Washington State Bar Licensure Task Force Subcommittee on Ethics/Character Fitness Report and Recommendations

Revised & Submitted by Task Force Subcommittee on Character & Fitness Chair Brent Williams-Ruth
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I. Introduction by Subcommittee Chair

The Subcommittee is made up of nine members[1] who have met at least monthly since March 2022. Many of the individuals who have been consulted, interviewed, and/or scholarly works that were read are featured prominently throughout the footnotes of the body of work. It would be an extreme disservice, however, if special recognition was not provided to the two associates at the law firm of Miller Nash in Portland, Oregon that helped bring all the ideas together into one report. Beatrice Lucas and Diana Ramos are (as of May 2023) Associates with Miller Nash who volunteered to join this project after a call went out across the firm by former Washington State Bar Association President, Kyle Sciuchetti[2]. Ms. Ramos and Ms. Lucas provided extensive support over the course of four months that weaved together the individual sections and provided the additional citations, references, and insights that formed the base foundation of what you are about to read.[3] The Subcommittee is grateful for their contributions to this process.

II. Executive Summary

The Washington State Bar Licensure Task Force's Subcommittee on Ethics/Character and Fitness (the "Subcommittee") was created at the behest of Brent Williams-Ruth, the representative selected by the President of the Washington State Bar Association ("WSBA" or the "Bar") to represent the Board of Governors on the Bar Licensure Task Force.[4] His interest in

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[1] Knowrasa Patrick, Renata Garcia, Kim Ambrose/Mary Hotchkiss, Christopher Howard, Kevin Hagan, Dolly Hunt, Katie Handick. The meetings have been organized and chaired by Brent Williams-Ruth.

[2] As of May 2023, Kyle Sciuchetti is a Partner with Miller Nash based out of their office in Portland, Oregon

[3] Any typos, grammatical errors, dead links, etc., are owned entirely by Subcommittee Chair Brent Williams-Ruth and do not reflect on any of the members of the subcommittee or on Ms. Ramos or Ms. Lucas.

[4] At the time of appointment, Governor Williams-Ruth was representing the 8th Congressional District and was then elected to an At-Large position on the Board of Governors. His interest in this process was stoked by meeting

modifying the Character and Fitness process took root after meeting Tarra Simmons during her experience with the Character and Fitness Board. After the WSBA Character and Fitness Board (the "Board") recommended that Simmons's application to sit for the bar exam be denied, the Washington Supreme Court reversed that recommendation in a 9-0 decision issued the same day as the oral argument.[5] *In re Simmons* highlighted the long overdue need to review the character and fitness assessment process and criteria.[6] The Subcommittee was created to examine the character and fitness process and criteria and to make recommendations as needed. This report summarizes the Subcommittees findings and recommendations and can be summarized as follows.

Findings

- The limited guidance, lack of transparency, and ambiguity in criteria in the character and fitness assessment may serve to hide biases, disadvantage minorities, and prevent diversity in the profession.
- The character and fitness criteria can exacerbate the harm caused by systemic injustices.
- Continued research, assessment, and reportable data is needed to fully understand and address the impact of the process.

Recommendations

The Subcommittee recommends the following changes to APR 21 and 24.1:

Tarra Simmons in person while fundraising for Seattle University School of Law and then being appointed to the Character and Fitness Board.

[5] *In re Simmons*, 190 Wash.2d 374, 414 P.3d 1111 (2018)

[6] Governor Williams-Ruth was present at the Supreme Court for the oral argument, having just been appointed to serve on the Character and Fitness Board. He served on the Board, rising to Vice Chair, only to resign his position after being elected to the WSBA Board of Governors because it became clear that due to the separation between the Board and the Court, the only way to potentially impact and change the process would not be while serving on the Board itself.

- Limit consideration of unlawful conduct under APR 21(a)(1);
- Eliminate consideration of "Neglect of Financial Responsibilities" under APR 21(a)(7);
- Revise and define parameters pertaining to "Omissions" and "Candor" under APR 20(c), APR 21(a)(3), and APR 21(b)(7)–(8);
- Revise and/or weight aggravating and mitigating factors under APR 21(b);
- Eliminate "Sufficiency of Punishment" under APR 21(b)(9)(iii); and
- Lower the burden of proof under APR 24.1(c).

The Subcommittee also specifically recommends the following process changes:

- Implement a conditional admission process; and
- Expand the timing of the character and fitness inquiry.

In addition to these recommendations, the Subcommittee recommends continued research and assessment of character and fitness process. Limited research is available on the conduct of attorneys and the impact of the criteria used to assess good moral character. The Subcommittee recognizes the limitations of this report and the need to continue discussing these topics and making adjustments to the process as more research becomes available. These revisions, and those forthcoming, will work to provide clarity in purpose, predictability in enforcement, and equity in application for all candidates seeking entry into the legal profession in Washington.

UPDATE: February 2024

After the presentation of the initial report to the Court, there was a public comment period that was concluded in January 2024. During this comment period there have been multiple groups and individuals who have submitted comments, both publicly and privately, regarding the proposals contained herein. The overwhelming feedback has been in support of these

recommendations AND included multiple offers to join any future workgroups or task forces created by the Court to conduct review and analysis of the areas seeking additional change. These offers came from scholars from around the country to current and former members of the Washington Character and Fitness Board.

III. Charge from the Court – June 4, 2020

On June 4, 2020, the Washington Supreme Court issued a letter, signed by all nine justices, denouncing the "persistent and systemic" injustice that devalues and degrades black lives in America.[7] The letter serves as a call to action to lawyers and members of the bar to recognize systemic injustice and "address the shameful legacy we inherit" to ultimately eradicate racism.[8] The letter includes a more general statement: that "[t]oo often in the legal profession, we feel bound by tradition and the way things have 'always' been.[9] We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful."[10] The Washington Bar Licensure Taskforce (the "Taskforce") calls upon this language now, as the Subcommittee seeks to dismantle the unnecessary barriers to admission to Washington's legal system.

As the system stands now, the character and fitness portion of bar admissions is shrouded in uncertainty. The APR 20 definition of "good moral character" and "fitness to practice law," does not appear to provide sufficient clarity to applicants and there is little case law or guidance on how this phrase should be interpreted. The factors that admissions staff, Bar Counsel, the

[7] Letter from the Supreme Court of the State of Washington, June 4, 2020.
[8] *Id.*
[9] *Id.*
[10] *Id.*

Character and Fitness Board, and the Court are to consider in APR 21 when reviewing flagged applications, which include both aggravating and mitigating factors, only stand to muddy the understanding. The factors are given no weight relative to one another nor is there guidance on how the degree of one or two factors may override the others.

The Subcommittee understands the Court has rejected bright-line rules in character and fitness determinations,[11] and that a certain level of vagueness can allow decisionmakers to be flexible as invariably fact-heavy cases come before them. But absolute discretion is more likely to introduce bias into the decision-making process, and certain populations are disproportionately affected by such processes.[12]

After extensive discussion, research, and conversations with stakeholders[13], the Subcommittee urges the Supreme Court to consider revisions to the character and fitness rules, including but not limited to, revisions of APR 21 and APR 24.1 for a more equitable and reliable[14] bar admission process. To do so would more narrowly tailor the process toward public protection and move away from an actual or perceived gatekeeping function that is often seen as keeping out deserving candidates, unnecessarily causing trauma for candidates who have had their character and fitness called into question, and upholding a system that can disproportionately

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[11] *In re Simmons*, 190 Wash.2d 374, 389 414 P.3d 1111 (2018) ("Specific time-based rules, or even flexible presumptions, are not appropriate, and we decline to adopt any at this time.").

[12] *See* Jennifer Aronson, Comment, *Rules Versus Standards: A Moral Inquiry into Washington's Character & Fitness Hearing Process*, 95 Wash. L. Rev. 997, 1014–15 (2020) (*citing* William J. Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition,* 3 U. PA. J. CONST. L. 171, 226–230 (2001).

[13] Stakeholder input has included several applicant's counsel; applicants who have appeared before the Character & Fitness Board; volunteer members of the Character & Fitness Board; members of the WSBA regulatory staff; academic professionals from around the country, as well as the stakeholders represented on the Washington Bar Licensure Task Force. Notes from each discussion are on file with Subcommittee Chair Brent Williams-Ruth

[14] Greater reliability is meant to provide both internal and external understanding as to how specific issues will be addressed, factors will be weighed, and decisions determined.

affect Black, Indigenous and People of color ("BIPOC"), poor communities, and first-generation examinees.

The Subcommittee is grateful for the opportunity to make its recommendations to the Supreme Court as a part of the larger Taskforce, which as a whole has the opportunity to make a generational shift in the way Washington licenses its attorneys. It is the Subcommittee's hope that other states will look to Washington as a leader in the movement for a more equitable legal profession.

IV. Background

In November 2020, the Washington Supreme Court issued an order to create the Taskforce. The purpose of the Taskforce is to examine Washington's bar exam and related requirements and assess the need, if any, for different examination methods or alternative licensure methods. Specifically, the Taskforce is to examine the disproportionate impacts on examinees of color and first-generation examinees when considering potential alternatives or changes to the bar exam.

The Subcommittee is made up of nine members[15] who have met at least monthly since March 2022. The Subcommittee members reviewed data, read current scholarly publications on character and fitness processes, and spoke with attorneys who have represented applicants through the character and fitness process as well as published authors who have researched and published on this topic. From this work, the Subcommittee has prepared this report and proposed the recommendations for the Court, which include revisions to APR 21 and 24.1 and process changes.

[15] Knowrasa Patrick, Renata Garcia/Julie Shankland, Kim Ambrose/Mary Hotchkiss, Christopher Howard, Kevin Hagan, Dolly Hunt, Katie Handick. The meetings have been organized and chaired by Brent Williams-Ruth.

1. Current Rules

The character and fitness review is conducted after the applicant submits an application and fee for the legal professional licensure in Washington, which includes but is not limited to an application to sit for the bar exam. Applicants must prove that they have "good moral character"[16] and the requisite "fitness to practice law".[17] Applicants are asked in the application to provide, among other things, the address of every place the applicant has lived for a period of one month or longer in the last 10 years or since age 18, whichever period is shorter; every job the applicant has held (with a reference to confirm employment) in the last 10 years; every moving traffic violation in the past ten years; any disciplinary action in undergraduate, graduate, or law school; and any arrest or criminal charge along with full details of the incident.[18]

Admissions staff refers to Bar Counsel for review applications that reflect one or more of the factors in APR 21(a).[19] Bar Counsel will also review the application for the presence of the factors listed in APR 21(a), however APR 22.1(c) provides Bar Counsel with the power to investigate "as they deem necessary" and may including issuing subpoenas or requiring the production of records, including a limited ability to request medical records.[20] If after review, Bar Counsel concludes "there is a substantial question whether the applicant possesses the requisite good

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[16] "Good moral character is a record of conduct manifesting the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process." APR 20(c).

[17] "Fitness to practice law is a record of conduct that establishes that the applicant meets the essential eligibility requirements for the practice of law." APR 20(d).

[18] *Character and Fitness Review*, Seattle University School of Law, https://law.seattleu.edu/academics/academic-resources/prepare-for-the-bar/character-and-fitness-review/.

[19] These factors are discussed extensively below. APR 22.1(a)–(b).

[20] APR 22.1(c), APR 22.1(f).

moral character and fitness to practice law," the application is referred to the Character and Fitness Board for a hearing.[21]

The Board will then conduct a hearing on the qualification of the applicant. Like Bar Counsel, the Board has the authority to request records, hear testimony, and issue subpoenas.[22] Although the hearings are not civil or criminal,[23]they are sui generis hearings with evidentiary rulings made by the Board Chair where evidence, including hearsay evidence, is admissible if in the Chair's judgement it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs and give the applicant to the right to counsel, providing that an "applicant may be represented by counsel." The applicant must establish by clear and convincing evidence that they are of good moral character and possess the requisite fitness to practice law, and importantly, all hearings and documents before the Board are confidential, except in hearings on petitions for reinstatement after disbarment.[24]

The Board will issue a written recommendation after the hearing, again basing their recommendation on the factors in APR 21.[25] Final disposition comes from the Supreme Court.[26] A bar-exam applicant referred to a hearing before the Character and Fitness Board may not sit for the bar exam for which they applied and after successful completion of the character and fitness process, at least eighteen days prior to the upcoming bar exam, may be able to the sit for

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[21] APR 22.1(d).
[22] APR 23.1(a).
[23] APR 24.1(d).
[24] APR 24.1(c), (g). APR 25.4(c)
[25] APR 24.2(a).
[26] APR 24.2(b).

the next scheduled bar exam. Though the process for most is resolved within one exam cycle from original application[27], in some instances, resolution can take several years.[28]

2. Case Law

As previously alluded to, there is very little case law from the Supreme Court on the review of character and fitness applications. In fact, there are a total of four published cases on the subject, and two of them are from almost 40 years ago.[29] While the lack of published opinions can be attributed to the decisions being confidential unless confidentiality is waived, and the Subcommittee does not dispute the policy reasons behind this practice, it can make bar applications guessing games for candidates and those reviewing their applications.[30]

While the few cases that are published are helpful, they stress that each character and fitness review is heavily fact-based. For instance in *In re Simmons*,[31] the Court declined to adopt a bright-line rule regarding, as an example, a rebuttable presumption that a candidate has recovered if they have not relapsed or engaged in misconduct for a certain number of years.[32] New applicants to the Bar, the Court explains, do not have experience as practicing attorneys, so there is no way to judge their fitness to practice law unless the review is individualized.[33]

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[27] Conversation with WSBA Chief Regulatory Counsel Renata Garcia, notes on file with Subcommittee Chair Brent Williams-Ruth

[28] In *Re Zachary Stevenson* was a case that was heard by the C&F Board in August/September of 2020, and the decision from the Court came down November 3, 2022. Frequently Asked Questions, WSBA | Online Admissions, https://admissions.wsba.org/faq (last visited Apr. 20, 2023). *See also* Aronson, *supra* note 12, at 1003 (discussing how the character and fitness hearings can extend the application process and swearing-in by at least nine months and typically a year).

[29] *In re Bar Application of Zachary LeRoy Stevens*, No. 201,997-8 (Slip Opinion), *In re Simmons*, 190 Wash.2d 374, 414 P.3d 1111 (2018), *In re Wright*, 102 Wash.2d 855, 690 P.2d 1134 (1984); *In re Belsher*, 102 Wash.2d 844, 689 P.2d 1078 (1984).

