regulations for admission to the practice of law. *Id.* at 171. In essence, the petitioners argued that the General Assembly had delegated broad rulemaking powers to the Board of Law Examiners without establishing an intelligible principle for the Board to follow in exercising that power, thereby violating the delegation doctrine. *Id.* at 173. In rejecting the petitioner's argument, the Supreme Court of North Carolina stated, in maintaining a competent bar,

the determination of proficiency becomes a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required 'to make important policy choices which might just as easily be made by the elected representatives in the Legislature,' but merely to compile and administer examinations. Form, grading and logistics only are left to the Board, which does no violence to constitutional principle.

Id. at 172 (quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 411 (N.C. 1978)). Accordingly, the statute which stated that the North Carolina Bar "examination shall be held in such manner and at such times as the Board of Law Examiners may determine," laid down an intelligible principle that, according to the court, satisfied due process requirements. *Id.* (quoting N.C. GEN. STAT. ANN. § 84-24 (2015)). Legislatures often grant lawyer-licensing boards broad rulemaking power without specific guidance on the limits of or how to exercise such power. *See id.*

232. *See, e.g.*, Order Amending Trial Rule 80, No. 94S00-1701-MS-5 (Ind. May 19, 2017), <https://www.in.gov/judiciary/files/order-rules-2017-0519-trial.pdf>.

relevant events. The model entity would use social media to share such information to communicate updates in a way that meets today's expectations. Essentially, sharing information in a forthcoming manner contributes to notions of fairness that are associated with due process and maintaining public trust.

In the example of a jurisdiction deciding how to implement the Uniform Bar Examination, the feature of being forthcoming applies to the ministerial aspects of the decision. The proposed paradigm would not require the agency to communicate to the public in a particular way when it decides, for example, what will constitute a passing score or how many testing sites there will be. The model lawyer-licensing entity, however, would proactively offer information to relevant stakeholders. It would send letters and notifications to law school deans well in advance of changing requirements, such as passing scores, and post the information through social media outlets, such as Facebook and Twitter. Once it adopted and finalized a proposed rule change, the model lawyer-licensing entity would send notifications of such through these same communication channels.

Being forthcoming can extend beyond mere information-sharing to explicit statements of being approachable and open to conversation. Minnesota provides an ideal example in this regard.²³³ Minnesota's lawyer-licensing entity shares resources with applicants about the character and fitness requirement in a transparent and forthcoming way. Recognizing that many applicants have questions about what it means to possess the requisite character and fitness for a particular profession, the agency not only provides a written guide to the good character and fitness standard,²³⁴ but also notes prominently on its website that, for any additional questions on character and fitness that these resources fail to address, anyone may call the Board office and speak anonymously with either the attorney for character and fitness assessments or the Director of the Board.²³⁵ These individuals are available to clarify and advise on matters of character and fitness issues, including how the Board has handled similar issues in the past.

233. See, e.g., *Character and Fitness Requirements*, MINN. STATE BD. OF LAW EXAM'RS, <http://www.ble.mn.gov/character-and-fitness-requirements> (last visited Mar. 4, 2018) (sharing resources with applicants about character and fitness requirements in a transparent and forthcoming way).

234. See *id.*

235. *Id.*

Within a larger context, being forthcoming contributes positively to the regard that outsiders have for the agency. Over time, this results in establishing a functional and trusting relationship between the community and the governmental entity.

In sum, to embrace the value of transparency, the model lawyer-licensing entity would comply with minimal requirements related to being open and well-documented and would share information in a proactive, forthcoming manner. Transparency allows all citizens to observe agency operations, appreciate the agency's reputation, and have equitable access to comprehensive, relevant information. Allowing all citizens to have access to comprehensive information about agency operations prevents relevant information being inaccessible to those without inside connections. Thus, transparency, and specifically its feature of being forthcoming, improves fairness. The next section explores the value of fairness and its features of balance, equity, and accommodation.

D. The Value of Fairness

Fairness here means impartial and just treatment and behavior without favoritism or discrimination.²³⁶ For lawyer-licensing entities, this value includes fairness in educational requirements and examinations as well as character and fitness assessments. Fairness refers to how agencies should make decisions. Under the rule of law, fairness is a foundational premise.²³⁷ The existence of rules and laws presupposes that people will receive equal treatment, as those laws define the term. Laws are prospective in nature in this regard. Without fairness, both the practice and the application of law, as well as oversight of the legal profession, would be arbitrary. For lawyer-licensing entities, fairness requires being balanced, equitable, and accommodating. Together, these features work against favoritism and discrimination to ensure justice.

The feature of being balanced provides a structural framework for fairness: building in diversity of experience, perspective, and expertise, as well as checks and balances that promote accountability. Balance compliments being equitable, which describes how lawyer-

236. *Fairness*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

237. *See, e.g.*, U.S. CONST. amend. XIV.

licensing entities act and make decisions with respect to individual applicants. The feature of equity not only relies on the premise that agencies should treat applicants equally, but also acknowledges that each contributes to the profession uniquely and importantly, and that licensing agencies should unilaterally value this diversity of professional contribution. The third feature, accommodation, is an essential component of fairness in that it enables just actions, decisions, and structures through flexibly applying rules, standards, and protocols. Balance leads these three fairness features in the analysis that follows.

