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IS BAR EXAM FAILURE A HARBINGER OF PROFESSIONAL DISCIPLINE?

JEFFREY S. KINSLER[†]

INTRODUCTION

In 1991, Maxcy D. Filer, a sixty-year-old councilman, passed the California bar exam on his forty-eighth attempt.¹ Between 1966 and 1991, Filer sat for the bar exam twice a year for nearly twenty-five years; it is estimated that he spent \$50,000 on bar fees, bar review courses, and other bar-related expenses.² Two of Filer's sons were in elementary school when he first took the bar exam; both sons had graduated law school, passed the bar exam, and were practicing law by the time Filer passed the exam.³ By most accounts, Filer holds the California—and national—record for bar exam attempts.⁴

In 1989, John DeZell, a fifty-six-year-old insurance salesman, passed the Oregon bar exam on his tenth attempt.⁵ DeZell first sat for the Oregon bar exam in 1965.⁶ In 1966, after failing three consecutive exams, DeZell turned to selling

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¹ Marc Lacey, *Passing the Test of Time: After 48 Tries, Compton Man Masters Bar Exam*, L.A. TIMES (May 31, 1991), http://articles.latimes.com/1991-05-31/local/me-2739_1_test-bar-exam.

² Diane Curtis, *Advice from One Who Failed Bar Exam 47 Times: Try Again, Again and Again*, CAL. B.J. (Feb. 2004), <http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=54802&categoryId=54503&month=2&year=2004>.

³ Lacey, *supra* note 1.

⁴ *Id.*

⁵ *Far Bar: 10th Time Is Charm for Law Student*, SEATTLE TIMES, July 16, 1989, 1989 WLNR 680406.

⁶ *Id.*

insurance.⁷ In 1986, DeZell began retaking the Oregon bar exam.⁸ After nine failures over a period of twenty-five years, DeZell passed the Oregon bar exam in 1989.⁹ By most accounts, DeZell holds the Oregon record for bar exam attempts.¹⁰

Filer and DeZell are both well known for their tenacity and perseverance; they are often held out as role models for students who fail the bar exam.¹¹ What is not well known is that both Filer and DeZell were disciplined early in their legal careers for failure to competently and/or diligently represent clients.¹² Were their disciplinary actions predictable based on the number of times they failed the bar exam?¹³ Two of the reasons students fail the bar exam are lack of diligence and incompetence,¹⁴ these are also the primary reasons attorneys are disciplined.¹⁵ Repeated failure of the bar exam, “even if ultimately followed by

⁷ *Id.* Prior to 1981, Oregon allowed applicants to take the bar exam a maximum of three times. *Poats v. Givan*, 651 F.2d 495, 498 (7th Cir. 1981).

⁸ *Far Bar: 10th Time Is Charm for Law Student*, *supra* note 5.

⁹ *Id.*

¹⁰ Don Hamilton, *Packwood Stays Miles Ahead of GOP Opponents*, OREGONIAN, Apr. 29, 1992, 1992 WLNR 4449907.

¹¹ See, e.g., David Margolick, *At the Bar; A Man's Pride and Persistence Conquer the California Bar Exam's Most Famous Losing Streak*, N.Y. TIMES (Sept. 13, 1991), <http://www.nytimes.com/1991/09/13/news/bar-man-s-pride-persistence-conquer-california-bar-exam-s-most-famous-losing.html>; Joan Clout-Kruse, *Persistence—Keep on Going and Never Give Up*, SELF-GROWTH.COM (Aug. 27, 2014), <http://www.selfgrowth.com/print/8660601>; *Far Bar: 10th Time Is Charm for Law Student*, *supra* note 5; Dustin Q. Diaz, *Former Naval Officer Comes Full Circle*, AMERICA'S NAVY (Sept. 26, 2007, 2:30 PM), http://www.navy.mil/submit/display.asp?story_id=32026.

¹² *Attorney Discipline*, CAL. B.J. (Aug. 2005), <http://archive.calbar.ca.gov/Archive/Archive.aspx?articleId=70768&categoryId=70682&month=8&year=2005> (reporting that in 2005 Filer was suspended for thirty days for failure “to perform legal services competently” and was also disciplined in 2001 “for not performing competently”); OREGON STATE BAR, 9 THE DISCIPLINARY BOARD REPORTER 1, 143–49 (Donna J. Richardson ed., 1995), http://www.osbar.org/_docs/dbreport/dbr09.pdf (reporting that DeZell was suspended in 1995 for three years for neglecting multiple legal matters and incompetence).

¹³ One possible clairvoyant was Dear Abby, who apparently wrote a column in which she opined that it would be a disservice to clients for Filer to hang out a shingle. Margolick, *supra* note 11.

¹⁴ See, e.g., Letter from Erica Moeser, President, Nat'l Conference of Law Exam'rs, to Law School Deans (Oct. 23, 2014), http://online.wsj.com/public/resources/documents/2014_1110_moesermemo.pdf (reporting that bar passage rates declined because the examinees were “less able”); *Bar Exam Tip: Diligence*, BAR EXAM MIND, <http://www.barexammind.com/diligence> (last visited Mar. 3, 2018) (stating that diligence is the key to passing the bar exam).

¹⁵ See *infra* Part I.A.

success, can seriously injure the rights and interests of the public.”¹⁶ Thus, it is logical to assume that bar exam failure is a harbinger of professional discipline.

Using bar exam and disciplinary data from Tennessee, this Article substantiates the following theses: (1) The more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for ethical violations, particularly early in the lawyer’s career; and (2) The more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for lack of diligence—including non-communication—and/or incompetence.

I. THESIS

This Article’s theses are premised on two suppositions. First, the primary causes of attorney discipline are nondiligence and incompetence.¹⁷ Similarly, the primary causes of bar exam failure are “poor study habits, weak academic skill development, or low intellectual functioning”¹⁸ Thus, it is reasonable to assume that lawyers who fail the bar exam are more likely to be disciplined as attorneys.

Second, there is statistical and anecdotal evidence linking the failure of entrance exams and subsequent professional discipline in other occupations.¹⁹ It is plausible, therefore, that such a link exists in the legal profession.

A. *Primary Causes of Attorney Discipline*

Unquestionably, “the largest category of [attorney] disciplinary actions nationwide . . . deals with issues of competence, diligence and failure to communicate with the client.”²⁰ Because nondiligence “generally goes hand in hand with . . . failure . . . to keep a client informed about the status of a

¹⁶ Jones v. Bd. of Comm’rs of the Ala. State Bar, 737 F.2d 996, 1001–02 (11th Cir. 1984), *reh’g en banc denied*, 745 F.2d 72 (11th Cir. 1984).

¹⁷ See *infra* Part I.A.

¹⁸ Gonzales v. Supreme Court of Tex., No. A-04-CA-750-SS, 2006 WL 897745, at *7 (W.D. Tex. Jan. 31, 2006).

¹⁹ See *infra* Part I.B.

²⁰ Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 462 (2012).

matter,”²¹ this Article uses the term “client neglect” to refer to both nondiligence and failure to communicate. In Tennessee, fifty percent of attorney disciplinary cases arise out of client neglect; no other category makes up more than ten percent of disciplinary actions.²² Similarly, in Michigan, client neglect makes up forty-eight percent of attorney disciplinary actions, the largest category of professional misconduct.²³ In some states, client neglect comprises more than eighty percent of complaints.²⁴

Three ethical rules are, generally, at issue in client neglect and incompetence cases: ABA Model Rules of Professional Conduct 1.3, 1.4 and, to a slightly lesser degree, Rule 1.1. Each of these rules is addressed below.

1. ABA Model Rule 1.3

ABA Model Rule 1.3, which has been adopted verbatim in Tennessee and most other states, requires a lawyer to “act with reasonable diligence and promptness in representing a client.”²⁵ A lawyer is obligated to “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf” regardless of “opposition, obstruction or personal inconvenience to the lawyer”²⁶ A lawyer must not let a “matter languish,” but rather should “perform the services called for by the client’s objectives, including appropriate factual research, legal analysis, and exercise of professional judgment.”²⁷

²¹ See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 55 (10th ed. 2015). Many states treat nondiligence and failure to communicate as a single category of attorney discipline, namely “client neglect.” See Stephen E. Schemenauer, Comment, *What We’ve Got Here . . . Is a Failure . . . To Communicate: A Statistical Analysis of the Nation’s Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 667 (2007) (reporting that Alaska, for example, uses the term “neglect” for three categories of violations—noncommunication, lack of diligence, and failure to perform).

²² TENNESSEE BD. OF PROF’L RESPONSIBILITY, 35TH ANNUAL DISCIPLINE REPORT (2016), <http://www.tbpr.org/news-publications/annual-reports> (follow “35th Annual Report” hyperlink).

²³ Schemenauer, *supra* note 21, at 672–73.

²⁴ *Id.* at 673 (reporting that 81.58% of complaints in Minnesota in 2005 involved neglect and/or non-communication).

²⁵ MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2014); TN. R. S. CT. Rule 8 RPC 1.3.

²⁶ MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2014).

²⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (AM. LAW INST. 2000).

The comments to Rule 1.3 describe the dangers of procrastination and delay: “A client’s interests often can be adversely affected by the passage of time or the change of conditions, in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.”²⁸ In some states, Rule 1.3 is written in the negative: “A lawyer shall not neglect a legal matter entrusted to the lawyer.”²⁹

Lack of diligence is often the product of an excessive workload. In such cases, the attorney must determine whether his or her workload is interfering with basic functions required of lawyers, such as communication, investigation, and research.³⁰ If the attorney concludes that his or her workload may result in ethical violations, such as nondiligence, the attorney must take remedial action.³¹ Thus, a lawyer must control his or her workload to ensure that each matter will be handled competently.³² For this reason, it is improper for an attorney to accept new matters when the attorney is unable to provide competent representation.³³ A lawyer’s need for income is no excuse for undertaking matters that cannot be handled competently and diligently.³⁴

In many states, more disciplinary actions are based on Rule 1.3 than any other rule or statute.³⁵ The comments to Rule 1.3 provide a possible explanation for its prevalence in disciplinary cases:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.³⁶

²⁸ MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 3 (AM. BAR ASS’N 2014).

