HONOR THE OATH: FLORIDA'S CONSTITUTION AND THE NEED FOR BAR EXAMINER REFORM

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I. INTRODUCTION

To join the Florida Bar, lawyers take an Oath of Admission.[1] By its terms, every practitioner pledges fairness, integrity, and civility,[2] and swears to support the state constitution.[3] Yet when it comes to bar admission, law students who aspire to join the profession can justifiably question whether Florida law means what it says.

The Florida Constitution empowers the Supreme Court of Florida ("Supreme Court") with exclusive authority over admission to the practice of law.[4] Exercising that authority, the Supreme Court created the Florida Board of Bar Examiners ("the Board").[5] The Board, as its general counsel once wrote, views itself as the "constitutional safeguard between attorney aspirants and the

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1. *Oath of Admission to the Florida Bar*, FLA. BAR, https://www-media.floridabar.org/uploads/2017/04/oath-of-admission-to-the-florida-bar-ada.pdf (Sept. 12, 2011); *see also* Judge Harry Lee Anstead, *I Do Solemnly Swear*, 63 FLA. BAR. J. 9 (Nov. 1989), https://www.floridabar.org/the-florida-bar-journal/i-do-solemnly-swear/ (explaining the history of the Oath of Admission).

2. The pledge was added in 2011. *In re* The Fla. Bar, 73 So. 3d 149, 150 (Fla. 2011) (revising the oath to recognize "the importance of respectful and civil conduct in the practice of law").

3. *Oath of Admission to the Florida Bar*, *supra* note 1.

4. FLA. CONST. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.").

5. RULES OF THE SUP. CT. RELATING TO ADMISSIONS TO THE BAR r. 1-13 (FLA. BD. OF BAR EXAM'RS 2020) [hereinafter FLA. BAR EXAM'RS RULES] ("The Florida Board of Bar Examiners is an administrative agency of the Supreme Court of Florida created by the court to implement the rules relating to bar admission."). References to "the Board" in this article often relate to official actions of the Florida Board of Bar Examiners or come from the text of the Board's own rules, whereas the common term "bar examiners" is used more generally in this article to refer to the whole organization, including the staff.

public."[6] Yet, as this Article explains, serious tensions exist between the Rules of the Supreme Court Relating to Admission to the Bar and the concepts of transparency, free speech, privacy, and judicial funding in the Florida Constitution. Reform offers an opportunity to honor the state's commitment to its Oath of Admission, the Florida Constitution, and the professionalism movement.

II. TRANSPARENCY: REASSESS CONFIDENTIALITY

Article I, Section 24 of the Florida Constitution creates a right to public records that "specifically includes the legislative, executive, and judicial branches of government."[7] The clause also contains exceptions "with respect to records exempted pursuant to this section or specifically made confidential by this Constitution."[8] Implementing this clause, Rule 2.420 of the Rules of Judicial Administration, adopted by the Supreme Court, defines confidentiality narrowly:

> (4) "Confidential," as applied to information contained within a record of the judicial branch, means that such information is exempt from the public right of access under article I, section 24(a) of the Florida Constitution and may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term "exempt" means that such information is confidential. Confidential information includes information that is confidential under this rule or under a court order entered pursuant to this rule. To the extent reasonably practicable, restriction of access to confidential information *shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential*.[9]

The Florida Board of Bar Examiners is part of the judicial branch. Accordingly, in theory, the constitutional right of access to public

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

7. FLA. CONST. art. I, § 24(a).

8. *Id.*

9. FLA. R. GEN. PRAC. & JUD. ADMIN. r. 2.420(b)(4) (emphasis added).

records and the Rules of Judicial Administration should apply.[10] Instead, in practice, and by rule, the Board and bar examiners are different: "All information maintained by the board in the discharge of the responsibilities delegated to it by the Supreme Court of Florida is confidential, except as provided by these rules or otherwise authorized by the court."[11]

In other words, in Florida, nearly everything related to bar admission is confidential unless declared otherwise. This presumption of confidentiality wholly reverses the approach of the Rules of Judicial Administration and the Florida Constitution. Remarkably, even the applicants' access to *their own files* is limited.[12] Moreover, when confidentiality exceptions exist, they reflect the bar examiners' needs and not the needs of any individual. For example, bar examiners may publish lists of applicants, or share information for investigatory, disciplinary, or criminal proceedings.[13]

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10. *Id.* at r. 2.420(b)(2) (defining "the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice").

11. FLA. BAR EXAM'RS RULES r. 1-61.

12. *See Final Report and Recommendations of the Supreme Court Select Committee to Study the Florida Board of Bar Examiners*, FLA. BD. OF BAR EXAM'RS 6, https://www.flcourts.org/content/download/218257/1975488/report.pdf (last visited Aug. 26, 2022) (questioning a 1991 case finding that applicant records were confidential, stating "[t]he Supreme Court should revisit this issue to consider whether to recede from its opinion in Florida Board of Bar Examiners . . . 581 So. 2d 895 (Fla. 1991) and implement the recommendation of the Bench/Bar Commission"). Some confidentiality exemptions, however, do allow the applicants some limited access to the otherwise confidential information in their own files. *See also* FLA. BAR EXAM'RS RULES r. 1-63.5 ("On written request from registrants or applicants for copies of documents previously filed by them, and copies of any documents or exhibits formally introduced into the record at an investigative or formal hearing before the board, and the transcript of hearings, copies will be provided."); *id.* at r. 1-63.6 ("On written request from registrants or applicants, copies of documents filed on their behalf, or at the request of the board with the written consent of the party submitting the documents, will be provided."); *id.* at r. 1-65 ("Unless otherwise ordered . . . nothing in these rules prohibits any applicant or witness from disclosing the existence or nature of any proceeding under rule 3, or from disclosing any documents or correspondence served on, submitted by, or provided to the applicant or witness.").

13. *See generally* FLA. BAR EXAM'RS RULES r. 1-63.1 (disclosure of applications and admissions); *id.* at r. 1-63.9 ("the applicant's name and mailing address is public information"); *id.* at r. 1-63.2 (placement of information into a National Conference of Bar Examiners data bank); *id.* at r. 1-63.4 (allowing responses to written requests from the National Conference of Bar Examiners or other similar agencies, with a release); *id.* at r. 1-63.8 ("The board may divulge the following information to all sources contacted during the background investigation: a. name of applicant or registrant; b. former names; c. date of birth; d. current address; and e. Social Security number."); *id.* at r. 1-63.3 ("On written

In 2002, in commentary to Rule 2.420 of the Rules of Judicial Administration, the Supreme Court "anticipated that each judicial branch entity will have policies and procedures for responding to public records requests."[14] For twenty years, no changes have been made. Bar examiner records remain confidential. Perhaps the inaction is intentional, because when the 1991 amendments to the Florida Constitution created a right of access to public records, they included a grandfather clause.[15] Thus, by leaving the preexisting confidentiality rule untouched, the Board and bar examiners can claim compliance with the text (but not the spirit) of the constitutional amendment because "[r]ules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed."[16]

Admittedly, applicant files contain sensitive private information, and examination questions must be kept secret to avoid unfair results. But secrecy can hide discrimination. Scholars have expressed concerns about due process[17] and documented the disproportionate impact of financial responsibility requirements upon underprivileged groups.[18] Furthermore, bar examiner confidentiality is not limited to matters of personal privacy or testing integrity. Instead, Florida's bar examiners operate unimpeded by administrative procedure or judicial transparency.[19] Elementary agency documents—meeting minutes, budgets, and

request from the Florida Bar for information relating to disciplinary proceedings, reinstatement proceedings, or unlicensed practice of law investigations, information will be provided with the exception of any information received by the board under the specific agreement of confidentiality or otherwise restricted by law."); *id.* at r. 1-63.7 ("On service of a subpoena issued by a Federal or Florida grand jury, or Florida state attorney, in connection with a felony investigation only, information will be provided with the exception of any information that is otherwise restricted by law.").

14. *Rule 2.420 Public Access to Judicial Branch Records*, FLA. SUP. CT. A-10, https://www.floridasupremecourt.org/content/download/327915/file/06-2136_Appendix%20A%2010-31-06.pdf (last visited Aug. 26, 2022).