1. Balanced

Balance in the lawyer-licensing context refers to decision making based on a spectrum of salient perspectives and information sources, thus allowing for thoughtful choices and actions. For lawyer-licensing entities, maintaining a balanced structure for decision making involves including specialized individuals from targeted groups to exercise authority over relevant decisions. The model lawyer-licensing entity would structure its body of leadership with diverse members who each offer the necessarily advanced expertise or perspective to understand both the substance and importance of decisions the licensing entity must make. Some high-functioning lawyer-licensing entities bifurcate examination committees from character and fitness committees, thus allowing for both diversity and expertise in the separate contexts of evaluating licensing examinations and assessing applicants' requisite character and fitness.²³⁸ In addition to bifurcating committees for examination as well as character and fitness, some high-functioning lawyer-licensing entities operate within a structure that includes adequate, meaningful oversight.²³⁹ Being balanced increases public trust by way of systematic reassurances against exclusivism that promote the inclusion of a broad range of

238. See, e.g., *Admission to the Vermont Bar*, VT. JUDICIARY, <https://www.vermontjudiciary.org/attorneys/admission-vermont-bar> (last visited Mar. 4, 2018).

239. See, e.g., COL. R. CIV. P. 202.2(1)–(2) (stating that the Supreme Court's Advisory Committee "is a permanent committee . . . [and] oversees the coordination of administrative matters for all programs of the attorney regulation process [including] the attorney admissions process").

current members of the legal profession charged with the important task of gatekeeping. Furthermore, a lawyer-licensing entity that balances its membership by including a richly diverse array of specialized knowledge and life experience will much more likely make democratically and professionally responsible decisions. By the same token, allowing public members to engage in the decision-making process acknowledges that the very people who receive legal services have important perspectives and should have a say in who represents them.

Colorado's structure effectively illustrates several aspects of an ideally balanced lawyer-licensing entity. In Colorado, the state supreme court has created a subordinate Advisory Committee and charges it with overseeing all administrative matters related to attorney regulation, including bar admission.²⁴⁰ In its oversight capacity, the Advisory Committee reviews "the productivity, effectiveness and efficiency of all matters involving the admission of persons to practice law"²⁴¹ and recommends proposed changes to bar admission procedural rules.²⁴² Subordinate to the Advisory Committee is the Colorado Board of Law Examiners, which consists of two committees—a Law Committee and a Character and Fitness Committee.²⁴³

The Advisory Committee charges the Law Committee with administering and grading Colorado's bar examination and making recommendations for passing scores.²⁴⁴ The Law Committee is comprised of eleven attorneys appointed by the Colorado Supreme Court.²⁴⁵ The court's own rules expressly provide that "[d]iversity shall be a consideration in making the[se] appointments."²⁴⁶ This provision acknowledges that the Law Committee exercises significant power and that only a diverse body will use it appropriately.

240. *Id.* at 202.2(1).

241. *Id.* at 202.2(4).

242. *Id.* at 202.2(3).

243. COL. R. CIV. P. 202.3(1).

244. *Id.* at 202.3(2)(c)(i)–(ii).

245. *Id.* at 202.3(2)(a).

246. *Id.*

Beyond diversity, Colorado limits the terms²⁴⁷ of Law Committee members to one term of seven years and has an express provision granting the Supreme Court the power to remove appointed members at any time.²⁴⁸ Accordingly, Colorado's lawyer-licensing entity achieves structural balance by operating within a framework that includes oversight, appointment of diverse leadership, term limits, and a power to remove reserved to the appointing body. These structural features encourage balance by setting limits within which Colorado's Law Committee acts.

Separate from the Law Committee, but paralleling it in structure, is the Character and Fitness Committee.²⁴⁹ By having both a Law Committee and a Character and Fitness Committee, the Colorado Board of Law Examiners has bifurcated who evaluates examinations, which assesses applicants' knowledge of the law, from who evaluates character and fitness, which assesses a different metric. As with the Law Committee, there is an explicit directive that "[d]iversity shall be a consideration" when the Colorado Supreme Court appoints the eleven members to the Character and Fitness Committee.²⁵⁰ In addition to diversity within the legal profession, the Colorado Supreme Court rule provides that four of the eleven Character and Fitness Committee members must be non-attorneys.²⁵¹ Two of these "citizen members shall be mental health professionals."²⁵² The other two citizen members shall represent other aspects of the Colorado community."²⁵³

Including a substantial number of non-attorney members on the Character and Fitness Committee acknowledges several important issues. First, attorneys lack expertise to evaluate character and fitness.²⁵⁴ Preserving positions for mental health professionals on the committee allows for an expanded knowledge base when deciding whether applicants currently possess the requisite character and fitness

247. *Id.* In addition to seven-year term limits, members serve staggered terms, allowing for the expiration of one member's term each year. *Id.* at 202.3(2)(a).