²⁹ OR. R. PROF. COND. Rule 1.3.

³⁰ S.C. Bar, Ethics Advisory Op. 04-12 (Apr. 12, 2004).

³¹ *Id.*

³² MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 2 (AM. BAR ASS’N 2014).

³³ S.C. Bar, Ethics Advisory Op. 04-12 (Apr. 12, 2004).

³⁴ Utah St. Bar, Ethics Op. No. 146a (Apr. 28, 1995).

³⁵ Schemenauer, *supra* note 21, at 668 (reporting that client neglect makes up the largest category of complaints in Florida; lack of communication ranked fifth); GILLERS, *supra* note 21, at 55 (“[A]mong the most frequent grounds for complaints to disciplinary committees is failure to pursue a client’s interests.”).

³⁶ MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 3 (AM. BAR ASS’N 2014).

“[A]cting promptly on a matter . . . is a *mandatory obligation* imposed upon attorneys. Albeit high, this obligation is the *minimum* we expect from a lawyer. It epitomizes professionalism.”³⁷ Lack of diligence is not limited to litigation lawyers; transactional attorneys also frequently violate Rule 1.3.³⁸ Violations of Rules 1.3, 1.4, and 1.1 are often the result of substance abuse.³⁹

2. ABA Model Rule 1.4

ABA Model Rule 1.4(a), which has been adopted verbatim in Tennessee and most other states, requires a lawyer to “keep the client reasonably informed about the status of the matter” and “promptly comply with reasonable requests for information.”⁴⁰ At a minimum, a client must be informed of “significant developments affecting the timing or the substance of the representation” and of “actions the lawyer has taken on the client’s behalf.”⁴¹ Rule 1.4 requires attorneys to engage in generous and abundant communications with clients.⁴² At the very least, effective representation requires regular communication with a client.⁴³ Implicit in the duty to communicate, of course, is that the communication will be honest and reasonable.⁴⁴

It is not sufficient merely to respond to client inquiries. Rule 1.4 imposes an affirmative duty of communication. A South Carolina lawyer, for instance, received a public reprimand for failing to keep his client apprised of the progress of the case.⁴⁵

³⁷ State *ex rel.* Okla. Bar Ass’n v. Johnston, 863 P.2d 1136, 1145 (Okla. 1993) (emphasis in original).

³⁸ See, e.g., *In re* Robertson, 612 A.2d 1236, 1243 (D.C. 1992) (suspending lawyer for failing to timely prepare client’s tax returns).

³⁹ See, e.g., Bd. of Prof’l Responsibility, Wyo. State Bar v. Jenkins, 307 P.3d 826, 827 (Wyo. 2013); *In re* Adams, 729 S.E.2d 313, 314 (Ga. 2012); *In re* Greene, 701 A.2d 1061, 1063 (Del. 1997).

⁴⁰ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2014); TN. R. S. CT. Rule 8 RPC 1.4.

⁴¹ MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. 3 (AM. BAR ASS’N 2014).

⁴² Dawaji v. Kohlhoss, No. 13 CV 6404, 2013 WL 6197161, at *3 (N.D. Ill. Nov. 27, 2013).

⁴³ *In re* Hoffman, Misc. No.: 1:16-mp-00001MDF, 2016 WL 2637707, at *3 (M.D. Pa. May 5, 2016).

⁴⁴ Bd. of Prof’l Responsibility, Wyo. State Bar v. Benham, 283 P.3d 1150, 1152 (Wyo. 2012).

⁴⁵ *In re* Carter, 733 S.E.2d 897, 901 (S.C. 2012).

He was disciplined despite the fact he had met with the client twice and spoke with him on several occasions, because all of those communications were initiated by the client.⁴⁶

Rule 1.4 violations come in many varieties. The most common violation may be the failure to return telephone calls.⁴⁷ A Colorado attorney, for example, received a ninety-day suspension for failure to communicate adequately with his client, returning only one of her numerous calls.⁴⁸ Despite his promise “to get to work on the case” the lawyer took no further action on his client’s behalf and thus failed to satisfy the statute of limitations for his client’s negligence claim.⁴⁹ Likewise, a Maryland attorney was disbarred for a pattern of neglect, including failure to return client phone calls, sometimes for a month at a time.⁵⁰ Not surprisingly, the first question on the “FAQ” page of the website of the Tennessee Board of Professional Responsibility (“BOPR”) is: “What should I do when my lawyer won’t return my calls?”⁵¹

Rule 1.4 violations also occur with modern technology. For instance, a Nebraska attorney was suspended for ninety days for violation of Rules 1.1, 1.3, and 1.4.⁵² Between December 2010 and April 2015, the attorney communicated with his client via Facebook messages.⁵³ During this period, the client asked the attorney “numerous questions regarding the progress of the case and asked for explanations regarding the lawsuit.”⁵⁴ The attorney responded by telling his client, among other things, to “relax,” “I will take care of it,” “I will explain later,” “we are fine,” “this is complicated,” and “I can’t explain the whole process.”⁵⁵

⁴⁶ *Id.*

⁴⁷ *See, e.g.*, Bd. of Prof'l Responsibility, *Wyo. State Bar v. Pretty*, 295 P.3d 833, 835 (Wyo. 2013).

⁴⁸ *People v. Wright*, 947 P.2d 941, 942 (Colo. 1997) (en banc).

⁴⁹ *Id.*

⁵⁰ *Attorney Grievance Comm'n of Md. v. Davis*, 825 A.2d 430, 437, 449, 451 (Md. 2003).

⁵¹ *Frequently Asked Questions*, BOARD PROF. RESP. SUP. CT. TENN., <http://www.tbpr.org/for-the-public/public-faq> (last visited Mar. 3, 2018).

⁵² *State v. Garrison*, 894 N.W.2d 339, 340 (Neb. 2017).

⁵³ *Id.* at 341.

⁵⁴ *Id.*

⁵⁵ *Id.*

Predictably, the attorney was charged with failing to “adequately answer the client’s questions and adequately explain what was happening regarding the status of the client’s lawsuit.”⁵⁶

Often, lawyers engage in a pattern of nondiligence that includes failure to communicate. For instance, a Wyoming attorney was suspended for nine months for neglecting several clients.⁵⁷ The Board of Professional Responsibility described his pattern of nondiligence—and noncommunication—as follows:

The first was a matter in which [the attorney] Powers undertook to facilitate the return of some funds to his client, but the matter dragged on for several months due to Powers’ lack of diligence.

The second matter was a landlord-tenant dispute in which Mr. Powers obtained a judgment in favor of the landlord but failed to diligently pursue collection of the judgment and failed to respond to his client’s inquiries regarding his efforts to collect the judgment.

The third matter was one in which Mr. Powers undertook to represent a client on two traffic citations and accepted a \$750.00 fee. Mr. Powers thereafter failed to appear at a hearing in the matter, which resulted in the forfeiture of the bond that had been posted by the client in both matters. Mr. Powers subsequently failed to follow through on efforts to resolve the matter with the district attorney, and ultimately refunded the \$750.00 fee to the client.⁵⁸

By some accounts, Rule 1.4 makes up more disciplinary cases than any other rule.⁵⁹ Because noncommunication is often a symptom of lack of diligence, many states treat violations of Rules 1.3 and 1.4 as a single category of attorney discipline, namely client “neglect.”⁶⁰ In other words, nondiligence “generally goes hand in hand with the related failure . . . to keep a client informed about the status of a matter.”⁶¹

⁵⁶ *Id.*

⁵⁷ Bd. of Prof'l Responsibility, *Wyo. State Bar v. Powers*, 322 P.3d 1287 (Wyo. 2014).

⁵⁸ *Id.* at 1288.

⁵⁹ Schemenauer, *supra* note 21, at 665–80 (a state by state analysis).

⁶⁰ *Id.* at 665 (reporting that Alaska, for example, uses the term “neglect” for three categories of violations—noncommunication, lack of diligence, and failure to perform).

⁶¹ See GILLERS, *supra* note 21, at 55.

3. ABA Model Rule 1.1

ABA Model Rule 1.1, which has been adopted verbatim in Tennessee and most other states, requires a lawyer to “provide competent representation to a client.”⁶² According to Rule 1.1, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁶³ Rule 1.1 requires adequate preparation and attention to the matter being handled for the client.⁶⁴ “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”⁶⁵ Lack of competence may result from numerous forces: “ignorance, inexperience, neglect, [and/or] lack of time.”⁶⁶ If the client suffers damages, an attorney’s incompetence may also form the basis of a malpractice action.⁶⁷

In some states, Rule 1.1 identifies the minimum requirements for legal competence. In New Hampshire, for example, competence requires:

- (1) specific knowledge about the fields of law in which the lawyer practices;
- (2) performance of the techniques of practice with skill;
- (3) identification of areas beyond the lawyer’s competence and bringing those areas to the client’s attention;
- (4) proper preparation; and
- (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client’s interest.⁶⁸

⁶² MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2014); TN. R. S. CT. Rule 8 RPC 1.1.

⁶³ MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2014).

⁶⁴ Utah St. Bar, Eth. Op. 96-07 (Aug. 30, 1996).

⁶⁵ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2014).

⁶⁶ See GILLERS, *supra* note 21, at 20.

⁶⁷ See, e.g., *Abramson v. Wildman*, 964 A.2d 703, 712 (Md. Ct. Spec. App. 2009) (using Rule 1.1 to create standard for competence for tort- and contract-based malpractice actions).

⁶⁸ N.H. R. RPC Rule 1.1(b).