[30] *Simmons*, 190 Wash.2d at 395 (*citing* Tom Andrews, Rob Aronson, Mark Fucile & Art Lachman, THE LAW OF LAWYERING IN WASHINGTON, 2–20 (2012)).

[31] 190 Wash.2d 374, 414 P.3d 1111 (2018).

[32] *Id.* at 1117.

[33] *Id.*

While the Court will not rely on bright-line rules or rebuttable presumptions, current credible social science is permissible for determining whether a factor is aggravating, mitigating, or neither. In *Simmons*, the Court cited research to show the relationship between the duration of a person's sobriety and their likelihood of relapse.[34] Similarly, in *Stevens*, the Court cited credible social science principles that were cited in non-admissions cases to find that the candidate's age at the time of his misconduct was a mitigating factor.[35]

This presents a challenging situation, in which Bar Counsel and the Board must be well-versed in both the applicable law and the ever-changing world of social science that supports that law when considering an application.[36] Because the nature of the review is highly individualized, the published cases provide little guidance on the application of either. As will be discussed in more detail later in this article, this amount of discretion is more susceptible to a biased disposition of cases, negatively impacting populations that already face barriers to entry in Washington's legal community.[37] Adhering to the practice in the cases cited, the discussion of the current impact and recommendations that follow are supported by social science findings. The approach of this article is to use research the Court would find helpful, and expect Bar Counsel and the Board to use, to propose changes to the rules and the process that would assist and provide general guidance on the character and fitness inquiry.

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[34] *Id.* at 1117–18.

[35] *In re Stevens*, No. 201,997-8, at 24.

[36] It would appear as though there is a burden for the applicant to be aware of and present this evidence to the Board and it also suggests that the Board should be doing its own research outside of the record. The Court may want to consider adding social science/studies to the rules.

[37] *See* Impact of the Current Process, infra Section III.3; Recommendation 1, infra Section IV.1.

3. Impact of the Current Process

As this article will discuss, the detrimental impact of the current character and fitness inquiry on vulnerable communities is significant. The purported purpose of the inquiry is to assess the morality of the individual in order to protect the public and preserve professionalism.[38] While these goals are laudable, terms like "morality" and "professionalism," and others used as part of the inquiry, are amorphous at best and often euphemisms for discrimination.[39] In 1957 Justice Black recognized the ambiguity of the term "good moral character" and stated that it only served to reflect "the attitudes, experiences, and prejudices of the definer."[40] "Professionalism" has also been recognized as a standard historically and arbitrarily defined by proximity to wealth, whiteness, and masculinity.[41] As this article will discuss in further detail, ambiguous terms present a significant barrier to entry for marginalized communities.

Although the use of these terms has not been specifically addressed, Washington has made significant strides to recognize the harm caused by the systems of oppression plaguing the legal system.[42] The WSBA also realizes the need to address the inequities in the profession. Specifically, the WSBA recognizes the need to strive for equal access to justice and how advancing diversity, equity, and inclusion in the legal profession contributes to this goal.[43] The WSBA's

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[38] *Simmons*, 190 Wash. 2d at 378.

[39] JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING, 9 -5 (Stanford University Press, 2022) (describing how language has been used to exclude disadvantaged or undesirable groups in the past including words like "dull, colorless, subnormal, unprepossessing, shifty smooth, keen, shrewd, arrogant, conceited, surly, and slovenly, radicals, religious fanatics."

[40] *Konigsber v. State Bar of California*, 353 U.S. 252 262 (1957)

[41] Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyles*, 36 Harv. BlackLetter L.J. 27, 27–28 (2020).

[42] Washington was the first state to adopt a court rule specifically aimed at eliminating implicit bias in jury selection. Washington has also recognized implicit bias at play in capital sentencing, even unanimously striking down the death penalty citing racial bias. Aronson, *supra* note 12, at 1016–19.

[43] Diversity & Inclusion, WSBA, https://www.wsba.org/about-wsba/equity-and-inclusion (last visited Apr. 20, 2023).

efforts to address these inequities include the creation of an Equity and Justice Team, an Access to Justice Board, a Council on Public Defense, a Diversity and Inclusion Plan and Public Service and Pro Bono programs.[44] The WSBA acknowledges the challenges historically marginalized groups face when attempting to enter the profession and has started to address bias in the character and fitness process by providing implicit bias training for the Board.[45] A non-discrimination policy is also included in APR 21, expressly prohibiting the Bar and the Character and Fitness Board from discriminating against any applicant on the basis of, among other things, race, color or ethnic identity; gender or gender identity; and sexual orientation.[46] The efforts in the state and by the WSBA show an acknowledgement of the problem. However, more work is needed.

Although the standards used to assess moral character have shifted to reflect society's changing norms and moral codes,[47] the results of a long history of—and often still present—prejudiced standards[48] is reflected in the membership of the WSBA. The most recent WSBA member licensing count reflects the homogenous population that makes up the profession in Washington (83% of respondents selected white European as their ethnicity and 56% selected male/man as their gender).[49] Despite well-documented and widespread knowledge of the racism

[44] *Id.*
[45] Aronson, *supra* note 12, at 1017.
[46] APR 21(c)
[47] *Simmons*, 190 Wash. 2d at 378.
[48] Howarth, *supra* note 39, at 9-5 (discussing the history of the profession and how fitness was defined by "being the son of wealthy Southern planters" in the 18th century and later evolving to reflect prejudice regarding economic status, race, gender identity, political ideology, sexual orientation, and religious affiliation).
[49] WSBA Member Licensing Count, WSBA, https://www.wsba.org/docs/default-source/licensing/membership-infodata/countdemo_20190801.pdf?sfvrsn=ae6c3ef1_86 [https://perma.cc/JH8H-6VEZ].

and bias in other aspects of the legal process, the profession has been slow to address it in the licensing process and specifically the character and fitness inquiry.[50]

The process to become an attorney is fraught with obstacles disproportionately difficult to overcome for historically disadvantaged groups.[51] The character and fitness review is particularly problematic.[52] The vagueness of the requirements compounded by the highly discretionary nature of the process can act as a cover for bigotries and biases in the name of protecting the image of the profession.[53] The timing of the review, and lack of conditional admission further exacerbate the problematic standards by depriving applicants of alternatives to entry and support in the application process.

In addition to the concerns noted about discrimination and bias, some believe that the stated purpose of the process is not being accomplished by the current inquiry. Ideally the process would protect the public from "bad apples" by keeping out aspiring attorneys that do

[50] While the Model Rules of Professional Conduct address client confidentiality, decorum, and law firm etiquette, they only added concerns with discrimination in 2016 and still fail to address bias. It was not until 2015 when the ABA updated standards for criminal justice to add anti-bias provisions. Kimberly Saltz, *Thinking Outside of the Box: Ethical Implications of the Unforeseen Backfire of Ban the Box Policies*, 34 Geo. J. Legal Ethics 1301, 1309 (2021). Washington Rules for Professional Conduct 8.4(g) & (h) address bias and discrimination and were added to the rules originally adopted in 1993.

[51] Wald discusses the "no problem" approach to diversity and its shortcomings. Under the "no problem" approach, diversity is seen as an inevitable outcome once formal discriminatory standards are removed (e.g. explicit prohibitions for women or BIPOC to attend law school or become attorneys). Wald posits that lack of diversity may persist as a result of minorities opting out, failing to meet the merit criteria, and be victims of structural or past discrimination, or economic inequalities preventing them from joining the profession. Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 Geo. J. Legal Ethics 1079, 1095 (2011).

Karen Sloan, *Does the bar exam cost too much? These law profs think so*, Reuters, https://www.reuters.com/legal/legalindustry/does-bar-exam-cost-too-much-these-law-profs-think-so-2022-04-22/ (last visited Apr. 20, 2023).

[52] Wald, *supra* note 51, at 1096, discussing how "seemingly objective and meritocratic, admission and hiring standards may turn out to be culturally manufactured, subjective and biased."

[53] Howarth, *supra* note 39, at 9-4; *See also* Aronson, *supra* note 12, at 1000, describing Simmons' experience.

not meet the requirements. Predicting human behavior is a complex if not impossible task.[54] Social science research reflects that a person's "character" is not fixed, and moral behavior is neither consistent nor predictable.[55] Moreover, albeit limited, the research on lawyer misconduct suggests that the factors triggering additional scrutiny during the application process (financial records, mental health, and substance abuse issues among others) do not correlate to the triggers for disciplinary investigations of practicing attorneys.[56] The limited research shows that there is very little correlation between factors triggering Board review and the reasons attorneys are disciplined.[57] The conduct of disciplined attorneys is more often rooted in personal difficulties that result in poor office management, neglect, overcharging, and unrealistic caseloads, among others.[58] More research is needed on the topic but the limited research available suggests that character and fitness assessments may be ineffective at protecting the public from lawyer misconduct.[59] It is a simple fact that every attorney who has faced disciplinary action, albeit a different standard, has been determined to have good moral character and fitness.

The next sections outline the impact of well-documented problematic aspects along with recommendations to lessen the burden. Although a "burn it to the ground" approach is tempting and arguably justified for some, the recommendations in this article specifically target

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[54] Howarth, *supra* note 39, at 9-3.
[55] Howarth, *supra* note 39, at 9-3.
[56] Howarth, *supra* note 39, at 9-12.
[57] Howarth, *supra* note 39, at 9-12 (citing Leslie C. Levin, Christine Zozula & Peter Siegelman, *The Questionable Character of the Bar's Character and Fitness*, 40 LAW & SOC. INQUIRY 51 (2015) (study of Connecticut lawyers showing that the information gathered in the character and fitness inquiry is of little value in predicting who will subsequently be disciplined)).
[58] Howarth, *supra* note 39, at 9-3 (citing DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 150 (2000).
[59] Howarth, *supra* note 39, at 9-13.

requirements that are well-documented contributors to discrimination of marginalized groups.[60] This article does not purport to be a full list of solutions to the problems faced by historically marginalized groups when attempting to join the profession. As other scholars have noted, additional research and analysis is needed to fully address the issues with the process.[61] However, the recommendations are intended to address "low hanging fruit" that can start the process of dismantling the unnecessary barriers currently in place.

Additionally, the recommendations in this article are mindful of the Washington Supreme Court's justifiable reluctance to establish bright line rules in the character and fitness process.[62] Although some states have opted for this approach,[63] bright line rules have historically been proven to be useful tools of discrimination.[64] Dishearteningly, history shows that standards suffer from the same susceptibility and can also be used to harm marginalized groups by serving as cover for biases and prejudices.[65] The recommendations in this article attempt to balance these concerns with the practical need for guidance for those involved in the day to day work (i.e. WSBA staff, Bar Counsel, and the Board).[66] The requests for guidance, clarity, and push towards bright line rules is especially understandable for applicants attempting to make sense of the requirements and for Board members struggling to apply the rules in an equitable manner while protecting the public.[67] Because of these reasons, and heeding the advice of scholars on the

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[60] Howarth, *supra* note 39, at 9-12.
[61] Aronson, *supra* note 12, at 1022.
[62] *Simmons*, 190 Wash. 2d at 378.
[63] Kansas, Missouri, Mississippi, and Texas have a bar on felony convictions, Kansas, Missouri, and Texas have a lifetime ban on all but a few felonies, and Mississippi, Florida, and Georgia require a pardon or restoration of rights. *See Generally* Howarth, *supra* note 39.
[64] Aronson, *supra* note 12, at 1012.
[65] Aronson, *supra* note 12, at 1012.
[66] Brent Williams-Ruth Memo on Proposed Ad-Hoc Committee for Character and Fitness Review (stating the need for guidance for volunteers serving on the Character and Fitness Board).
[67] Howarth, *supra* note 39, at 10-6.

matter,[68] the recommendations lean towards a "bright line" approach when removing barriers to entry that have a clear discriminatory effect. A "standards" approach continues to be recommended for any unchanged requirements. The hope is that this approach serves to remove problematic barriers while at the same time not creating unnecessarily rigid rules that may have unintended consequences.

The next section discusses the specific recommendations starting with proposed changes for APR Rules 21 and 24.1. This is followed by recommended changes to the process including the addition of a conditional admission process, adjusting the timing of the review, and providing applicants with additional support.

V. Recommendations

1. Changes to APR Rules 21, and 24.1

a. Limit Consideration of Unlawful Conduct Under APR 21(a)(1).

Recommendation

Eliminate from consideration the following "unlawful conduct:" (1) records of arrest not followed by a conviction, sealed, dismissed, or expunged convictions, and misdemeanor convictions where no jail sentence can be imposed; (2) juvenile records; and (3) unlawful conduct five years old or older.

Discussion

[68] Aronson, *supra* note 12, at 1021.

The Criminal System. It is well documented that the criminal system is plagued by racism and discrimination that severely disadvantages already disenfranchised populations.[69] Washington state specifically recognizes the persistent structural racism embedded in the state's criminal system and continues to research and document the systemic problems and the harm to disadvantaged communities.[70] As noted in the *2021 Race and Washington's Criminal Justice System Report to the Supreme Court*, the problems with the criminal system begin with the laws passed by legislative bodies, affect policing practices, and continue with practices and policies regarding how defendants are charged, convicted, and punished.[71] The list of police harm to communities of color includes disproportionate killings,[72] use of force, stops, searches, and arrests.[73] The harm continues as BIPOC are processed through the system shown by disproportionate convictions,[74] sentencing,[75] incarceration,[76] and death penalties.[77] The harm is further compounded by the disproportionate legal financial obligations placed on BIPOC communities.[78] Finally, and although not an exhaustive list, BIPOC individuals are disproportionately impacted after conviction by decisions related to supervised release, early

[69] *Supra* note 7.
[70] *Id.*; *See also* The Task Force 2.0 Research Working Group, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, 97 Wash. L. Rev. (2022) (hereinafter "The Task Force Report").
[71] The Task Force Report.
[72] Police are more likely to kill people from communities of color: Black people 3.6 times, indigenous people 3.3 times, Latinos 1.3 times and Pacific Islanders 3.3 times. The Take Force Report.
[73] Police are more likely to arrest people from communities of color: Black 3.2 times, Indigenous, 2.6 times, Asian 0.4 times. The Task Force Report.
[74] People of color are more likely to be convicted: Black people 2.7 times, indigenous people up to 1.7 times. In addition to disproportionality in the punishment given for felony sentences for certain kinds of offenses. White people are more likely to be sent to jail or receive an alternative punishment than being sent to prison. The Task Force Report.
[75] BIPOC defendants receive longer sentences than White defendants. The Task Force Report.
[76] Black people are 4.7 times more likely to be incarcerated. The Task Force Report.
[77] Black defendants in a capital case were 4.5 times more likely to be sentenced to death than similarly situated White defendants. The Task Force Report.
[78] Black, Latin, and Indigenous people have sentences involving legal financial obligations more frequently and at higher rates. The Task Force Report.

release, and reentry to their communities.[79] The harms listed still do not account for the ripple effect to BIPOC communities in general—families, friends, and neighbors—of those directly harmed by the system.[80] This analysis also does not account for the compounding effects of harming these communities through generations.[81]

Impact on Character and Fitness. Importantly, the harms caused by the legal system extend their reach to the character and fitness assessment. Because BIPOC individuals are more likely to have been pulled over, arrested, harshly sentenced, and incarcerated, they are more likely to be referred for Board review triggered by findings on their criminal record.[82] The harms caused by the criminal system are further compounded by the biases imbedded in the current character and fitness process.[83] The result is a disservice to the profession and the public as BIPOC are excluded from the profession.[84]

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[79] The Task Force Report.