15. *Florida Access to Public Records and Meetings, Amendment 2 (1992)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Access_to_Public_Records_and_Meetings,_Amendment_2_(1992) (last visited Aug. 26, 2022).

16. FLA. CONST. art. I, § 24(d).

17. Sonya Harrell Hoener, *Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions*, 29 WHITTIER L. REV. 827, 847 (2008).

18. Joseph A. Valerio, *The Impact of the Character and Fitness Honesty and Financial Responsibility Requirements on Underprivileged Groups*, 30 GEO. J. LEGAL ETHICS 1093, 1094 (2017).

19. Keith W. Rizzardi, *Excessive Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency*?, 34 GEO. J. LEGAL ETHICS 423, 423 (2021); *see generally*, FLA. STAT. § 120 (2021); FLA. R. GEN. PRAC. & JUD. ADMIN. 2.420.

policy memos—are confidential, too.[20] In sum, the bar examiners rules stand in conflict with both the spirit of the Florida Constitution and the directives of a Florida Supreme Court order; yet still, the bar examiners remain largely immune from further public scrutiny.

III. FREEDOM OF SPEECH: REJECT VAGUE DISQUALIFICATION RULES

Through its broadly confidential process, the Florida Board of Bar Examiners investigates applicants to ensure that they possess the necessary character to become a lawyer.[21] That investigation of character tests the boundaries of Florida's constitutional system protecting the freedom of speech.

To earn admission to the bar, applicants must show good moral character, adequate knowledge of the standards and ideals of the profession, and proof of fitness to perform the obligations and responsibilities of an attorney.[22] However, based on an applicant's past conduct, the bar examiners may find an applicant lacking the character and fitness necessary to become an attorney. Findings of unlawful conduct, including substance abuse, may be a basis for "disqualification."[23] Acts involving dishonesty, fraud, deceit, or misrepresentation can be disqualifying too.[24] Disqualification can also be premised upon lesser (and even unintentional) concerns such as academic misconduct, misleading statements or omissions on the bar application, misconduct in employment, financial irresponsibility, and mental health.[25] The broad criteria allows nearly any articulated reason to become a

20. Rizzardi, *supra* note 19, at 427.

21. *See generally* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491 (1985).

22. FLA. BAR EXAM'RS RULES r. 2-12 (proof of character and fitness).

23. *Id.* at r. 3-11 (defin potentially disqualifying conduct to include: "(a) unlawful conduct; . . . (e) acts involving dishonesty, fraud, deceit, or misrepresentation; (f) abuse of legal process; . . . (h) neglect of professional obligations; (i) violation of an order of a court; . . . (k) evidence of a substance use disorder that may impair the ability to practice law; . . . and (m) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction").

24. *Id.* at para. (e) ("acts involving dishonesty, fraud, deceit, or misrepresentation").

25. *Id.* at para. (b) ("academic misconduct"); *id.* at para. (c) ("making or procuring any false or misleading statement or omission of relevant information"); *id.* at para. (d) ("misconduct in employment"); *id.* at para. (g) ("financial irresponsibility"); *id.* at para. (j) ("evidence of a mental disorder that may impair the ability to practice law"); and *id.* at para. (n) ("any other conduct that reflects adversely on the character or fitness of the applicant").

basis for disqualification, without any clear standard explaining how the weight of the evidence is considered.[26]

Perhaps the most troubling provision, however, is the last criterion of the disqualification rule, which states: "The revelation or discovery of any of the following may be cause for further inquiry before the board recommends whether the applicant or registrant possesses the character and fitness to practice law . . . (n) *any other conduct* that reflects adversely on the character or fitness of the applicant."[27]

A rule declaring "any other conduct" related to "character" to be potentially disqualifying raises serious constitutional concerns. To begin with, both the state and federal constitutions provide Floridians with rights of free speech.[28] The Florida and United States Supreme Courts have held that "an overbroad regulation may not be enforced until the scope of regulation is narrowed by a limiting construction, or partial invalidation, to remove the threat to protected expression."[29] A regulation prohibiting "any other conduct" surely seems lacking in limitations.

Furthermore, caselaw ensuring the constitutional protections of speech provides that a substantial state interest is necessary for any regulation of speech to survive scrutiny.[30] When the government's regulations are vague, careful scrutiny is needed. For example, in *State v. Mayhew*, the Florida Supreme Court considered the constitutionality of a misdemeanor statute prohibiting "profane, vulgar and indecent language, in any public place."[31] The court discussed the need for people to understand laws that impinge upon free speech:

> We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not in

26. *See id.* at r. 3-12. Upon finding disqualifying conduct, the bar examiners evaluate "present character," and they consider (a) age, (b) recency, (d) seriousness and (f) effects of the conduct; (c) reliability of the information and (e) underlying factors; (i) candor and (j) omissions or misrepresentations about the conduct; and evidence of (g) rehabilitation or (h) positive social contributions thereafter. *Id.* According to the rules, these factors, "among others," will be considered in assigning weight and significance to prior conduct. *Id.*

27. *Id.* at r. 3-11 (emphasis added).

28. *See generally* FLA. CONST. art. I, § 4 (freedom of speech); *see also* U.S. CONST. amend. I.

29. City of Daytona Beach v. Del Percio, 476 So. 2d 197, 202 (Fla. 1985) (discussing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

30. *Id.*

31. State v. Mayhew, 288 So. 2d 243, 245–46 (Fla. 1973).

> indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not. We acknowledge that certainty is all the more essential when vagueness could induce individuals to forego their rights of speech, press and association for fear of violating an unclear law.[32]

Despite these concerns about vagueness or overbreadth, *Mayhew* initially held the misdemeanor statute to be "sufficiently explicit."[33] Five years later in *Brown v. State*, the Supreme Court reversed itself.[34] Reviewing the same statute, and reapplying its own vagueness concerns, it found the text impermissibly overbroad, with unacceptable consequences upon freedoms of speech that could not be cured by judicial interpretation. As the court explained, "because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[35]

The bar examiners' "any other conduct" rule is even more vague than the statute tested in *Mayhew* and *Brown.* Upon learning about the bar examiner rules, law students quickly abandon their rights to free speech. They scrub their past social media and retrain themselves thereafter, concerned about "any other conduct" that might violate undefined "character" standards.[36] In other words, just as the court warned against in *Mayhew*, Florida Bar applicants are induced to forgo their rights of free speech to avoid violating an unclear law.[37]

To justify broad rules and vast bar examiner discretion, defenders of the status quo sometimes argue that the practice of law is a privilege.[38] Withholding that privilege, however, is an exercise of governmental power. That power must be subjected to constitutional limits, as the United States Supreme Court has

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32. *Id.* at 248 (citing Scull v. Virginia, 359 U.S. 344 (1959)).

33. *Id.*

34. Brown v. State, 358 So. 2d 16, 21 (Fla. 1978).

35. *Id.* at 21 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

36. *See, e.g.*, John G. Browning & Al Harrison, *"What Is That Doing on Facebook?!" A Guide to Advising Clients to "Clean Up" Their Social Media Profiles*, HOUS. LAW., Jan./Feb. 2016, at 26; Rachel Margiewicz, *Social Media and the Law School Admissions Process*, NAT'L JURIST (Feb. 25, 2019), https://www.nationaljurist.com/prelaw-social-media-and-law-school-admissions-process/.

37. *Mayhew*, 288 So. 2d at 248.