As a general rule, expertise in a specific area of law is not required in order to meet the minimum standards for competency.⁶⁹ Instead, the required proficiency is usually that of a general practitioner.⁷⁰ According to the comments to Rule 1.1:

A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.⁷¹

The fundamental skills required by Rule 1.1 are quite similar to those tested on the bar exam, namely:

- a. Recognition, characterization and articulation of the issues;
- b. Analysis and evaluation of the facts presented in the light of those issues;
- c. Recognition and statement of the rules, standards or principles of law pertinent to those issues, including qualifications and limitations;
- d. Application of the law to the facts and reasoning to a sound conclusion; and
- e. Coherent communication of such analysis and reasoning.⁷²

Although the bar exam “is not a perfect measure of an individual’s ability or competency to practice law, ‘it’s the most accurate’”⁷³ Repeated failure of the bar exam may reflect upon a person’s competency to practice law.⁷⁴ Should it be surprising, therefore, that lawyers who repeatedly fail the bar exam are more likely to be disciplined for incompetence early in their legal careers?

⁶⁹ *In re Richmond’s Case*, 872 A.2d 1023, 1028 (N.H. 2005).

⁷⁰ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS’N 2014).

⁷¹ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS’N 2014).

⁷² *Suggestions for Answering Essay Questions*, TENNESSEE BD. LAW EXAM’RS (on file with author).

⁷³ *Younger v. Colo. State Bd. of Law Exam’rs*, 625 F.2d 372, 377 (10th Cir. 1980).

⁷⁴ *Id.*; *Poats v. Givan*, 651 F.2d 495, 499 (7th Cir. 1981).

B. Exam Failure and Discipline in Other Professions

The second supposition for this Article's theses is evidence linking the failure of entrance exams and subsequent discipline in other professions. For example, the more times a broker fails the FINRA Series 7 Exam, which a person must pass to sell securities to the public, "the higher the average total of black marks" on the broker's record.⁷⁵ In particular, those who fail the test more than twice "were 77% more likely to report [committing] a felony or financial-related misdemeanor than brokers who passed the exam on the first try."⁷⁶ Studies also have shown that physicians who fail the board certification exam for internal medicine are more likely to be disciplined by their state licensing boards.⁷⁷

II. SCOPE OF RESEARCH

This Article focuses on lawyers who were licensed to practice law in Tennessee between January 1, 2005 and December 31, 2014. The research is limited to lawyers who passed the Tennessee bar exam during this ten-year period; lawyers who were admitted to practice law in Tennessee based on comity—that is, practice in another jurisdiction—were excluded from the research in this Article.⁷⁸ This Article concentrates on lawyers who passed the bar exam between 2005 and 2014 and were publicly disciplined by the BOPR between January 1, 2005 and December 31, 2016 (the "relevant time period"). In other words, it looks at whether these lawyers committed ethical violations in the first few years—ranging from two years to twelve years—of their legal careers.

⁷⁵ Jean Eaglesham & Rob Barry, *Stockbrokers Who Fail Test Have Checkered Records*, WALL STREET J. (Apr. 14, 2014, 9:41 PM), <https://www.wsj.com/news/articles/SB10001424052702304819004579489754292756262>.

⁷⁶ *Id.*

⁷⁷ Maxine A. Papadakis et al., *Performance During Internal Medicine Residency Training and Subsequent Disciplinary Action by State Licensing Boards*, 148 ANNALS INTERNAL MED. 869, 872 (2008) (reporting that diplomates who had more unsuccessful attempts on the internal medicine certification examination were more likely to be disciplined).

⁷⁸ Fifteen lawyers admitted to practice based on comity between January 1, 2005 and December 31, 2014 were disciplined by the BOPR during the relevant time period.

Of the lawyers who passed the Tennessee bar exam between January 1, 2005 and December 31, 2014, 87.76% passed on the first attempt, 8.37% passed on the second attempt, 2.83% passed on the third attempt, and 1.05% passed after four or more attempts. In total, 7,256 lawyers passed the bar exam during this ten-year period, but very few (281) failed more than twice. Thus, the sample size of some parts of this research is limited.

Of the 7,256 lawyers who passed the Tennessee bar exam between January 1, 2005 and December 31, 2014, sixty-nine were publicly disciplined by the BOPR during the relevant time period.⁷⁹ Of these sixty-nine cases, 47.83% involved Rules 1.1, 1.3, and/or 1.4. Of the more serious discipline—disbarment and suspension—sixty-four percent involved Rules 1.1, 1.3, and/or 1.4.

Unlike the majority of states, Tennessee does not have a unified state bar.⁸⁰ In Tennessee, the BOPR handles attorney discipline. The Supreme Court of Tennessee created the BOPR to “aid in supervising the ethical conduct of attorneys.”⁸¹ The mission of the BOPR is “[t]o assist the Court in protecting the public from harm from unethical lawyers by administering the disciplinary process; to assist the public by providing information about the judicial system and the disciplinary system for lawyers; and, to assist lawyers by interpreting and applying the Court’s disciplinary rules.”⁸²

Tennessee has four types of public discipline: (1) disbarment, (2) suspension, (3) probation, and (4) public censure. The most severe penalty is disbarment, which terminates a person’s right to practice law.⁸³ Disbarment may be imposed for conduct that causes injury or potential injury to a client or the legal process, including “[a]bandoning a practice, knowingly failing to perform

⁷⁹ The research in this Article does not include lawyers who were “temporarily suspended” or placed on “disability inactive status” because these categories include attorneys who have not violated ethical obligations.

⁸⁰ James B. Lake, Note, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833, 1837 n.38 (1993) (listing thirty states with unified state bars).

⁸¹ *About the Board of Professional Responsibility*, BOARD PROF. RESP. SUP. CT. TENN., <http://www.tbpr.org/about-the-board> (last visited Mar. 3, 2018).

⁸² *Mission Statement*, BOARD PROF. RESP. SUP. CT. TENN., <http://www.tbpr.org/about-the-board/mission-statement> (last visited Mar. 3, 2018).

⁸³ TN. R. S. CT. Rule 9, § 12.1.

services for a client or engaging in a pattern of neglect with respect to client matters.”⁸⁴ Of the sixty-nine lawyers at issue in this Article, nine were disbarred; seven of the disbarments involved Rules 1.1, 1.3 and/or 1.4. Some of the misconduct for which these lawyers were disbarred includes neglect, failure to communicate with clients and/or opposing counsel, failure to file court papers, incompetence, failure to perform work as promised, misrepresentation of the status of a case to clients, failure to timely file or refile a case, failure to attend meetings, failure to attend court on behalf of clients, failure to notify clients of the attorney’s suspension, failure to protect client interests, failure to respond to the BOPR, and abandonment of the attorney’s practice.⁸⁵

In Tennessee, disbarment is permanent; an attorney who has been disbarred, however, may seek reinstatement after five years.⁸⁶ Reinstatement is warranted only if the petitioner can “clearly and convincingly” demonstrate that he or she “(1) has the moral qualifications and (2) legal competency to be admitted to the practice of law in this state and, further, that (3) reinstatement will not be detrimental to the integrity and standing of the bar or administration of justice, or subversive to the public interest.”⁸⁷ Moreover, an “attorney who has previously been disbarred and reinstated is not eligible for reinstatement following a second disbarment.”⁸⁸ In addition, the BOPR may require a disbarred attorney to make restitution to persons financially injured by the attorney’s misconduct.⁸⁹

In descending order of seriousness, the next penalty is suspension, which removes “an attorney from the practice of law for a specified minimum period of time. Suspension may be for a

⁸⁴ *A Primer on the Discipline of Attorneys in Tennessee*, TENN. B. ASSOC., <http://www.tba.org/info/a-primer-on-the-discipline-of-attorneys-in-tennessee> (last visited Mar. 3, 2018).

⁸⁵ This information comes from BOPR opinions, which may be found at *Recent Disciplinary Actions*, BOARD PROF. RESP. SUP. CT. TENN., <http://www.tbpr.org/news-publications/recent-disciplinary-actions> (last visited Mar. 3, 2018).

⁸⁶ TN. R. S. CT. Rule 9, § 30.2.

⁸⁷ *Hughes v. Bd. of Prof. Resp. of the Sup. Ct. of Tenn.*, 259 S.W.3d 631, 642 (Tenn. 2008) (quoting TN. R. S. CT. Rule 9, § 19.3). In some states, there is a presumption against readmission of a disbarred attorney. *See, e.g., In re Haynes*, 426 S.W.3d 411, 413 (Ark. 2013).

⁸⁸ TN. R. S. CT. Rule 9, § 30.2.

⁸⁹ TN. R. S. CT. Rule 9, § 12.7.

fixed period of time, or for a fixed period of time and an indefinite period to be determined by the conditions proposed by the judgment.”⁹⁰ If an attorney is suspended for one year or more, the attorney may not resume practice until reinstated by the Tennessee Supreme Court.⁹¹ To be reinstated, the attorney must prove by clear and convincing evidence that he or she “has the moral qualifications, competency and learning required to practice law, and that resumption of his [or her] practice would not be detrimental to the integrity and standing of the bar or the administration of justice or be subversive to the public interest.”⁹² Of the sixty-nine lawyers at issue in this Article, sixteen were suspended; nine of the suspensions involved Rules 1.1, 1.3, and/or 1.4.

An attorney may also receive probation. According to the Tennessee Supreme Court Rules, “The imposition of a portion but not all of a suspension for a fixed period . . . may be deferred in conjunction with a fixed period of probation.”⁹³ Probation “should be used only in cases where there is little likelihood that the attorney will harm the public during the period of rehabilitation, and where conditions of probation—which are to be stated in writing—can be adequately supervised.”⁹⁴ Of the sixty-nine lawyers at issue in this Article, four received probation; all four of the probations involved Rules 1.1, 1.3, and/or 1.4.

