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## Do it in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities

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# DO IT IN THE SUNSHINE: A COMPARATIVE ANALYSIS OF RULEMAKING PROCEDURES AND TRANSPARENCY PRACTICES OF LAWYER-LICENSING ENTITIES

Bobbi Jo Boyd

## INTRODUCTION

Regulation of occupational licensing has garnered national attention.<sup>1</sup> During the last sixty years, the number of occupations regulated by governmental entities has notably increased.<sup>2</sup> As the number of regulated occupations increases, employment opportunities and wages for individuals who cannot afford or otherwise meet licensing requirements decrease.<sup>3</sup>

In addition to concerns linked to the growing number of occupations requiring licensure, private<sup>4</sup> and governmental<sup>5</sup>

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1. U.S. DEP'T OF THE TREASURY OFFICE OF ECON. POLICY, THE COUNCIL OF ECON. ADVISERS, & THE DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3, 6, 17, (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) [<https://perma.cc/8DGS-FNCL>] [hereinafter OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS].

2. Since the 1950s, states have increasingly assumed responsibility for regulating professions practiced within their borders. See Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S175-S176 (2013). Between 1952 and 2008, the number of recorded occupations requiring a license leapt from less than 5% to 29%. See *id.* at S176.

3. See OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, *supra* note 1, at 4; see also Ryan Nunn, *Occupational Licensing and American Workers* 1, 4-5, 7, THE HAMILTON PROJECT (June 21, 2016), [http://www.hamiltonproject.org/assets/files/occupational\\_licensing\\_and\\_american\\_workers.pdf](http://www.hamiltonproject.org/assets/files/occupational_licensing_and_american_workers.pdf) [<https://perma.cc/27VL-2PR8>] (noting that both wages and employment opportunities decrease for those without occupational licenses).

4. See, e.g., Morris M. Kleiner, *Reforming Occupational Licensing Policies* 11, 16-17, THE HAMILTON PROJECT (Jan. 2015), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/reforming\\_occupational\\_licensing\\_morris\\_kleiner\\_final.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf) [<https://perma.cc/XFJ6-GQ8Y>].

5. See, e.g., N.C. GEN. ASSEMB., PROGRAM EVAL. DIV., OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED 1, 15-21, (2014), [http://www.ncleg.net/PED/Reports/documents/OccLic/OccLic\\_Report.pdf](http://www.ncleg.net/PED/Reports/documents/OccLic/OccLic_Report.pdf) [<https://perma.cc/YK4Z-WVF9>] (concluding North Carolina's occupational licensing agencies need stronger oversight).

organizations alike have raised concerns about adequate oversight of state occupational licensing entities,<sup>6</sup> even for occupations that have been regulated for a century.<sup>7</sup> Agency operations that result in anti-competitive<sup>8</sup> or discriminatory effects<sup>9</sup> serve as two reasons why there is concern that oversight of occupational licensing entities is inadequate.

Occupational licensing entities have responded to these concerns by initiating rulemaking procedures to amend, withdraw, or create new rules.<sup>10</sup> In addition to these concerns, our globalized world and economy has prompted occupational licensing entities to adapt traditional rules to new ways in which professional services are delivered and regulated.<sup>11</sup> If changes to

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6. See, e.g., Jon Sanders, *Texas Occupational License Ruling Another Warning to North Carolina*, JOHN LOCKE FOUND. (Aug. 26, 2015), <http://www.johnlocke.org/update/texas-occupational-license-ruling-another-warning-to-north-carolina/> [<https://perma.cc/D3P9-3AXV>].

7. Compare N.C. GEN. STAT. ANN. § 90-22(a)-(b) (West 2017) (acknowledging the North Carolina State Board of Dental Examiners as an entity created in 1879 and affirming the entity's continued existence in 1935 "as the agency of the State for the regulation of the practice of dentistry"), with *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015) (denying sovereign immunity for want of active state supervision to members of the North Carolina State Board of Dental Examiners in antitrust litigation where a majority of dental board members are private-market participants).

8. See *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1111.

9. See, e.g., Jenni Bergal, *A License to Braid Hair? Critics Say State Licensing Rules Have Gone Too Far*, THE PEW CHARITABLE TRUSTS (Jan. 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/30/a-license-to-braid-hair-critics-say-state-licensing-rules-have-gone-too-far> [<https://perma.cc/8WVJ-5RRJ>] (critiquing jurisdiction's regulations requiring African-style hair braiders to obtain cosmetology license, which entails 1,500 hours of training, passing two exams, and paying thousands of dollars in tuition costs to attend a cosmetology school that does not teach hair braiding, despite the fact that hair braiding does not involve chemicals, nor cutting, dying, or shampooing hair); Matt Powers, "*Natural Hair Braiding Protection Act*" *Now Law in Arkansas*, INSTITUTE FOR JUSTICE, <http://ij.org/press-release/natural-hair-braiding-protection-act-now-law-in-arkansas/> [<https://perma.cc/J42X-KG5M>] (stating that the Institute for Justice filed a lawsuit on behalf of two Arkansas hair braiders, Nivea Earl and Christine McLean, but that, prior to the case being heard, the law was changed to exempt hair braiders by mirroring legislation that the Institute for Justice supported); ARK. CODE ANN. § 17-26-504 (Supp. 2017) (stating that natural hair braiders are generally exempt from occupational regulation).

10. See, e.g., N.C. GEN. STAT. ANN. § 93B-8.1(b) (West 2017) (stating that occupational licensing boards "shall not automatically deny licensure on the basis of an applicant's criminal history" and boards must consider a list of factors related to the applicant's criminal record before denying licensure on that basis).

11. See, e.g., Letter from Leigh I. Saufley, Chief Justice, Me. Supreme Judicial Court, to Jennifer Archer, Chair, Me. Bd. of Bar Exam'rs (Jan. 25, 2017), <http://mainebarexaminers.org/wp/wp-content/uploads/2017/01/UBE-adoption-notice-from->

agency rules are likely, it makes sense to pay attention to the processes by which occupational licensing entities use their rulemaking authority and the extent to which that authority is exercised in the sunshine.<sup>12</sup>

Rulemaking procedures and transparency practices matter. They matter because they obtain and perpetuate the democratic ideal of meaningful participation in government. In the context of administrative agencies, meaningful participation requires agencies to provide avenues for public participation, access to information about how to engage with the agency, and the ability to observe agency operations. Typically, state occupational licensing entities promulgate rules governing admission to a particular profession, as well as administer various entrance requirements.<sup>13</sup> Essentially, these entities serve as gatekeepers to regulated professions.<sup>14</sup> When it comes to licensing lawyers, occupational licensing entities serve as gatekeepers to an entire branch of government—the judicial branch.<sup>15</sup>

This Article focuses on lawyer licensing as an atypical variety of administrative entity. In the interest of fostering conversation about democratic procedures, I lay the groundwork for evaluating the structure and function of various entities charged with licensing lawyers. Specifically, I analyze the

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SJC.pdf [<https://perma.cc/H8UG-55SA>] (stating the Maine Supreme Judicial Court decided to adopt the Uniform Bar Examination beginning with the July 2017 administration of the exam).