38. *See, e.g.*, *Ex rel.* McMahan, 944 So. 2d 335, 339 (Fla. 2006) ("The evaluation here falls far short of the expectations for those having the privilege of admission to The Florida Bar.").

held: "[r]egardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."[39]

At a minimum, Florida's vague bar examiner rule regarding disqualification based on "any other conduct" generates covert free speech consequences. But another rule addressing disqualification overtly chills free speech—and even free thinking. Specifically, if bar examiners find disqualifying conduct, the burden then shifts to applicants to prove "rehabilitation" with clear and convincing evidence of strict compliance with law, unimpeachable character, good reputation for professional ability, personal assurances (with corroborating evidence), restitution where applicable, *and* positive action showing rehabilitation.[40] In addition, proof of rehabilitation requires "lack of malice and ill feeling toward those who, by duty, were compelled to bring about the disciplinary, judicial, administrative, or other proceeding."[41]

The bar examiners are among those who bring about judicial and administrative proceedings, so according to this requirement, it appears that bar applicants with "ill feeling[s]" towards the officials and their process cannot prove rehabilitation.[42] While neither lawyers nor bar applicants have absolute free speech rights, because the practice of law is a commercial endeavor,[43] long-established caselaw provides that regulation of lawyer speech must possess a substantial government interest at stake, demonstrate that the restriction on commercial speech directly and materially advances that interest, and show that the regulation is narrowly drawn.[44] The regulation of "ill feelings" goes too far. Free speech principles still apply to bar applicants and future lawyers, and at a minimum, Florida's rehabilitation requirement fails intermediate scrutiny, because a rule prohibiting "ill feelings" serves no substantial governmental interest.

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39. Schware v. Bd. of Bar Exam'rs of State of N.M., 353 U.S. 232, 239 n.5 (1957).

40. *See generally* Charles A. Stampelos, *The Florida Board of Bar Examiners: The Use of and Rehabilitation at Formal Hearings*, 74 FLA. BAR. J. 54 (May 2000), https://www.floridabar.org/the-florida-bar-journal/the-florida-board-of-bar-examiners-the-use-of-and-rehabilitation-at-formal-hearings/; FLA. BAR EXAM'RS RULES r. 3-13 (explaining the elements of rehabilitation).

41. FLA. BAR EXAM'RS RULES r. 3-13(d).

42. *Id.*

43. Bates v. State Bar of Ariz., 433 U. S. 350, 383–84 (1977).

44. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 624 (1995).

In *In re Florida Board of Bar Examiners Re: E.R.M.*, for example, the Supreme Court said, "no qualification for membership in The Florida Bar is more important than truthfulness and candor."[45] The government's primary interest in a character and fitness process, therefore, is honesty, integrity and the public good:

> This Court, along with the Florida Board of Bar Examiners, is committed to the proposition that issues of honesty, integrity and character will be fully and fairly analyzed and properly addressed in connection with those who seek to assume a position of trust and confidence through admission to The Florida Bar. . . . The task is not easy, but it is essential and fundamental to support a system in which the people of Florida can have trust and confidence.[46]

A rule prohibiting "ill feelings" does not ensure honesty or integrity, nor is it directly and materially related to public interests; rather, it diminishes honesty and undermines integrity by silencing individual dissent.[47] This limitation of free expression seems particularly egregious given the careful wording of the Florida Constitution, which states that "[e]very person may speak, write and publish sentiments on all subjects but shall be responsible *for the abuse* of that right."[48] It certainly is not an "abuse" of free speech rights for an applicant to vigorously disagree with the bar examiners and their constitutionally questionable investigations of otherwise private actions, feelings, finances, or personal health. In fact, the Florida Constitution further provides that "[i]f the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated."[49] Well-founded opinions about disciplinary, judicial, or administrative officials, therefore, qualify as constitutionally protected speech and disagreement and conflict resolution lies at

45. 630 So. 2d 1046, 1048 (Fla. 1994).

46. Fla. Bd. of Bar Exam'rs Re R.L.W., 793 So. 2d 918, 925–26 (Fla. 2001).

47. *See generally,* Mulford Q. Sibley, *Anonymity, Dissent, and Individual Integrity in America*, 378 THE ANNALS AM. ACAD. POL. & SOC. SCI. 45, 45–57 (1968).

48. FLA. CONST. art. I, § 4 (emphasis added); *see also* Fla. Canners Ass'n v. State Dep't of Citrus, 371 So. 2d 503, 517 (Fla. 2d Dist. Ct. App. 1979); Dep't of Educ. v. Lewis, 416 So. 2d 455, 461 (Fla. 1982) (finding Florida courts lack authority to limit constitutional protections, and Florida's principles of freedom of expression are applied consistent with the First Amendment).

49. FLA. CONST. art. I, § 4.

the heart of our legal profession.[50] Rather than being silenced, bar applicants should be expected to conduct themselves with candor and civility, practicing honest and effective communication and avoiding acrimony, precisely as Florida's oath and professionalism documents demand.[51]

Instead, by adopting a rule prohibiting *ill feelings* towards the Board—and using this as a basis to justify disqualification[52]—the bar examiners squelch both speech and professionalism because they dislike being disliked. Indeed, their rules allow the bar examiners to disqualify a person based on an unknowable standard of "any other conduct," while simultaneously protecting the government and the bar examiners from any criticism by the people most affected when those rules are applied.[53] Predictably, some applicants who openly voiced their concerns with the bar examination process have later accused the bar examiners of engaging in more rigorous and retaliatory investigations of their character and fitness.[54]

Fully aware of the consequences of these speech-chilling bar admission rules, lawyers who occasionally represent bar applicants in formal bar examiner proceedings routinely convey the same advice: be contrite, be quiet, or else.[55] The irony is

50. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (speech concerning "politics, nationalism, religion, or other matters of opinion" is at the core of the First Amendment); *see also* Michael T. Colatrella Jr., *A Lawyer for All Seasons: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93 (2012).

51. *See Oath of Admission to the Florida Bar*, *supra* note 1; *Professionalism Expectations*, FLA. BAR, https://www.floridabar.org/prof/regulating-professionalism/professionalism-expectations-2/ (Jan. 30, 2015) at Expectation 2 ("Effective communication requires lawyers to be honest, diligent, civil, and respectful in their interactions with others."); *Id.* at 2.2 ("Candor and civility must be used in all oral and written communications"); *Id.* at 2.3 ("A lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court.").

52. FLA. BAR EXAM'RS RULES r. 3-13 (explaining the elements of rehabilitation).

53. *Id.* at r. 3-11.

54. Karen Sloan, *Law Grad Says He's Being Retaliated Against for Bar Exam Criticism*, LAW.COM (Sept. 15, 2020, 04:31 PM), https://www.law.com/dailybusinessreview/2020/09/15/law-grad-says-hes-being-retaliated-against-for-bar-exam-criticism/; *see also* Joe Patrice, *NCBE Prez Issues Threat to Tie Up Licenses of Bar Exam Critics*, ABOVE THE LAW (Aug. 6, 2020, 11:43 AM), https://abovethelaw.com/2020/08/ncbe-prez-issues-threat-to-tie-up-licenses-of-bar-exam-critics/.

55. *See, e.g.*, Gabriel Kuris, *Law School Applicants and Disciplinary Issues: Disclose Past Incidents Directly to Show Your Integrity Rather Than Call it into Question*, U.S. NEWS & WORLD REPORT (July 30, 2020), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/how-law-school-applicants-can-address-criminal-disciplinary-incidents; Bruce D. Greenberg, *The Final Hurdle for New Lawyers: The New Jersey Supreme Court's Committee On Character*, LITE DEPALMA GREENBERG L. BLOG (Oct. 8, 2015),

immense. According to our professional ethics, lawyers should "zealously assert[] the client's position under the rules of the adversary system" and act "[a]s an evaluator . . . by examining a client's legal affairs and reporting about them to the client or to others."[56] Yet when it comes to advocating for themselves or evaluating their own circumstances, our future lawyers are instructed to be submissive and silent. Instead of achieving the ideals of character and professionalism, Florida's bar admission rules necessitate theatrical obsequiousness.[57]

IV. PRIVACY: REFINE MENTAL AND FINANCIAL HEALTH INQUIRIES

Florida's constitutional right to privacy states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[58] Perhaps an argument can be made that the Florida Constitution "otherwise provided" when it granted the Supreme Court "exclusive jurisdiction to regulate the admission of persons to the practice of law."[59] Yet that grant of exclusive power does not eliminate the need to comply with other provisions of the state Constitution. While some invasions of privacy may be appropriate, as the state Supreme Court explained, Florida's right of privacy is powerful, too:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the

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https://www.litedepalma.com/the-final-hurdle-for-new-lawyers-; *Policy Statement of the Board to Determine Fitness of Bar Applicants Regarding Character and Fitness Reviews*, SUP. CT. GA. OFF. BAR ADMISSIONS 2, https://www.gabaradmissions.org/policy-statement (May 7, 2015); Mitchell Simon, Nick Smith & Nicole Negowetti, *Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process*, 2012 J. PROF. LAW. 37, 40–41 (2012).