[80] For example, the impact of mass incarceration practices in the 1990s when Black children had at 25.1% chance of having their father sent to prison compared to 3.6% for white children. The chance of being homeless while school aged had a 60% gap between black and white children. The monetary impact to a community can be up to $87 billion a year. The mental health impact to the community of those incarcerated. Andrea Roth, *Mass Incarceration*, 20 Berkeley J. Afr.-Am. L. & Pol'y 73, 76 (2019*).*

See also Roberts thorough discussion of the social and moral costs of mass incarceration including damages to social networks and norms, social citizenship, labor market, isolation, among others. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1304 (2004).

See also Finzen discussing the "collateral consequences" to communities of incarcerated individuals including loss of eligibility for assistance programs including food stamps and housing. Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 Geo. J. on Poverty L. & Pol'y 299, 320 (2005).

[81] Craig-Taylor aptly referencing LEWIS CARROLL, THROUGH THE LOOKING GLASS & WHAT ALICE FOUND THERE 238 (1946), to describe the Black experience. Specifically discussing the barriers to property acquisition for the Black community after years of slavery. Phyliss Craig-Taylor, *Through A Colored Looking Glass: A View of Judicial Partition*, Family Land Loss, and Rule Setting, 78 Wash. U.L.Q. 737, 738 (2000).

See also Quaid Galván's discussion of the cumulative harm framework as an effective tool for addressing second-generation discrimination. Nicolás Quaid Galván, *Adopting the Cumulative Harm Framework to Address Second-Generation Discrimination*, 11 Colum. J. Race & L. 147, 153 (2021).

[82] Aronson at 1017

[83] See discussion in Section III Impact of the Current Process

[84] Prior arrests and convictions records serve to exclude African American and Latinx applicants and provide little benefit to the public. Howarth Ch 9- 9

"Ban-the-box" Laws. In the broader employment context, Washington has acknowledged the unjust barriers to entry caused by the criminal system. In 2008, the Washington legislature enacted the Washington Fair Chance Act, "ban-the-box," prohibiting employers from asking applicants about arrests or convictions before conducting an initial screening to identify qualified applicants.[85] Supporters of the law highlighted the disproportionate negative impact on BIPOC when a criminal record is considered as part of the hiring process.[86]

The law was further supported by studies showing that past behavior is not always predictive of future behavior. In this context the research even showed that employees with a criminal record were assessed as better workers by their employers than individuals with no criminal record. [87] Concerns about future criminal activity were dissuaded by research showing that recidivism, to the extent it can be predicted, is driven by shame, isolation, violence, resource deprivation, lack of ability to improve circumstances, and a diminished capacity to meet one's economic needs.[88] This shows that someone who is employed—and therefore more likely to have sufficient resources, improve their circumstances, and the capacity to meet economic needs—is less likely to engage in criminal activity. This research and the enactment of "ban the box" helps dispel prejudices and biases against individuals with a criminal record.

[85] WASHINGTON 'BANS THE BOX' WITH FAIR CHANCE ACT. 25 No. 3 Wash. Emp. L. Letter 1

[86] WASHINGTON 'BANS THE BOX' WITH FAIR CHANCE ACT. 25 No. 3 Wash. Emp. L. Letter 1

[87] Statistics show that "employees with criminal backgrounds are 1 to 1.5 percent more productive on the job than people without criminal records." 264 Pamela Paulk, Vice President of Human Resources for the John Hopkins Health Resource Center, reviewed about 500 of their employees' employment files and found that the employees with a criminal record "had significantly higher retention rates" when compared to employees without a criminal record. Melissa Pascualini, Ban the Box: Breaking Barriers to Employment in the Private Sector, 37 Hofstra Lab. & Emp. L.J. 255, 280 (2019)

[88] Citing: Danielle Sered discusses the limits on rehabilitation in her book Until We Reckon. **Ellison Berryhill, Unintended Consequences: An Analysis of Six Proposals to Reform the U.S. Criminal Justice System**, 58 U. Louisville L. Rev. 485, 496 (2020)

<u>Solutions for Character and Fitness.</u> Despite this research and as acknowledged by Washington's Task Force on Race and the Criminal Justice System, knowing the infirmities plaguing the criminal system does not mean there are easy solutions.[89] In the legal profession, the protection of the public is of particular importance due to the potential impact to individuals in the vulnerable position of needing an attorney. Despite the flaws in the criminal system, exposing the public to individuals with a history of violating the law without additional information or any other protections is likely unadvisable. Therefore, although the criminal system is admittedly problematic, completely eliminating consideration of an applicant's criminal record may be rash at this time absent additional information or safeguards for the public.[90]

As a result, the recommendation to remove the specific criteria listed above is a conservative approach to help curve the negative impact from a broken criminal system.[91] Specifically, excluding records of arrests not followed by a valid conviction, sealed, dismissed, or expunged as well as misdemeanor convictions serves the purpose of filtering out violations that the system has already deemed as less serious.

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[89] Discussing postponing recommendations due to concerns raised regarding the vetting process and consensus on changes. The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 57 Gonz. L. Rev. 119, 134 (2022).

[90] There is research and early findings indicating that "there is no reliable evidence that criminal record screening has benefits for the public or the legal profession that outweigh the disparate adverse impact on people of color." Report of the Working Group on Question 26 of the New York State Bar Examination Admission Application at page 2 https://nysba.org/app/uploads/2021/11/H6.-Working-Group-on-Question-26-NYS-Bar-Exam-Admission-App-APPROVED-HOD-1.22.2022.pdf

[91] Washington Task Force on Race and Criminal Justice System 2.0 finding that "race continues to affect outcomes in the criminal justice system and matter in ways that are unfair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system." **The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 97 Wash. L. Rev. 1, 5 (2022)**

Juvenile Records.[92] Likewise, removing juvenile records from consideration is consistent with the legal system's determination that youthful offenses warrant flexibility. Washington already recognizes the sensitive nature of juvenile records and subjects them to numerous special statutes designed to protect juvenile offenders.[93] Washington state has also made strides to reform the juvenile system, albeit with little improvement related to race disproportionality.[94] The Washington Supreme Court has also recognized youth as a mitigating circumstance further solidifying the importance of considering someone's age when determining the impact of an offense on the person's future.[95] At the national level, the United States Supreme Court has also recognized differences between juvenile offenders and their adult counterparts.[96] Furthermore and specifically in the character and fitness process, the Washington Supreme Court has also recognized the age of the conduct as a relevant factor, even for conduct that is not considered part of someone's juvenile record.[97] These decisions support the idea that a person's actions during youth should be seen through a more forgiving lens. It is only reasonable that a line be drawn with juvenile offenses in the character and fitness process.

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[92] At the time of submission, the Subcommittee Chair was advised that the WSBA is presently in the process of removing questions on the application about matters involved in juvenile court.

[93] JuCR 10.1. Scope of Title 10, 4B Wash. Prac., Rules Practice JuCR 10.1 (8th ed.)

[94] Reforms noted included the codification of considering mitigating qualities of youth in sentencing, elimination of detention for status offenses, extension of juvenile rehabilitation to twenty-five, and expansion of juvenile offenses eligible for diversion among other listed in the report from the Washington Juvenile Justice Subcommittee. Fn 16. **The Task Force 2.0 Juvenile Justice Subcommittee, Race in Washington's Juvenile Legal System: 2021 Report to the Washington Supreme Court, 57 Gonz. L. Rev. 636, 638 (2022)**

[95] In State v Houston-Sconiers the Washington Supreme court recognized and cited Miller v Alabama, related to mitigating circumstances related to someone's youth including 'hallmark features' such as 'immaturity, impetuosity, and failure to appreciate risks and consequences.' **State v. Houston-Sconiers,** 188 Wash. 2d 1, 23, 391 P.3d 409, 421 (2017)

[96] Stating that children are constitutionally different from adults for sentencing purposes due to their lack of maturity and underdeveloped sense of responsibility. Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2458, 183 L. Ed. 2d 407 (2012)

[97] The court went beyond considering age in a juvenile record and included acts of the applicant as an adult. *Matter of Stevens* at 220.

"Stale" unlawful conduct. Lastly, limiting the use of unlawful conduct older than five years is consistent with the findings regarding recidivism and potential risk to the public based on the possibility of an applicant reoffending[98]. This recommendation is supported by other Washington scholars as well as by research on recidivism showing that six years after release, the risk of repeated unlawful conduct is the same between those with and without a criminal record.[99] Based on this research and assuming the main purpose of the character and fitness process is to protect the public from bad actors, removing stale conduct from consideration does not increase the risk to the public. A person who has never committed an offense poses the same risk as a person who completed their sentence once five years have passed. Removing this barrier that does not provide any protection for the public does not add risk and could open doors for qualified and more diverse candidates.

b. Eliminate Consideration of "Neglect of Financial Responsibilities" Under APR 21(a)(7).

Recommendation

Eliminate consideration of "neglect of financial responsibilities."

Discussion

Assessing whether someone is neglecting their financial responsibilities is intrinsically tied to their relationship with the financial services industry. Like the criminal system, the financial services industry has a long history of discrimination and racial inequity. Also like the criminal

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[98] The nuances of this rule are not meant to encompass a prohibition of introduction of unlawful conduct that may have led to the disbarment that is up for a reinstatement hearing. Whether or not the Court would want to expand this to include unlawful conduct while as an attorney in another jurisdiction or profession would be open for further debate and discussion should the Court agree with the premise of the recommendation.

[99] See Jennifer Aronson, Comment, Rules Versus Standards: A Moral Inquiry into Washington's C& F Hearing process, 95 Wash. L. Rev. 997 (2020) at 1021. See also https://s27147.pcdn.co/wp-content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf.

system, it is important to understand the structural racism imbedded within it.[100] Understanding the systemic nature of racism in the U.S. and how multiple systems of oppression converge and contribute to the disenfranchisement of BIPOC in the financial services industry is also of significant importance.[101] Neglect of financial responsibilities does not exist in a vacuum and is innately tied to the wealth disparity in the U.S.—which is significant and growing in the wrong direction.[102]

Importantly, wealth disparity disproportionality impacts people of color. BIPOC are more likely to live in poverty,[103] have lower household income,[104] and less wealth[105] than their white counterparts. The inequities specific to the financial industry occur in the context of a racist criminal system, unequal access to housing, education, and jobs, resulting in persistent intergenerational poverty.[106] While each of these topics deserves a detailed discussion, they are presented here merely as background to understand the specific inequities within the financial

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[100] Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics, 22 Hous. Bus. & Tax. L.J. 1, 4 (2021)

[101] Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics, 22 Hous. Bus. & Tax. L.J. 1, 4 (2021)

[102] The Pew Research Center noted that income inequality in the U.S. has increased since 1980 and is greater than peer countries regardless of the metric used. https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/. Also noted that Black Americans face more economic insecurity than Americans overall. https://www.pewresearch.org/short-reads/2022/02/23/most-black-americans-say-they-can-meet-basic-needs-financially-but-many-still-experience-economic-insecurity/ Minorites are more likely to live in multigenerational family households in an effort to protect against poverty. https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/

[103] In 2020 minorities had a higher percentage of living in poverty than their white counterparts: Hispanics by 8%, Black 12%. https://www.pewresearch.org/interactives/racial-and-ethnic-gaps-in-the-u-s-persist-on-key-demographic-indicators/

[104] Median household income adjusted for household size and scaled to reflect a 3 person household, in 2019 dollars, Hispanic lower by $31,900 per year, Black lower by $33,900. https://www.pewresearch.org/interactives/racial-and-ethnic-gaps-in-the-u-s-persist-on-key-demographic-indicators/

[105] Median wealth of families was $153,100 lower for Hispanic households and $165,000 lower for Black households. https://www.pewresearch.org/interactives/racial-and-ethnic-gaps-in-the-u-s-persist-on-key-demographic-indicators/

[106] Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics, 22 Hous. Bus. & Tax. L.J. 1, 4 (2021)

system that may result in a finding of "neglect of financial responsibilities." The financial services industry has a long history of harm including discriminatory lending practices resulting in harm to BIPOC's credit reports and scores, further exacerbating the poverty BIPOC experience and resulting in poor financial records. The discussion in this section aims to provide glimpses into the history of harm to disadvantaged communities at the hands of the banking system including discrimination in home mortgages, consumer and business lending, credit reporting, deposit products, and problem credit processes.

Lending and Housing. Firmly rooted in slavery—when black people were used as collateral for loans—the inequities in the financial services industry have persisted through the years despite attempts by regulators to address them.[107] Overt racist practices in the industry continued after slavery was abolished through lending practices like redlining—which includes prohibiting lending in geographic regions with high concentrations of minorities.[108] The federal government participated in the harm to BIPOC through the Federal Housing Administration (FHA)—the largest provider of home loans in the nation—by adopting redlining policies and creating low-income housing projects intended to segregate the population by race.[109] These practices continued for years and the harm to BIPOC communities went unchecked and often remains unrecognized.