248. COL. R. CIV. P. 202.3(2)(a).

249. *Id.* at 202.3(3).

250. *Id.* at 202.3(3)(a).

251. *Id.*

252. *Id.*

253. *Id.*

254. Levin, *supra* note 96, at 785.

to be an attorney and counselor-at-law. Furthermore, preserving positions for two public members enables perspectives outside the professions to have a voice in who should be allowed to provide legal services to members of the public. Thus, consumers of legal services in some part influence the legal-services industry, and this structure somewhat mediates the problem of limited entry into the profession.²⁵⁵

The model lawyer-licensing entity would build on existing practices like those described above to promote the feature of being balanced. In addition to the structural features like the ones prescribed in Colorado, the model lawyer-licensing entity would increase diversity and balance by limiting the number of consecutive terms that board members could serve. Similar to how our own government limited presidential terms after Franklin Delano Roosevelt's presidency,²⁵⁶ administrative agencies, including occupational-licensing agencies should have term limits for its board members. This limitation is particularly important given the fact that many lawyer-licensing entity executive directors can serve for more than four decades.²⁵⁷

Model organization structures and practices promote balance in lawyer-licensing entities. For example, the Virginia Board of Law Examiners have adopted a practice that features a balanced approach

255. These problems include those arising out of self-interested action. Namely, licensed professionals have an economic interest in excluding others from entering the profession or offering services that licensed professionals historically provided. A contemporary example of this problem arose in the *North Carolina Board of Dental Examiners* case. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108 (2015) (denying state-action immunity for the North Carolina Board of Dental Examiners for its anti-competitive conduct in sending cease-and-desist letters to teeth-whitening service providers in shopping malls due to want of active state supervision).

256. See U.S. CONST. amend. XXII, § 1; Dan T. Coenen, *Two-Time Presidents and the Vice-Presidency*, 56 B.C. L. REV. 1287, 1291 (2015).

257. See, e.g., *Fred Parker to Retire; Lee Vlahos to Head NCBLE*, NABE NEWS (Nat'l Ass'n Bd. Execs.), Mar. 2013, <http://www.nabenet.org/mpage/NABENewsMarch2013> (noting the retirement of Fred P. Parker, III, after serving as Secretary of the North Carolina Board of Law Examiners for more than 40 years, from 1973–2013).

to bar examination essay grading.²⁵⁸ The details of Virginia's approach to grading its bar examination essays usefully model balance in lawyer licensing.

The essay question component of the Virginia bar examination consists of twelve essay questions and is administered during day one of the two-day exam.²⁵⁹ The essay questions test state-specific Virginia law on topics that range from contract law to criminal law.²⁶⁰ At the end of the first testing day, the Virginia Board of Bar Examiners sends a copy of the twelve essay questions to the deans of each law school in Virginia, inviting the schools to circulate the questions among the faculty and to send one law school representative to a joint meeting of the Virginia Board of Bar Examiners members and the law school professors.²⁶¹ That meeting takes place during day two of the Virginia Bar Examination, during the time in which the examinees are completing the multi-state portion of the test.²⁶² At the meeting, Board of Bar Examiner members and law school representatives discuss the substance of the essay questions.²⁶³ The purpose of the discussion is to allow further evaluation of the essay questions prior to board members finalizing their rubrics as they turn to grading the essay portion of the Virginia Bar examination.²⁶⁴ This practice provides a useful example of gathering a variety of salient perspectives to the task of judging the minimal competency standards that the bar examination intends to measure. This balanced approach to assessment bridges the gap between educational requirements and licensing decisions with a variety of perspectives.

258. Interview with Scott Pryor, Professor of Law, Campbell Univ. Sch. of Law, in Buies Creek, N.C. (Professor Scott Pryor was a Professor of Law at Regent University School of Law in Virginia Beach, VA from 1998 to 2015).

259. *Id.*; VA. BD. OF BAR EXAM'RS, RULES OF THE VIRGINIA BOARD OF BAR EXAMINERS 1 (2018) [hereinafter VA. BAR RULES], <http://barexam.virginia.gov/pdf/VBBERules.pdf>.

260. Interview with Scott Pryor, *supra* note 258; VA. BAR RULES, *supra* note 259, at 1.

261. Interview with Scott Pryor, *supra* note 258; VA. BAR RULES, *supra* note 259, at 1.

262. Interview with Scott Pryor, *supra* note 258.

263. *Id.*

264. *Id.*

In addition to operating within a structure and adopting practices that promote balance, the model lawyer-licensing entity would operate within—not outside—the broader context of our tripartite system of government. A lawyer-licensing entity that is not balanced within this broader context of our democracy justifies its isolated functioning by pointing to its location within the judicial branch of government.²⁶⁵ While lawyers do play a special role in society and can serve the important public interest of protecting against the abuse of governmental power, that purpose is not relevant to a licensing function. The inherent structure of lawyer-licensing entities has implications for how they function. Being placed within the judicial branch of government often means that lawyer-licensing entities are not balanced by legislative safeguards that promote due process and the values embraced here—clarity, accessibility, transparency, and fairness. Ideally, being within the judicial branch of government should not exempt lawyer-licensing entities from complying with duly enacted state statutes. Indeed, several jurisdictions have state constitutions that acknowledge this need for balance.²⁶⁶ For example, the Texas Constitution provides that its judicial branch has the power to regulate lawyers, including the licensing of lawyers, but also states that its power can be exercised only so far as it is not inconsistent with state law.²⁶⁷