56. FLA. RULES OF PRO. CONDUCT ch. 4, pmbl. (FLA. BAR 2022).

57. *See, e.g.*, Michael Johnson, *Sackcloth and Ashes: Stephen Glass and the Good Moral Character Requirement's Problem with Remorse*, 26 GEO. J. LEGAL ETHICS 789 (2013).

58. FLA. CONST. art. I, § 23.

59. FLA. CONST. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.").

> amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.[60]

Defying this constitutional privacy right, Florida's bar examiners demand personal mental health records during their character and fitness investigations.[61] Reassuringly, the bar examiners webpage contains a placating statement: "[l]ike all matters before the board, any information about an applicant's mental health is confidential."[62] This prophylactic promise of future confidentiality does not prevent the original sin of a needless privacy invasion. Yet the Supreme Court of Florida has defended these mental health inquiries anyway, declaring them a result of a "voluntary" application:

> In this case, the applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right. By making application to the Bar, he has assumed the burden of demonstrating his fitness for admission into the Bar. Fla. Sup.Ct. Bar Admiss. Rule, art. III, § 2. This encompasses mental and emotional fitness as well as character and educational fitness.
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> . . .
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> The inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder [as requested] furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he

60. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (citing State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981)).

61. *See* Fla. Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 73 (Fla. 1984).

62. *Frequently Asked Questions: Will My Mental Health Information Be Kept Confidential?*, FLA. BD. BAR EXAM'RS, https://www.floridabarexam.org/web/website.nsf/faq.xsp#2106 (last visited Aug. 26, 2022).

> is able to handle his responsibilities. We find that the Board has employed the least intrusive means to achieve its compelling state interest. [63]

This logic subverts the whole point of the constitutional right. Florida explicitly limited "governmental intrusion."[64] Moreover, as the Supreme Court of Florida itself has recognized, the right to privacy is not limited to "unreasonable" or "unwarranted" intrusions.[65] Instead, the state Constitution intended "to create a zone of autonomy protecting personal decision making, *especially concerning issues of health*."[66]

Rather than pretending that applicants seeking admission to the bar have abandoned their constitutional rights and "voluntarily" submitted themselves to the precise types of intrusions that the constitution prohibited, the Supreme Court and bar examiners could be more circumspect. The right to privacy should not be rendered meaningless. Indeed, back in 1984, Justice James Calhoun Atkins, Jr. wrote a prescient dissent, arguing that the bar examiners' mental health inquiries could be narrowed without impinging on the Board's effectiveness:

> As petitioner argues, it is difficult to conceive of information in which an individual has a greater legitimate expectation of privacy than medical records containing communications and other information between an applicant and a psychiatrist, psychologist, or counselor. Accordingly, information which is irrelevant to an applicant's ability to practice law in this state should not come within the scope of the Board's inquiry. An applicant's past treatment for some emotional disturbance, such as loss of a parent for instance, or treatment for amnesia which occurred, say, as a child ten or fifteen years ago surely is

63. Fla. Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 74–75 (Fla. 1983); *cf.* State of Fla., Dep't of Health & Rehab. Serv. v. Cox, 627 So. 2d 1210, 1216 (Fla. 2d Dist. Ct. App. 1993) (finding that the right to privacy was not violated when a foster parent applying to adopt a child identified his homosexuality, in part because "*the state did not demand secret information*; the plaintiffs voluntarily provided the information" and noting that for the right of privacy to apply, a reasonable expectation of privacy must exist). The bar examiners, in contrast, do demand secret information.

64. FLA. CONST. art. I, § 23.

65. *Winfield*, 477 So. 2d at 548.

66. *Cox*, 627 So. 2d at 1216 (citing *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989)) (emphasis added).

> not relevant to the potential of that applicant to be a fit and worthy member of The Florida Bar today.[67]

Time has proven Justice Atkins correct. The U.S. Department of Justice investigated the bar examiners' potentially discriminatory approach to mental health inquiries.[68] Confronted with civil rights lawsuits,[69] Florida's bar examiners scaled back their inquiries.[70] Item 25 on the Florida Bar Application now asks applicants to disclose any treatment for, or recurrence of, thought disorders and mood disorders, specifically mentioning schizophrenia, psychotic disorders, bipolar disorder, and major depressive disorder.[71]

The current scope of the bar examiners' inquiries is more narrow than prior versions.[72] Recognizing that law students knowingly avoided visiting a medical professional merely to ensure they had nothing to disclose, their webpage now states, "You do not need to disclose any other mental health conditions or treatment, including any counseling for stress or anxiety."[73] Despite these beneficial and long overdue changes, constitutional questions remain.

When applicants seek membership into the Florida Bar, the bar examiners require them to sign a broad waiver and release, authorizing release of "*any* documents, records or other

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67. *Fla. Bd. of Bar Exam'rs Rules Re: Applicant*, 443 So. 2d at 74.

68. *See* Andrea Stempien, *Answering the Call of the Question: Reforming Mental Health Disclosure During Character and Fitness to Combat Mental Illness in the Legal Profession*, 93 U. DET. MERCY L. REV. 185 (2016); Martha Neil, *DOJ Says Bar Officials Violate ADA By Asking Applicants Too Much About Their Mental Health*, ABA J. (Feb. 12, 2014), https://www.abajournal.com/news/article/doj_says_bar_officials_violated_ada_by_asking_applicants_too_much_about_the; Marilyn Cavicchia, *A New Look at Character and Fitness: Bar Leaders, Lawyers, Others Urge Elimination of Mental Health Questions*, 44 ABA J. 3, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2019_20/january-february/a-new-look-at-character-and-fitness-bar-leaders-lawyers-others-urge-elimination-of-mental-health-questions/.

69. Complaint at 3–4, Hobbs v. Fla. Bd. of Bar Exam'rs, No. 4:17-cv-00422-RH-CAS, (N.D. Fla. Sept. 20, 2017); Raychel Lean, *Florida Board of Bar Examiners Settles Suit Alleging Discrimination Over Mental Health*, LAW.COM (Mar. 27, 2019), https://www.law.com/dailybusinessreview/2019/03/27/florida-board-of-bar-examiners-settle-suit-alleging-discrimination-over-mental-health/?slreturn=20211116090635.

70. Lean, *supra* note 69.

71. *Frequently Asked Questions*, FLA. BD. BAR EXAM'RS, https://www.floridabarexam.org/web/website.nsf/faq.xsp#211E (last visited Aug. 26, 2022).

72. *Compare Frequently Asked Questions*, *supra* note 71, *with* Keith W. Rizzardi, *Victims of Disorganized Thinking: When Law Students with Mental Health Issues Confront Florida's Unconstitutional Inquisition*, 4 MENTAL HEALTH & POL'Y J. 87, 102–05 (2015) (discussing Florida's mental health inquiries).

73. *Frequently Asked Questions*, *supra* note 71.

information" the bar examiners deem "relevant to my character and fitness" to an "Authorized Person."[74] This governmental mandate is, unquestionably, a governmental intrusion upon personal privacy. The bar examiners mental health inquiries, however, need to adhere to constitutional limits.

While the dissent of Justice Atkins provides helpful context, the majority decision of the court in *Winfield v. Division of Pari-Mutuel Wagering* provides further clarity on what the state constitution demands.[75] In *Winfield*, the Department of Business Regulation sought all of Mr. Winfield's banking records yet instructed the banks not to provide him with any personal notice.[76] The Fourth District Court of Appeal certified the matter to the Florida Supreme Court, explicitly recognizing the tension between privacy rights of individuals and investigative powers of government:

> The power of investigation is a necessary adjunct to the exercise of the power to legislate. But the power is not an unbridled one. It must be circumscribed by reasonable limitations and should never be used to "hunt witches."
>
> The subpoenas before us now may, or may not, involve witch-hunts but it is hard not to label them fishing expeditions. Nonetheless we recognize the power of the legislative body to seek out and acquire needed information and we cannot find the subpoenas in question to be an unbridled exercise of that power.[77]

74. FLA. BD. BAR EXAM'RS, AUTHORIZATION AND RELEASE 1 (2010), https://www.floridabarexam.org/__85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/99755d36c827e49085257c0c007280e3 ("To Whom It May Concern: Having filed an application with the Florida Board of Bar Examiners, I hereby authorize and request every person, official, representative of a firm, corporation, association, organization or institution (collectively the "Authorized Persons") having control of any documents, records or other information pertaining to me or relevant to my character and fitness, to furnish the originals or copies of any such documents, records and other information to the Board or any of its representatives and to permit the Board or any of its representatives to inspect and make copies of any such documents, records or other information.") (emphasis added).

75. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).

76. Div. of Pari-Mutuel Wagering v. Winfield, 443 So. 2d 455, 457 (Fla. 4th Dist. Ct. App. 1984) ("There is something Gestapo-like about state agencies grabbing bank records not only without notice, but with entreaties to the banks to conceal the grab.").

77. *Id.* (emphasis added) (internal citation omitted).

Ultimately, the Supreme Court applied, and the government passed, a strict scrutiny test in *Winfield*.[78] Yet both the district court of appeal and the Florida Supreme Court noted that the subpoena and investigation was originally premised on probable cause.[79] The agency suspected Winfield did not own the racehorses he had reported and that his declared ownership was really a front for family members or closely held family corporations.[80] Thus, *Winfield* held that the subpoena used the least intrusive means under the circumstances, and the government's broad subpoena for banking records overcame the individual's right to privacy because of the compelling governmental interest to investigate the *specific* circumstances and knowledge of potential wrongdoing.[81]

In contrast, to defend its mental health inquiries, the bar examiners cite general concerns and mental health risks, ranging from incivility[82] to suicide.[83] These general concerns should not nullify a constitutional right and should not be used to justify a "witch hunt," "fishing expedition," or other investigation of mental health that is unsupported by specific circumstances and an individualized need. Even assuming, *arguendo*, that the bar examiners mental health inquiries are narrowly tailored (and consistent with the Americans with Disabilities Act),[84] the government cannot demonstrate a compelling interest that overcomes individual privacy rights to justify an investigation of the mental health of *every* bar applicant.

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78. *Winfield*, 477 So. 2d at 548.

79. *Id.* at 546.

80. *Id.*; *Div. of Pari-Mutuel Wagering*, 443 So. 2d at 456.

81. *Winfield*, 477 So. 2d at 548; *see Div. of Pari-Mutuel Wagering*, 443 So. 2d at 457.

82. As the Florida Supreme Court's own commission explained, lawyers and law students may struggle disproportionately with general mental health concerns:

> Current research shows that during law school students become more depressed than the population as a whole, and that law students' interpersonal skills atrophy under the traditional law school regimen. Other studies show that lawyers have an elevated level of substance abuse and mental illness. As a result, new lawyers are at a distinct disadvantage in the realm of interpersonal relationships and general mental health.

Fla. Bd. of Bar Exam'rs Character & Fitness Comm'n, *Final Report to the Supreme Court of Florida*, FLA. SUP. CT. 209 (Mar. 2, 2009), https://www.floridasupremecourt.org/content/download/242822/file/2009_FBBE_Character_Fitness_Report.pdf.

83. Scott M. Weinstein, Ph.D., *Lawyer Suicide: Finding a Ray of Sunshine Through a Dark Cloud*, FLA. BAR NEWS (Mar. 1, 2015), https://www.floridabar.org/the-florida-bar-news/lawyer-suicide-finding-a-ray-of-sunshine-through-a-dark-cloud/.

84. *Cf.* Ana P. V. Paladino, *Mental Health and The Legal Profession: The Florida Board of Bar Examiners Continues to Violate the Americans with Disabilities Act*, 50 STETSON L. REV. 295 (2021).

Consider applicants who graduate from law school, pass the bar, and demonstrate no significant character, fitness, honesty, or conduct concerns. In their case, the requirement to sign a sweeping release that authorizes a search of medical records is truly a witch hunt and fishing expedition. As a matter of law, and pursuant to *Winfield*, an underlying, individualized reason for the inquiry is needed.[85] Mental health—and the signing of a more limited waiver—should be a secondary line of inquiry, pursued only when individualized evidence of disqualifying conduct provides cause to consider whether mental health is a contributing factor.

Notably, this type of limited, individualized two-step approach is precisely how the bar examiners approach evaluations of financial responsibility. As part of its character and fitness process, the bar examiners consider whether the applicant has "[a] record manifesting a lack of honesty, trustworthiness, diligence, or reliability,"[86] including "financial irresponsibility."[87] Although it is not initially required by all applicants, the bar examiners can, in response to one of the items on the Bar Application, or as part of their investigation, require some applicants to complete a detailed financial affidavit.[88] The actual content of that financial affidavit, however, raises additional concerns about governmental intrusions into personal privacy.

When Florida's right to privacy amendment was adopted, it was specifically understood to apply to background investigations conducted by the government.[89] Privacy protections still have limits. For example, legislators can be required to engage in financial disclosures, justified by fear of corruption and a public need to know.[90] Bar applicants are not seeking to become

85. *Winfield*, 477 So. 2d at 547.

86. FLA. BAR EXAM'RS RULES r. 3-11.

87. *Id*. at para. (g).

88. FLA. BD. OF BAR EXAM'RS, FINANCIAL DECLARATION 1 (2021), https://www.floridabarexam.org/__85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/dd2021054740e56985257c0c0072f4f9.

89. Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 731–32 (1978) (discussing the Florida Constitutional Reform Commission transcripts, Transcripts of Fla. C.R.C. Proceedings 39–42 (Jan. 9, 1978); Transcripts of Fla. C.R.C. proceedings 10–16 (Mar. 7, 1978)).

90. Goldtrap v. Askew, 334 So. 2d 20, 22 (Fla. 1976) (acknowledging a compelling interest in protecting its citizens from abuse of the trust placed in their elected officials).

legislators.[91] Accordingly, the bar applicants' financial privacy interests must be balanced against the need to evaluate financial responsibility. Perhaps some disclosures are appropriate, but as *Winfield* emphasized, witch hunts and fishing expeditions are not.[92] Based on their own rules, the bar examiners' inquiry into financial responsibility should be limited to matters related to honesty, trustworthiness, diligence, or reliability.[93] Writing bad checks, surely, is a problem. But the bar examiners' financial affidavit is not limited to an assessment of payment of debts to creditors. It is a wholesale, detailed investigation of the individual's entire economic life, demanding careful attention under penalty of perjury.[94] It asks for monthly gross income, monthly deductions from gross income, total expenses, and yes, payments to creditors.[95] It requests line item disclosures of household, automobile, and insurance expenses, too.[96] And the itemized expenses are extraordinarily specific: medical, dental, hair care, toiletries, and other personal expenses; lunch money, allowance, movies, camps, scouting expenses, and toiletries for child-rearing; recurring expenses for churches and charities; and a list of assets that includes jewelry, insurance, retirement accounts, boats, and sporting equipment.[97] In other words, when it comes to personal finances, the bar examiners are truly engaged in a fishing expedition, because the bar applicants must even disclose the value of their fishing poles.[98]

In sum, the bar examiners approach to mental and financial health should be reevaluated. To protect and implement Florida's constitutional right to privacy in a meaningful way, the scope of the bar examiners' inquiries should be both narrowed and individualized.

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91. Plante v. Gonzalez, 575 F.2d 1119, 1136 (5th Cir. 1978) ("Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure for elected officials is constitutional.").

92. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).

93. FLA. BAR EXAM'RS RULES r. 3-11.

94. *See* FINANCIAL DECLARATION, *supra* note 88, at 1 ("To assist the board in evaluating your financial responsibility, you are asked to complete the following declaration with careful attention to all details. The completeness and accuracy of each entry on this declaration is made under penalty of perjury.").

95. *Id.* at 2–6.

96. *Id.* at 3–4.

97. *Id.* at 4–8.

98. *Id.* at 8.

V. MONEY: REALIZE THE NEED FOR PUBLIC FUNDING

While the bar examiners carefully review individual budgets—including toiletry expenditures—their own budgets lack any meaningful scrutiny at all.[99] Worse yet, the burdens of financing the bar examiners are borne by a group of people who are often entirely dependent upon borrowed funds.[100] If the purpose of the bar examiners is to protect the public, then the public at large should contribute, both by providing funding, and by providing input, into this budgetary process.