Finally, the BOPR may issue a public censure. A “[p]ublic censure is a form of public discipline which declares the conduct of the attorney improper, but does not limit the attorney’s privilege to practice law.”⁹⁵ A censure is a written form of discipline more serious than a private reprimand or private

⁹⁰ TN. R. S. CT. Rule 9, § 12.2(a).

⁹¹ *A Primer on the Discipline of Attorneys in Tennessee*, *supra* note 84.

⁹² *Id.*

⁹³ TN. R. S. CT. Rule 9, § 12.2(a).

⁹⁴ *A Primer on the Discipline of Attorneys in Tennessee*, *supra* note 84.

⁹⁵ TN. R. S. CT. Rule 9, § 12.4.

informal admonition.⁹⁶ Of the sixty-nine lawyers at issue in this Article, forty received public censures; thirteen of the public censures involved Rules 1.1, 1.3, and/or 1.4.

III. RESULTS

Of the lawyers who passed the Tennessee bar exam between January 1, 2005 and December 31, 2014, 87.76% passed on the first attempt. Because the vast majority passed on the first attempt, it is necessary to use an incident rate to determine whether lawyers who fail the bar exam are more likely to face professional discipline. An incident rate controls for different sample sizes. Table 1 lists the discipline rates per 1,000 lawyers based on the number of bar exam attempts:

Table 1

| Bar Exam Attempts | Discipline Rate Per 1,000 Lawyers |
|--------------------------|--|
| 1 | 8.64 |
| 2 | 15.77 |
| 4 or more | 26.32 |

As Table 1 makes clear, lawyers who passed the bar exam on their second attempt were nearly twice as likely to face professional discipline than lawyers who passed on their first attempt. Stated differently, although lawyers who passed the bar exam on their second attempt made up only 8.37% of the lawyers who passed the exam between 2005 and 2014, they made up 15.94% of the disciplinary cases during the relevant time period.

⁹⁶ *Id.* The BOPR may also issue a private reprimand or a private informal admonition; these are forms of nonpublic discipline declaring the conduct of the attorney improper but not limiting the attorney's privilege to practice law. *Cf.* TN. R. S. Ct. Rule 9, §§ 12.5, 12.6. Private reprimands and private informal admonitions were not considered in this Article because the records of such discipline are not released to the public.

The numbers are more striking for lawyers who passed the bar exam after four or more attempts; these lawyers were three times more likely to be disciplined than lawyers who passed on their first attempt. In other words, although lawyers who passed the bar exam after four or more attempts made up only 1.05% of the lawyers who passed the exam between 2005 and 2014, they made up 2.90% of the disciplinary cases during the relevant time period.

The disparity is even greater for lawyers who were disciplined for client neglect and/or incompetence. Table 2 lists the discipline rates for violations of Rules 1.1, 1.3, and/or 1.4 per 1,000 lawyers based on the number of bar exam attempts:

Table 2

| Bar Exam Attempts | Discipline Rate Per 1,000 Lawyers |
|--------------------------|--|
| 1 | 4.40 |
| 2 or more | 10.14 |

As Table 2 illustrates, lawyers who failed the bar exam were more than twice as likely to be disciplined for client neglect and/or incompetence than lawyers who passed on their first attempt. Lawyers who passed the bar exam after two or more attempts made up 20.29% of all disciplinary cases during the relevant time period, but those same lawyers made up 28.13% of the disciplinary actions based on Rules 1.1, 1.3, and/or 1.4. Thus, lawyers who fail the bar exam are not only more likely to be disciplined, they are even more likely to be disciplined for client neglect and/or incompetence.

Lawyers who failed the bar exam were also more likely to face severe discipline—disbarment or suspension. Table 3 lists the severe discipline rates per 1,000 lawyers based on the number of bar exam attempts:

Table 3

| Bar Exam Attempts | Severe Discipline Rate Per 1,000 Lawyers |
|--------------------------|---|
| 1 | 2.98 |
| 2 or more | 6.76 |

As Table 3 demonstrates, lawyers who fail the bar exam are more than twice as likely to be disbarred or suspended than lawyers who pass on their first attempt.

Although the data shows a correlation between bar failure and subsequent discipline, the data suffers from two limitations. First, 87.76% of the lawyers who passed the Tennessee bar exam between 2005 and 2014 did so on their first attempt. Thus, those who failed the exam make up a relatively small sample size (12.24%), and those who failed three or more times make up a very small sample size (1.05%).

Second, the research in this Article is limited to lawyers who were disciplined relatively early in their careers. This group consisted of only sixty-nine attorneys. Most of the disciplinary cases during the relevant time period involved lawyers licensed before 2005; unfortunately, Tennessee does not maintain bar exam records for years prior to 2005. Of course, if a correlation between bar failure and discipline were to exist, it would probably appear early in an attorney's career.

Despite its limitations, the findings in this Article are remarkably consistent with the results of similar studies. There is anecdotal evidence that lawyers who failed the Minnesota bar exam were more likely than other lawyers to be disciplined.⁹⁷ That study looked at lawyers admitted to practice in Minnesota between 1982 and 1991 and found:

Although only 15% of all applicants to practice law in Minnesota since 1982 needed to take the Minnesota Bar examination more than once in order to be successful, 27.8% (15 of 52) of the disciplined attorneys needed to take more than one

⁹⁷ Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, 61 BAR EXAMINER 5, 6–7 (1992).

exam. Of those attorneys who received “severe discipline” (disbarred or indefinitely suspended), 41% (7 of 17) were attorneys who were required to take the bar examination more than once.⁹⁸

There is also anecdotal and statistical evidence showing that lawyers who failed the Connecticut bar exam were more likely to face discipline than lawyers who never failed that exam.⁹⁹ Moreover, there is recent anecdotal evidence that lawyers with lower bar exam performance—that is, lower MBE scaled scores—on the California bar exam are more likely to be disciplined and disbarred than those with higher performance.¹⁰⁰

IV. EXISTING LIMITS ON BAR EXAM ATTEMPTS

In Part V, this Article proposes rules limiting the number of times a person may sit for the bar exam. Before discussing those proposals, however, it is important to be aware of existing limits on bar exam attempts. In thirty-two states, there are no limits on the number of times an applicant may sit for the bar exam.¹⁰¹ And “no limits” really means “no limits.” Recall that Maxcy Filer sat for the California bar exam forty-eight times.¹⁰² But Filer is not the only person notorious for bar exam attempts: Marcus Wiggins passed the California bar exam on his twenty-fourth attempt,¹⁰³ John Scinto failed the Connecticut bar exam more than twenty times,¹⁰⁴ Robert Baker failed the California bar

⁹⁸ *Id.* at 7.

⁹⁹ LESLIE C. LEVIN ET AL., A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE 21 (2013), [http://www.lisac.org/docs/default-source/research-\(lisac-resources\)/gr-13-01.pdf](http://www.lisac.org/docs/default-source/research-(lisac-resources)/gr-13-01.pdf); Leslie C. Levin et al., *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 L. & SOC. INQUIRY 51, 70 (2015).

¹⁰⁰ Robert Anderson, IV & Derek T. Muller, *The High Cost of Lowering the Bar 6* (last revised Oct. 13, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2977359>.

¹⁰¹ NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2017, at 20–22, <http://www.ncbex.org/pubs/bar-admissions-guide/2017/index.html> [hereinafter COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS].

¹⁰² *See supra* Introduction.

¹⁰³ Marcus Breton, *On 24th Try, He Cracks the State Bar Exam*, SACRAMENTO BEE, Nov. 28, 2010.

¹⁰⁴ *After Failing 20 Bar Exams, Man Loses Appeal on Scores*, N.Y. TIMES (Feb. 10, 1993), <http://www.nytimes.com/1993/02/10/nyregion/after-failing-20-bar-exams-man-loses-appeal-on-scores.html>.

exam sixteen times;¹⁰⁵ Paulina Bandy passed the California bar exam on her fourteenth attempt;¹⁰⁶ Kevin D. Callahan failed the Massachusetts bar exam ten times;¹⁰⁷ and John DeZell passed the Oregon bar exam on his tenth attempt.¹⁰⁸

The states without limits are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, Wisconsin, and Wyoming.¹⁰⁹

Eighteen states and the District of Columbia limit the number of times an applicant may sit for the bar exam.¹¹⁰ In some of these states, the limit applies only to that state's bar exam; in others—particularly Uniform Bar Examination (“UBE”) states—the limit applies to any state's bar exam.¹¹¹ Seven states have “absolute” limits; in these states, once an applicant reaches the maximum number of attempts, the applicant is generally barred from retaking the exam in that state.

Eleven states and the District of Columbia have various forms of “discretionary” limits; these jurisdictions prescribe a maximum number of attempts, but the applicant may exceed the maximum with permission of that state's Supreme Court or board of law examiners. In many discretionary-limit states, permission to exceed the maximum number is liberally granted.¹¹² In Iowa, for example, permission to exceed the limit

¹⁰⁵ *In re Baker*, 579 A.2d 676, 677 (D.C. 1990).

¹⁰⁶ Ellyn Pak, *Bar Exam Was Test of Time*, ORANGE COUNTY REGISTER (July 4, 2007, 3:00 AM), <http://www.ocregister.com/2007/07/04/bar-exam-was-the-test-of-time>.

¹⁰⁷ Frederick Melo, *Callahan Emerges as Challenger with a New Vision*, CAPE CODE TIMES (Oct. 27, 2002, 2:00 AM), <http://www.capecodtimes.com/article/20021027/NEWS01/310279988>.

¹⁰⁸ *Far Bar: 10th Time Is Charm for Law Student*, *supra* note 5.

¹⁰⁹ COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 101, at 20–22.

¹¹⁰ *Id.* Puerto Rico and the Virgin Islands also limit the number of times an applicant may take the bar exam. *Id.*

¹¹¹ *Id.* at 22. As of December 31, 2017, twenty-eight states, the District of Columbia, and the Virgin Islands have adopted the UBE. *Uniform Bar Exam*, NAT'L CONF. OF B. EXAM'RS, <http://www.ncbex.org/exams/ube> (last visited Dec. 31, 2017).