While the Fair Housing Act made redlining illegal in 1968, discriminatory lending practices continued. As an example, reviews of lending practices as a result of the Great Recession of 2008

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[107] Discussing how enslaving gave plantation owners the ability to grow their economy. Also discussing credit secured by enslaved individuals and how this credit financed the expansion of the economy. **Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics,** 22 Hous. Bus. & Tax L. J. 1, 13 (2021)
[108] Vu-Dinh at 14
[109]Vu-Dinh at 14

found that minorities were targeted for subprime loans despite qualifying for conventional lending products.[110] The harm to BIPOC is further exemplified by the historic, and not isolated, $175 million settlement the Department of Justice ("DOJ") reached with Wells Fargo because of their discriminatory lending practices.[111] Over the history of the financial services industry, and specifically banking, there is a pattern and practice of discrimination. While overt discrimination is prohibited, it is often replaced or accompanied by more subtle iterations including discretionary and target pricing, and underwriting guidelines that disproportionately disqualify BIPOC from better financial products.[112]

Consumer and Business Lending. BIPOC are also disproportionately disqualified from other types of credit including consumer and business loans. Through tactics similar to redlining, consumer credit is less readily available and offered in worse terms for BIPOC than their white counterparts.[113] As an example, large auto lenders including Ally Bank and American Honda Finance Corporation have paid a combined $122 million to settle lawsuits alleging interest rate discrimination.[114] The same issues are seen in business lending. BIPOC small business owners are more likely to be asked for additional financial information, be given less information about

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[110] Vu-Dinh at 15 discussing how minorities were given subprime loans despite being eligible for better rates.
[111] Vu-Dinh at 16 quoting U.S. assistant attorney general for civil rights, Thomas Perez, "This a case about real people, African-American and Latino, who suffered real harm as a result of Wells Fargo's discriminatory lending practices .... People with similar qualifications should be treated similarly. They should be judged by the content of their credit worthiness and not the color of their skin ...."
[112] Target pricing allows the setting of interest rates and loan fees based on the amount of a loan. Higher fees and rates are justified on smaller loans, which are typically secured by homes in minority neighborhoods. Underwriting practices prohibit or limit the inclusion of roommate income (a common feature of BIPOC households) or income from the informal economy (Latino and Black workers make up 28% of the informal economy). Vu-Dinh at 14.
[113] Credit card offers vary based on the geographic location of the consumer. Neighborhoods with large minority populations receive less offers of credit and the terms offered are less advantageous even when controlling for credit scores and debt-to-income ratios. Vu-Dinh at 19.
[114] BIPOC borrowers were charged higher interest rates than white borrowers. The DOJ complaint stated that the higher interest rates were because of the borrower's race or national origin and not based on creditworthiness. Cain at 688.

product offerings, and be offered worse products than their white counterparts.[115] This is in addition to the targeted efforts by predatory lenders like payday lenders, pawn brokers, or Rent-to-Own stores, where BIPOC are offered products that are likely to further harm their financial health.[116]

Credit Reports, Credit Scores, and Discrimination. While harmful practices by specific providers of financial services are plentiful, it is also important to highlight systemic issues within the industry. Access to quality credit is increasingly important with broad ranging repercussions, from access to more and better lending products, leasing an apartment, accessing basic services like a cell phone or other utilities, and to obtaining employment even outside of the legal profession. [117] The lack of equity in lending product offerings and lending access in general for BIPOC has wide ranging impacts especially with the creation of credit reports and credit scores. The access and type of lending product available to an individual can impact their ability to have stable housing, cover an emergency, and make payments on time. Payment history in turn, is a significant factor in a person's credit report and credit score.[118]

Credit reports, explained by the Consumer Financial Protection Bureau (the "CFPB") as statements of information about a person's credit activity and current credit situation, may be limited for BIPOC if loans are not readily available.[119] A credit report is made up of personal information (name, address, social security number, date of birth, and phone number), credit

[115] Vu-Dinh at 20
[116] These lenders offer quasi-banking and quasi-lending products charging high interest rates and fees. Vu-Dinh at 21
[117] Discussing how credit invisibility can affect a consumer's ability to obtain employment, rent an apartment, obtain a cell phone, and access utilities without a deposit. https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf
[118] https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309/
[119] https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309/

account information, collection items, and public records (like liens, foreclosures, bankruptcies, civil suits and judgements).[120] Lack of credit account information, due to limited access to credit products, reduces the positive information available on a person's credit report. For example, if a person does not have a mortgage, a credit card, or other type of credit, their "good" payment history on rent, utilities, and medical bills is not part of their credit report. Conversely, "bad" payment history on any of these non-credit payments can reflect negatively on the consumer as the individual is referred to collection agencies and the courts through the filing of liens and judgements for parties seeking payment. In other words, although a long history of timely rent and utility payments will not benefit a consumer's credit report, late payments can result in collection items, liens, and judgements on their credit report.[121] The inequities in lending practices result in less opportunities for BIPOC to build credit, and in turn be eligible for better lending products. Conversely, these same inequities make the impact of any financial struggles exponentially worse as only negative activity is reported absent credit history on other credit products.

Items reported on a credit report also negatively affect a consumer's credit score. Credit scores are created with information from credit reports and although they can be provided concurrently, they are separate items. A credit score is a "prediction of credit behavior" typically created by Credit Reporting Agencies ("CRAs"), like Transunion, Equifax, and Experian, utilizing information from credit reports, and available for consumer review under certain circumstances

[120] https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309/

[121] It is worth noting that this is starting to change. The CFPB reported that an increasing number of public housing agencies now report tenant rental payments. However, this offered as an "opt-in" option. https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf

after the enactment of the Fair Credit Reporting Act (the "FCRA").[122] Credit scores are complex creations shrouded in mystery despite their wide-ranging impact to consumers.[123] A common and widely known credit score is the Fair Isaac Corporation ("FICO") score. FICO was a pioneer in credit scoring and widely used today by banks when determining whether a loan product will be offered or approved.[124]

Although technology, like credit scores, has improved processes within the financial industry in many ways, BIPOC have not benefited. Automating or involving computer generated processes in banking has not removed personal biases. Specifically, algorithms used to create credit scores and make credit determinations have proven to be useful tools for discrimination.[125] FICO specifically has been found to have imbedded bias and racially disparate impacts.[126]

Not having a credit score can also have a negative impact. The CFPB identified 20% of the adult U.S. population as "credit invisibles," or individuals lacking sufficient credit history to determine their credit score.[127] Unsurprisingly based on the factors considered on a credit report and the history discussed above, consumers in low-income neighborhoods are more likely to be credit invisible.[128] The practical result is that despite technological advances in banking, BIPOC

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[122] Credit scores can also be created by financial institutions. https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-score-en-315/ While consumers have the right to a free annual consumer credit report under 15 U.S.C.A 1681j, their credit score is only available under limited circumstances e.g. as part of the notices on a credit transaction under 15 U.S.C.A 1861m(h)(5)(E)

[123] See the CFPBs explanation of the factors that can be considered by credit scoring models and clarifying that there is more than one credit score. https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-score-en-315/

[124] https://www.consumerfinance.gov/ask-cfpb/what-is-a-fico-score-en-1883/

[125] **Jane R. Bambauer (FNa1) et. al., When A Small Change Makes A Big Difference: Algorithmic Fairness Among Similar Individuals**, 55 U.C. Davis L. Rev. 2337, 2351 (2022)

[126] **Jane R. Bambauer (FNa1) et. al., When A Small Change Makes A Big Difference: Algorithmic Fairness Among Similar Individuals**, 55 U.C. Davis L. Rev. 2337, 2351 (2022)

[127] https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf

[128] https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf vulnerable populations also include Black and Latin consumers, young consumers,

continue to be disproportionately denied credit and financial services, although now through automated processes.[129]

Banking Services. Discrimination in the financial industry does not stop with lending products. BIPOC and the poor, often overlapping categories,[130] are offered deposit products and banking services with higher fees and less advantageous terms.[131] Most recently, the CFPB identified deposit products that were unfair, deceptive, or abusive due to their practices around overdraft and non-sufficient funds fees.[132] Financial institutions have been faced with enforcement actions and class action lawsuits due to these practices, which generally disproportionally affect people of color.

Collections, Workouts, and Bankruptcy. The harm from the financial industry does not stop at denying credit or offering deceptive products. The collections process is also plagued by unfairness.[133] BIPOC receive less advantageous terms at loan origination, are more likely to lose their homes to foreclosures,[134] and more likely to file for bankruptcy protection.[135] Efforts to address the known issues in the financial industry include the enactment of the Fair Housing Act,

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[129] Black and Latinx individuals have lower credit scores than their White counterparts. Terrence Cain, The Bankruptcy of Refusing to Hire Persons Who Have Filed Bankruptcy, 91 Am. Bankr. L.J. 657, 660 (2017)
[130] See income and wealth disparity discussion at the beginning of this Section.
[131] Vu-Dinh at 21
[132] https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf. As an example, the CFPB ordered Regions Bank to pay $191 million for illegal surprise overdraft fees. https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/
[133] As an example, Navy Federal Credit Union was ordered to pay $28.5 million for improper debt collection actions including falsely threatening legal action and wage garnishment and misrepresented credit consequences of falling behind on a loan. https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-navy-federal-credit-union-pay-285-million-improper-debt-collection-actions/ More recently, the CFPB ordered Portfolio Recovery Associates, one of the largest debt collectors in the nation, to pay $24 million for continued illegal debt collection practices and consumer violations.
[134] Black and Latinx homeowners were 70% more likely to lose their home to foreclosure during the Great Recession. Cain at 687.
[135] Cain at 689

the Community Reinvestment Act, the Equal Credit Opportunity Act, and the Credit Card Accountability Responsibility and Disclosure Act, and the creation of the CFPB, among others.[136] Yet despite these attempts at exorcising discrimination from the industry, BIPOC continue to have limited access to quality credit and financial services in addition to historically lower income, and wealth.[137]

Predicting Behavior. Though the character and fitness review does not attempt to predict behavior, a discussion with multiple members of the Character and Fitness Board from 2015 through the present, believe that without further guidance as to how to analyze, interpret, and apply the applicable rules, they believe and feel as though they are being asked to predict behavior.[138] The following section is provided in response to those statements.

As with other studies related to predicting human behavior, it is unclear whether an individual's credit history can provide useful information to predict their actions in the future. [139] Commentators do not agree on whether past financial blemishes predict whether an individual has good moral character, measured by whether they are likely to steal, be responsible or honest, have good judgement, or be qualified for a job. [140] This is further supported by research showing that, contrary to popular belief, most bankruptcies are not caused by financial recklessness but rather job losses and medical problems.[141] Tellingly, studies show that most people in the United States are living pay check to pay check and would not be able to withstand a $400 emergency.

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[136] **Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics,** 22 Hous. Bus. & Tax L. J. 1, 2 (2021)
[137] Terrance Cain at 689
[138] Interviews of Character and Fitness Board members conducted by subcommittee chair Brent Williams-Ruth from June 2020 through May 2023. Notes on file with author.
[139] Terrance Cain at 660
[140] Terrance Cain at 660
[141] Job losses, medical problems and divorce account for 85% to 90% of bankruptcy filings. Terrance Cain at 661

[142] Moreover, bank products, like deposit accounts where customers with lower balances are more likely to be charged fees than those with higher balances, further stretch the financial resources of poor communities. [143] This speaks to the economic realities of the majority of the population and the role these realities play in the financial history of job applicants, including those applying to become attorneys.

The complexity of the financial system further compounds the negative impacts of its shortcomings. Understanding concepts like building credit, equity, balancing a check book, shopping for rates, FICO scores, among other financial concepts requires research by consumers and transparency from financial institutions. The general population's lack of knowledge regarding the workings of financial institutions is significant enough to warrant the creation of a federal body to protect the public, like the CFPB. The CFPB was created to implement and enforce consumer financial law that ensures consumer financial products are fair, transparent, and competitive.[144] Yet despite having laws and regulations enacted to protect the public, the majority of the public continues to be harmed by the financial industry.[145] Financial literacy is an absolute requirement to be able to navigate the complex banking and financial systems and has proven to be a better indicator of future financial success.[146]

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[142] "In May 2015, the Board of Governors of the Federal Reserve System published a "Report on the Economic Well-Being of U.S. Households in 2014 ("Fed Report")." The Fed Report revealed that 47% of Americans could not easily come up with $400 to cover an emergency. Fourteen percent could not come up with that amount at all; 10% would have to sell something to raise that amount; 18% would have to use a credit card that they could not pay in full at the next billing cycle; 13% would have to borrow from friends or family; and 2% would have to use a payday loan." Terrence Cain, The Bankruptcy of Refusing to Hire Persons Who Have Filed Bankruptcy, 91 Am. Bankr. L.J. 657, 690 (2017)

[143] Vu-Dinh at 21

[144] https://www.consumerfinance.gov/about-us/

[145] Most recently, the CFPB has highlighted the impact of "junk" fees including overdraft and non-sufficient fund fees. https://www.consumerfinance.gov/rules-policy/junk-fees/

[146] "Financial literacy is one of the most effective tools supporting household economic growth by equipping individuals with the ability to handle both daily and long-term financial decisions. Without it, it is difficult to

Character and Fitness. Continuing the consideration of "neglect of financial responsibilities" perpetuates and exacerbates the damage done by this industry.[147] Although financial troubles have historically been classified as a type of moral failing, as noted above, most U.S. residents live in financially unstable situations. Moreover, the history of discrimination in the U.S. compounded with the discriminatory practices in the financial industry disproportionately impact BIPOC. Removing "neglect of financial responsibilities" from consideration will help alleviate this additional barrier for diverse applicants. Consideration of the financial status of an applicant is a vestige of antiquated requirements intended to keep disadvantaged groups outside of the profession.[148]

Consideration of the applicant's money management skills is understandable based on concerns with the management of client funds, as well as personal funds, and the impact mismanagement can have on the public. This concern is legitimate and often a cause for attorney discipline.[149] However, the limited research on attorney conduct indicates that disciplined lawyers do not have history of financial struggles.[150] Conversely, financial blemishes in the application process are not an indicator of future disciplinary actions related to mismanagement of funds.[151] Despite the validity of the concern, the current inquiry into an individual's financial

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negotiate better loan terms or credit card offers. According to a 2015 National Financial Capabilities Study of over 27,000 individuals nationwide (at least 500 in each state), sponsored by the FINRA Investor Education Foundation, minorities scored 6-15 points lower on financial literacy tests than whites." Kim Vu-Dinh, Black Livelihoods Matter: Access to Credit As A Civil Right and Striving for A More Perfect Capitalism Through Inclusive Economics, 22 Hous. Bus. & Tax L. J. 1, 22 (2021)

[147] Aronson at 1026.

[148] Howard discusses how in the latter part of the 18th century proximity to wealth and gender were used as a proxy for "fitness" to enter the profession. Howard Ch. 9 pg 5.

[149] Howarth Chapter 9 pg 1

[150] Howarth Chapter 9 pg 5

[151] Howarth Chapter 9 pg 5

past does not alleviate it. Instead, this requirement is perpetuating the inequities against disadvantaged groups and preventing the profession from becoming more diverse.