12. “Sunshine” as used in this Article refers to legislation, state constitutional clauses, court rules, or agency regulations that require meetings of public bodies to be open, allowing governmental operations to occur in the bright sunshine. *See, e.g.*, FLA. CONST. art. I, § 24(a)-(b); Government in the Sunshine Act, 5 U.S.C. § 522(b) (2012); N.C. GEN. STAT. ANN. § 143-318.18 (West 2017).

13. *See, e.g.*, OR. REV. STAT. ANN. § 679.250(4)(a) (West 2017) (vesting the Oregon Board of Dentistry with the power to examine applicants seeking a license to practice dentistry); *see also* OR. REV. STAT. ANN. § 679.065(1)(a)-(b) (West 2017) (setting forth age and educational requirements for dental license applicants); OR. REV. STAT. ANN. § 679.070(1)-(2) (West 2017) (describing the parameters of the professional entrance examination).

14. Adam B. Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives* 1, REASON FOUNDATION (Aug. 2017), <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf> [<https://perma.cc/HK5L-EERH>].

15. *See, e.g.*, *Qualifications to Serve as a Trial Court Judge*, NATIONAL CENTER FOR STATE COURTS, <http://data.ncsc.org/QvAJAXZfc/.opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true> [<https://perma.cc/X7JF-8LMC>] (showing that a majority of jurisdictions require trial-level judges to be licensed lawyers).

rulemaking procedures and transparency practices of lawyer-licensing entities across fifty-one United States jurisdictions. Based on study findings, I evaluate each jurisdiction, placing it into one of three categories: (1) sufficient; (2) questionable; or (3) insufficient. I then comparatively analyze the features of each category.

Part I of the Article provides background information on the creation and function of administrative agencies. Occupational licensing entities are introduced as a special type of administrative agency, with lawyer-licensing entities making up a unique sub-type.

Part II begins by introducing the metrics used in this study and describing how they relate to the quasi-legislative roles that administrative agencies play. The first metric—rulemaking procedures—analyzes the extent to which lawyer-licensing entities promulgate rules within procedural frameworks, like notice-and-comment rulemaking. The second metric—open meeting laws—analyzes whether lawyer-licensing entities hold meetings that are open to the public while exercising their rulemaking authority. Part II concludes by setting forth the methodology used in gathering data for the study.

Part III reports this study's findings on the use of rulemaking procedures and transparency practices by lawyer-licensing entities. I chart whether a jurisdiction's lawyer-licensing entity uses notice-and-comment rulemaking procedures, whether the entity possesses an express avenue for petition and declaratory relief, and whether the entity holds meetings that are open to the public when engaged in rulemaking.

Part IV discusses and comparatively analyzes this study's findings by categorizing jurisdictional use of standard rulemaking procedures and adherence to open meeting practices as (1) sufficient; (2) questionable; or (3) insufficient. Within each of the three categories, I select one or more lawyer-licensing entities and describe that entity's structure, function, rulemaking procedures, and transparency practices. I conclude by identifying how jurisdictions might use this study's data and offer suggestions for further inquiry.

## I. BACKGROUND

### A. Administrative Agencies: Creation and Function

Administrative agencies are entities to which a governmental authority delegates powers to administer a particular set of governmental functions.<sup>16</sup> Whereas legislatures possess power to make law, and courts possess power to interpret law, both departments of our tripartite system of government can be granted authority to delegate power.<sup>17</sup> The legislative and judicial departments typically delegate such power by creating subordinate administrative entities charged with administering governmental functions on behalf of the more-superior governmental body.<sup>18</sup> The subordinate entities are commonly known as administrative agencies.<sup>19</sup>

Administrative agencies, deriving their power from the superior body that enables their existence, are often delegated one

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16. See 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMIN. L. & PRAC. § 1:21 (3d ed. 2017). “An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting.” *Id.* (quoting KENNETH CULP DAVIS, ADMIN. L. AND GOV’T 6 (2d ed. 1975). “The power to issue regulations and to adjudicate disputes is delegated to administrative bodies by Congress.” *Id.*

17. See, e.g., OHIO CONST. art. IV, § 2(B)(1)(g) (providing that the supreme court of the state of Ohio has power over the “[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law”). The Supreme Court of Ohio created a Board of Bar Examiners and delegated power to the Board. See OHIO ST. GOVT. BAR R. 1, § 4. Similarly, the Florida Constitution explicitly grants its supreme court the power to create administrative agencies. FLA. CONST. art. V, § 1. “The Florida Board of Bar Examiners is an administrative agency of the Supreme Court of Florida created by the court to implement the rules relating to bar admission.” FLA. BD. OF LAW EXAM’RS R. 1-13; see also OKLA. CONST. art. V, §§ 36, 39 (providing the Oklahoma legislature the power to create administrative agencies). In exercise of its power, the Oklahoma legislature created a Board of Bar Examiners. See OKLA. STAT. tit. 5, § 14 (West 2017). Similarly, the Oregon Constitution grants its legislature “all powers necessary . . . of a free, and independent State.” OR. CONST. art. IV, § 17. Exercising that authority, the Oregon legislature created the Oregon State Board of Law Examiners. OR. REV. STAT. ANN. § 9.210(1) (West 2017).

18. See LA. STAT. ANN. § 37:832(A)(1) (West 2017) (evinced the Louisiana legislature’s creation of the Louisiana State Board of Embalmers and Funeral Directors as a subordinate administrative entity).

19. See KOCH & MURPHY, *supra* note 16.

or more of the following powers:<sup>20</sup> rulemaking power,<sup>21</sup> adjudicatory power,<sup>22</sup> and/or investigatory power.<sup>23</sup> When administrative entities are delegated a combination of powers, particularly the combined power to make rules and adjudicate contested cases, the entity has the implicit authority to simultaneously take on both quasi-legislative and quasi-judicial roles.<sup>24</sup> Concerns over separation of powers can arise when a single entity applies and interprets the very rules that it makes, highlighting the need for adequate oversight.<sup>25</sup>

### B. Occupational Licensing: A Special Type of Agency

Occupational licensing entities provide an example of such separation of powers concerns. These agencies are a subset of administrative agencies created specifically for the purpose of regulating identified professions practiced within state borders.<sup>26</sup> Without a state-issued license, practicing one of these professions constitutes unauthorized practice—a crime.<sup>27</sup> State licensing agencies operate as gatekeepers to many professions.<sup>28</sup> Historically, principles of public safety partially justified the regulation of occupational licensing,<sup>29</sup> requiring individuals

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20. Some administrative entities are granted limited forms of these powers, or perhaps none, serving merely an advisory role. Compare COLO. BAR ADMISSION R. 202.3 (providing for a board of law examiners to oversee exam administration and make recommendations to an advisory committee regarding proposed rule changes), with COLO. BAR ADMISSION R. 202.1 (stating the supreme court exercises jurisdiction over all matters involving the licensing of lawyers in Colorado).