¹¹² *Kelly v. W. Va. Bd. of Law Exam'rs*, No. 2:08–00933, 2010 WL 9921505, at *14 (S.D.W. Va. Apr. 16, 2010) (admitting testimony of a member of the West

has been denied only once in the past nine years; during that time, some applicants were granted permission to take the exam as many as thirteen times.¹¹³ A survey of the states with absolute and discretionary limits is set forth below.

A. *Jurisdictions with Absolute Limits*

1. Kansas

In Kansas, “[a]n applicant who has failed the examination four times shall no longer be eligible to apply for admission.”¹¹⁴

2. Kentucky

In Kentucky, “[a]fter failing to pass five (5) Kentucky Bar Examinations, an applicant shall not be permitted to sit for the Kentucky Bar Examination.”¹¹⁵

3. Louisiana

In Louisiana, “[a]fter failing to pass five examinations, an applicant shall never be permitted to reapply.”¹¹⁶ This limit was suspended from February 4, 2014 until July 1, 2016 to give the Louisiana Supreme Court time to study various changes to the bar exam.¹¹⁷ The limit has since been reinstated, but is not being applied retroactively.¹¹⁸

Virginia Board of Law Examiners that “applicants are routinely permitted to take the examination more than four times”), *aff'd*, 418 F. App'x 203 (4th Cir. 2011), *cert. denied*, 565 U.S. 826 (2011).

¹¹³ E-mail from Dave Ewert, Iowa Office of Prof'l Regulation, to author (Apr. 6, 2017) (on file with author).

¹¹⁴ KS. R. ADMIS. Rule 709(q).

¹¹⁵ KY. SUP. CT. R. 2.080(4).

¹¹⁶ LA. ST. S. CT. Rule 17, § 8(b).

¹¹⁷ *Id.*

¹¹⁸ *News*, LOUISIANA SUPREME COURT COMMITTEE ON BAR ADMISSIONS, <https://www.lascba.org/News.aspx> (last visited Mar. 3, 2018).

4. New Hampshire

In New Hampshire, “[a] person who has failed the New Hampshire bar examination four times will not be permitted to retake the examination.”¹¹⁹ For purposes of this rule, the limit of four applies “regardless of whether the examination was taken in New Hampshire or taken in another jurisdiction administering the Uniform Bar Examination prepared and coordinated by the National Conference of Bar Examiners.”¹²⁰

5. North Dakota

In North Dakota, “[a]n applicant who fails to achieve a passing score after taking six North Dakota or UBE bar examinations may not take additional bar examinations for admission in North Dakota.”¹²¹

6. Rhode Island

In Rhode Island, “[n]o person who has failed a total of five (5) bar examinations . . . will again be permitted to take the Rhode Island Bar Examination, and no special order excepting any such person from this five (5) examination limit will be granted by this Court.”¹²² This rule applies to exams taken “in Rhode Island or in any other combination of states, districts, or territories of the United States (including the District of Columbia).”¹²³ Although fashioned as an absolute limit, the Supreme Court of Rhode Island has allowed applicants to take additional exams. In *In re Thao*, an applicant who spoke English as second language petitioned for permission to exceed Rhode Island’s limit on bar exam attempts.¹²⁴ At that time, Rhode Island’s limit provided:

[N]o person who prior to the date thereof or at any time thereafter has failed a total of three (3) bar examinations, whether in Rhode Island or in any other combination of states, districts, or territories of the United States (including the District of Columbia), will again be permitted to take the Rhode

¹¹⁹ N.H. SUP. CT. R. 42, § VIII(c).

¹²⁰ *Id.*

¹²¹ N.D. R. ADMIS. Rule 6(G).

¹²² R.I. R. S. CT. ART II ADMIS. Rule 1(d).

¹²³ *Id.*

¹²⁴ 635 A.2d 1195, 1195–96 (R.I. 1994).

Island bar examination, and no special order excepting any such person from this three (3)-examination limit will be granted by this court.¹²⁵

Despite language forbidding exceptions, the Supreme Court of Rhode Island granted Thao “permission to take the bar examination one additional time if, and only if, she engages in and successfully completes at least a two-semester, two-course sequence of intensive study in English writing, composition and reading at an accredited post-secondary institution of higher education.”¹²⁶

7. Vermont

In Vermont, an “[a]pplicant who has failed the bar examination four times will not be permitted to sit for the UBE in Vermont. For purposes of this rule, attempts to achieve a passing score on the UBE count toward the limit of four regardless of where the Applicant sat for the UBE.”¹²⁷

B. *Jurisdictions with Discretionary Limits*

1. Arizona

In Arizona, an “applicant taking the uniform bar examination three times in any jurisdiction and failing to earn the minimum acceptable score established by the Committee on Examinations will not be permitted to take a further examination, unless . . . the Committee on Examinations grants permission for the applicant to write another examination in Arizona.”¹²⁸ To sit for an additional exam, the applicant must submit a request “stating the additional study and preparation that the applicant has made to qualify for further examination.”¹²⁹

¹²⁵ *Id.* at 1196.

¹²⁶ *Id.*; see also *In re Fischer*, 425 A.2d 601, 603–04 (Del. 1980) (permitting applicant to take a fourth bar exam provided applicant completes an approved bar review course).

¹²⁷ VT. R. BAR ADMIS. Rule 9(b)(4).

¹²⁸ AZ. ST. S. CT. Rule 35(c)(3).

¹²⁹ *Id.*

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2. District of Columbia

In the District of Columbia, “[a]n applicant who has taken the bar examination . . . four times in the District of Columbia and failed to earn a passing score will not be permitted to take a further examination, except upon a showing of extraordinary circumstances.”¹³⁰

3. Idaho

In Idaho, “[a]n Applicant who has failed six or more bar examinations, regardless of the jurisdiction, is ineligible to apply for the bar examination or reexamination in Idaho”¹³¹ The Idaho State Bar Board of Commissioners, however, may waive this rule if the Applicant has:

- (1) Demonstrated in writing . . . that there has been a substantial change in the degree of the Applicant’s legal learning which makes it probable that the Applicant will pass the bar examination; and
- (2) Been notified . . . that special permission to retake the bar examination has been granted by the Board.¹³²

4. Iowa

In Iowa, “[a]n applicant who fails the examination once shall be allowed to take the examination at the next scheduled time. Thereafter, the applicant shall be allowed to take the examination at the discretion of the court.”¹³³

5. Maryland

In Maryland, “[i]f an applicant fails three or more examinations, the Board may condition retaking of the examination on the successful completion of specified additional study.”¹³⁴

¹³⁰ D.C. CT. APP. R. 46(c)(14).

¹³¹ ID. R. BAR COMM. Rule 218(d).

¹³² *Id.*

¹³³ IOWA CODE ANN. § 602.10104 (West 2017).

¹³⁴ MD. R. ATTORNEYS Rule 19-208(d).

6. Montana

In Montana, “[a]n applicant who has been unsuccessful in three attempts at the Uniform Bar Examination must petition and be given permission by the Montana Supreme Court before sitting for the examination again.”¹³⁵ The petition “must include a study plan and an explanation of the steps taken and to be taken by the applicant to improve the likelihood of the applicant’s successful completion of the examination.”¹³⁶

7. South Carolina

In South Carolina, “[a]n applicant who has failed to receive a qualifying score on three or more bar examinations shall not be eligible to sit for the UBE in South Carolina until at least one (1) year following the administration of the last bar examination resulting in a non-qualifying score.”¹³⁷ For purposes of this rule:

[A]n applicant shall be treated as receiving a non-qualifying score on a bar examination if: (1) the applicant failed a bar examination in South Carolina prior to February 2017; or (2) the applicant sat for the UBE in this or any other jurisdiction and failed to receive a score of 266 or higher.¹³⁸

8. South Dakota

In South Dakota, “[a]n applicant who fails three times to pass the bar examination in any jurisdiction or combination of jurisdictions, may not be permitted to take another examination in South Dakota except by permission of the Supreme Court”¹³⁹ To obtain such permission, the applicant must demonstrate “that the reasons for previous failures no longer exist and there is a reasonable likelihood the applicant will pass the examination if allowed to take it.”¹⁴⁰

¹³⁵ MT. R. ADMIS. § 3(I); *see also* Rothstein v. Mont. State Sup. Ct., 637 F. Supp. 177, 179 (D. Mont. 1986) (holding that federal district court did not have jurisdiction to issue a writ of mandamus compelling Montana Supreme Court to permit petitioner to sit for the state bar examination for a fourth time).

¹³⁶ MT. R. ADMIS. § 3(I).

¹³⁷ S.C. APP. CT. R. 402(d)(4).

¹³⁸ *Id.*

¹³⁹ S.D. CODIFIED LAWS § 16-16-11 (West 2017).

¹⁴⁰ *Id.*

9. Texas

Texas has a perplexing history of bar exam limits. Prior to 1998, Texas had a limit of five exams; however, for good cause shown, “the Board at its discretion [could] permit an applicant to take additional examinations upon such conditions as the Board may prescribe.”¹⁴¹ In 1998, Texas adopted an absolute limit of five exams.¹⁴² Very few applicants—about .005 percent—reach the maximum in Texas; in a period of more than twenty years, only 287 out of 53,135 applicants failed five times.¹⁴³ Nonetheless, in 2006 efforts were made to eliminate all exam limits. Those efforts failed because, as stated by the then-Executive Director of the Texas Board of Law Examiners, the bar exam is a “tool we . . . use to measure minimum competency.”¹⁴⁴ Senator Wentworth, a member of the Texas legislature, aptly summed up the purpose of the limit: “If you can’t pass the bar exam after the fifth time, you need to find something else to do with your life. . . . We think that’s sort of it. Five times is an extreme number of times to take it. It’s a matter of professional competency.”¹⁴⁵

In 2007, Texas reinstated its discretionary limit of five exams.¹⁴⁶ The current rule provides that “[a]n Applicant may take no more than five (5) examinations. However, for good cause shown, the Board at its discretion may waive this limitation upon such conditions as the Board may prescribe.”¹⁴⁷ To show good cause:

The Applicant shall demonstrate to the Board that mitigating circumstances exist and there has been a substantial change in the degree of the Applicant’s legal learning which makes it probable that the Applicant will pass the Texas Bar

¹⁴¹ *Gonzalez v. Supreme Court of Tex.*, No. A-04-CA-750-SS, 2006 WL 897745, at *1 n.2 (W.D. Tex. Jan. 31, 2006).