Additionally, there are alternative options for protecting the public. Rather than focusing on financial history as a requirement for entry, efforts would be better spent providing practicing attorneys tools to better manage their own, and their client's funds.[152] As noted above, increasing financial literacy in the profession would also be a better solution to protect the public than reviewing an applicant's financial history.

c. Revise and Provide Guidance Regarding Consideration of "Omissions" and "Candor" Under APR 20(c), APR 21(a)(3) and APR 21(b)(7)-(8).

Recommendation

Revise and provide guidance regarding consideration of "omissions" and "candor."

Discussion

Although a seemingly reasonable expectation—that an applicant be open about their shortcomings during the character and fitness process—this requirement has morphed, and the weight of this factor has reached a level that is no longer reasonable. The need for guidance, definition, and direction from the Court is critical for a fair and equitable process. Research shows that the candor requirement in character and fitness reviews has become a bigger barrier for admission to the bar than the past misconduct itself.[153] Additionally, although candor is a conceptually reasonable expectation, in practice it has the potential of causing confusion,

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[152] "Borrowing" client funds as a result of gambling issues is a more common reason for discipline in the profession. Howarth Chapter 9 pg 1.

[153] Howard discussing Deborah Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 544 (1985). Ch 9 footnote 9.

masking bias, and be misconstrued due to the limited understanding and education about trauma.[154] Lastly, as with other recommendations in this article, historically disadvantaged groups bear the brunt of these challenges.

Potential for Confusion. Omissions, qualified as moral failings during the character and fitness review, are often due to applicant stress and confusion about the requirements.[155] This experience of confusion is shared by many applicants and exemplified by Simmons' experience. During her character and fitness review, the Board initially found that Simmons lacked candor because she did not disclose information about her sealed juvenile record in her law school application.[156] Simmons' lack of disclosure was reasonable based on Washington state law permitting individuals with a sealed record to treat it as if it never occurred.[157] While the Board and Washington Supreme Court ultimately concluded that Simmons demonstrated candor,

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[154] Lack of candor is a reason applicants can be disciplined after admission. So, revisions to the expectations regarding candor should be done in conjunction with RPC 8.1(a) and (b).

RPC 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS An applicant for admission to the bar, or a lawyer in connection with an application for reinstatement or admission to the Bar or a disciplinary matter involving a legal practitioner, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6. [Adopted effective September 1, 1985; Amended effective October 1, 2002; September 1, 2006; April 14, 2015; June 4, 2019.]

[155] *See* Howard discussing her experience during the character and fitness inquiry when completing her application to become a licensed attorney. Even after attending law school, the application caused confusion regarding her record and obligations to report. Howard Ch 9 pg 1.

[156] Aronson, *supra* note 1212, at 1007.

[157] Aronson, *supra* note 12, at 1007; *See also* RCW 13.50.260(6)(a).

Simmons' initial confusion regarding the disclosure requirements is justified and was improperly characterized as lack of candor.[158]

Like *Simmons*, *Stevens* is another example of the application process being burdened by confusion regarding disclosure requirements. Like in Simmons, the Board in Stevens determined that Stevens made a false statement or omitted information based on Stevens' answer regarding felony charges.[159] The Court noted in Stevens that the discrepancy was better explained by the applicant's understanding of the expungement statute in Utah, the applicable jurisdiction.[160] It is noteworthy that in both of the most recent cases, the Court came to conclusions regarding candor and omissions that were opposite to the Board's determinations.

Simmons and *Stevens* are clear examples of applicants being confused about the disclosure requirements. This confusion in turn can increase stress levels and the potential for inadvertent omissions. Applicants have a shared experience of fearing overlooked or forgotten parking tickets or events that might be deemed relevant by the Board.[161] The stress and confusion is compounded by the sheer volume of questions involved in the process.[162] Additionally, the mere nature of the proceedings can create confusion and cause an applicant to omit information that can be interpreted as lack of candor by the Board.[163]

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[158] Aronson, *supra* note 12, at 1007; Matter of Simmons at 391

[159] Matter of Stevens at 218-219.

[160] *Id.* at 219.

[161] Aronson, *supra* note 12, at 1007.

[162] The Washington Application for Licensure requires listing every address (where you lived for longer than one month), every job (and an explanation for any unemployment periods), for the last ten years or since age 18; every revoked credit card, defaulted or past due debt; any warnings, questioning or confrontations regarding job performance in the past five years.

[163] Aronson, *supra* note 12, at 1007.

Potential for Bias. In addition to the potential for confusion, determinations of candor can help mask and hide biases. Assessments of candor are highly subjective and therefore susceptible to prejudice. Regardless of intent, when determinations are highly subjective bias can creep in.[164] Importantly, cognitive bias is known to be stronger when the person assessed or reviewed is a member of a minority in a group.[165] As with other concerns noted in this article, this results in a disproportionately negative impact to already disadvantaged individuals. Additionally, research shows that the potential for bias is exacerbated when there is a perceived negative attribute.[166] In practical terms, this means that an assessment of candor of an applicant already referred to the Board for review will be harsher than an assessment of candor outside of these circumstances. Biases related to individuals who have already been flagged as having a "substantial question" regarding their character and fitness to practice law are only going to intensify the negative association. As a result, there is a stronger likelihood that the Board will find "lack of candor" for any applicant referred. Other stereotypes related to race, economic status, gender, criminal background, among others, are likely to further compound biases and a negative finding for marginalized applicants.

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[164] **Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity**, 47 Stan. L. Rev. 1161, 1193 (1995)

[165] "Taylor and his colleagues compared subjects' judgments of a black person when he was the only black person in an otherwise all white group and when he was in a fully integrated group.
In the "solo" condition, participants judged the black participant in more extreme ways and perceived him more prominently in the discussion than in the "integrated" condition. **Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity**, 47 Stan. L. Rev. 1161, 1193 (1995)

[166] Explaining that an illusory correlation is created in the formation and maintenance of stereotypes. **Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity**, 47 Stan. L. Rev. 1161, 1195 (1995)

Impact of Trauma. In addition to the potential for confusion and greater opportunity for bias, the impact of trauma, and the added trauma associated with the retelling of traumatic stories, may affect traditional notions of candor and honesty. Before expanding on the effect of trauma on notions of candor, it is important to understand what trauma is and who is affected by trauma.

PTSD is the most commonly known type of official trauma diagnosis.[167] However, traumatic events have a wider definition and can be characterized by events that inspire "helplessness and terror."[168] Moreover, Adverse Childhood Experiences (ACEs),[169] when experienced for prolonged periods, can result a different type of trauma diagnosis, Complex PTSD. ACEs can include exposure to violence, abuse or neglect, mental health disorders and substance abuse in the family, housing instability, growing up in an unsafe or crime-heavy environment, and chronic poverty.[170] These factors are all too common and often do not result in an official trauma diagnosis like PTSD or C-PTSD. Unsurprisingly, ACEs overlap with factors that contribute to the creation of a criminal record and poor financial history. Regardless of fault, traumatic experiences affect the way a story is told and retold. The result of these converging factors is that individuals referred for Board review are more likely to have experienced trauma because of their life experiences.

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[167] **Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 485 (2016)**

[168] **Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 485 (2016)**

[169] Defined as traumatic events that occur in childhood. https://www.medicalnewstoday.com/articles/adverse-childhood-experiences

[170] https://www.medicalnewstoday.com/articles/322886#causes See also Todd J. Clark et. al., Meek Mill's Trauma: Brutal Policing As an Adverse Childhood Experience, 33 St. Thomas L. Rev. 158 (2021)

Moreover, marginalized communities are more likely to experience ACEs, and therefore more likely to experience trauma.[171] This is worth highlighting as any applicant from a marginalized community is even more likely to come into the character and fitness process with a history of trauma. This means that the stories they tell, the information they choose to share, and the way the information is shared will inevitably be colored by these traumas.

These traumatic experiences have a significant impact on how a person communicates, particularly when discussing the events that caused the trauma. Through more recent research we understand that the brain of a person with trauma will not always respond in expected ways.[172] A person that has experienced trauma may share their story in ways that defy expectations and may be deemed not credible.[173] Trauma can make it difficult to share a story, causing the applicant to omit potentially relevant information that could help explain their situation, reaction, or response.[174] As a result, the typical markers of honesty and candor are not reliable when trauma is involved.[175] "Vague" or "evasive" answers, conventional markers of dishonesty, are to be expected when an individual is sharing stories related to their trauma.[176]

[171] https://www.medicalnewstoday.com/articles/322886#causes

[172] "But psychological trauma is common among refugees,9 and the stories told by trauma survivors defy our expectations for a "credible" story. Trauma narratives tend to be fragmented and disjointed, both logically and chronologically." **Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 461 (2016)**

[173] "But psychological trauma is common among refugees,9 and the stories told by trauma survivors defy our expectations for a "credible" story. Trauma narratives tend to be fragmented and disjointed, both logically and chronologically." **Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 461 (2016)**

[174] Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 484 (2016)

[175] Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 494 (2016).

[176] Stephen Paskey, Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 494 (2016).

In the character and fitness assessment process this may result in an applicant not answering questions as thoroughly as the Board would expect or prefer. Rather than this being an indication of lack of candor or a moral failing, this response may be better explained as a result of trauma.

To summarize, determinations of candor are highly subjective and particularly susceptible to bias. Additionally, the individuals referred to the Board are more likely to have experienced trauma which may affect their ability to show the markers typically associated with candor. Lastly, as with the other barriers to entry discussed in this article, the shortcomings and pitfalls of these assessments tend to disproportionately affect marginalized communities.

d. Revise and/or Weight the Aggravating and Mitigating Factors Under APR 21(b).

Recommendation

Revise and/or weight the aggravating and mitigating factors under APR 21(b).

Discussion

The character and fitness assessment is highly discretionary.[177] The Washington Supreme Court has highlighted the importance of evaluating bar applicants on an individualized manner and the preference for staying away from bright line rules.[178] This approach is both intentional and justified as discussed elsewhere in this article.[179] However, the lack of published opinions and guidance has created confusion regarding the practical application of the factors. The Court

[177] Aronson, *supra* note 12, at 1000.
[178] Matter of Simmons, 190 Wash. 2d 374, 389, 414 P.3d 1111, 1117 (2018)
[179] See Section III Impact of the Current Process

has recognized these challenges as is seeking ways to alleviate them—as exemplified by the creation of the Committee that prompted this article.[180]

Revising the factors into two categories, aggravating and mitigating, attempts to strike a balance between allowing discretion—particularly when considering mitigating circumstances—and a more “bright line” approach by removing from consideration problematic factors when determining aggravating circumstances. Alternatively, the Court can issue guidance pertaining to precisely how the Board is to utilize these factors, such as a proportional weight or by assigning a specific “degree of weight” to each factor. This approach also aims to alleviate the potential damage caused by factors more susceptible to biases--like the applicant’s age at the time of the conduct, an assessment of reliability, candor, and omissions. The continued use of these items as mitigating factors further reduces the potential harm caused by them and continues to provide the Board with the flexibility needed to make individual assessments.

The current system in place may be suitable for the Court, who is the ultimately decision-maker in this process, but it unduly burdens the Board who is tasked with the review of all submitted materials, conducting the hearing, and listening to each of the witnesses. When looking at comparative examples of our legal system, the criminal justice realm provides examples of how the more crimes that are present, the greater the potential sentence – or – the different level of crime committed, the range of the potential punishment. Imagine if you will, a society where every crime was punishable by death or life incarceration – no matter how small. We can collectively agree that such a system would be preposterous. The character and fitness

[180] See Proposal of Ad-Hoc Committee for Character and Fitness Review by Brent Williams-Ruth dated September 23,2020.

analysis and recommendation can have that same effect of a lifetime punishment. A greater sense of transparency in the application would benefit not only the public, but also the applicants, the Board, and the WSBA staff.

e. Eliminate "Sufficiency of Punishment" Under APR 21(b)(9)(iii).

Recommendation

Remove "sufficiency of punishment" from the aggravating and mitigating factors under APR 21(b)(9).

Discussion

As discussed elsewhere in this article, the stated goal of the character and fitness inquiry is to assess moral character and fitness to practice law.[181] As such, the assessment is subject to the changing attitudes and community standards on morality.[182] A factor challenged by today's attitudes and community standards is the concept of "sufficiency of punishment" and its relationship to moral character.[183] While this factor was used by the *Simmons* Court to contrast the application process with the attorney discipline process, the court did not elaborate on how this factor advances the stated purpose of the inquiry—namely to assess moral character and fitness to practice law. [184]

In contrast to the purpose of the character and fitness inquiry, the "paramount" purpose of the criminal system has been recognized as punishment.[185] Despite this acknowledged

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[181] APR 20(c) and (d)
[182] The Washington supreme court acknowledged this in their Simmons opinion. Matter of Simmons, 190 Wash. 2d 374, 378, 414 P.3d 1111, 1112 (2018)
[183] Considering the sufficiency of the punishment also focuses on applicants who have been punished--and many studies show that applicants from communities historically underrepresented in the legal profession are punished at a greater rate which exacerbate the structural concerns raised by this subcommittee report.
[184] Matter of Simmons, 190 Wash. 2d 374, 388, 414 P.3d 1111, 1117 (2018)
[185] State v. T.C., 99 Wash. App. 701, 707, 995 P.2d 98, 102 (2000)

purpose, even in the criminal system, reforms have been made to promote more laudable goals including the protection of the public, accountability, and rehabilitation.[186] This shows the changing nature of society's perception of fairness, justice, and the goal of the legal system. Moreover, even in the criminal context where punishment is more readily acknowledged as a purpose, notions of "sufficient punishment" are not static and involve concepts like retaliation, retribution, proportionality, deterrence, and rehabilitation.[187] More recently, scholars have even challenged the purpose and benefit of punishment in the criminal system.[188] The goals of the legal system involve complex theories and notions about justice that are better argued by scholars on the topic and not the subject of this article. [189] These notions are salient to the discussion at hand to the extent they provide context on the changing perceptions and the contemporary discussions related to these concepts.