21. DANIEL L. FELDMAN, *ADMINISTRATIVE LAW: THE SOURCES AND LIMITS OF GOVERNMENT AGENCY POWER* 71 (2016).

22. See *id.* at 109-10.

23. See, e.g., N.C. GEN. STAT. ANN. § 84-24 (West 2017) (providing the North Carolina Board of Law Examiners with the power to conduct investigations).

24. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.3 (5th ed. 2010).

25. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984).

26. See generally KOCH & MURPHY, *supra* note 16, § 1:12 (noting the longstanding tradition of government regulation regarding “the competence and integrity of certain types of professions”).

27. See, e.g., ARK. CODE ANN. § 16-22-501(c)-(d) (2015) (stating the unauthorized practice of law is punishable as a class A misdemeanor and that a second conviction under the statute is punishable as a class D felony).

28. See Kleiner & Kreuger, *supra* note 2, at S175.

29. See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 22 (6th ed. 2006).

seeking professional licensure to separately meet the regulatory requirements of each state.<sup>30</sup>

In administering this gatekeeping function, occupational licensing entities are often granted the same types of powers as all other types of agencies—rulemaking, adjudicatory, and investigatory.<sup>31</sup> Thus, occupational licensing agencies are vulnerable to the same risks and concerns as any other administrative agency that possesses and exercises combined governmental powers.<sup>32</sup> As such, the very structure of administrative agencies, including occupational licensing agencies, creates a need for adequate oversight.<sup>33</sup>

Well-known legislative responses to concerns regarding adequate oversight and a lack of uniformity among state and federal agencies have included the passage of federal and state administrative procedure acts and government-in-the-sunshine laws.<sup>34</sup> Both administrative procedure acts and government-in-the-sunshine laws allow for observation of and participation in agency operation, which contributes to adequate oversight.<sup>35</sup> State administrative procedure acts and state open meeting laws

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30. *See, e.g.*, ALA. CODE § 34-1-3 (West 2017) (stating that the Alabama State Board of Public Accountancy “may adopt and amend rules and regulations” pertaining to the accountants); ARK. CODE ANN. § 17-12-203 (2013) (providing that the Arkansas State Board of Public Accountancy may adopt rules and regulations for the profession).

31. *See, e.g.*, N.C. GEN. STAT. ANN. § 84-24 (West 2017) (delegating to the North Carolina Board of Law Examiners the power to make rules, perform investigations, and issue licenses with respect to admission to the North Carolina State Bar).

32. *See, e.g.*, *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1107, 1116-17 (2015) (denying sovereign immunity for want of active state supervision to the North Carolina Board of Dental Examiners in defending an action brought by the Federal Trade Commission).

33. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-504 (2011) (amended 2017) (delegating to a board of cosmetology the power to adopt and enforce rules concerning sanitary and safety requirements for salons).

34. Administrative procedure acts exist at both the federal and state levels. *Compare* 5 U.S.C. §§ 551-559 (2012), *with* GA. CODE ANN. § 50-13-1 (West 2017). This Article focuses on administrative procedure acts at the state level, since the vast majority of occupational licensing regulation is done by states. *See* Kleiner, *supra* note 4, at 5.

35. *See, e.g.*, IOWA CODE ANN. § 21.1 (West 2017) (declaring the policy of the Iowa open meetings law is to assure the public has access to governmental decisions); MINN. STAT. ANN. § 14.001 (West 2017) (stating purposes of the Minnesota Administrative Procedure Act as “to provide oversight of . . . administrative agencies” and “to increase public participation in the formulation of administrative rules”). *See generally* PIERCE, *supra* note 24, at 497 (noting political accountability created by the rulemaking process).



often apply to occupational licensing entities that regulate occupations practiced within state borders.<sup>36</sup>

### C. Lawyer-Licensing Entities: An Atypical Type

While occupational licensing entities across the country are often subject to procedural process rules<sup>37</sup> that help maintain our democratic society, entities that license lawyers have not been uniformly subject to standard rulemaking procedures or transparency practices.<sup>38</sup> This section summarizes key historical developments of lawyer-licensing entities and identifies facts that make lawyer licensing distinct from other occupational licensing regimes.

In the early part of this country's existence, states adopted ad hoc approaches to the licensing of lawyers.<sup>39</sup> These

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36. *See, e.g.*, ALA. CODE § 34-1-3(g) (West 2017) (stating that the board of public accountancy “may adopt and amend rules and regulations pursuant to the Administrative Procedure Act”); ARK. CODE ANN. § 17-100-202(b)(1) (2016) (providing the Board of Examiners in Speech-Language Pathology and Audiology the power to adopt rules and regulations relating to professional conduct and directing the Board to do so in accordance with the Arkansas Administrative Procedure Act); ARIZ. REV. STAT ANN. §§ 38-431(6), -431.01(A) (West 2017) (mandating all public-body meetings be public and defining public bodies to include “multimember governing bodies of departments, agencies, institutions and instrumentalities”); CAL. GOV'T CODE §§ 11123(a), 11126(c)(1)-(2) (West 2017) (mandating state body meetings be public, but allowing licensing entities to hold closed sessions in special situations related to testing and individual applicant privacy); N.C. GEN. STAT. ANN. § 83A-2(a) (2017) (“The North Carolina Board of Architecture shall have the power and responsibility to administer the provisions of this Chapter in compliance with the Administrative Procedure Act.”); N.C. GEN. STAT. ANN. §§ 143-318.10(a), -318.18(6) (West 2017) (mandating public body meetings be public, but creating exceptions for licensing agencies when the meeting regards testing or an individual applicant or licensee).

37. *See, e.g.*, ALA. CODE § 34-1-3(g) (West 2017) (stating that the board of public accountancy “may adopt and amend rules and regulations pursuant to the Administrative Procedure Act”); N.C. GEN. STAT. ANN. §§ 150B-2(1a), -21.2(a) (West 2017) (defining “agency” as an agency belonging to the executive branch and requiring agencies to provide notice-and-comment opportunities); OHIO REV. CODE ANN. §§ 101.35, 119.01(A)(1) (West 2017) (creating a “joint committee on agency rule review” and defining “agency” as an entity “having authority to promulgate rules”).

38. *See, e.g.*, GA. CODE ANN. § 50-13-2(1) (West 2017) (exempting the judiciary and Georgia's Board of Bar Examiners from being subject to the Georgia Administrative Procedure Act).