¹⁴² *Id.*

¹⁴³ Salatheia Bryant, *Should Texas Lower Bar Exam Standard?*, HOUS. CHRON. (Jan. 1, 2006, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Should-Texas-lower-bar-exam-standard-1892151.php>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Salatheia Bryant, *Justices Ease Rules for Bar Exam Tries*, HOUS. CHRON. (Jan. 6, 2007, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Justices-ease-rules-for-bar-exam-tries-1801020.php>.

¹⁴⁷ TX. R. ADMIS. Rule 11(f).

Examination or the Applicant shall demonstrate to the Board that substantial changes have occurred in the Applicant's life by reason of education, work, experience, training and/or personal circumstances which make it substantially more likely that the Applicant will pass the Texas Bar Examination.¹⁴⁸

In addition, the Applicant must complete "such additional review courses or additional legal study as the Board may require . . ." ¹⁴⁹ Moreover, the applicant is barred from seeking a waiver if the applicant has "filed a request to waive the 5 time limit . . . within the past two years."¹⁵⁰

10. Utah

In Utah, "[a]n Applicant who fails to achieve a passing score after six Bar Examinations may only take additional examinations with the permission of the Admissions Committee. A petition providing good cause as to why the Admissions Committee should grant such a request must be filed with the Deputy General Counsel . . ." ¹⁵¹

11. Virginia

In Virginia, "[a]ny applicant who fails an examination . . . may be reexamined not more than four additional times upon showing to the Board that he has diligently pursued the study of law since the former examination and that he remains otherwise qualified under the provisions of this article."¹⁵² The Board of Bar Examiners may, however, "allow an applicant who has taken the examination five times to take additional examinations when, in the discretion of the Board, the applicant has shown mitigating circumstances which constitute good and sufficient cause for the applicant's failing the prior examination."¹⁵³

¹⁴⁸ *Guidelines for Evaluation of Requests for Waiver of the Five-Time Limit on Attempts to Pass the Texas Bar Examination Pursuant to Rule XI(f) of the Rules Governing Admission to the Bar of Texas*, TEXAS BD. LAW EXAM'RS, <https://formfiles.justia.com/pdf/texas/0363/85.pdf>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ UT. R. BAR ADMIS. Rule 14-707(f)(2).

¹⁵² VA. CODE ANN. § 54.1-3930 (West 2017).

¹⁵³ *Id.*

12. West Virginia

In West Virginia, “[a]n applicant who has failed to earn the minimum score required to pass in this State after a fourth examination taken in this or any other jurisdiction shall not again be admitted to an examination . . . except upon permission of the Board of Law Examiners for good cause shown.”¹⁵⁴ The Board of Law Examiners “may, as a condition to the granting of another examination, prescribe a further course of study.”¹⁵⁵

C. Trend

In the mid-1970s, approximately two-thirds of states had limits on the number of times a person could sit for the bar exam.¹⁵⁶ By 1995, only twenty-four jurisdictions limited the number of times an applicant could sit for the bar exam.¹⁵⁷ Twenty-two years later, that number has dropped to twenty-one.¹⁵⁸ Tennessee exemplifies this trend. At one time, Tennessee had an absolute limit of four attempts; this limit was strictly enforced.¹⁵⁹ Tennessee then shifted to a discretionary limit, which provided:

An applicant who has failed 3 or more examinations shall not be permitted to take another examination except upon filing with the Board, at the time of the notice of intent to take the examination: (i) a statement certifying that applicant has undertaken a course of study designed to prepare applicant for the examination, including a description thereof; and (ii) a statement from an attorney admitted to practice in this State confirming that such attorney has supervised the applicant’s course of study. An applicant who has failed 3 or more examinations shall not be permitted to take another

¹⁵⁴ W.V. R. ADMIS. Rule 3.4(c).

¹⁵⁵ *Id.*

¹⁵⁶ Bd. of Comm’rs of the Ala. State Bar v. State *ex rel.* Baxley, 324 So. 2d 256, 263 (Ala. 1975).

¹⁵⁷ See GILLERS, *supra* note 21, at 624 (“Twenty-four American jurisdictions limit the number of times an applicant may take the bar examination. Puerto Rico is six times. Others range from five times (Alabama, Illinois, Texas, and Virginia) down to two times (Iowa and New Hampshire). In some states, the limit may be waived.”).

¹⁵⁸ COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 101, at 20–22.

¹⁵⁹ Belmont v. Bd. of Law Exam’rs, 511 S.W.2d 461, 464 (Tenn. 1974) (denying petitioner’s request to take the bar exam for a fifth time).

examination until at least one examination has intervened between the last examination which the applicant failed and the one the applicant seeks eligibility to take. If the Board determines that the applicant's course of study is not sufficient evidence of additional legal education to justify re-examination, the Board may refuse to allow the applicant to take that examination.¹⁶⁰

The Board of Law Examiners routinely granted permission to exceed the limit. During this period, some applicants were given permission to take the Tennessee bar exam as many as ten times. Not surprisingly, these applicants rarely passed. In 2016, Tennessee removed all limits on the number of times an applicant may sit for the bar exam.¹⁶¹ Like the majority of jurisdictions, Tennessee now permits applicants to take the bar exam an unlimited number of times.

Tennessee is not the only state to drop its limit on bar exam attempts. Since 1981, Alabama, Colorado, Delaware, Florida, Indiana, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, and Wisconsin have abolished limits on the number of times an applicant may sit for the bar exam.¹⁶² In light of the cases examined in the next Section, some of these states—such as Alabama, Colorado, and Indiana—may have dropped their limits to avoid the costs and aggravation of litigation, albeit successful litigation.

D. *Legality of Limits*

Limits on the number of times a person may take the bar exam have been frequently challenged in state and federal courts. Most of the cases allege violations of the United States Constitution. These cases are discussed in Subsection 1, below. In a few cases, the claimants argue that the limits are superseded by state statutes. These cases are discussed in Subsection 2, below. Subsection 3 examines challenges to bar exam limits based on the Americans with Disabilities Act (“ADA”). Regardless of the type of claim, no applicant has been successful in challenging a state limit on bar exam attempts.

¹⁶⁰ TN. R. S. CT. Rule 7, § 4.05 (amended 2016).

¹⁶¹ *Id.*

¹⁶² *Poats v. Givan*, 651 F.2d 495, 497–98 (7th Cir. 1981).

1. Constitutional Challenges

a. *Equal Protection Clause*

The courts have held that the practice of law is not a fundamental right for purposes of the Equal Protection Clause.¹⁶³ Thus, rules limiting the number of times an applicant may take the bar exam are scrutinized under the rational basis test and, as such, will be upheld if the rule is “rationally related to a legitimate state interest and it is neither arbitrary, unreasonable [n]or irrational.”¹⁶⁴ Federal courts have consistently rejected Equal Protection challenges to limits on the number of times a person may take the bar exam. Judge Daniel R. Dominguez explained the rationale for such decisions:

Rule 2(c), now Rule 5.8.1, limits the number of opportunities an applicant in Puerto Rico has to pass the Bar Examination. This rule is the result of a policy judgment whereby the Supreme Court has determined that applicants who fail the Bar Examination on six (6) occasions have failed to demonstrate the minimum legal proficiency necessary to gain admission to the Bar. This policy judgment, and hence the resulting limitation, certainly bears a rational relationship to the State’s legitimate interest in securing the competency of its Bar membership. Plaintiff’s Equal Protection challenge is, consequently, meritless.¹⁶⁵

In *Jones v. Commissioners of the Alabama State Bar*, the United States Court of Appeals for the Eleventh Circuit also rejected an equal protection challenge to a rule limiting the number of times a person could sit for the bar exam.¹⁶⁶ In that case, the plaintiffs challenged Alabama’s five-time limit on bar exam attempts.¹⁶⁷ The court concluded that “the limitation on the number of times one can sit for the Alabama bar examination is rationally related to the state’s legitimate interest in ensuring the competency of its bar.”¹⁶⁸ Likewise, in *Younger v. Colorado*

¹⁶³ *Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F. Supp. 2d 4, 17 (D.P.R. 1999).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (footnotes omitted).

¹⁶⁶ 737 F.2d 996, 1004 (11th Cir. 1984).

¹⁶⁷ *Id.* at 997–98.

¹⁶⁸ *Id.* at 1002.

State Board of Law Examiners, the United States Court of Appeals for the Tenth Circuit upheld Colorado's limit on bar exam attempts, concluding that "[i]t is a rational policy adopted in the exercise of the State's recognized authority to assure a competent bar."¹⁶⁹

The plaintiffs in *Jones* also claimed that Alabama's limit on bar exam attempts had a disparate impact on African Americans in violation of the Equal Protection Clause.¹⁷⁰ The Eleventh Circuit rejected this claim because the plaintiffs failed to allege "intentional racial discrimination."¹⁷¹ According to the court, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."¹⁷² It was insufficient to allege that the Alabama State Bar knew or should have known that the bar exam limit would have a racially discriminatory effect; the plaintiffs were required to allege that the bar exam limit was adopted "because of" not merely "in spite of" its adverse effects.¹⁷³

b. Substantive Due Process

The practice of law is not a fundamental right for purposes of the Due Process Clause.¹⁷⁴ As a result, bar exam rules are subject only to the rational basis test.¹⁷⁵ Under that test, states have "a legitimate and substantial interest in excluding from the practice of law" applicants who do not have minimal competence.¹⁷⁶ Consequently, substantive due process challenges to limits on the number of times a person may sit for the bar

¹⁶⁹ *Younger v. Colo. State Bd. of Law Exam'rs*, 625 F.2d 372, 378 (10th Cir. 1980).