Being balanced requires lawyer-licensing entities to operate within an organizational structure that includes meaningful oversight and diversity, as well as to function within the broader governmental system that acknowledges legislative supremacy. However, the task of professional licensing is too far removed in its purpose to violate the inherent powers doctrine. Notwithstanding operating within these

265. See, e.g., *In re Splane*, 16 A. 481, 483 (Pa. 1889) (declaring a Pennsylvania statute—which purported to state when a court shall admit an attorney—unwise, illegal, and an encroachment on the exclusive power of the judicial branch of government).

266. See, e.g., TEX. CONST. art. 5, § 31 (“[Texas] Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration *not inconsistent with the laws of the state* as may be necessary for the efficient and uniform administration of justice in the various courts.” (emphasis added)).

267. See *id.*

balanced structures, fairness further requires equitable treatment of applicants in their pursuit of becoming a licensed lawyer.

2. Equitable

“Equitable,” as used here, means having the same rights and opportunities as others. Government-sanctioned occupational-licensing should be equally treating applicants seeking professional licenses. Typically, those exercising such power are already members of the profession for which the applicants seek admission. A person’s livelihood and ability to determine that source of income have long been recognized as a fundamental right in our society.²⁶⁸ Moreover, the legal profession exists to uphold fundamental rights, including the right to pursue the vocational calling of one’s choice. This right is inherently part of the social structures within which the legal profession operates, on which it relies on, and that it seeks to uphold. It is important, then, that applicants seeking to enter the legal profession receive equitable treatment that the rule of law protects, rather than suffer subjective decisions of lawyer-licensing boards. Unfortunately, the exclusivist practices of some lawyer-licensing entities fail to meet this standard, and applicants may find themselves subject to unfair application of rules that are discriminatorily vague.²⁶⁹

Lawyer-licensing entities embrace equity when they adopt and adhere to practices that promote the value of fairness such as grading examinations anonymously, using standard-based grading rubrics, and having experts or multiple perspectives contribute to test design and validity. Within the examination context, a model lawyer-licensing entity within a jurisdiction that administers the Uniform Bar Examination would continuously monitor whether the use of that examination resulted in a lower passing rate for its minority applicants

268. See *In re Griffiths*, 413 U.S. 717, 718, 729 (1973); see also *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924); *State v. Ballance*, 51 S.E.2d 731, 735–36 (N.C. 1949) (taking photos in downtown Raleigh, North Carolina is not an occupation subject to state regulation for the purpose of public safety or general welfare).

269. Cf. *City of Chicago v. Morales*, 527 U.S. 41, 65–66 (1999) (invalidating a Gang Congregation Ordinance because it failed to give potential defendants sufficient notice of prohibited conduct and it failed to provide meaningful enforcement guidance to police, effectively giving them unlimited discretion to apply it as they saw fit).

as compared to the passing rate prior to the adoption of the Uniform Bar Examination. Thus, a model lawyer-licensing entity would adopt practices, procedures, and express standards that would allow it to operate prospectively and reflectively.

Throughout the application for admission process, applicants should receive equitable treatment that the rule of law preserves. Thus, equity extends beyond administration of the bar examination and includes decisions such as who gets to sit for the bar examination as well as who possesses the requisite character and fitness to become an attorney.

Lawyer-licensing entities have traditionally held great power over who enters the profession and have, over time, used this power, under the cloak of the character and fitness assessment, to exclude people on the basis of race,²⁷⁰ gender,²⁷¹ national origin,²⁷² marital status,²⁷³ political affiliation,²⁷⁴ mental health,²⁷⁵ and criminal history.²⁷⁶ Moreover, there is a significant gap between how licensing entities assess character and fitness during the admission process and how related transgressions play out in law practice.²⁷⁷ Because of this gap, licensing entities should value equity over speculative judgments about future conduct based on past transgressions when conducting

270. Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1201–02 (2008).

271. *Id.*

272. Levin, *supra* note 96, at 781 (noting how the increase of immigrants “fueled the bar’s efforts to raise admission standards”).

273. *See, e.g.*, *Cord v. Gibb*, 254 S.E.2d 71 (Va. 1979).

274. *See, e.g.*, *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232 (1957).

275. Melody Moezzi, *Lawyers of Sound Mind?*, N.Y. TIMES (Aug. 5, 2013) <http://www.nytimes.com/2013/08/06/opinion/lawyers-of-sound-mind.html> (noting the denial of admission to a Connecticut bar applicant based on a mental health diagnosis of bipolar disorder and a subsequent nine-year conditional bar admission period requiring physician certifications of fitness twice each year).