According to Article I, Section 21 of the Florida Constitution, "justice shall be administered *without sale* . . . ." Cases interpreting this clause have rejected court fees designed to pay for other justice services such as a county law library.[101] Yet with the bar examiners, the bar applicants pay for their own justice. Their own fees fund the process that threatens to deny them bar admission.[102]

The filing of a typical Florida bar application begins with a $1,000 fee.[103] In comparison, a professional license from the boards of dentistry,[104] engineering,[105] or medicine,[106] costs hundreds of dollars, with no comparable character and fitness process. People who have already become lawyers in other jurisdictions pay even more—$1,600 to $3,000[107]—perhaps because of a perception that these practicing lawyers have a greater capacity to pay, and thus suggesting that these practicing lawyers are paying a disproportionate share.

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99. *Id.* at 4–5.

100. Jim Ash, *YLD Takes a Hard Look at Law School Debt*, FLA. BAR NEWS (Apr. 9, 2019), https://www.floridabar.org/the-florida-bar-news/yld-takes-a-hard-look-at-law-school-debt/.

101. Flood v. State *ex rel.* Homeland Co., 117 So. 385, 387 (Fla. 1928).

102. FLA. BAR EXAM'RS RULES r. 2-23.4.

103. *See id.* at r. 2-23.2 ($1,000 Student Applicant Fee); *id.* at r. 2-23.1 (Student Registrant Fees of $100, $350 or $400); *id.* at r. 2-23.3 (Supplement to Registrant Bar Application Fee of $600).

104. *Initial Licensing Requirements Process, Fees, Statutes and Administrative Rules for a Dentist*, FLA. BD. OF DENTISTRY, https://floridasdentistry.gov/licensing/dentist/#tab-fees (last visited Aug. 26, 2022) (fees of $405).

105. *Licensure Process: Professional Engineers*, FLA. BD. OF PRO. ENG'RS, https://fbpe.org/licensure/licensure-process/professional-engineers/#:~:text=What%20is%20the%20fee%20for,of%20Business%20and%20Professional%20Regulation (last visited Aug. 26, 2022) (fee of $230).

106. *Initial Licensing Requirements Process, Fees, Statutes and Administrative Rules for a Medical Doctor*, FLA. BD. OF MED., https://flboardofmedicine.gov/licensing/medical-doctor-unrestricted/#tab-fees (last visited Aug. 26, 2022) (total fees starting at $955).

107. FLA. BAR EXAM'RS RULES r. 2-23.4 (Attorney Fee).

Other rules go beyond application fees. If an applicant's file necessitates investigation, pay $250.[108] If formal hearings are needed, pay $600.[109] To postpone a formal hearing, pay $600.[110] If investigations involve "extraordinary expenditures," the Supreme Court can order payment of additional unknown amounts.[111] To use a computer for the bar examination, pay $125.[112] To reschedule the bar examination, pay $100 or $200.[113] The bar examiners even charge $50 for a copy of a bar application[114] and $25 per document, plus 50 cents per page for materials used in the formal hearing process.[115] In contrast, Florida's public records law allows $1 for certified copies of public records and fifteen cents per page.[116]

For the ambitious bar applicants who hope to become officers of the court, their law license has a price tag. At best, these fees can be justified by the argument that bar admission is an exclusive Supreme Court responsibility, and therefore, the power to assess fees falls within the inherent powers of the judiciary.[117] However, this expansive interpretation of the court's powers in Article V, Section 15 seems contrary to other provisions of the Florida Constitution.

To begin, the Florida Constitution declares that "[t]he judiciary shall have no power to fix appropriations."[118] Presumably, the Constitution intended to limit the role of the judiciary in its own funding decisions. Despite that limitation, the Supreme Court of Florida adopted rules to approve an annual budget for its own administrative agency and to determine its own income.[119]

Meanwhile, Article V, Section 14(b) of the Florida Constitution limits the use of filing fees in two ways. First, it limits "adequate and appropriate filing fees for judicial proceedings and service

108. *Id.* at r. 3-22.1 (Investigative Hearing Cost).
109. *Id.* at r. 3-23.3 (Formal Hearing Cost).
110. *Id.* at r. 3-23.5 (Formal Hearing Postponement).
111. *Id.* at r. 3-17.2 (Petition for Extraordinary Expenses).
112. *Id.* at r. 4-44 (Computer Option).
113. *Id.* at r. 4-45, 46 (Examination Postponement).
114. *Id.* at r. 1-63.5(b) (copy fees for applications).
115. *Id.* at r. 1-63.5(a) (copy fees for other documents).
116. FLA. STAT. § 119.07(4) (2021).
117. *See* James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIA. L. REV. 507, 536 (2002); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding and Inherent Judicial Powers*, 52 MD. L. REV. 217, 220 (1993).
118. FLA. CONST. art. V, § 14(d).
119. FLA. BAR EXAM'RS RULES r. 1-51 (Budget).

charges and costs for performing court-related functions" to the circuit and county courts.[120] Second, the same clause further provides that these fees "shall be provided . . . as required by general law."[121] The bar examiners are not part of the circuit or county courts, and their fees are not authorized by general law. Most significantly, Article V, Section 14(a) of the Florida Constitution states: "Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law."[122] The "except as otherwise provided" clause, and its cross reference to subsection (c) limits the obligations of *counties* or *municipalities* to pay for the court system and has no relevance to the bar examiners. The general constitutional rule of Article V, however, as noted previously, requires funding for the state courts system to be provided from state revenues.[123] And, according to their own rules, the bar examiners are part of the state courts system, because they are part of "an administrative agency of the Supreme Court of Florida created by the court to implement the rules relating to bar admission."[124] Yet no general law authorizes the bar examiner fees nor provides appropriations to the bar examiners.

In other words, the bar examiners' budget demands further scrutiny. As many as 2,000 to 3,000 people take the Florida Bar Examination each year.[125] Assuming fees of just $1,000 per examinee, revenues likely exceed $2 to $3 million per examination.[126] But the confidentiality rule stymies any effort to understand the bar examiners' budget.

The bar examiners proudly claim to perform a public, judicial function. The facts suggest that law students and their student loans are privately financing the justice system. Perhaps, in accord

120. FLA. CONST. art. V, § 14(b).
121. *Id.*
122. *Id.* § 14(a).
123. *Id.*
124. FLA. BAR EXAM'RS RULES r. 1-12
125. For February 2021 bar examinees, 441 of 659 passed, and for July 2021 bar examinees, 1,637 of 2,285 passed, totaling 2,078 out of 2,944. *See, e.g.*, *July 2021 Bar Exam Results Release Dates by State*, J.D. ADVISING, https://jdadvising.com/july-2021-bar-exam-results-release-dates-by-state/ (last visited Aug. 26, 2022). In October 2020, when Covid caused changes to the bar testing schedule, 1,567 of 2,186 passed. *Id.*
126. Jim Rosica, *Bar Exam Blues: Florida Pass Rate Falls Again*, FLA. POL. (April 16, 2019), https://floridapolitics.com/archives/293670-bar-exam-pass-rate-feb-19/.

with Florida's Constitution, the public should pay more for these public benefits.

VI. PARTICIPATION: RESTORE SOME POWER TO THE PEOPLE

The role of the public should not be limited to providing funds. According to the Florida Constitution, "[a]ll political power is inherent in the people."[127] Moreover, the justice system is intended to serve the people, and the people should be given a greater role in the entire bar examiner process.

At present, the schools and professors educating the students, the lenders financing the students, and the bar examination preparation companies helping the students all lack standing or an opportunity to be heard.[128] Only bar applicants and registrants can seek review of character and fitness decisions[129] or other administrative decisions.[130] Rules do allow for a public member to serve on the bar examiners[131] but otherwise limit public engagement.