39. *See, e.g.*, DEP'T OF CULTURAL RES. DIV. OF ARCHIVES AND HISTORY, ARCHIVES AND RECORDS SECTION, GUIDE TO RESEARCH MATERIALS IN THE NORTH CAROLINA STATE ARCHIVES: STATE AGENCY RECORDS 781-82 (1995) [hereinafter N.C. DEP'T OF CULTURAL RES.].

approaches were responsive to practical needs.<sup>40</sup> During this early period, state courts were located in independent judicial districts<sup>41</sup> and some states operated without a state supreme court.<sup>42</sup> For lawyers, the issue was not whether they possessed a statewide license; rather, the issue was whether they were admitted to the bar for a particular judicial district or court.<sup>43</sup> Consequently, numerous lower-level state trial courts routinely admitted lawyers to practice law within their respective geographic jurisdictions.<sup>44</sup>

As the judicial branch of a state government developed, lawyer licensing became more centralized.<sup>45</sup> State courts and their administrative responsibilities moved away from ad hoc approaches to more formal structures.<sup>46</sup> For lawyer licensing, this formal structure meant that bar admission was no longer handled primarily on a local level, but rather was a matter of statewide regulation.<sup>47</sup> Indeed, statewide regulation for several occupations soon became established.<sup>48</sup> However, occupational licensing of lawyers still differed from other occupations because lawyer

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40. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985).

41. See N.C. DEP'T OF CULTURAL RES., *supra* note 39, at 725-26 (noting the state legislature's choice to create separate judicial districts within the state).

42. See *id.* at 726 (“[T]he terms supreme court and superior court were used interchangeably . . . and the legislature made no effort to develop a separate and higher court of last resort.”).

43. See *id.* at 781 (“In the late eighteenth and early nineteenth centuries, prospective lawyers had to apply for separate admission to [North Carolina] county and superior courts, and submit to an oral examination before two or more superior court judges.”).

44. See *id.*

45. See *id.* at 782 (“Written examinations were offered on the first Monday of each term of the Supreme Court.”).

46. N.C. DEP'T OF CULTURAL RES., *supra* note 39, at 782.

47. See generally 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 68 (1965) (observing that as court structures in Massachusetts became more formalized the judiciary simultaneously began formulating rules for the practice of law).

48. See, e.g., Act to Regulate General Contracting, 1935 Ala. Laws 721 (creating a state licensing board to regulate general contractors in the state of Alabama) (codified as amended at ALA. CODE § 34-8-20 (West 2017)).

licensing almost always<sup>49</sup> remained housed under the judicial branch of state government.<sup>50</sup>

Despite a more centralized, statewide approach to lawyer licensing, jurisdictions vary considerably in how lawyer-licensing entities are structured.<sup>51</sup> For example, some states, such as Ohio,<sup>52</sup> Kentucky,<sup>53</sup> and Pennsylvania,<sup>54</sup> have constitutions that expressly proclaim that the state's highest court shall regulate lawyers, including their admission to the profession. In other states, the high court claims its inherent power to regulate admission to the bar through case law<sup>55</sup> or tradition.<sup>56</sup> In many jurisdictions, the court possessing the power to regulate lawyer licensing creates subordinate entities to handle those administrative tasks.<sup>57</sup> Still in other states, professional bar associations have integrated with state supreme courts, making the creation of additional administrative entities unnecessary.<sup>58</sup>

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49. *But see* An Act to Provide for the Organization as an Agency of the State of North Carolina of the North Carolina State Bar, and for Its Regulation, Powers, and Government, Including the Admission of Lawyers to Practice and Their Discipline and Disbarment, 1933 N.C. Sess. Laws 313 (codified as amended at N.C. GEN. STAT. § 84-15 to -38 (West 2017)) (describing in Section 9 the powers of the governing body of the state bar as “[s]ubject to the superior authority of the General Assembly”); *cf.* An Act to Amend the Authority of the North Carolina State Bar Concerning Paralegals and Fees Relating to Certification and to Extend the Sunset of the Industrial Commission Fee Earmarked for Information Technology, 2004 N.C. Sess. Laws 670, 671 (striking the language “[s]ubject to the superior authority of the General Assembly to legislate thereon by general law, and except as herein otherwise limited” from N.C. GEN. STAT. § 84-23).

50. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2, at 22-27 (practitioner's ed. 1986).

51. *See infra* notes 52-62 and accompanying text.

52. OHIO CONST. art. V, § 2(B)(1)(g).

53. KY. CONST. § 116.

54. PA. CONST. art. V, § 10.

55. *Compare* *Hanson v. Grattan*, 115 P. 646, 647 (Kan. 1911) (concluding unequivocally that courts have exclusive power to set bar-admission standards), *with In re Applicants for License*, 55 S.E. 635, 636 (N.C. 1906) (confirming that setting bar-admission standards in North Carolina is an exercise of the state's police power and properly vested in the legislature).

56. *See* WOLFRAM, *supra* note 50, at 22-23.

57. *See, e.g.,* COLO. BAR ADMISSION R. 202.2(1)-(2) (creating an Advisory Committee that “shall have oversight over the attorney admissions process”).

58. Take, for example, the birth and subsequent evolutions of the Alaska Bar Association. Although the bar association was founded in the late 1800s, the district courts still heard lawyer-disciplinary cases until the aftermath of *United States v. Stringer*, 124 F. Supp. 705 (D. Alaska 1954). *See* Pamela Cravez, *A Revolt in the Ranks: The Great Alaska Court-Bar Fight*, 13 ALASKA L. REV. 1, 5-7 (1996). That case, in which an Alaskan district court drastically mishandled a disciplinary matter, catalyzed the Alaska Supreme Court's

With an integrated approach, bar associations exercise governmental power and can take on a primary role in licensing lawyers.<sup>59</sup> In a small number of jurisdictions, state supreme courts play a minimal role in the licensing of lawyers, with the state legislature, other administrative bodies, or lower-level courts retaining significant power.<sup>60</sup> For example, in North Carolina, the entities that examine and admit lawyers to the state's bar are the North Carolina State Bar and the Board of Law examiners, but the North Carolina Supreme Court has never acknowledged either of these entities as being part of the judicial branch of government or an "arm of the court."<sup>61</sup> Indeed, these entities were created by the legislature, demonstrating that not all lawyer-licensing entities are housed within the judicial branch of government.<sup>62</sup>

In addition to variation in the formal structures of lawyer-licensing entities, considerable differences exist in how these entities function. For example, in those jurisdictions where state supreme courts create judicial branch administrative entities to handle lawyer licensing, some courts create one entity charged with overseeing the entirety of the licensing process,<sup>63</sup> but others create two separate entities—one charged with handling character and fitness matters and the other charged with handling examination matters.<sup>64</sup> In jurisdictions with more than one

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adoption of the Alaska Bar Association via statute. *Id.*; 1955 Alaska Sess. Laws 410 (codified at ALASKA STAT. ANN. § 08.08.010 (West 2017) (showing that the Alaska Bar Association was adopted by the state supreme court via statute following the *Stringer* case).

59. See Cravez, *supra* note 58, at 7.

60. See, e.g., N.C. GEN. STAT. ANN. § 84-15 (West 2017) (creating the North Carolina State Bar as an agency of the state).

61. See, e.g., N.C. State Bar v. Tillett, 794 S.E.2d 743, 746, 748 (N.C. 2016) (stating the North Carolina State Bar is an agency created by the legislature).

62. An Act to Provide for the Organization as an Agency of the State of North Carolina of the North Carolina State Bar, and for Its Regulation, Powers, and Government, Including the Admission of Lawyers to Practice and Their Discipline and Disbarment, 1933 N.C. Sess. Laws 319 (codified as amended at N.C. GEN. STAT. ANN. § 84-15 to -38 (2015)) (describing in Section 9 the powers of the governing body of the state bar as "[s]ubject to the superior authority of the General Assembly").