276. NAT’L CONFERENCE OF BAR EXAM’RS ET AL., COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2017 4 (2017) https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf (listing Kansas and Mississippi as states that will bar an applicant with a prior felony conviction from admission).

277. Levin, *supra* note 96, at 775–76.

character and fitness assessments during the admission process.²⁷⁸ What is more, the use of speculative judgments instead creates an inequity between the way in which applicants and current practitioners are judged on potential, future conduct. Thus, the same behavior that triggers more extensive character and fitness evaluations for applicants often does not trigger any evaluative or disciplinary measures for current practitioners.²⁷⁹

Assessments of applicants' character and fitness is especially context-sensitive. Equity as applied in the model lawyer-licensing process ideally would look at people as individuals at a specific point in time, taking into account contextual information and resisting irrelevant or unnecessary biases. Because character is not static, equity demands that licensing entities evaluate it with valid evidence rather than implicitly flawed notions of personality and speculation.²⁸⁰

The inequitable track record of the profession underscores the need to reprioritize fairness in agency practices. There have been many instances in which the Supreme Court and other federal agencies intervened to limit the problematic behavior of lawyer-licensing entities.²⁸¹ Being inequitable in implementing character and fitness requirements, however, has not gone unnoticed.

In the past decade, several jurisdictions have enacted statutes that require occupational licensing entities to embrace equitability when making licensing decisions about applicants who have prior criminal record histories. These state statutes require licensing decision makers to balance a long list of factors before making character assessments that are based on an applicant's prior criminal record. These statutory factors include the nature of the crime; how long ago it occurred; and whether the applicant has completed any imposed sentence, paid fines or restitution, demonstrated remorse, and

278. *See id.* at 777.

279. *See, e.g.,* Anne Blythe, *Former Rockingham County DA Pleads Guilty to Role in Wife-Swap Hiring Scheme*, NEWS & OBSERVER (July 17, 2017, 6:01 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article161846533.html> (reporting that two former District Attorneys stole public money by hiring each other's wives to do little to no work).

280. Levin, *supra* note 96, at 785.

281. *See supra* Part II.

made recent positive contributions to the community.²⁸² While state legislatures that have adopted statutes like these have embraced equity and taken a step in the direction of fairness, many lawyer-licensing entities do not consider themselves subject to such statutes. As noted above, some lawyer-licensing entities avoid functioning within the broader context of state statutory law by asserting that any legislative action related to the licensing of lawyers violates the separation of powers doctrine and interferes with a court's inherent authority to carry out its judicial function.²⁸³ But even for those jurisdictions where the state constitution delegates bar admission tasks to the judicial branch, complying with duly enacted state law regarding the licensing function does not erode the values that the separation of powers doctrine is intended to forward.

To the contrary, complying with statutes that embrace equity promotes fairness and protects against arbitrary and discriminatory use of government-sanctioned power regarding a person's chosen profession.²⁸⁴ Accordingly, lawyer-licensing entities across jurisdictions should comply with state statutory mandates, including those that ensure citizens with prior criminal records can appropriately apply to rejoin public life via avenues of reasonable, unbiased consideration, based on personal potential as well as personal history.²⁸⁵ Similarly, our Constitution makes avenues like these available for non-citizens to participate meaningfully in American

282. See, e.g., N.C. GEN. STAT. § 74F-18 (2011); N.C. GEN. STAT. § 70-13.1 (2011); N.C. GEN. STAT. § 93E-2-11 (2011); N.C. GEN. STAT. § 90-171.48 (2011); N.C. GEN. STAT. § 90-345 (2011).

283. See WOLFRAM, *supra* note 3, at 15.

284. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that the collateral consequences of mass incarceration have created a system of second class citizenship disproportionately affecting minority communities).

285. Ostensibly, some applicants with prior criminal histories may have served active prison sentences. Current law acknowledges that restoring civil liberties is part of re-engaging in public life. See, e.g., N.C. GEN. STAT. § 15A-173.2 (2011) (providing that certain classes of convicted felons "may petition the court . . . for a Certificate of Relief relieving collateral consequences" of a criminal conviction); see also N.C. GEN. STAT. § 15A-173.1 (2011) (defining a collateral sanction as any "penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense which applies by operation of law").

public life. Thus, our federal Constitution's Privileges and Immunities Clause acknowledges the value of fairness and non-discriminatory treatment for non-citizens.²⁸⁶