Even when judicial review is possible, complaints ultimately return to the Supreme Court of Florida, the entity that created the bar examiners in the first place.[132] When facing challenges to their decisions, the bar examiners repeatedly emphasize that their evaluation of a bar applicant's character and fitness to practice law serves the same function as a referee in an attorney discipline proceeding.[133] And when review does occur, the Board and bar examiners expect a great degree of deference. In the Supreme Court, "[p]ast justices have frequently cautioned against the

127. FLA. CONST. art. I, § 1.
128. FLA. BAR EXAM'RS RULES r. 3-30, 3-40.
129. *Id*.
130. *Id*. at r. 2-30.
131. *Id*. at r. 1-23.
132. *Id*. at r. 2-30(b).
133. *See, e.g.*, Answer Brief at 9, Florida Board of Bar Examiners Re: Alan Ira Karten, No. SC11-1647 (Fla. Sept. 13, 2011); *see also* Answer Brief at 9, Fla. Bd. of Bar Exam'rs Re: Scott Elliott Itkin, No. SC11-718 (Fla. June 14, 2011); Answer Brief at 6, Fla. Bd. of Bar Exam'rs Re: William Castro, No. SC10-2439 (Fla. April 25, 2010) (citing Fla. Bar v. Rood, 622 So. 2d 974, 977–78 (Fla. 1993)) ("The referee is the person most well-equipped to judge the character and demeanor of the lawyer being disciplined.").

rejection of Board recommendations of whether to admit an applicant to the practice of law."[134]

Ultimately, when it comes to bar admissions, the powers exercised by the bar examiners and the Supreme Court are vast. The court possesses legislative powers, enacting its own rules and funding mechanisms.[135] The court possesses executive powers through an administrative agency.[136] And still, the court acts as a judicial entity, adjudicating matters and disputes between its own agency and the bar applicants. The Supreme Court and its agent, the Board of Bar Examiners, are the lawmaker, investigator, prosecutor, judge, jury, and sometimes, career executioner. The matter begs for legislative oversight,[137] and James Madison's warning seems apropos: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[138]

VII. PROFESSIONALISM: RESPECT OTHERS

For the applicants, the denial of a law license is an extraordinarily consequential decision. A denial creates lifelong burdens for law students indebted with educational loans of $100,000 or more.[139] But given the many ways in which the bar

134. Answer Brief at 16–17, *Fla. Bd. of Bar Exam'rs Re: Alan Ira Karten*, No. SC11-1647 (citing Fla. Bd. Bar Exam'rs Re R.L.W., 793 So. 2d 918, 926 (Fla. 2001)) (observing that "[t]he Board has had the firsthand opportunity to hear the evidence and evaluate the suitability of an applicant for entry into the practice of law")).

135. FLA. BAR EXAM'RS RULES r. 1-12.

136. *Id*. at r. 1-13.

137. *See, e.g.*, Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 997 (1998).

138. THE FEDERALIST NO. 47 (James Madison).

139. According to U.S. News, the average law student debt exceeded $100,000 at some Florida law schools, including: Ave Maria School of Law ($152,847); Florida Coastal School of Law ($179,558); Nova Southeastern University ($157,230); Stetson University ($132,441); and University of Miami ($139,492). *See Which Law School Graduates Have the Most Debt?*, U.S. NEWS & WORLD REP. (2020), https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings [https://perma.cc/V8J8-K7G9] (last visited Aug. 26, 2022). The author's law school has been separately reported as having student debts of $161,701. *See Law School Costs*, L. SCH. TRANSPARENCY, https://www.lawschooltransparency.com/trends/costs/debt?scope=schools (last visited Aug. 26, 2022). As noted earlier, these debts may not account for the fact that the law students also pay for the bar examiner process that scrutinizes them, and then pay even more for their own lawyers to represent them before the bar examiners. *See, e.g.*, FLA. BAR EXAM'RS RULES r. 3-23.2

examiners test the boundaries of the Constitution, the whole secretive process can create a poor impression of the legal profession. People aspiring to become officers of the court may feel silenced and interrogated by the very justice system they hope to serve. Although every Florida lawyer, judge, and justice swears to support the Constitution of the State of Florida,[140] the applicants seeking admission to the bar still can reasonably critique the Florida Board of Bar Examiners and the Florida Supreme Court as violating the letter, spirit, and norms of that Constitution.[141]

Meanwhile, the professors, legal educational professionals, and members of the Florida Bar all possess ethical and professional duties to be "mindful of deficiencies in the administration of justice."[142] In theory, their voice in the effort to understand the justice system should carry special weight because our ethics rules acknowledge that "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[143] Similarly, our professionalism standards explicitly state the expectation that lawyers will be part of the peer-regulation process to ensure lawyer competence, declaring that lawyer professionalism is: "accepting responsibility for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations and fostering peer regulation to ensure that each lawyer is competent and public spirited."[144] Yet when it comes to the bar admission process, the legal community, like the applicants, stays largely silent. Moreover, public understanding is impeded by confidentiality rules that shield bar examiners' budgets and records from scrutiny.[145] The bar exam can be reimagined, and a more collaborative process is possible.

(acknowledging that any applicant or registrant may be represented by counsel at his or her own expense).

140. *Oath of Admission to the Florida Bar*, *supra* note 1.

141. *See generally* FLA. CODE OF JUD. CONDUCT Canon 1 cmt. (FLA. JUD. ETHICS ADVISORY COMM. 2018) (requiring judges to "Uphold the Integrity And Independence of the Judiciary" and commenting that "[a]lthough judges should be independent, they must comply with the law").

142. FLA. RULES OF PRO. CONDUCT ch. 4, pmbl. (FLA. BAR 2022).

143. *Id.*

144. *Professionalism Expectations*, *supra* note 51.

145. FLA. BAR EXAM'RS RULES r. 1-60.

In 2009, the Supreme Court convened a commission to evaluate the Florida Bar Examination.[146] Another commission evaluated the character and fitness process.[147] Of particular note, the latter commission recommended "greater involvement by the law school community in the bar admissions process of law students including an increased emphasis on professionalism."[148] Those professionalism requirements have evolved, and knowledge of the principles of lawyer professionalism is now a tested subject on the bar examination.[149] So, following up on its own commission's recommendations, the Supreme Court should convene a new reform commission to help the bar examiners comply with the Florida Constitution, engage in a culture shift, and require the bar examiners to embrace the professionalism movement.

Recently, the bar examiners demonstrated some willingness to engage the public using a survey of Florida's legal profession. The "comprehensive practice analysis study" asked current Florida lawyers about their practices and expectations of newly licensed Florida lawyers.[150] The study "seeks to develop an empirical understanding of the common activities that attorneys perform and what they must know as they practice early in their career."[151]

Ideally, this survey could mark the beginning of a changed mindset and more collaborative approach. Rather than building barriers to entry, Florida's legal community can build bridges. Instead of an adversarial, regulatory approach, designed to keep new lawyers out, the bar examiners could cooperate with law schools and the Florida Bar's Henry Latimer Center for Professionalism ("Latimer Center") as they bring lawyers in. The Supreme Court has emphasized the role of the Latimer Center "to promote the fundamental ideals and values of the justice system within the legal system, and to instill those ideals of character, civility, competence, and commitment *in all those persons serving*

146. Fla. Bd. of Bar Exam'rs Testing Comm'n, *Final Report to the Supreme Court of Florida*, FLA. SUP. CT. 3 (Mar. 11, 2009), https://www.floridasupremecourt.org/content/download/242825/file/2009_FBBE_Testing_Report.pdf.

147. Fla. Bd. of Bar Exam'rs Character & Fitness Comm'n, *supra* note 82, at 6.

148. *Id.*

149. FLA. BAR EXAM'RS RULES r. 4-22(o) (listing professionalism as a tested subject).

150. *Florida Board of Bar Examiners Practice Analysis Study*, FLA. BD. OF BAR EXAM'RS (June 16, 2022), https://www.floridabarexam.org/web/website.nsf/index.xsp?documentId=973EA5B6819BF82B852587420048AC82.

151. *Id.*

therein."[152] The bar examiners serve the legal system and the Florida Supreme Court, so they too should promote the ideals of professionalism.