¹⁷⁰ *Jones*, 737 F.2d at 1003.

¹⁷¹ *Id.* at 1003-04.

¹⁷² *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

¹⁷³ *Id.* at 1004.

¹⁷⁴ *Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F. Supp. 2d 4, 17 (D.P.R. 1999).

¹⁷⁵ *Davidson v. Georgia*, 622 F.2d 895, 896 (5th Cir. 1980).

¹⁷⁶ *Id.*

exam have repeatedly failed. The United States Court of Appeals for the Seventh Circuit aptly stated the rationale for these decisions:

In sum, while concededly an applicant may eventually become minimally qualified after several periods of preparing for and taking successive bar examinations, a state is constitutionally able to require a somewhat more stringent standard for those who continue to fail after multiple attempts We hold that a limit of four times for taking the bar examination satisfies reexamination due process and bears a rational connection to the applicant's fitness and capacity to practice law.¹⁷⁷

Similarly, the Tenth Circuit rejected a substantive due process challenge to Colorado's limit on the number of times a person may take the bar exam. The Tenth Circuit determined that the limit was "a rational policy adopted in the exercise of the State's recognized authority to assure a competent bar."¹⁷⁸

c. Procedural Due Process

The purpose of procedural due process is to "guarantee a fair procedure."¹⁷⁹ To prevail on a procedural due process claim, the plaintiff must show: "(1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation."¹⁸⁰ Failure to establish any one of these elements is fatal to a due process claim.¹⁸¹ In *Feliciano*, the court rejected a claim that Puerto Rico's limit on bar exam attempts violated procedural due process because the plaintiff

¹⁷⁷ *Poats v. Givan*, 651 F.2d 495, 499–500 (7th Cir. 1981).

¹⁷⁸ *Younger v. Colo. State Bd. of Law Exam'rs*, 625 F.2d 372, 378 (10th Cir. 1980); *see also* *Rothstein v. Mont. Supreme Court*, 638 F. Supp. 1311, 1314 (D. Mont. 1986) (concluding that plaintiff did not have a substantial chance of prevailing on due process challenge to Montana's limit on number of bar exam attempts); *Florida Bar re Ines*, 718 So. 2d 779, 780–81 (Fla. 1998) (upholding rule providing that an applicant who fails the marital and family law certification examination after two consecutive attempts is ineligible to reapply for two years).

¹⁷⁹ *Zinerman v. Burch*, 494 U.S. 113, 125 (1990).

¹⁸⁰ *Bank of Jackson Cty v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993) (citations omitted), *cert. denied*, 510 U.S. 819 (1993).

¹⁸¹ *Id.*

could not “even establish the existence of a constitutionally protected interest in taking the Bar Examination an unlimited number of times.”¹⁸²

In *Jones*, the Eleventh Circuit rejected a similar procedural due process challenge, holding that “the rules applicable to the Alabama bar examination, limiting to five the number of times an applicant can sit for the bar examination . . . afford applicants adequate due process protections against the possibility that their interests in practicing law will be limited or denied improperly.”¹⁸³

2. State Statutory Challenges

Limits on the number of times an applicant may take the bar exam are generally set by state supreme courts or agencies of such courts, like boards of law examiners. In a few states, the legislatures have enacted laws inconsistent with such limits. In the 1970s, Tennessee had an absolute limit of four bar exam attempts. In 1971, the Tennessee General Assembly passed § 4-1902, which provided:

No board, commission or agency of this state that issues licenses to persons to engage in an occupation, trade or profession based upon written or oral examination shall adopt or enforce any rule, regulation or law limiting the number of times that any person, otherwise qualified, may apply for and stand for such written or oral examination.¹⁸⁴

At first, it was unclear whether § 4-1902 applied to the bar exam. As a result, the General Assembly amended § 4-1902 in 1972 by adding the following clause: “This section shall specifically apply to the state board of law examiners.”¹⁸⁵

An applicant who failed the Tennessee bar exam four times challenged the state’s limit on bar exam attempts, arguing that § 4-1902 superseded Tennessee’s limit on bar exam attempts.¹⁸⁶ The Supreme Court of Tennessee disagreed, holding that courts

¹⁸² *Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F. Supp. 2d 4, 18 (D.P.R. 1999).

¹⁸³ *Jones v. Bd. of Comm’rs of Ala. State Bar*, 737 F.2d 996, 1003 (11th Cir. 1984).

¹⁸⁴ TENN. CODE ANN. § 4-19-102 (West 1971).

¹⁸⁵ TENN. CODE ANN. § 4-19-102 (West 1972).

¹⁸⁶ *Belmont v. Bd. of Law Exam’rs*, 511 S.W.2d 461, 464 (Tenn. 1974).

have the inherent right to determine who shall practice law before them and “that an act of the legislature . . . that conflicts with and supersedes the Court’s declared requirements, and constitutes an attempted exercise of powers properly belonging to the judicial branch by the legislative branch of government violates Article II, Section 2 and Article VI, Section 1 of the Constitution of Tennessee.”¹⁸⁷ Section 4-1902, according to the court, was in direct conflict with the Rules of the Supreme Court and thus was unconstitutional.¹⁸⁸ The court, therefore, rejected the applicant’s request to take a fifth bar exam.¹⁸⁹

The Supreme Court of Alabama confronted a similar separation of powers dispute.¹⁹⁰ At that time, Alabama had a discretionary limit of three bar exam attempts.¹⁹¹ In 1973, the Alabama legislature enacted a statute, which provided that “[a]ny rule, regulation or law limiting the number of times that any person, otherwise qualified may apply for and stand the Alabama Bar Examination at any regular examination session is hereby prohibited.”¹⁹² The Attorney General, and other plaintiffs, sought a declaratory judgment that the statute was unconstitutional.¹⁹³ The Alabama Supreme Court first recognized that “[t]he practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of state government.”¹⁹⁴ In fact, “[i]n every state of the union the

¹⁸⁷ *Id.* at 463–64.

¹⁸⁸ *Id.* at 464.

¹⁸⁹ *Id.*; see also Tenn. Op. Att’y Gen. No. 89-71, 1989 WL 434709 (May 2, 1989) (opining that bill which would allow individuals failing a portion of the bar examination to take only the failed portion upon reexamination violates Article II, § 2 of the Tennessee Constitution inasmuch as it would intrude upon the supreme court’s supervisory power with respect to licensing attorneys); *In re Splane*, 16 A. 481, 483 (Pa. 1889) (holding that whether an attorney shall be admitted to practice is a judicial and not a legislative question).

¹⁹⁰ *Bd. of Comm’rs of the Ala. State Bar v. State ex rel. Baxley*, 324 So. 2d 256 (Ala. 1975).

¹⁹¹ *Id.* at 257.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 261 (quoting *Rowen v. LeMars Mut. Ins. Co. of Iowa*, 230 N.W.2d 905, 914 (Iowa 1975)).

judiciary exercises regulatory control in admissions to the bar.”¹⁹⁵ Accordingly, the Supreme Court held that the statute amounted to an unconstitutional effort to perform a judicial function.¹⁹⁶

In addition, in 2006 a bill was introduced in the Texas Senate to eliminate Texas’ limit of five bar exam attempts.¹⁹⁷ The bill failed to make it out of the Senate’s Jurisprudence Committee with the Chairman of that Committee commenting that five attempts at the bar exam are “more than enough opportunity to pass.”¹⁹⁸

3. ADA Challenges

The purpose of the ADA is to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”¹⁹⁹ Under the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁰⁰

To prevail on an ADA claim, the plaintiff must show (1) he or she has a qualifying disability, (2) is being excluded from participation in a program or activity for which defendants are responsible, and (3) that such exclusion is by reason of his or her disability.²⁰¹

In *Gonzales v. Supreme Court of Texas*, an applicant requested a waiver of the limit on bar exam attempts based on his recent ADHD diagnosis.²⁰² The applicant had failed the Texas bar exam nine times, and he was requesting permission to sit for a tenth exam.²⁰³ The Board of Law Examiners denied his

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 262.

¹⁹⁷ Bryant, *supra* note 143.

¹⁹⁸ *Id.*

¹⁹⁹ 42 U.S.C. § 12101(b)(2) (2012).

²⁰⁰ *Id.* § 12132 (2012).

²⁰¹ *Lightbourn v. County of El Paso*, 118 F.3d 421, 428 (5th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998).

²⁰² No. A-04-CA-750-SS, 2006 WL 897745, at *2 (W.D. Tex. Jan. 31, 2006).

²⁰³ *Id.* at *1.

request, prompting the applicant to file suit.²⁰⁴ In his suit, the applicant claimed that the Board's rejection violated the ADA.²⁰⁵ The court disagreed, concluding:

In sum, although Gonzales points to various difficulties he faces as an ADHD sufferer, he has simply not adduced sufficient evidence to demonstrate that the problems he faces are so different in magnitude from those facing the majority of people coping with work and academic life that he can be appropriately characterized as substantially limited by his ADHD. Although he has experienced a number of academic difficulties and has ultimately proved unable to pass the bar exam on nine occasions, Gonzales has failed to show that ADHD—rather than poor study habits, weak academic skill development, or low intellectual functioning—was responsible. Thus, on this record, the Court necessarily finds Gonzales has not demonstrated, by a preponderance of the evidence, that he is a person with a disability under the ADA.²⁰⁶

The federal court, therefore, upheld the Board's rejection of Gonzales' application for a waiver of the rule limiting the number of bar exam attempts.²⁰⁷

V. PROPOSALS

For three distinct reasons, this Article urges the states to adopt policies limiting the amount of times test takers may retake the bar exam.