Unfortunately, however, arbitrary and subjective requirements in the lawyer-licensing context undermine protected privileges. One illustration of discriminatory admission practices concerns *who*, as a non-citizen, can sit for the bar examination within a specific state jurisdiction. A recent example sheds light on the importance of clear standards that remove subjective bias and place non-citizen applicants on a level that is equal to citizen applicants.²⁸⁷ In February 2016, Tennessee's lawyer-licensing entity denied an applicant's request to take the Tennessee bar examination despite that he earned a law degree in his home country of Argentina and then practiced law there for more than ten years.²⁸⁸ He also earned an LL.M. degree with a 3.9 grade point average from Vanderbilt Law School but was still unable to "persuade the Board" that his legal education was "substantially equivalent" to an American ABA-approved law school education.²⁸⁹ The denial of the applicant's request to sit for the bar examination, blocking his ability to enter into the influential profession of his choice, demonstrates the very same casual, unexamined exclusivism that lawyers should guard against. Indeed, given the qualifications of the applicant, the Board's decision seemed arbitrary, capricious, and discriminatory. To the applicant's benefit, the Tennessee Supreme Court reviewed its Board of Law Examiners' decision and concluded that the new "substantially equivalent" requirement enacted in January 2016 should not apply to the applicant and prevent him from sitting for

286. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

287. See *Gluzman v. Tenn. Bd. of Law Exam'rs*, No. M2016-02462-SC-BAR-BLE, *1 (Tenn. Aug. 4, 2017), <https://scotblog.org/wp-content/uploads/2017/08/Gluzman-Order.pdf>.

288. Stephen Elliot, *Argentine Lawyer Challenging Tennessee Board of Law Examiners*, NASHVILLE POST (Feb. 3, 2017), <https://www.nashvillepost.com/business/legal/article/20851046/argentine-lawyer-challenging-tennessee-board-of-law-examiners>.

289. Petitioner's Reply Brief at 27, *Gluzman v. Tenn. Bd. of Law Exam'rs*, No. M2016-02462-SC-BAR-BLE (Tenn. June 29, 2017), https://works.bepress.com/daniel_horwitz/32/.

the bar examination.²⁹⁰ The Court's order, however, is overly narrow and void of any substantive rationale.²⁹¹ Given its ambiguity and general lack of substantive directives, the reversal of the decision preserves the possibility for similar professional discrimination in the future. Mr. Gluzman's case accentuates a very narrow vision of the ethics of the membership and practice of law and how problematically limited and perfunctory corrective measures can be when issues arise.

This example confirms that the value of fairness for lawyer-licensing entities includes decision-makers who evaluate applicants on a case-by-case basis and document the rationale of their decisions for

290. *Gluzman*, No. M2016-02462-SC-BAR-BLE at *1.

291. Referring to the "substantially equivalent" legal education requirement only by rule number, the Tennessee Supreme Court order reads, in its entirety, as follows:

On February 9, 2016, the Tennessee Board of Law Examiners ("BLE") denied the petitioner, Maximiliano Gabriel Gluzman, permission to take the February 2016 Tennessee bar examination on the basis that he had not satisfied section 7.01 of Tennessee Supreme Court Rule 7. Mr. Gluzman filed a petition for review with the BLE, but, after a hearing the BLE issued an order on October 13, 2016, denying Mr. Gluzman's petition, again citing his failure to satisfy the requirements of Rule 7, section 7.01. Thereafter, Mr. Gluzman timely filed a petition for review in this Court pursuant to Rule 7, section 14.01. We granted Mr. Gluzman's petition on January 26, 2017; thereafter, the BLE filed the administrative record in this Court. After the parties filed their briefs, Mr. Gluzman notified this Court of his wish to waive oral argument and submit the matter for decision on briefs, explaining the he intends to sit for the February 2018 Tennessee bar examination should he prevail in this Court.

Upon consideration of the briefs and the entire record in this cause, and in the exercise of our discretion as the 'ultimate authority on the interpretation of the rules governing attorney licensing and admission' and pursuant to our 'plenary power to review the actions of the [Board of Law Examiners] in interpreting and applying those rules,' we conclude that the requirements of section 7.01 should not be applied to preclude Mr. Gluzman from taking the Tennessee bar examination. As a result, the BLE may not hereafter rely upon section 7.01 of Rule 7 as a basis to deny Mr. Gluzman permission to take the Tennessee bar examination. Costs of this appeal are assessed one-half to Mr. Gluzman and one-half to the BLE. It is so ordered."

Id. (citations omitted).

future cases. Such a case-by-case approach is consistent with how states regulate licensed lawyers in practice.²⁹² Lawyers must apply the same sensitivity and discernment with integrity. Additionally, professional ethics rules require that lawyers include disclaimers in advertisements to avoid misleading others who may think that a lawyer can achieve the same result for them as for someone else.²⁹³ All good lawyers know that each case is different and that external contexts matter, like who the judge is or who the opposing party is.²⁹⁴ This very standard should apply to the behavior and practices of lawyer-licensing entities.

Our democratic ideals and the rule of law acknowledge that being accommodating is a necessary aspect of fairness.²⁹⁵ Thus, to achieve fairness, accommodation must supplement balance and equity.

3. Accommodating

Accommodating as used here means being amenable to acting in an inclusionary manner and willing to meet the needs of others. For lawyer-licensing entities, being accommodating requires decision makers to treat applicants with the respect and flexibility with which

292. See, e.g., OFFICE OF COUNSEL TO N.C. STATE BAR COUNCIL, REPORT: PENDING DISCIPLINE AND DISABILITY CASES 6 (2017), <https://www.nbar.gov/media/490483/2017-january-report.pdf> (censuring attorney for violating the no-contact rule and for engaging in *ex parte* communications with a judge without providing an opposing party with sufficient advance notice).