In the Latimer Center's professionalism publication, one author called for a new standard of civility among lawyers, termed "compassionate professionalism."[153] His words readily apply to the bar examiners: "[T]he time has come to put down the flame throwers and put up our heart antennae."[154] For the bar examiners, the pursuit of compassionate professionalism begins with introspection and a recognition of the duty to comply with the letter and spirit of the state constitution and professionalism rules.[155] Reform is an opportunity. The bar examiners can transform a culture of investigation and inquisition into an engaging dialogue pursuing continuous improvement of the legal profession.[156] After all, as the Florida Bar Mentoring Handbook emphasizes, professionalism includes the art of helping others become better lawyers:

> Lawyers are colleagues and co-workers in making the legal system work justly and effectively. Lawyers therefore have mutual obligations, including the obligations of the experienced to those lawyers that are less experienced. The willingness to seek and give assistance to one another is the hallmark of true professionalism.[157]

To meaningfully engage in the enhancement of professionalism, the bar examiners need to dialogue with the legal education professionals, too. The educators—as the Florida

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152. Fla. Sup. Ct. Comm'n on Professionalism & Civility, Fla. Admin. Order No. AOSC19-12 (Mar. 12, 2019) (emphasis added) (on file with Clerk, Fla. Sup. Ct.).

153. Don Blackwell, *The Next Step on the Road to True Civility: Embracing Our Shared Humanity*, PROFESSIONAL, Winter 2018, at 3, 3.

154. *Id.*

155. *See, e.g.*, Keith W. Rizzardi, *Redefining Professionalism? Florida's Code Mandating the Aspirational Raises Challenging Questions*, FLA. B. J., Nov. 2013, at 39 (discussing Florida's professionalism documents)*; cf.* Keith W. Rizzardi, *Expectations in the Mirror: Lawyer Professionalism and the Errors of Mandatory Aspirations*, 44 FLA. ST. U. L. REV. 691 (2017).

156. FLA. BAR EXAM'RS RULES r. 1-33 ("A board member should be conscientious, studious, thorough, and diligent in learning the methods, problems, and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration, and requirements for admission to the bar.").

157. *Mentoring Program Handbook*, FLA. BAR 6–7, https://www-media.floridabar.org/uploads/2017/04/3-mentoring-handbook-ada.pdf (last visited Aug. 26, 2022).

Supreme Court's own commission acknowledged[158]—have a critical role to play. For example, students working in clinical programs though law school are trained and encouraged through supervised mentoring, internships, and apprenticeships, to refine their character and fitness.[159] Working together, the educators, bar examiners, and Supreme Court can shape legal education and the future of the profession.[160] Unfortunately, Florida's rules consider it a conflict of interest for members of the Board of Bar Examiners to be affiliated with law school educators.[161] And once again, the Board's rigid demand for confidentiality makes meaningful feedback difficult, if not impossible.[162]

VIII. CONCLUSION: REIMAGINE THE BAR EXAMINERS

The Supreme Court of Florida should order the Florida Board of Bar Examiners to engage in reforms. Open government initiatives can enhance transparency and public understanding. Vague character rules can be rewritten. Freedom of speech (and

158. Fla. Bd. of Bar Exam'rs Character & Fitness Comm'n, *supra* note 82, at 5.

159. Jan Pudlow, *Mentoring Promotes Professionalism*, THE FLA. BAR NEWS (Dec. 15, 2002), https://www.floridabar.org/the-florida-bar-news/mentoring-promotes-professionalism/.

160. Clinical programs also provide an opportunity to see future lawyers in action, creating a meaningful evidentiary record to document a person's present-day character and fitness. If the evidence shows that a law student's record falls short of the applicable standards, then admission to the profession may justifiably be delayed or denied. *See, e.g.*, Richard M. Conran et al., *Due Process in Medical Education: Legal Considerations*, ACAD. PATHOL., Jan.–Dec. 2018, at 1; *see also* Christopher Carl Grindle, An Analysis of Court Cases Involving Student Due Process in Dismissal From Higher Education (2009) (Ph. D. dissertation, University of Alabama) (on file with author), https://ir.ua.edu/bitstream /handle/123456789/710/file_1.pdf?sequence=1&isAllowed=y (explaining how medical schools generate records to justify dismissals from the profession or graduate programs). Similarly, if some applicants have been identified as a character and fitness risk, or otherwise need to prove themselves even after law school, then conditional admissions programs could be replaced with transitions into practice programs—something already occurring in other states. *Compare* FLA. BAR EXAM'RS RULES r. 3-23.6, 5-15 (discussing conditional admission) *with* STATE BAR OF GA., ORGANIZATION OF THE STATE BAR & ADMISSIONS r. 8-104(B), https://www.gabar.org/handbook/index.cfm#handbook/ha3, *and Mandatory Mentoring Program*, LA. STATE BAR ASS'N, https://www.lsba.org/Mentoring /MandatoryMentoring.aspx (last visited Aug. 26, 2022).

161. FLA. BAR EXAM'RS RULES r. 1-34 ("A member of the board or a board member emeritus may not serve as . . . a regular or adjunct professor of law; an instructor, advisor or in any capacity related to a bar review course, or in other activities involved with preparation of applicants for bar admission; or as a member of the governing or other policy-making board or committee of a law school or the university of which it is a part."). *But see* ILL. SUP. CT. RULES r. 702(a) ("[T]he Supreme Court shall appoint a dean of a law school located in Illinois as a nonvoting, ex officio member of the Board.").

162. *See supra* pt. II.

thought) can be respected. Needless invasions of personal privacy can be avoided, and financial and mental health inquiries can be narrowed in scope. Burdensome fees can be reduced, and the public at large should contribute to the budget through contribution of dollars and through scrutiny of policy decisions. The virtues of professionalism, including mentoring and community dialogue, can be embraced.

While these many reforms will take time, two measures can be implemented immediately. First, the Supreme Court should demand an increase in transparency from the Board. If the Supreme Court and the Florida Bar Board of Governors can publish annual reports,[163] online announcements of official activities, and meeting summaries,[164] then so, too, can the Florida Board of Bar Examiners.[165] Second, to assist with the process of reform, a Florida Board of Bar Examiners Advisory Committee composed of lawyers, legal educators, and other stakeholders should be promptly created and convened.[166]

Today's bar applicant is tomorrow's lawyer. Yet every new Florida lawyer, at the outset of their career, endures a first encounter with a constitutionally suspect process. The Supreme Court of Florida cannot and should not exempt its agents from the State Constitution. The age old justification—"we have always

163. *See, e.g.*, FLA. STAT. § 29.0085 (2021) (showing the annual statement of the Florida courts on revenues and expenditures); FLA. STAT. § 25.382 (2021) (requiring an annual report from the Chief Justice of the Florida Supreme Court on the recruitment, selection, promotion, and retention of minorities and outlining progress, problems, and corrective actions); *see also* Chief Justice JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

164. *Board of Governors Agenda and Meetings*, FLA. BAR, https://www.floridabar.org/about/bog/bog-master-agenda/ (last visited Aug. 26, 2022); *Meeting Summaries Index*, FLA. BAR, https://www.floridabar.org/about/bog/bog005/ (last visited Aug. 26, 2022); *Board of Governors Meeting Minutes*, FLA. BAR, https://www.floridabar.org/about/bog/bog006 (last visited Aug. 26, 2022).

165. See MINN. BD. OF L. EXAM'RS, ANNUAL REPORT 2021 (2021), https://www.ble.mn.gov/wp-content/uploads/2022/05/BLE-2021-Annual-Report.pdf, and WIS. BD. OF BAR EXAMR'S, 2020 ANNUAL REPORT (2020), https://www.wicourts.gov/courts/offices/docs/bbe20.pdf, for examples of annual reports from Boards of Bar Examiners from other states.

166. *See, e.g.*, Establishment of the Att'y Regul. Advisory Comm. & Appointment of Members, Admin. Order No. 2011-44 (Ariz. May 4, 2011); RULES FOR ADMISSION TO THE BAR r. 19-A (MINN. STATE BD. OF L. EXAM'RS 2021) ("There shall be an Advisory Council consisting of representatives of the Minnesota State Bar Association and of each of the Minnesota law schools to consult with the Board on matters of general policy concerning admissions to the bar, amendments to the Rules, and other matters related to the work of the Board.").

done it this way"—is no excuse. The Florida Board of Bar Examiners and the stakeholders in our legal profession all need to honor our oaths.