Despite its differences, a commonality between the criminal system and the character and fitness inquiry is the concern with protecting the public. However, even in this narrower topic there is no consensus on the best way to accomplish this goal. The scientific community has criticized the criminal system's theoretical framework highlighting the fact that human behavior is complex, shaped by many factors, and difficult to predict.[190] Protecting the public is therefore

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[186] State v. Murray, 128 Wash. App. 718, 724, 116 P.3d 1072, 1075 (2005)

[187] **Elizabeth Bennett, Neuroscience and Criminal Law: Have We Been Getting It Wrong for Centuries and Where Do We Go from Here?, 85 Fordham L. Rev. 437, 438 (2016)**

[188] **Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platow, Retributive and Restorative Justice, 32 Law & Hum. Behav. 375, 376 (2008)**

[189] See Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platow, Retributive and Restorative Justice, 32 Law & Hum. Behav. 375 (2008) (discussing and comparing the appropriateness or morality of retributive and restorative justice). Nicola Lacey, Getting Proportionality in Perspective: Philosophy, History, and Institutions, 50 Crime & Just. 77 (2021) (discussing proportionality and questioning its conception as a moral precept).

[190] Mark R. Fondacaro, Rethinking the Scientific and Legal Implications of Developmental Differences Research in Juvenile Justice, 17 New Crim. L. Rev. 407, 431 (2014)

an almost impossible task to attempt or measure since deterrence of criminal behavior—which theoretically will in turn protect the public—is difficult to measure let alone precipitate.[191] Rehabilitation, another way to protect the public, suffers from similar challenges.[192] Without digging further into the woes of determining what constitutes sufficient measures to protect the public, it is sufficient to highlight that even when narrowing down the scope of "sufficiency of punishment" to the salient topic of protection of the public, the answer is ambiguous at best and impossible at worst.

If on the other hand, the "sufficiency of punishment" standard is meant to assess an applicant's moral character *after* completing the punishment, this would be better expressed as sufficiency of rehabilitation and not punishment. Although the result would likely be similar because of the challenges in assessing rehabilitation mentioned above. [193] Regardless of the purpose, the standard is amorphous, highly debated, and contributes little to a character and fitness assessment.

Detriment of Considering Punishment. Not only is the contribution of "sufficiency of punishment" minimal to the process, it also has the potential of harming already vulnerable applicants. In the criminal context, and specifically in Washington, punishment is acknowledged as problematic. [194] As previously noted, in Washington BIPOC receive disproportionately harsher

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[191] Benjamin L. Apt, Do We Know How to Punish?, 19 New Crim. L. Rev. 437, 449 (2016)
[192] Benjamin L. Apt, Do We Know How to Punish?, 19 New Crim. L. Rev. 437, 459 (2016)
[193] Rehabilitation is difficult to ascertain and can't be measured without considering the efforts made to "ameliorate the social circumstances, such as deleterious family relations or child abuse, poverty and unemployment, inadequate education, or a local culture that encourages certain crimes." Benjamin L. Apt, Do We Know How to Punish?, 19 New Crim. L. Rev. 437, 459 (2016)
[194] See Section IV.1.a. discussing the findings from The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court

punishments than their white counterparts.[195] These known issues with disproportionality in criminal punishment are a result of the same systemic issues and potential for bias present in the character and fitness inquiry process.[196] Like in the criminal system, the character and fitness inquiry process involves numerous actors—such as board members, bar counsel, and the courts—whose opinions and judgements may be affected by conscious and unconscious biases. [197] Like in the criminal system, seemingly facially neutral policies, can have discriminatory effects.[198] Importantly, like in the criminal system, assessments of "sufficiency of punishment" present another opportunity to further marginalize and disproportionately negatively impact marginalized communities.

In summary, the "sufficiency of punishment" factor does not provide relevant information in the assessment of an applicant's moral character and fitness to practice law. The value add in the protection of the public is questionable at best. Lastly, assessing "sufficiency of punishment" provides another opportunity to compound the harm caused by other systems of oppression by once again subjecting the individual to a vague and bias-susceptible factor.

f. Change The Burden of Proof Under APR 24.1(c).

Recommendation

[195] The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 97 Wash. L. Rev. 1, 21 (2022) (finding that people of color are sent to prison instead of jail or alternative punishments, receive sentences to Legal Financial Obligations (LFOs) more often, receive longer sentences, are more often sentenced to death

[196] The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 97 Wash. L. Rev. 1, 54 (2022) (discussing the role of bias and systemic and structural racism).

[197] The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 97 Wash. L. Rev. 1, 21 (2022)

[198] The Task Force 2.0 Research Working Group, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, 97 Wash. L. Rev. 1, 21 (2022)

Lower the burden of proof under APR 24.1(c) from "clear and convincing evidence" to a "preponderance of the evidence" standard.

Discussion

The importance of the burden of proof in any proceeding cannot be understated. Justice Brennan famously summarized its importance by stating that "where the burden of proof lies may be decisive of the outcome."[199] This rings true in the character and fitness process as well. In order to decrease potential harm, the recommendation is to lower the burden placed on the applicant. This change would help mitigate the potential for bias and discrimination and align with burdens in civil cases.

<u>Burden Theories: Risks Associated with Uncertainty.</u> Scholars posit that the burden of proof is intended to minimize uncertainty through two main functions, "dealing with risk" and "coping with ignorance."[200] The burden allocation is intended to produce the best possible outcome, "maximizing the expected utility of the legal proceedings."[201] In the character and fitness inquiry, two opposing risks can be identified: excluding qualified applicants and including unfit applicants. In other words, the burden should minimize the risk of excluding qualified applicants *and* the risk of including unfit applicants. In order to determine the right level of burden, the risks associated with an erroneous answer must be assessed.

A higher burden is clearly understood from the perspective of the high risk to the public if unfit attorneys are admitted to the Bar. "Attorney misconduct can impose a substantial

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[199] Speiser v. Randall, 357 U.S. 513, 525 (1958).
[200] Lawrence B. Solum, You Prove It! Why Should i?, 17 Harv. J.L. & Pub. Pol'y 691, 701 (1994)
[201] Lawrence B. Solum, You Prove It! Why Should i?, 17 Harv. J.L. & Pub. Pol'y 691, 701 (1994)

financial burden on the public and undermine the public's confidence in the legal profession."[202] Attorney misconduct can have far reaching consequences including significant financial cost,[203] and life changing repercussions for the victims involved.[204] Misconduct also reflects poorly on the profession, and the erodes trust in legal system. [205] These high stakes explain the focus on protecting the public from bad actors by having a higher burden threshold.

However, this approach ignores the risk to the public from excluding qualified applicants. As discussed throughout this article and as reflected by the current makeup of the Bar, the exclusion of applicants has disproportionately affected marginalized communities.[206] The harm to the public from this historical exclusion is evident and widely acknowledged by the WSBA as exemplified by the efforts to improve diversity and inclusion in the profession.[207] Lack of diversity is more than a risk, it is a reality, and the results and harm to the public are real as well. Homogeny in the profession hampers critical thinking and problem solving and encourages "group think."[208] In other words lack of diversity creates an environment where the attributes that are anathema to the law prevail. The impacts of this reality are far reaching as expressed by the American Bar

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[202] Jennifer Staley, Professional Responsibility-the "Snitch Rule," Dr 1-103(a), Meets the Employment-at-Will Doctrine: Weider v. Skala, 19 J. Corp. L. 353, 370 (1994) (citing Marcia Chambers's article Why Lawyers Must Police Themselves).

[203] Jennifer Staley, Professional Responsibility-the "Snitch Rule," Dr 1-103(a), Meets the Employment-at-Will Doctrine: Weider v. Skala, 19 J. Corp. L. 353, 370 (1994) (noting attorney misconduct cases in New York totaling $24.5 million in potential costs to the public."

[204] Including deportation (In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 494, 69 P.3d 844, 848 (2003)), assault (In re Disciplinary Proceeding Against Perez-Pena, 161 Wn.2d 820, 825, 168 P.3d 408, 411 (2007)), recruitment into prostitution (In re Kosher, 61 Wn.2d 206, 209, 377 P.2d 988, 990 (1963)), among others.

[205] Jennifer Staley, Professional Responsibility-the "Snitch Rule," Dr 1-103(a), Meets the Employment-at-Will Doctrine: Weider v. Skala, 19 J. Corp. L. 353, 372 (1994) (referencing surveys finding a crisis of confidence in the legal profession)

[206] See Section III.3. Impact of the Current Process discussing the current makeup of the Washington Bar.

[207] https://www.wsba.org/about-wsba/equity-and-inclusion

[208] Jason P. Nance & Paul E. Madsen, An Empirical Analysis of Diversity in the Legal Profession, 47 Conn. L. Rev. 271, 281 (2014)

Association (ABA), noting that "without diversity in the law, the rule of law is weakened as the people see and come to distrust their exclusion from mechanisms of justice."[209] Excluding qualified applicants harms the public and slows down the progress of improving access to justice. This does not account for the perpetuation of discrimination inherent in the process. The admission that diversity is lacking in the profession is also an acknowledgement of the discrimination that caused the lack of diversity in the first place.[210] Maintaining a higher burden of proof, ignores the harm caused by the exclusion of diverse individuals, to those denied entry, to the profession, and to the public.

Burdens of Proof and Discrimination. In deciding the right burden of proof, another important consideration is how this procedural tool has resulted in further harm to marginalized communities. For example, in the criminal law context, defendants claiming discrimination at the hands of government actors face an insurmountable obstacle by bearing the burden of proof. In *Whren v. United States*, the United States Supreme Court acknowledged the occurrence of racial profiling—technically a banned practice—while at the same time placing the burden to show discrimination on the victim of the profiling.[211] The Court further complicated the challenge to prove discrimination by stating that subjective intent is irrelevant in the assessment of discrimination.[212] In other words, the burden being on the victim of the profiling allowed the

[209] Eli Wald, A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why, 24 Geo. J. Legal Ethics 1079, 1101 (2011) (quoting the ABA Presidential Diversity Initiative)
[210] Eli Wald, A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why, 24 Geo. J. Legal Ethics 1079, 1109 (2011)
[211] Whren v. United States (1996).
[212] Whren v. United States (1996).

court to reach a conclusion that discrimination had not occurred despite acknowledging that racial profiling occurred.

Lower Burden. The concerns noted evidence the need for change in the burden of proof. Lowering the standard used could help alleviate the risks associated with the vagueness of burden of proof standards and their negative impact on disadvantaged communities. Additionally the "clear and convincing" standard is not only hard to define, but also higher than standards used in most civil cases.[213] The "clear and convincing" standard is mainly used when an individual's liberty is at stake—removal proceedings in immigration, pretrial detention, and civil commitment determinations—and the burden is assigned to the government in these contexts.[214] Specifically in Washington, the "clear and convincing evidence standard is used in negligent misrepresentation cases (with the burden on the plaintiff),[215] and to terminate parental rights (burden on state).[216] Lowering the burden could help alleviate some of these concerns and better align with the stakes in the proceeding.

2. Conditional Admission

Recommendation

Implement a conditional admissions process.

Discussion

As noted in this report, applicants face significant uncertainty during the character and fitness process. As they consider the requirements, many have concerns about bad decisions they made

[213] Kevin M. Clermont (FNd1), Standards of Proof Revisited, 33 Vt. L. Rev. 469 (2009) (stating that most civil cases use a "preponderance of the evidence" or "more likely than not" standard).
[214] Mary Holper, The Beast of Burden in Immigration Bond Hearings, 67 Case W. Res. L. Rev. 75, 98 (2016)
[215] Specialty Asphalt & Constr., LLC v. Lincoln Cnty., 191 Wash. 2d 182, 196, 421 P.3d 925, 934 (2018)
[216] Hardee v. State, Dep't of Soc. & Health Servs., 172 Wash. 2d 1, 8, 256 P.3d 339, 343 (2011)

in the past and how the repercussions of those decisions linger over them. In Washington, past mistakes may prevent an applicant from joining the Bar altogether while in many other states applicants can be found to have the requisite character and fitness on a conditional basis. Conditional admission allows an applicant to move forward with their legal career in turn alleviating the situations that may have caused the prior bad decisions.[217]

By establishing a conditional admissions process, Washington state would not be pioneering a new idea. Approximately 29 jurisdictions currently offer conditional admission. Most often conditional admission is offered in specific circumstances. The conduct eligible for conditional admission generally falls into the following categories: (a) substance abuse, (b) mental health, (c) criminal history, and (d) debt. Under conditional admission, the applicant generally has a set time limit to meet expectations and not engage in further bad conduct, most often up to five years, or a time period tied to court mandated expectations.

Members of the Character and Fitness Board have discussed how it is not uncommon that during deliberations a discussion would repeatedly occur regarding the desire to have had the option to allow someone to be conditionally admitted. Two members of this Taskforce, who have served on the Character and Fitness Board can remember numerous times they recommended a denial because conditional admission was not an option. In these circumstances, the members of the Board discussed how they wanted to encourage applicants to return after a few years of continued good conduct. Further, these two Task Force members who served on the Character and Fitness Board never had a time that they recommended admission but would have requested

[217] See discussions elsewhere in the article regarding the impact of external factors on a person's criminal background, financial history, among others.

conditional admission if it were an option. In other words, including a conditional admission option in Washington would be a positive benefit for applicants on the cusp, rather than a barrier.

3. Adjusting Timing of Character and Fitness Review

Recommendation

Adjust the timing of the character and fitness review allowing applicants to execute and file an Application for Admission and Character and Fitness review upon enrollment in either a J.D. or LL.M. program at a law school.

Discussion

$119,520. 856 days.

These numbers are two of the barriers standing between students on their first day of classes at the University of Washington School of Law and the day they can submit their application for Character and Fitness Review. $119,520 in tuition and fees for Washington resident students and 856 days of classes, assigned readings, group projects, written papers, internships, law reviews, moot courts, studying for and taking exams. Meanwhile, for non-resident students or students at Gonzaga University and Seattle University the cost of tuition and the time between their first class and when they can submit their character & fitness applications are both higher and longer. The $119,520 also does not include the additional costs for room and board, books and supplies, or transportation which the University of Washington estimates at $26,025 for each of the student's three years for a total cost of attendance of $197,595. Currently, all of this must be incurred by students before they know whether they will be allowed to sit for the bar exam.

The Subcommittee has heard from Board members and representatives of applicants who have detailed instances of lengthy character and fitness investigations delaying the applicants' ability to sit for the bar exam, the Board denying applicants whom they would have preferred – given additional time – to prescribe remedial measures, and of applicants who have been denied admission only after they have invested the time and incurred the expense of attending and graduating from law school.

The Subcommittee finds that the time limit currently prescribed by the Bar under APR 3(i)(1)(A) unnecessarily delays review of character and fitness applications, constrains the ability of the Board to prescribe remedial measures for applicants, and creates the unnecessary risk that students spend more than two years of full-time study and invest six-figure sums before they are allowed to submit their applications for Character and Fitness review that may ultimately result in their denial.