293. See, e.g., TENN. RULES OF PROF'L CONDUCT 7.1 cmt. 3 ("An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public." (emphasis added)).

294. See, e.g., Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 85–86 (1994); Judge Richard Ginkowski, *Things You May Not Have Learned in Law School*, 31 CRIM. JUST. 10, 10–11 (2016).

295. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

they would treat their own clients. Accommodating the basic range of needs and preferences of applicants is important not only because of the human element, but also because not doing so would be discriminatory and unfair. When circumstances require, lawyer-licensing entities should qualify their rules, adapting to treat applicants' needs on a case-by-case basis. Elite racial, social, and class members are unaware of the strictures their privilege enforces on their rules for behavior.²⁹⁶ Men have long dominated the legal profession.²⁹⁷ It is therefore unsurprising, for example, that bar examiners do not routinely advertise their breastfeeding accommodations through their websites.²⁹⁸ Accommodation requires that lawyer-licensing entities face the realities of a diverse membership and public.

The Minnesota Board of Law Examiners made a noteworthy accommodation with regard to breastfeeding when it established a policy to give accommodations to breastfeeding mothers during examinations.²⁹⁹ An examinee need only submit a letter to the office stating the type of accommodation requested with respect to her

296. See, e.g., Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley College, Ctr. for Research on Women, Paper No. 189, 1988), <http://www.collegeart.org/pdf/diversity/white-privilege-and-male-privilege.pdf> (unpacking an invisible knapsack of privileges carried by those within a society's dominant class, race, or culture). See generally RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1995).

297. See Theresa M. Beiner, *Some Thoughts on the State of Women Lawyers and Why Title VII Has Not Worked for Them*, 44 *IND. L. REV.* 685, 686 (2011) (describing report from U.S. Department of Labor estimating that women only make up 32.4% of lawyers in the United States).

298. I refer primarily to the need to express (or pump) breast milk while lactating and pursuing a profession. While many lawyer-licensing entities have internal policies on accommodating breastfeeding, the American Civil Liberties Union considered the issue enough of a problem to pair with Law Students for Reproductive Justice to create a page on the ACLU website to help ferret out this information. See *Breastfeeding Policies During the Bar Exam by State*, ACLU, <https://www.aclu.org/issues/womens-rights/pregnancy-and-parenting-discrimination/breastfeeding-policies-during-bar-exam> (last visited Mar. 4, 2018) (including notes for individual states suggesting policy information from individual states was available only through phone contact and that an ACLU campaign was necessary to effect change).

299. See *Test Accommodations*, MINN. STATE BOARD OF LAW EXAM'RS, <http://www.ble.mn.gov/bar-exam/test-accomodations> (last visited Mar. 8, 2018).

physical needs, and the test administrators will send a response to the examinee's Applicant Portal.³⁰⁰ The Board's three-step process for the accommodation is straightforward, thus indicating that the Board values the needs of breastfeeding mothers over complex procedures.³⁰¹ The simplicity of this consideration, while it should be obvious, is exceptional for lawyer-licensing entities. While Minnesota's approach to accommodating lactating women is commendable, lawyer-licensing entities must still make significant progress in accommodating applicants with disabilities.

Under the Americans with Disabilities Act, individuals with a qualifying disability that interferes with a major life activity are entitled to reasonable accommodations.³⁰² In the context of occupational-licensing entrance examinations, applicants with disabilities routinely require accommodated testing conditions.³⁰³ The process for requesting accommodations for physical and cognitive disabilities is neither simple nor efficient.³⁰⁴ More problematically, applicants' requests for accommodations do not receive the consistent and reliable review that these same requests enjoy in other professional contexts.³⁰⁵ For example, in 2011, a blind student who relied on assistive technology for law school examinations had to resort to seeking an equitable remedy against the National Conference of Bar Examiners to use this standard assistive technology to take the Multi-state Bar Exam.³⁰⁶ This inconsistency in judging what constitutes a reasonable accommodation is problematic, as consistency is a hallmark of fairness.³⁰⁷ Additionally, individuals with qualified

300. *Id.*

301. *See id.*

302. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

303. *See, e.g.,* Elder v. Nat'l Conference of Bar Exam'rs, No. C 11-00199 SI, 2011 WL 672662, at *1 (N.D. Cal. Feb. 16, 2011).

304. *See generally Bar Information for Applicants with Disabilities*, ABA, <https://www.americanbar.org/groups/disabilityrights/resources/biad.html> (last visited Mar. 4, 2018) (maintaining a website for applicants seeking bar admission for the purpose of helping applicants with disabilities to navigate the process of receiving reasonable testing accommodations).

305. *Elder*, 2011 WL 672662, at *1.

306. *Id.* at *6.