63. See, e.g., STATE OF CONN. JUD. BRANCH, CONNECTICUT BAR EXAMINING COMMITTEE, <http://www.jud.ct.gov/cbec/index.htm> [https://perma.cc/33N8-RNVE] (stating that "[t]he Committee prepares and administers the bar examination and investigates the character and fitness of" applicants).

64. See, e.g., COLO. BAR ADMISSION R. 202.3 (creating both a Law Committee to oversee examinations and a Character and Fitness Committee to investigate applicants).

judicially created administrative entity,<sup>65</sup> whether the relationship among those entities is lateral or hierarchical varies as well.<sup>66</sup> Noticeably, even within similarly structured entities, the distribution and exercise of regulatory powers varies greatly.<sup>67</sup> Some state supreme courts retain or delegate more power and oversight than others.<sup>68</sup>

This article focuses on two implications stemming from the historical development of lawyer-licensing entities. The first implication is widespread variation in jurisdictional use of rulemaking procedures and transparency practices. This study lays the foundation for studying those variations, including how entities that license lawyers can be outliers in conforming to standard democratic procedures in several respects.<sup>69</sup> The second implication is the adequacy of oversight for some entities that exercise the power to license lawyers. Oversight measures, which have become commonplace for other administrative agencies<sup>70</sup>

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65. GA. SUP. CT. R. pt. A, § 1(a) (creating a Board to Determine Fitness of Bar Applicants).

66. Compare SUP. CT. OF GA.: OFFICE OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW (Jan. 2016), <https://www.gabaradmissions.org/information> [<https://perma.cc/Z59T-G2TU>] (“Admission to the practice of law in Georgia is under the jurisdiction of two separate and distinct boards, the Board to Determine Fitness of Bar Applicants and the Board of Bar Examiners.”), with GA. CODE ANN. § 50-13-2(1) (West 2016) (exempting the judiciary and Georgia Board of Bar Examiners from being subject to the Georgia Administrative Procedure Act, but not mentioning whether the Board to Determine Fitness of Bar Applicants is also exempt).

67. Consider, for instance, Oregon and Alabama. The Oregon Supreme Court, which possesses the power to promulgate bar-admission rules, created both a Board of Bar Examiners and a Board of Governors of the Oregon State Bar. OR. REV. STAT. ANN. §§ 9.210(1), 9.542(1) (West 2017); OR. BAR R. 1.2; The Board of Bar Examiners may recommend to the supreme court rules relating to admission to the bar, and the Board of Governors, subject to the court’s approval, may adopt procedural rules regarding its investigatory powers over bar admission. OR. REV. STAT. ANN. §§ 9.210(1), 9.542(1) (West 2017); OR. BAR R. 1.2. In Alabama, on the other hand, the Board of Commissioners of the State Bar holds the power to make rules pertaining to “the qualifications and requirements for admission to the practice of law.” ALA. CODE § 34-3-2, -40(a), -43(a)(1) (West 2017).

68. See *supra* note 67.

69. The amount of variation I found among lawyer-licensing entities with respect to the use of rulemaking procedures and transparency practices appeared to be similar to the amount of variation in agency process that prompted “uniformity” to be a guiding principle in administrative procedure acts at both the federal and state levels. See *infra*, Parts III, IV.

70. See, e.g., ALA. CODE § 34-1-3(g) (2017) (stating that the board of public accountancy “may adopt and amend rules and regulations pursuant to the Administrative Procedure Act”); ALA. CODE § 41-22-2(b)(1) (stating that the purpose of the Administrative Procedure Act is to provide legislative oversight for agencies); N.C. GEN. STAT. ANN. § 150B-21.2 (West 2017) (requiring agencies, as part of the Administrative Procedure Act,

can sometimes be absent in the context of licensing lawyers.<sup>71</sup> As noted in this Article's introduction, entities charged with licensing lawyers not only constitute gatekeepers for a profession, but also hold keys to the judicial branch of government.<sup>72</sup> For this reason alone, fair procedures and transparent operations for lawyer-licensing entities affect more than an individual's ability to pursue a chosen occupation. Fair procedural process and transparent operations affect who holds essential positions within the judicial branch of government and, consequently, who exercises state and federal judicial power.<sup>73</sup>

## II. STUDY METRICS

This study presents data on two metrics: (1) the extent to which lawyer-licensing entities exercise rulemaking authority in accordance with rulemaking procedures; and (2) whether lawyer-licensing entities regularly hold open meetings to ensure transparency.<sup>74</sup> These two metrics are useful in beginning a conversation regarding the lack of uniformity in the operation of lawyer-licensing entities and an inadequacy in adhering to procedural process safeguards. This conversation is particularly relevant today as the channels and providers of legal services evolve.<sup>75</sup>

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to provide notice-and-comment opportunities); N.C. GEN. STAT. ANN. § 150B-2(1a) (West 2017) (defining "agency" as an agency belonging to the executive branch); OHIO REV. CODE ANN. § 101.35 (West 2017) (creating a "joint committee on agency rule review" to provide oversight); OHIO REV. CODE ANN. § 119.01(A)(1) (West 2017) (defining "agency" as an entity "having authority to promulgate rules").

71. See *infra* Appendix.

72. See, e.g., KAN. CONST. art. 3, § 7 ("Justices of the supreme court and judges of the district court shall be . . . duly authorized by the supreme court of Kansas to practice law."); MONT. CONST. art. 7, § 9 (requiring that judges in Montana be admitted to and members of the Montana bar for at least five years before serving as a judge).

73. Notably, the exercise of ordinary judicial power can be far-reaching, having worldwide implications. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017), *aff'd* 847 F.3d 1151 (9th Cir. 2017) (demonstrating the ability of a federal district court judge seated in the state of Washington to enter a nationwide temporary restraining order, thereby enjoining the enforcement of specific sections of a presidential order that affected United States residents in areas of "employment, education, business, family relations, and freedom to travel").

74. Open meeting laws are popularly known as "Government in the Sunshine" acts. See, e.g., Government in the Sunshine Act, 5 U.S.C. § 552b (2010).

75. See N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, INTERIM REPORT: LEGAL PROFESSIONALISM COMMITTEE 5 (July 2016), [http://nccalj.org/wp-content/uploads/2016/07/Legal-Professionalism\\_interim-report\\_NCCALJ.pdf](http://nccalj.org/wp-content/uploads/2016/07/Legal-Professionalism_interim-report_NCCALJ.pdf) [<https://perma.cc/CV9J-UZR9>].