Allowing applicants to execute and file character and fitness reviews upon enrollment will also allow the Bar to streamline the application process for licensed legal interns under APR 9. Rule 9 licenses are necessary for interns to appear in court and represent an important educational opportunity for students and provides needed help in many government offices and small firms. Students applying for licensure under APR 9(d) undergo Character and Fitness examination by the Bar similar to those under APR 3. Beginning the APR 3 process upon enrollment in law school would make a second review under APR 9 redundant and ensure a faster process for issuance of Rule 9 licenses.

4. Information Resource for Applicants and Assigned Counsel Ombudsperson

a. Information Resource for Applicants

Issue

The process of applying for admission to the Bar involves submitting an application that includes, among other things, questions about education, employment, and criminal history. As part of the application verification process, WSBA's Regulatory Services staff will often engage with applicants through an online admissions portal where questions can be asked and answered in writing. The additional information and documentation submitted by an applicant can assist an applicant in being approved to sit for the exam or, for other applicant types, to proceed with pre-licensing steps without the need for referral to a hearing before the Board. However, the process of being asked a follow-up question may be stressful to an applicant especially considering written requests and responses become part of the application record.

Discussion

The Subcommittee discussed the negative impact on applicants of having to respond to questions. More specifically, the Subcommittee heard about the stress, anxiety, and fear experienced by some applicants who are asked a follow-up question. Not only may applicants be concerned that their admission may be delayed or that they may not be able to sit for the exam, but bar-exam applicants may also divert their attention from studying for the bar exam to answering questions about their application. The fear is exacerbated by the fact that all written communications with Bar staff will become part of the application and could potentially lead to additional questions and/or a referral to a hearing before the Board.

Proposed Solution

The Subcommittee explored ways to lessen the negative impact of the process of asking follow-up questions in the form of support from either a designated staff person located in a different department, or from a group of volunteers who would be willing to be an informational resource to applicants and respond to their questions about the admissions process. The idea is that any follow-up question from Bar staff would trigger an automated email to the applicant connecting the applicant with the designated Bar staff person or group of volunteers. The designated staff person or volunteer would be trained and qualified to respond to questions about the admissions process, including character and fitness. The goal would be to support applicants through a process that can be stressful and impactful. The cost of this service would be covered by either an increase to application fees or license fees.

Other Considerations

- The Subcommittee might want to consider surveying former applicants (current members) to gather some data around the perceived issues and potential solutions.
- Being contacted by the Bar for more information and then being contacted by a neutral party or volunteer could be confusing and potentially even more alarming than being contacted by one person only.
- Other options could include providing additional information in the Admissions FAQs, making a recording of law-school presentations on the bar exam and character and fitness available on WSBA website, and/or including more written information regarding the application and character and fitness processes on the WSBA website.
- This proposal does not consider the fact that applications for admission to the Bar are confidential and therefore the Bar may be limited in its ability to provide the designated

staff or volunteer with the applicant's name and contact information under the APR. The rule could be amended to permit such disclosure, or the applicant could be provided with information to give them the option to reach out to the designated staff or volunteer for "off the record" support and information.

b. Assigned Counsel for Character and Fitness Hearings

Issue

Each year, a small number of applicants are referred to a hearing before the Board. These applicants have the option to represent themselves or retain counsel. Some applicants choose to represent themselves due to the cost of retaining counsel.

Discussion

The Subcommittee discussed how hiring a lawyer adds an additional financial burden on applicants who already have paid application fees and, in many cases, law school and fees for bar review courses.

Proposed Solution

The Subcommittee's goal is to ensure that every applicant referred to a hearing is represented by a lawyer, should one be requested by the applicant[218]. Therefore, the Subcommittee recommends WSBA be directed to assign counsel to all applicants referred to a

[218] This recommendation would be for all hearings, including reinstatement hearings, before the Character and Fitness Board.

hearing before the Board regardless of the applicant's ability to pay. The Board would be responsible for maintaining a roster of approved assigned counsel and the Character and Fitness Board Chair would be responsible for assigning counsel to applicants. The costs associated with the representation would need to be addressed to determine whether it was feasible to be included in the fees collected by WSBA for the licensing process[219], without an undue or burdensome increase to existing fees, or whether a volunteer pool should be established for those willing to donate their time, resources, and knowledge on a pro bono basis. One idea would be to have a panel or pool of lawyers who have represented applicants, or who are trained in representing applicants, in character and fitness matters. No current WSBA staff would be permitted to be on the roster.

VI. Conclusion

The issues surrounding the character and fitness component of the admissions process need modification and modernization. There is a wealth of greatly respected legal scholars who have dedicated their lives toward the movement of fairness and equality in this process who question whether any character and fitness reviews are even necessary. The Taskforce believes that a character and fitness review may be completed – but that the current system is fraught with opportunities for inequality to exist.

[219] It is presumed that an assigned counsel would require an increase of fees but given the numbers provided by WSBA pertaining to the actual number of hearings, it is believed that any increase would be nominal given the low number of hearings per annum.

The recommendations by the Subcommittee and adopted unanimously by the Taskforce are meant to be a framework for where changes can and should be made.[220] The above discussion is not meant to be an exhaustive list of the specific recommendations but rather a starting place of initial proposed modifications, revisions, and amendments to the applicable APR would be should the Court agree with the need to make changes.[221] There is a continued push for further guidance and revisions as discussed above, especially as it relates to the substantive analysis to be undertaken by and through the application of the applicable APRs.

Unlike the Task Force recommendations associated with the alternative pathways to licensure (based upon substantive knowledge), the issues around character and fitness review truly narrow down the examination into an individual's past behavior and open it for scrutiny, judgment, and a finding of a *moral* failure that is easy to sweep aside because of the circumstances of the collective whole. Conducting a review of someone's character and fitness does not produce a score. It is time for the Court to recognize the issues presented with the current structure and take steps toward embracing the moral imperative forth to all members of the profession on June 4, 2020.

UPDATE: February 2024.

[220] Given the nature of this Task Force and the fact that there was not 100% attendance of all members at all meetings, and, while subcommittee members provided input and engaged in discussions, the opinions and recommendations provided in this report are not necessarily shared by all.
[221] Given the confidential nature of this process, the Subcommittee would hope that the Court would forego the normal process of rulemaking whereby an outside party proposed a series of amendments to rules and submits them to the Court. A top-down approach, based upon the direction that the Court would want to take would lend itself to greater results and use of stakeholder time. The specific intent of this report is that the Court would respond with directions regarding what the Court would be willing to entertain in terms of modifications to the process and rules.

After the presentation of the initial report to the Court, there was a public comment period that was concluded in January 2024. During this comment period there have been multiple groups and individuals who have submitted comments, both publicly and privately, regarding the proposals contained herein. The overwhelming feedback has been in support of these recommendations AND included multiple offers to join any future workgroups or task forces created by the Court to conduct review and analysis of the areas seeking additional change. These offers came from scholars from around the country to current and former members of the Washington Character and Fitness Board.

TAB O

Law School Deans' Recommendation on Bar Exam Cut Score
DISCUSSION / ACTION ITEM

GONZÁLEZ, C.J., TO REPORT

Attachment(s): Memorandum from Chief Justice González

Deans' Recommendation

Revised APR 4

TAB O

LAW SCHOOL DEANS' RECOMMENDATION ON BAR EXAM CUT SCORE

EN BANC ADMINISTRATIVE CONFERENCE

MARCH 6, 2024

DISCUSSION / ACTION ITEM

DISPOSITION	
JOHNSON	MADSEN
OWENS	STEPHENS
GORDON MCCLOUD	YU
MONTOYA-LEWIS	WHITENER
CHIEF JUSTICE GONZÁLEZ **REPORTS**	**ACTION:**

The Supreme Court
State of Washington

STEVEN C. GONZÁLEZ
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To: Justices

From: Chief Justice González

Date: February 1, 2024

RE: Law Deans' Bar Exam Cut Score Recommendation
En Banc Case Conference, March 6, 2024, Tab O

The deans of our three law schools ask us to lower the Uniform Bar Examination cut score from 270 to 260 immediately. I recommend we do so for this year and 2025. In 2026, NextGen Bar Exam, which will have a different scoring system, will be available and we can decide then what steps to take.

BACKGROUND

The current Uniform Bar Examination (UBE or bar exam) is scored out of 400 points. Minimum passing (cut) scores vary from 260 to 270.[1] Under our current rules, Washington examinees must earn a cut score of at least 270 to pass though we temporarily adjusted the cut score during the pandemic.[2] APR 4(d)(1).

Deans Lawson, Rooksby, and Varona have asked us to adopt a cut score of 260, consistent with the "overwhelming research on fairness and access to the profession." The deans do not offer supporting argument or citation, but their request is supported by a great deal of evidence that the bar exam disproportionately burdens BIPOC and low-income examinees. *See* Washington Bar Licensure Taskforce, A Proposal for the Future 1-3 (2023), https://www.courts.wa.gov/content/publicUpload/Washington%20Bar%20Licensure%20Task%20Force/WBLTF%20Alternatives%20Recommendation%20%20Working%20Draft%20101123.pdf; Michael B. Frisby et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*,70 J. LEGAL EDUC. 125 (2020); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession*

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[1] See Appendix 1, Figure 1.
[2] We reduced Washington's cut score to 266 for the exams in 2020, 2021, and Winter 2022.

or Who is Responsible for Pursuing Diversity and Why, 24 GEO. J. LEGAL ETHICS 1079 (2011).

There is a statistically significant negative relationship between the percentage of Black and Latinx students in a law school's student body and the bar passage rates of that school's graduates, indicating that the bar exam is a more significant barrier to practice for students of color than their white peers. Scott Devito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J. LEGAL. REFORM 597, 599 (2022). A 2020 AccessLex Institute study in California found that "maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites."[3] MITCHEL L. WINICK ET AL., EXAMINING THE CALIFORNIA CUT SCORE: AN EMPIRICAL ANALYSIS OF MINIMUM COMPETENCY, PUBLIC PROTECTION, DISPARATE IMPACT, AND NATIONAL STANDARDS 2 (2020) [hereinafter WINICK ET AL. (2020)].[4]

Of the thirty-nine states currently using the UBE, six have set their cut scores at 260.[5] Utah adopted 260 in 2023; public comments from the deans and faculty of BYU Law School and the S.J. Quinney College of Law at the University of Utah[6] attest that the most important factor in bar passage is the ability to devote oneself to exclusive study (usually correlated with affluence) and that the bar exam disproportionately "burdens and disadvantages women, racialized minorities, and low-income earners." *See* Proposed Utah State Bar (USB) Rules 14-0711 and 14-0712 (Utah 2023). Appendix 2 at 6.[7]

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[3] Although California does not use the UBE, this study looked at relative changes in cut scores, making its analysis transferrable to other exams. The California analysis was cited in the public comment when Utah, which does use the UBE, lowered its cut score to 260 in 2023.

[4] https://www.accesslex.org/grant-research-and-data-tools-and-resources/examining-california-cut-score-empirical-analysis

[5] See Appendix 1, Figure 1.

[6] Available in their entirety in Appendix 2.

[7] Full public comment available at: https://legacy.utcourts.gov/utc/rules-comment/2023/05/05/rules-governing-the-utah-state-bar-and-rules-of-professional-practice-comment-period-closes-june-19-2023/. Expert comment excerpted in Appendix 2.

PROJECTED IMPACTS IN WASHINGTON

On average 84 people score between 260 and 269 (inclusive) on the UBE each year.[8] While the WSBA does not track the demographics of that cohort, California data suggests that this is likely to be made up of people of color. WINICK ET AL. (2020).

RECOMMENDATION

I recommend we grant the request and drop the cut score to 260 for this year and the next via an emergency rule change to APR 4(d)(1). I have attached a revised rule for review. I welcome your thoughts.

[8] Data from the WSBA reflects all exams between Winter 2018 and Summer 2023. See Appendix 1, Figure 1.

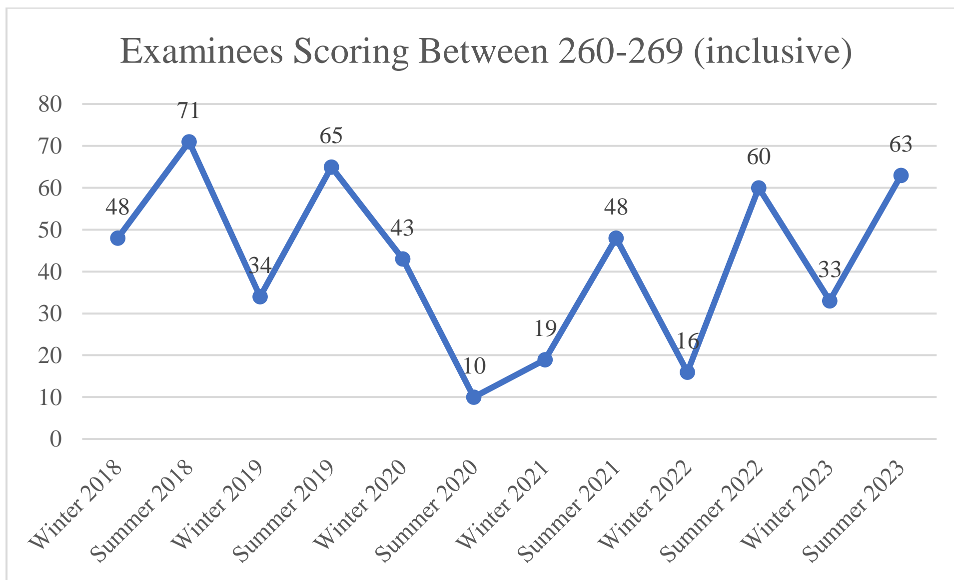
Appendix 1: Figures

Figure 1: Cut Scores in UBE States

MINIMUM PASSING UBE SCORE*	JURISDICTION
260	Alabama, Minnesota, Missouri, New Mexico, North Dakota, Utah
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
268	Michigan
270	Alaska, Arizona, Arkansas, Colorado, Idaho, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wyoming

https://www.ncbex.org/exams/ube/ube-minimum-scores

Figure 2: Washington UBE Examinees Scoring Between 260 and 269 (inclusive)[9]



Data courtesy of the Washington State Bar Association

[9] Due to the COVID-19 emergency, we reduced Washington's cut score to 266 for the exams in 2020, 2021, and Winter 2022. Some of the examinees represented in this graph may have achieved licensure on those exams. However, the exam itself remained unchanged and the scoring distributions represented here are accurate and generalizable.