307. *See* H. L. A. HART, *THE CONCEPT OF LAW* 155 (1961).

disabilities who make reasonable requests for needed accommodations too often suffer undue burdens because they regularly have to engage the adversarial system to vindicate their rights.³⁰⁸

In its pursuit to keep its test secure, lawyer-licensing entity decision-makers and participants end up contributing to problematic social barriers and assumptions about applicants with disabilities who need accommodation. This inefficiency forces applicants to overcome hurdles that relate in both direct and indirect ways to their physical and cognitive disabilities. Embracing public purpose through accommodating all members of the applicant pool involves serving this group in a humane way that undergirds the equitable treatment expected of lawyers toward the public.

IV. CONCLUSION

This Article has described a model lawyer-licensing entity that embraces the four values of clarity, accessibility, transparency, and fairness. It has identified the features associated with each of these four values, respectively. For the value of clarity, a lawyer-licensing entity should adopt substantive standards that are specific, instructive, cohesive, and complete. To hold the value of accessibility, the entity must make relevant information findable, and agency decision-makers must be reachable to those outside of its membership. To be transparent, that entity must be open, well-documented, and forthcoming in their actions and operations. To be fair, the entity must be balanced, equitable, and accommodating. A guide to the application of these qualities can be derived from the examples this Article has offered of standard administrative law practices, existing practices of lawyer-licensing entities, past practices of lawyer-licensing entities, samples from local government practices, and other plausible ideals.

The benefits of considering a value-based model are immediate and far-reaching. First, a lawyer-licensing entity that values clarity, accessibility, transparency, and fairness would possess a foundation for accountability over time, building essential public trust and regard.

308. See generally Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 105–15 (2008).

Public participation that these values fostered would further enhance accountability. Additionally, express avenues of public engagement can result in more functional rules, processes, and outcomes. Regard for lawyer-licensing entities grows when they make fair decisions and operate in transparent ways. Such a positive regard has far reaching potential to affect the culture of the lawyer-licensing process, shaping applicants' initiation into the profession of law and thereafter potentially affecting their evaluation of their own profession and commitment to provide essential public service. In terms of the public legitimacy of licensed lawyers within the larger professional landscape, image matters. Adopting more coherent model practices would enhance this public perception of lawyers and the legal profession. More importantly, however, the substance of professional behavior of all legal professionals will more appropriately reflect the foundational values that enable their work. In short, a lawyer-licensing entity aligned with the values outlined here has fidelity to its purpose, as well as the rule of law.

This model lawyer-licensing entity is a practical and ethical imperative. Of all types of occupational-licensing agencies, lawyer-licensing entities must faithfully follow standard democratic procedures when regulating who can enter the profession. Lawyer-licensing entities, notwithstanding their placement within the judicial branch of government, should avoid violating citizens' substantive and procedural due process rights. Nor should these entities be ones that operate behind closed doors and outside the bright sunshine of public scrutiny.

Lawyer-licensing entities embracing value-based features and practices embody fidelity to the rule of law. This fidelity helps characterize lawyer-licensing entities according to their steadfast adherence to protocols that preserve predictability and reliability. One could test the extent of a lawyer-licensing entity's fidelity to the rule of law over time by assessing its reputation for being clear, accessible, transparent, and fair. Moreover, as a profession that recognizes and defends reputational interests, lawyer-licensing entities should not only consistently practice the qualities that foster fidelity, but they must also promote an awareness of their adherence to such practices through documentation and outreach, which helps meet changing expectations for public access to information.

Moving forward, lawyer-licensing entities need not reinvent themselves. Rather, states and localities can steadily make adjustments as needed. Newly minted attorneys should consider serving as board members of lawyer-licensing entities and become involved in the lawyer-licensing process. Also, historically marginalized lawyer-licensing applicants should band together and advocate for their rights. This group includes non-citizens, people with disabilities, and people with prior criminal records.

As a group of licensed professionals, lawyers should continuously reflect on the health of their own profession and the privileges associated with self-regulation. Lawyers must handle privileges faithfully and responsibly. Lawyers who want to influence the culture of their profession in the direction of model behavior should get involved in their local bar associations, and consider becoming mentors to newly licensed attorneys. They should consider participating in continuing education and outreach that develops the skills enabling them to fulfill their public purpose and promote the values of clarity, accessibility, transparency, and fairness in the lawyer-licensing context and within the practice of law.

Lawyer-licensing entities need not chance their long-standing behaviors and practices overnight or reinvent themselves to make significant progress toward model behavior. Varying structures across jurisdictions can make incremental, tailored improvements and adjustments that embrace the highest values of the legal profession. For example, many could quickly implement changes such as adopting express procedures for outsiders to petition an agency for a rule change. Implementations like these could help lawyer-licensing entities respond to demands for changes in how lawyers are licensed throughout the country and how legal services are delivered.

As a profession that serves an essential public purpose, the legal profession, in all its intricacies, including lawyer-licensing entities, should strive to embrace and adhere to ideal democratic practices. Lawyers have much to be proud of in representing clients in a way that upholds the highest values of the legal profession. Lawyers are entitled to these same feelings of dignified purpose and integrity of values when considering how lawyer-licensing entities serve as gatekeepers to the profession.