## A. Defining the Metrics

### 1. *Rulemaking Procedures*

Generally speaking, a rule is “[a] principle or regulation set up by authority”<sup>76</sup> that describes what action is permitted, prohibited or required.<sup>77</sup> In the context of professional licensure, state occupational licensing entities typically promulgate rules that set forth licensing requirements for education, practical experience, character and fitness, and examination.<sup>78</sup> Formulating and adopting rules that express such requirements is “rulemaking.”<sup>79</sup> Thus, rulemaking is what agencies do when they formulate, adopt, amend, or withdraw agency rules. Rules and regulations brought about by the rulemaking process help agencies administer their delegated duties.<sup>80</sup>

Rulemaking procedures create a uniform and fair process by which agencies promulgate rules—a process that also provides for express avenues of public engagement while agencies function in a quasi-legislative manner.<sup>81</sup> Three standard

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76. *Rule*, BLACK’S LAW DICTIONARY (6th ed. 1990). The Federal Administrative Procedure Act (APA) defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .” 5 U.S.C. § 551(4) (2011). Individual states, following Congress’ lead, eventually enacted state versions of the APA that define state rulemaking similarly. *See, e.g.*, ALA. CODE § 41-22-3(9) (West 2017).

77. *See* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 13 (1985).

78. *See, e.g.*, N.Y. CT. R. § 520.16(a) (requiring fifty hours of pro bono service prior to admission to the bar); 21 N.C. ADMIN. CODE 16B.0101(a) (2017) (requiring examination); 21 N.C. ADMIN. CODE 16B.0201(a) (requiring education); 21 N.C. ADMIN. CODE 16B.0302 (investigating requisite character and reputation of applicants seeking dental licensure).

79. *See* PIERCE, *supra* note 24, at § 6.1 (“Rulemaking is ‘the issuance of regulations or the making of determinations which are addressed to indicated but unnamed or unspecified persons or situations.’”) (quoting Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938)).

80. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY, at xi (1994) (“Rulemaking . . . provides direction and content for . . . program implementation . . . and other government activities”).

81. *See, e.g.*, MINN. STAT. ANN. § 14.001 (West 2017) (identifying fairness, uniformity, public access, and public participation as goals of the Minnesota Administrative Procedure Act). In addition to promoting uniformity, fairness, and public engagement, these procedures also serve an essential role in ensuring adequate oversight of administrative

procedures by which the goals of uniformity and fairness are achieved include:

- (1) notice-and-comment rulemaking procedures;<sup>82</sup>
- (2) an express avenue to petition the agency; and<sup>83</sup>
- (3) an express avenue to seek declaratory relief.<sup>84</sup>

#### a. Notice-and-Comment Rulemaking Procedures

Notice-and-comment rulemaking procedures refer to a basic tenet of due process, whereby citizens receive advance notice of proposals to change rules and have an opportunity to be heard prior to changes being made.<sup>85</sup> When promulgating rules with substantive impact, administrative agencies must follow a three-step procedure to adhere to notice-and-comment rulemaking standards.<sup>86</sup> Those three steps include issuing a notice of a proposed rule change, receiving and considering public comment on the proposed change, and issuing a final rule along with a statement about the rule's basis and purpose.<sup>87</sup>

Advance notice and an opportunity to comment are especially important to ensuring adequate oversight because they provide the foundation for a democratic rulemaking procedure. Issuing a notice of rulemaking is how our government communicates with its citizens about government and citizen obligations, responsibilities, and benefits.<sup>88</sup> Without notice, stakeholders are cut-off from governmental action. Comment serves as the next logical step in contributing to adequate oversight. Comment preserves a space of time during which citizens may share opinions, ideas, and offer critiques to

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agencies. *See, e.g.*, MISS. CODE ANN. § 25-43-1.101(2) (West 2017) (stating one purpose of the Mississippi Administrative Procedures Law is “to provide legislative oversight of powers and duties delegated to administrative agencies”).

82. *See, e.g.*, N.C. GEN. STAT. ANN. § 150B-19.1(c) (West 2017) (notice-and-comment rulemaking).

83. *See, e.g.*, N.C. GEN. STAT. ANN. § 150B-20(a) (West 2017) (petition).

84. *See, e.g.*, N.C. GEN. STAT. ANN. § 150B-4(a) (West 2017) (declaratory rulings). While there are alternative channels for the public to engage administrative agencies, notice-and-comment, petition, and declaratory relief are the focus of this Article.

85. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 1.04[B] at 17 (6th ed. 2012).

86. PIERCE, *supra* note 24, § 7.1 at 557.

87. *See id.*

88. *See* KERWIN, *supra* note 80; PIERCE, *supra* note 24, § 7.3, at 570-71.



government officials concerning proposed changes to rules.<sup>89</sup> Thus, without comment, citizens may not meaningfully participate as members of a democracy.

To constitute notice for purposes of rulemaking procedures, notice must be given in advance, where the amount of time between when the public is informed of a proposed rule change and when an administrative agency acts to adopt such change is an amount of time that is reasonable for citizens to learn about the proposal for change.<sup>90</sup> In addition, notice contemplated for these purposes must be accessible.<sup>91</sup> Thus, a notice of a proposed rule change that was posted somewhere obscure, like in a dark alley or within a location on an agency website that is difficult to quickly find, would not constitute sufficient access in order for the notice to comply with the intent of this rulemaking procedure.<sup>92</sup> Finally, notice must be informative in order for it to facilitate the democratic ideal of meaningful participation.<sup>93</sup> To be informative, notice must advise readers of what result the proposed rule will create.<sup>94</sup> If a notice of a proposed rule change is posted, but the substance of the rule that is being considered for change is not a part of that posting, the goal of notice will not be met.<sup>95</sup>

Similarly, for an opportunity to comment to be meaningful, the public must be instructed on how to offer such comments.<sup>96</sup> Necessary information includes: (1) where to send comments; (2) the required format—oral or written; and (3) a deadline for submitting them.<sup>97</sup>

Together, notice and comment create a space of time that works to preserve two components of our democracy ideal.<sup>98</sup> First, that space of time allows for meaningful public participation in the agency rulemaking process.<sup>99</sup> This allows time for experts to weigh in and share empirical evidence and data that is relevant

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89. See PIERCE, *supra* note 24, § 7.3, at 570-71.

90. See *id.*

91. See *id.*

92. See *id.*

93. See *id.* at 570-72.

94. See PIERCE, *supra* note 24, § 7.3, at 570-72.

95. See *id.*

96. See *id.* at 572.

97. *Id.* at 571-72.

98. *Id.* at 570-72.

99. See PIERCE, *supra* note 24, § 7.3, at 571.

to the proposed agency action, which may not be accessible or known by those internal to the agency.<sup>100</sup> Second, notice and comment work together to slow the pace of change for new regulatory requirements to take effect.<sup>101</sup> This space of time between the beginning of the notice and the end of the comment period allows those persons affected by a changed regulation the time to take measures to conform their behavior to a new regulatory standard.<sup>102</sup>

### b. Public Avenues to Petition for Change

In the context of agency rulemaking, the procedure known as petition creates an express avenue for those outside the agency to initiate a rulemaking proceeding.<sup>103</sup> Like rulemaking that is initiated from within an agency, a petition can concern adding a new rule, amending an existing rule, or withdrawing an obsolete rule.<sup>104</sup> For a petition to satisfy its procedural intent, agency rules regarding the petition procedure should provide clear instructions to those outside the agency on how to comply with the requirements for submitting petitions.<sup>105</sup> An express avenue to petition and initiate a rulemaking proceeding opens up rulemaking to a much broader group of people than those internal to the agency.<sup>106</sup> With a petition, then, it is possible to produce superior rules through a kind of crowd sourcing.<sup>107</sup>

Avenues to petition that are expressly provided for within agency rules allow those who are being regulated to initiate proposals for change, acknowledging their perspective, as

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100. See William V. Luneberg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 5-6 (1988).