Appendix 2: Expert Comment re: Utah's Proposed Cut Score Change

Dean Elizabeth Kronk Warner [S.J. Quinney College of Law, University of Utah]
May 23, 2023 at 3:22 pm

I write to support the proposed amendment lowering the passing bar examination score from 270 to 260. I appreciate the Court's willingness to consider this important issue and comments submitted by the public.

First, I wholeheartedly support the comments submitted by Dean Gordon Smith and Professor Catherine Bramble. Both have done an excellent job of explaining why the passing bar examination score should be lowered to 260.

My comments focus on the discriminatory impact of the existing 270 passing bar examination score. As Dean Smith explained, many, including myself, question whether the bar exam is a test of competency. We can agree that the current exam is flawed, as the NCBE has announced the release of the Next Generation Bar Examination in the coming years. The bar examination is a test of affluence and not competence as most test takers must invest significant time and money into preparing for the exam. For example, if a law student were to accept a post-graduation job making $60,000 per year, the student would lose approximately $15,000 in salary if they took time off from work to study for the bar examination. [It is recommended that students study between 400 and 600 hours to adequately prepare for the bar exam, or 10 to 15 weeks.] Additionally, the student might pay up to $3,500 for bar preparation costs. The financial cost to the student could be upwards of $20,000 to study for the bar exam.

As a result of these costs, the bar exam disproportionately burdens and disadvantages women, racialized minorities, and low-income earners. In turn, those falling between a 260 and 269 bar score are more likely to fall within one of these impacted groups than those scoring a 270 or higher. The higher passing score in Utah excludes recent graduates who would add significant diversity to the practice of law. The ABA recently released data showing the difference in bar passage. In 2022, the first-time pass rate for white test takers was 83%, while 57% of Black examinees passed on their first attempt. For first-time Hispanic and Asian test takers the pass rates were 69% and 75% respectively.

The 270 passing score only exacerbates the disparate impact of the bar exam. In 2020, the AccessLex Institute released a study confirming that a lower cut score "would have increased the number of newly admitted minority attorneys in California." Further, "[t]he study also determined that no relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys. The study results indicate that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites." Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards, **https://www.accesslex.org/grant-research-and-data-tools-and-resources/examining-california-cut-score-empirical-analysis**. Although California is not a UBE state, the analysis from this study is equally applicable to Utah.

Further, an unfortunate and significant consequence this disproportionate impact on women, racialized minorities, and low-income earners is the public's access to justice. There is evidence that non-majority lawyers provide a disproportionately high percentage of services to "minority" and underserved communities. By excluding people who would likely serve underserved populations, the 270 bar examination pass score negatively impacts many of those most in need of legal services throughout our state. Access to justice is an issue of significant and increasing concern in Utah. The task force created in 2018 to research and make recommendations on this critical issue states in its August 2019 Final Report that '"[a]n estimated five billion people have unmet justice needs globally. This justice gap includes people who cannot obtain justice for everyday problems, people who are excluded from the opportunity the law provides, and people who live in extreme conditions of injustice.'" The report explains that the lack of access to justice is not limited to those in underdeveloped countries; rather, "an astonishing '86% of civil legal problems reported by low-income Americans in [2016-2017] received inadequate or no legal help.'"

Since joining the legal academy in 2006, I have known many students who missed the passing bar exam score by a mere handful of points. In most instances, they failed because they were unable to take two to three months off from work to study for the exam, and not because of their competency. All would have been excellent additions to the legal bar (and many eventually passed after retaking the bar exam at significant cost to themselves or took the bar exam in a state with a lower passing bar exam score requirement). As at BYU Law School, only a small number of students at the S.J. Quinney College of Law fail to pass the Utah bar exam on the first try, and most of those would have been admitted in other states. All of these students would be a welcome addition to the Utah practicing bar. Because our students are passionate about access to justice and pro bono, I am also confident that these students would have helped the most vulnerable Utahans. I therefore agree with Dean Smith that the proposed amendment is in the best interest of the public.

For these reasons and those advanced by other commentators, I support the proposed amendment as it is consistent with notions of anti-racism and will advance access to justice in Utah. Again, I very much appreciate the Court's consideration of these comments.

https://legacy.utcourts.gov/utc/rules-comment/2023/05/05/rules-governing-the-utah-state-bar-and-rules-of-professional-practice-comment-period-closes-june-19-2023/

Dean Gordon Smith [BYU College of Law]
May 5, 2023 at 11:54 pm

Lowering the passing score on the bar examination from 270 to 260 is a welcome step on bar licensure. According to the National Conference of Bar Examiners (NCBE), the Uniform Bar Exam (UBE) "assures a high-quality, uniform system of assessment of minimum competence." Nevertheless, the NCBE has never been shown to be a valid test of competence to practice law. Indeed, in 2018 the NCBE appointed a task force "to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice," and the task force implicitly acknowledged the failure of the UBE to accomplish its stated goal,

recommending a major overhaul of the examination that has come to be called the "Next Generation Bar Examination."

Even if we assumed the current UBE was well-designed to test competence to practice law, no one — including the NCBE — could tell us the score at which "minimum competence" would be established. Thus, it is impossible to justify any passing score as the correct one. Perhaps not surprisingly, therefore, the 39 states currently using the UBE have seven different passing scores, even though no one seriously argues that "minimum competence" varies from state to state. Two law professors who studied the setting of these so-called "cut scores" concluded that they were the result of "a peculiar mixture of psychometrics, tradition, and politics." Joan W. Howarth & Judith Welch Wegner, Ringing Changes: Systems Thinking About Legal Licensing, 13 FIU L. REV. 383, 413 (2019). In some instances, cut scores have been explicitly connected to controlling the number of lawyers, rather than establishing the standard of minimum competence.

Utah's choice of 270 seems to have been motivated primarily by the fact that 270 was the modal score among states that had adopted the UBE. Among UBE states, Utah and 17 other states require a passing score of 270, but 18 other states (plus the District of Columbia and the Virgin Islands) have established lower passing scores, including six states with a score of 260.

While the change in cut score from 270 to 260 suffers from the same problem as the initial setting of the cut score at 270, namely, the lowering of the score is not justified by any connection between that score and minimum competence to practice law, moving the cut score to the lower boundary of UBE passing scores follows the recent trend of states lowering cut scores to acknowledge significant problems with relying on the UBE as a test of minimum competence to practice law. Utah now has the third highest cut score in the nation. Given the limited value of the UBE as a test of minimum competence to practice law, it should not present such a barrier to licensure for people who have already completed three years of graduate study in law (which is, itself, an unusually high barrier to licensure compared with other countries).

BYU Law School typically has only a small number of graduate who score below 270 on the UBE, and almost all of those graduates could be admitted to practice law in another jurisdiction. Knowing these students, I am confident that they would be a credit to the Utah Bar, and many of them would work in jobs that promote greater access to justice for Utahns. The proposal to lower the passing bar examination score from 270 to 260 is a small change, but I am confident that it would serve the public's interest. Thus, I endorse the proposal.

Beyond the proposed amendments. I would welcome the inclusion of some modest retroactivity for this change. I would allow all applicants who have already applied for the July 2023 administration of the UBE (the final filing deadline date was April 1) to update their existing applications with a prior score. This would affect a small number of people, but would obviate the need for this limited group of people to retake an examination for which they have already obtained a passing score.

I am grateful to the Utah Supreme Court for its constant efforts on behalf of the people of Utah, and I hope these changes will be embraced by the Utah Bar and the public.

Professor Catherine Bramble [BYU Law School]
May 16, 2023 at 12:44 pm

I am strongly in favor of the Utah Supreme Court's proposal to lower the passing score from 270 to 260 and appreciate the Court's continued interest in and thoughtful attention to ongoing issues with attorney licensure and the Uniform Bar Exam.

I graduated in 2005 and was admitted to the Utah Bar that same year. I never thought about the Bar Exam again until a few years ago when, as a law professor, I became involved in BYU Law School's efforts to support students post-graduation. What I have learned over the past 4 years while critically studying the Bar Exam has completely changed my perception of it. In a profession that prides itself on critical thinking, evidence-based conclusions, and modernization when evidence and logic demonstrate that the way things have previously been done are no longer warranted or supportable, I would hope that we as members of the Utah State Bar will become informed about the issues surrounding attorney licensure and supportive of the Utah Supreme Court in its efforts to improve the licensure process.

The Uniform Bar Exam (used in Utah and 40+ other jurisdictions) is administered by the National Conference of Bar Examiners (NCBE) and is an exam that was not created based on any evidence-based research to determine what is required for an attorney to be minimally competent. In October of 2020, results were published from the most comprehensive study ever done of what minimum attorney competence is by researchers completely unaffiliated with the NCBE. Building a Better Bar: The Twelve Building Blocks of Minimum Competence, Deborah Merritt & Logan Cornett (October 2020). The study was the first to use qualitative research and involved 50 focus groups of practicing attorneys in 18 locations spread across the U.S. including junior and experienced lawyers across multiple areas of practice. The study concluded that there are "12 building blocks of minimum competence"—the ability to identify legal issues, the ability to conduct research, and the ability to communicate as a lawyer, to name a few. The study further included 10 recommendations for future licensure processes including that (1) written exams are not well-suited to assessing all aspects of minimum competence, (2) multiple-choice questions should be using sparingly, if at all, as they are a poor way of assessing threshold understanding of legal doctrine, and (3) test questions should be open book given that legal practice is open book.

Interestingly, the NCBE chose to run a study at the same time to determine what minimum competence is and concluded that it includes many of the same skills identified by The Twelve Building Blocks study. However, the NCBE's list of skills included multiple skills that have never been tested on the Bar Exam in any fashion (e.g., client counseling and advising, negotiation and dispute resolution, and legal research). As a result of its own study, the NCBE promised to overhaul the existing exam by 2026 with the "NextGen Bar Exam." Given that the rollout is taking several years, the NCBE has still defended its current exam—the UBE—as a completely reliable test of minimum competence even while admitting that its own study demonstrated that family law, trusts and estates, conflict of laws, and secured transactions are not sufficiently relevant to be tested for minimum competence. The NCBE, however, claims it has no way of removing these areas from the Bar before 2026 since exams are written so far in advance.

Therefore, the current Bar Exam fails to test critical skills needed for minimum competence, continues to test areas that it admits are irrelevant to minimum competence, and uses improper methods to test those areas it does focus on, including requiring significant amounts of memorization with 50% of the test-taker's score being from 200 multiple-choice questions. In the meantime, the UBE has become a test of privilege, requiring students to spend up to $4,000 on a commercial Bar prep course and devote hundreds of full-time study hours during the 10-12 weeks following law school graduation.

This test of privilege has resulted in significant racial disparities in Bar Exam results. According to data from the American Bar Association, in 2020, only 66% of Black first-time test takers passed as compared to 88% of white first-time test takers.

Perhaps the disparate impact could be justified if it played a necessary role in protecting the public. However, just as the lack of research has resulted in a current Bar Exam that does not test the right things in the right way, there has never been any evidence from any jurisdiction that having a lower cut score has resulted in an increase in attorney malpractice. In fact, a 2013 study showed that the most common areas of discipline for attorneys have nothing to do with the skills tested on the Bar Exam. The most common areas of attorney discipline identified from that study were (1) failing to communicate with clients (20%); lack of diligence (17.93%); and failure to safeguard client property (11.26%). A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline. **https://ssrn.com/abstract=2258164**.

Furthermore, the NCBE itself claims that the Bar Exam is a completely reliable test of minimum competence that will better protect the public while, in the same breadth, claiming that individual jurisdictions can pick any score between 260-280 and the results will be equally reliable. If minimum competence is truly a minimum standard, which is presumably a yes/no question, how can there be a 20-point spread that jurisdictions can arbitrarily choose from?

Finally, from an anecdotal standpoint as the most oft-cited reasoning I hear to support attorneys' opinions on the Bar Exam is based on their personal experience as Bar taker or Bar grader, I have now worked with hundreds of students preparing for the Bar Exam. I have worked with students who failed by one or two points in Utah, earning a score that made them "minimally competent" in many other U.S. jurisdictions that have chosen a slightly lower pass score. Some of these students have moved out of Utah to be licensed elsewhere and have had wonderfully successful careers as attorneys. More than one of them have been students who would have added to the diversity of Utah's attorneys, but an arbitrary pass score kept them out. Others have stayed here and spent the next 6 months studying again with all of the cost that entails—not working for 6 months, paying again for a prep class, paying again for the Bar Exam, and not being able to contribute their legal skills to the citizens of Utah; none of this is to mention the severe mental and emotional stress of retaking the Bar Exam to earn 1 or 2 more points. Not one student has ever reported that the second time through resulted in them gaining helpful legal knowledge or skills they didn't have before; rather, they drill down on test-taking strategies and practice hundreds of multiple-choice questions to memorize obscure legal rules that have nothing to do with their area of legal practice.

Turning back to evidence-based argument, California lowered its cut score a few years ago, and it resulted in significantly more underrepresented populations being admitted to the California Bar while having no effect on increasing malpractice rates.

I applaud the Court for being willing to carefully consider the issue of attorney licensure given the current Bar exam options available. I hope my colleagues in legal practice will do the same and support not only a lowering of the passing score to 260—a score the test-makers themselves claim is reliable in demonstrating minimum competence—but also support further reform in the area of attorney licensure in the coming years.

SCHOOL OF LAW
UNIVERSITY *of* WASHINGTON

SEATTLE U SCHOOL OF LAW

GONZAGA UNIVERSITY School of Law

Offices of the Deans

Date: February 26, 2024

To: Chief Justice González and the Washington Supreme Court Justices

From: Law Deans Tamara F. Lawson, University of Washington, Jacob Rooksby, Gonzaga University, and Anthony E. Varona, Seattle University

Re: Washington State Bar Exam Cut Score

As the Washington Supreme Court evaluates and considers reform to attorney licensure, the law deans of all three law schools in Washington unanimously agree and recommend a bar exam cut score of 260.

We come to this view consistent with the overwhelming research on fairness and access to the profession, as well as the recent decision by the Utah Supreme Court to set their cut score at 260.

APR 4
EXAMINATIONS FOR ADMISSION; NOTIFICATION OF RESULTS

(d) Lawyer Bar Examination. Unless otherwise provided by these rules, applicants for admission to practice as a lawyer must take and pass the National Conference of Bar Examiners' (NCBE) Uniform Bar Examination (UBE) and Multistate Professional Responsibility Examination (MPRE).

(1) Washington's UBE minimum passing score is 260.