A. *Protecting the Public*

First and foremost, limits on the number of bar exam attempts are necessary to protect the public. Some legal education professionals see no “need for a policy that limits the number of times a person could take the bar exam,” and these same professionals believe the character and fitness process is

²⁰⁴ *Id.* at *2.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at *7.

²⁰⁷ *Id.*; *cf.* Lipton v. N.Y. Univ. Coll. of Dentistry, 865 F. Supp. 2d 403, 410 (S.D.N.Y. 2012), *aff'd*, 507 Fed. App'x 10 (2d Cir. 2013) (holding that requested accommodation by dental student, who suffered from reading disorder, that he be permitted to retake national exam an unlimited number of times was not reasonable).

sufficient to protect the public.²⁰⁸ This Article, however, proves otherwise. Lawyers who pass the bar exam after four or more attempts are three times more likely to be disciplined early in their legal careers. The risk of discipline is even greater for cases arising out of Rules 1.1, 1.3, and/or 1.4. These findings are consistent with similar studies.²⁰⁹ The character and fitness process is not designed to weed out incompetent or nondiligent applicants; the bar exam is designed for this purpose.

The purpose of the bar exam is to ensure that new lawyers have minimal competency.²¹⁰ As the Tenth Circuit noted, “three failures of the . . . bar examination [are] indicative of an individual’s lack of competence and ability to practice law.”²¹¹ In other words, “justifiable doubts could be felt about those taking four or more examinations, despite ultimate success.”²¹² If Oregon had retained its three-bar-exam limit—which it had in the 1960s—John DeZell’s clients would not have been harmed. A limit on the number of bar exam attempts, therefore, is necessary to protect clients and the judicial system.

B. Protecting Applicants from Their Own Misjudgments

Second, allowing applicants to take the bar exam an unlimited number of times creates false hope. “[P]ass rates among applicants taking the bar examination for the fourth or fifth time drop[] sharply from the rate achieved by first-, second- and even third-timers.”²¹³ Of those who will eventually pass the bar exam, 99.3% will have done so by their third attempt and 99.9% will have done so by their fourth attempt.²¹⁴ Moreover, bar passage rates have been declining nationwide in recent years,

²⁰⁸ See, e.g., Bryant, *supra* note 143.

²⁰⁹ See *supra* Part IV.

²¹⁰ FL. ST. BAR ADMIS. Rule 1-15.1.

²¹¹ Younger v. Colo. State Bd. of Law Exam’rs, 625 F.2d 372, 377 (10th Cir. 1980).

²¹² *Id.*

²¹³ Jones v. Bd. of Comm’rs of the Ala. State Bar, 737 F.2d 996, 1001 (11th Cir. 1984).

²¹⁴ Letter from Kyle McEntee, Executive Director, Law School Transparency & David Frakt, National Advisory Council, to Council of the ABA Section on Legal Education and Admission to the Bar (2016), http://lawschooltransparency.com/documents/2016-07-27_LST_to_Council.pdf.

particularly among repeat takers.²¹⁵ Thus, the percentage of applicants passing after three attempts will probably decline even further in future years. As a result, those taking the bar exam four or more times have, for all practical purposes, a false hope of passing.

Additionally, there are significant costs in preparing for and taking multiple bar exams; such preparation also consumes a large portion of a person's working life. Recall that Maxcy Filer spent twenty-five years of his life and \$50,000 on bar exams. As Senator Wentworth stated, if an applicant has not passed the bar exam by the numerical limit, the applicant needs "to find something else to do with [his or her] life." After all, the "practice of law is a privilege and not a right."²¹⁶

C. *Protecting the Examination Process*

Third, anyone who has graded essays or performance exams knows that the greater the number of exams, the greater the risk of error. In California, for example, 12,495 applicants sat for the bar exam in 2016; of these, nearly half (5,936) were repeaters.²¹⁷ Presumably, hundreds—if not thousands—of these repeaters had previously taken the exam at least three times. Allowing these applicants unlimited opportunities to take the bar exam increases the number of essay and performance tests that must be graded in a fixed period of time. Such an increase inevitably leads to a more cursory review of answers and, concomitantly, a higher risk of error. In recent years, several states have

²¹⁵ The national pass rate for repeaters declined from thirty-seven percent in 2011 to thirty-three percent in 2016. *Compare 2011 Statistics*, NAT'L CONF. OF B. EXAM'RS 15, <http://www.ncbex.org/dmsdocument/146> (last visited Mar. 3, 2018), *with 2016 Statistics*, NAT'L CONF. OF B. EXAM'RS 23, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205> (last visited Mar. 3, 2018).

²¹⁶ *In re Butcher*, 907 S.W.2d 715, 717 (Ark. 1995).

²¹⁷ *2016 Statistics*, *supra* note 215, at 16, 20.

committed serious errors in grading bar exams.²¹⁸ For example, on September 6, 2016, Georgia, which is one of the last states to release bar exam results, announced:

The Board of Bar Examiners has determined that errors in the scoring of the July 2015 and February 2016 Bar examinations resulted in 90 applicants being mistakenly notified that they had failed the examination when, in fact, they had passed. The Board is making a concerted effort to notify each and every one of them personally.²¹⁹

Moreover, as the number of test takers has grown, so has the time period for grading. Several states—such as Arizona, California, Georgia, Nevada, and Rhode Island—release their February bar exam results in mid-May.²²⁰ Thus, those who fail the exam have only ten weeks to prepare for the July exam. Repeaters often need far more than ten weeks to adequately prepare, so many of them have little chance of passing the July exam. Hence, the huge pool of test takers is creating a cycle of failure for many repeaters because, by the time an applicant learns that he or she has failed the last bar exam, it is already too late to adequately prepare for the next bar exam.

D. *Absolute-Limit Proposals*

Consequently, this Article recommends that jurisdictions adopt one of the following proposals. Proposal One recommends an absolute limit of three attempts; states can choose whether the limit applies only to that state's bar exam, to all bar exams, or all UBEs.

²¹⁸ Kathryn Rubino, *Georgia Mistakenly Tells People They Failed the Bar Exam*, ABOVE THE LAW (Sept. 6, 2016, 4:29 PM), <https://abovethelaw.com/2016/09/georgia-mistakenly-tells-people-they-failed-the-bar-exam>; Deborah Cassens Weiss, *Suit Claims 'Screaming Attacks' by Nev. Bar Official Led to Grading Errors on 2010 Bar Exam*, A.B.A. J. (Apr. 5, 2011, 11:58 AM), http://www.abajournal.com/news/article/suit_links_alleged_screaming_attacks_by_nev_bar_official_with_grading_error; Michael Higgins, *Mistake Gives 19 Break on Bar Exam*, CHI. TRIB. (May 30, 2003), http://articles.chicagotribune.com/2003-05-30/news/0305300121_1_erica-moeser-law-school-graduates-bar-examiners.

²¹⁹ Rubino, *supra* note 218.

²²⁰ *Historical Release Dates for Bar Exam Results*, DECEPTIVELY BLONDE, <http://deceptivelyblonde.weebly.com/results---historic-release-dates.html> (last visited Mar. 3, 2018).

Proposal One: An applicant who fails to achieve a passing score after taking three (State or UBE) bar examinations may not take additional bar examinations for admission in this State.

Proposal Two recommends a limit of three attempts, with one additional attempt if the applicant came close to passing the exam on one of the applicant's first three attempts. How close to passing does the applicant have to come to take a fourth exam? This Article recommends a ten-point margin on a 400-point scale, which is the type of scale used in Tennessee and in UBE states. If an applicant fails the bar exam three times by large margins, a fourth attempt is unlikely to change the outcome. A fifth opportunity is even less likely to change the outcome because very few, if any, applicants pass on the fifth attempt.²²¹ Thus, Proposal Two sets a four-exam maximum.

Proposal Two: An applicant who fails to achieve a passing score after taking three (State or UBE) bar examinations may not take additional bar examinations for admission in this State, except that an applicant may take one additional examination if the applicant's score on any of the first three examinations was (260) or higher.

CONCLUSION

The purpose of the bar exam is to ensure that new lawyers have minimal competency.²²² Although the bar exam "is not a perfect measure of an individual's ability or competency to practice law, 'it's the most accurate . . .'"²²³ As the Tenth Circuit noted, "[T]hree failures of the . . . bar examination [are] indicative of an individual's lack of competence and ability to practice law."²²⁴ "Thus justifiable doubts could be felt about those taking four or more examinations, despite ultimate success."²²⁵

²²¹ Between February 1975 and February 1979, the pass rate of persons taking the Colorado bar exam for the fifth time was 0 percent. *Poats v. Givan*, 651 F.2d 495, 499 n.10 (7th Cir. 1981).

²²² FL. ST. BAR ADMIS. Rule 1-15.1.

²²³ *Younger v. Colo. State Bd. of Law Exam'rs*, 625 F.2d 372, 377 (10th Cir. 1980).

²²⁴ *Id.*

²²⁵ *Id.*

At the outset, this Article promised to substantiate two theses: (1) The more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for ethical violations, particularly early in the lawyer's career; and (2) The more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for lack of diligence—including noncommunication—and/or incompetence. With regard to the first thesis, the evidence in this Article establishes a link between bar failure—particularly repeated failure—and subsequent professional discipline. As to the second thesis, the evidence in this Article shows that lawyers who fail the bar exam are not only more likely to be disciplined, but that they have an even greater likelihood of being disciplined for client neglect and/or incompetence. In addition, this Article demonstrates that lawyers who fail the bar exam are more likely to face severe discipline—disbarment or suspension—than lawyers who pass the bar exam on the first attempt. As a consequence, the Article urges states to adopt one of the “absolute” limits proposed in Part V.