101. See PIERCE, *supra* note 24, § 7.3, at 570.

102. *Id.*

103. See *id.*, § 6.10, at 516-17.

104. See, e.g., ARIZ. REV. STAT. ANN. § 41-1056(M) (West 2017); N.C. GEN. STAT. ANN. § 150B-20(a) (West 2017). For an example of an outdated rule, see RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, N.C. BD. OF LAW EXAM'RS .0903, <http://ncble.org/wp-content/uploads/2015/09/rules.pdf> [https://perma.cc/96U5-KCTU]. Though the rule lists taxation as a testable subject, the board has not tested on tax law in more than fifteen years.

105. See Luneberg, *supra* note 100, at 7-8; PIERCE, *supra* note 24, § 7.3, at 571.

106. See PIERCE, *supra* note 24, § 7.3, at 571.

107. See DAREN C. BRABHAM, CROWDSOURCING IN THE PUBLIC SECTOR 21 (2015); Luneberg, *supra* note 100, at 5-6.

opposed to proposals for change coming only from the perspective of those doing the regulating.<sup>108</sup> As a procedural mechanism, an avenue to petition requires agencies to engage with outside persons.<sup>109</sup>

### c. Declaratory Relief: Seeking Rule Clarity

Declaratory relief is a procedural process requiring administrative entities to engage with those outside the agency.<sup>110</sup> Those who are substantially affected by an agency rule may request clarification about the rule's meaning, how the rule applies under a given set of facts, or whether the rule is valid.<sup>111</sup> To illustrate, suppose an applicant seeking a law license had expunged criminal-record entries, and the licensing application was unclear about whether the applicant needed to disclose those expunged criminal-record entries. An express avenue for declaratory relief would allow that applicant to force the agency to declare what the disclosure requirements were and how that rule applied in the context of an applicant who had expunged criminal records.<sup>112</sup>

By allowing outsiders to force the agency to state what a rule means, declaratory relief contributes to the adequacy of agency oversight.<sup>113</sup> The declaratory relief procedure facilitates the realization that law should be written in a clear manner, a basic tenet in our democratic society.<sup>114</sup>

## 2. *Open Meeting Laws*

In addition to the three features of rulemaking procedures described above, this study evaluates the extent to which lawyer-licensing entities<sup>115</sup> hold meetings that are open to the public.

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108. See PIERCE, *supra* note 24, § 7.3, at 571.

109. See *id.*

110. See JAMES M. FISCHER, UNDERSTANDING REMEDIES 6 (2d ed. 2006).

111. See *id.*; *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 307 (1961); Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. REV. 277, 278-79 (1986).

112. See Powell, *supra* note 111, at 278-79, 289-90.

113. See *id.* at 294.

114. See *id.*

115. Entities that possess the power to adopt lawyer-licensing rules are the ones that are most relevant to this Article.

Open meeting laws are typically state statutory schemes,<sup>116</sup> and are commonly known as sunshine laws or acts or open-government laws.<sup>117</sup> These laws secure the democratic ideal that a government that is both for the people and by the people is one that includes the consent of the people.<sup>118</sup> For consent to be meaningful, it must be informed.<sup>119</sup> To this end, various types of government-in-the-sunshine laws secure the public's ability to access information.<sup>120</sup> For example, the Freedom of Information Act and Public Records Acts allow citizens to make requests for information from governmental entities.<sup>121</sup> Similarly, open meeting laws allow the public to access information by observing agency operation during regularly scheduled meetings.<sup>122</sup> Worth noting here is that open meeting laws provide not only access to information, but also a measure of oversight because humans act differently when they are being watched.<sup>123</sup> For this reason, I have chosen to use the practice of holding open meetings as a metric to evaluate transparency practices of lawyer-licensing entities.

State open meeting statutory schemes set forth requirements for public bodies and provide instructions on how those bodies are to conduct meetings that are open to the public while simultaneously allowing for proceedings, such as closed sessions in order to preserve other important democratic values.<sup>124</sup> At their

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116. *But see* FLA. CONST. art. 1, § 24 (adopting government-in-the-sunshine principles in its state constitution).

117. *See, e.g.*, Judy Nadler & Miriam Schulman, *Open Meetings, Open Records, and Transparency in Government*, SANTA CLARA U. (Oct. 23, 2015), <https://www.scu.edu/ethics/focus-areas/government-ethics/resources/what-is-government-ethics/open-meetings-open-records-transparency-government/> [<https://perma.cc/LE7N-ATR2>].

118. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governmental power comes “from the consent of the governed”).

119. Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994).

120. *See* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 285 (2d ed. 2002) (describing how government-in-the-sunshine laws provide notice of agency meetings and allow for public observation of agency action).

121. *See* CAL. GOV'T CODE ANN. §§ 6251, 6253 (West 2017); STRAUSS, *supra* note 120, at 276-77.

122. Brett Kandt, *New Changes in Nevada's Open Meeting Law: Promoting Transparent Government*, 20 NEV. LAW. 6, 6 (2012).

123. *See* STRAUSS, *supra* note 120, at 276.

124. *See, e.g.*, N.C. GEN. STAT. ANN. § 143-318.11(a)(1) (West 2017) (permitting limited portions of open meetings to occur during closed sessions for the purpose of preventing the disclosure of privileged or confidential information under state or federal law).

core, open meeting laws require agencies to provide notice of when and where they meet in order to prevent agencies from wrongly using the power granted to them by the people.<sup>125</sup>

### B. Methodology

The previous section defined the metrics used in this study. Before describing the methodology used to collect data, it is worth noting that gathering data for these metrics can be complex. One source of complexity is that answers to the questions posed may be governed by authorities from any of the three branches of government, requiring the evaluation of many sources.<sup>126</sup> A lack of uniformity results from this multi-source oversight of lawyer-licensing entities. Whereas in a typical research project, the question posed implicates only one branch of government at a time, or there is more uniformity across jurisdictions with respect to whether the issue is answered by researching authorities within either the executive, legislative, or judicial branches of government, the questions posed by this article often involve more than one governmental branch.<sup>127</sup> In addition to the sheer number of sources, answers supplied by authorities emanating from one branch of government are neither exclusive nor exhaustive, as authorities from a separate government branch may control and answer the same questions in a different way.<sup>128</sup> Finally, if and when government branch authorities or practices

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125. See N.C. GEN. STAT. ANN. § 143-318.12 (West 2017); see also IND. CODE ANN. § 5-14-1.5-1 (West 2017) (requiring that all public agencies conduct their business in meetings open to the public).

126. Compare N.C. State Bar, 794 S.E.2d at 746 (stating that the North Carolina State Bar is an agency created by the legislature), with KY. CONST. § 116 (vesting power to regulate lawyers in the Kentucky Supreme Court).

127. See, e.g., N.D. CENT. CODE ANN. § 44-04-19 (West 2017); N.D. Att’y Gen. Op. 90-04 (Jan. 23, 1990) (stating that the North Dakota open meeting law applies to the state bar association).

128. See, e.g., N.D. CENT. CODE ANN. § 44-04-19 (West 2017) (requiring that “all meetings of a public entity . . . be open to the public”); N.D. Att’y Gen. Op. 2005-O-19 (Nov. 22, 2005) (concluding that the open meetings law does not apply to committees of the North Dakota Supreme Court tasked with promulgating rules of procedure; N.D. Att’y Gen. Op. 90-04 (Jan. 23, 1990) (stating that the open meetings statute applies to the North Dakota State Bar Board).

seem to conflict, resolving inconsistencies is not necessarily intuitive or easy.<sup>129</sup>

A second complexity in conducting this research arises because the judicial entities and rules that govern them can be compound in structure and encompass multiple entities, each having its own set of rules.<sup>130</sup> Further, it can be difficult to discriminate whether the relationships between some entities are lateral or hierarchical in form, further complicating questions about whether and the extent to which one entity's procedural rules apply to another entity's operations.<sup>131</sup>

Third, the organization of court rules is neither consistent nor intuitive.<sup>132</sup> Again, judicial systems across the states are not structured in a uniform way.<sup>133</sup> Widespread variations in approach require persistent and thorough research and a close reading of current and historical authorities. Of course, these complexities are amplified by the fact that court rules are dynamic and change annually.<sup>134</sup>

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129. For example, it is not always clear whether a state's administrative procedures act or open meeting laws apply to lawyer-licensing entities. *See, e.g.*, KY. REV. STAT. ANN. § 61.805(2) (West 2017). Although at least a few jurisdictions' lawyer-licensing entities appear to be subject to their state's administrative procedure act, others may be expressly exempt. *See, e.g.*, GA. CODE ANN. § 50-13-2 (West 2017). Likewise, several jurisdictions have open meeting laws that expressly apply to lawyer-licensing entities, while some jurisdictions have open meetings statutes containing language that does not answer the question with any degree of certainty. *Compare* ALASKA STAT. ANN. § 08.08.075 (West 2017), *with* KY. REV. STAT. ANN. § 61.805(2) (West 2017).

130. *See, e.g.*, COLO. BAR ADMISSION. R. 202.3(1) (providing for a state board of law examiners that consists of two other subcommittees—the Law Committee and the Character and Fitness Committee).

131. *See, e.g.*, CONN. GEN. STAT. ANN. § 51-80 (West 2017) (stating that the superior court has the power to promulgate bar admission rules); State of Conn., Judicial Branch, *Practice Book Revisions Superior Court Rules Forms*, CONN. L.J. (July 4, 2017), [http://www.jud.ct.gov/lawjournal/Docs/Misc/2017/27/pblj\\_7901.pdf](http://www.jud.ct.gov/lawjournal/Docs/Misc/2017/27/pblj_7901.pdf) [<https://perma.cc/868T-HGLT>] (stating that the judges of the superior court adopted a new bar-admission rule relating to military spouses); *2000 Information Booklet*, STATE OF CONN.: JUD. BRANCH, [https://www.jud.ct.gov/cbec/Notice\\_Amend\\_UBEScoreEthics\\_Eff0916.pdf](https://www.jud.ct.gov/cbec/Notice_Amend_UBEScoreEthics_Eff0916.pdf) [<https://perma.cc/U33W-BDBH>] [hereinafter *2000 Information Booklet*] (stating that the Connecticut Bar Examining Committee adopted the presented rules).

132. *See infra* note 152.

133. *See* discussion *supra* Section II.C.

134. *See* *CBEC Regulation Amendments Effective Oct. 2017*, STATE OF CONN.: JUD. BRANCH, [https://www.jud.ct.gov/cbec/Notice\\_Amends\\_AppFees\\_2017.pdf](https://www.jud.ct.gov/cbec/Notice_Amends_AppFees_2017.pdf) [<https://perma.cc/P4HB-EQN8>].

### *1. Step One: Identifying Rulemaking Power*

Collecting data on jurisdictional use of rulemaking procedures and holding open meetings as a transparency practice involved three steps. The first step was to answer the threshold question, “Who has the power to regulate?” This required identifying the entity or entities within a jurisdiction that possess and exercise rulemaking authority to formulate and adopt lawyer-licensing rules.<sup>135</sup>

Research for step one began with reviewing state constitutions, as these documents sometimes delegate rulemaking power for lawyer regulation to the judicial branch.<sup>136</sup> When state constitutions did not provide a definitive answer, I continued researching other controlling law, including case law, statutes,<sup>137</sup> rules of court,<sup>138</sup> administrative regulations, and attorney general opinions. Once I identified the entity or entities possessing rulemaking authority for promulgating lawyer-licensing rules within each jurisdiction, I proceeded to step two, which involved assessing whether rules were formulated and adopted pursuant to standard rulemaking procedures.

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135. A variety of institutional structures built around the rulemaking power emerged. *See infra* note 152.

136. Several state constitutions contain express provisions concerning rulemaking power and lawyer regulation, including lawyer licensing. *See, e.g.*, VT. CONST. ch. 2, § 37 (stating the Vermont Supreme Court shall make and promulgate all rules relating to the practice and procedure in all courts).

137. *See, e.g.*, N.D. CENT. CODE ANN. § 27-11-02 (West 2017) (declaring the “power to admit persons to practice as attorneys” is vested in the North Dakota Supreme Court); N.D. CENT. CODE ANN. § 27-11-19 (West 2017) (stating that “[t]he supreme court, after receiving and considering the state board of law examiners’ report of the results of an examination of applicants for admission to the bar” and the board’s recommendations for that applicant, “shall enter an order authorizing the issuance of certificates of admission to the bar to those applicants the court considers entitled to admission”).

138. *See, e.g.*, HAW. SUP. CT. R. 1.1 (declaring that the Hawaii Supreme Court “shall appoint a Board of Examiners . . . to administer the process of admission to the bar,” while reserving the court’s authority to “oversee and control the privilege of the practice of law”); HAW. SUP. CT. R. 1.2(d) (“The Board shall promulgate procedural rules within the scope of its powers and authority, subject to the approval of the Supreme Court.”); HAW. SUP. CT. R. 17(a)-(b) (creating the Hawaii State Bar as an “independent, member-governed organization” with the purpose of assisting the supreme court in its governance of the legal profession through carrying out the promulgated rules of admissions, but clarifying that the supreme court retains ultimate authority over the admission of attorneys).

## 2. Step Two: Locating Rulemaking Procedures

In step two, I focused on locating procedural rules governing how entities must exercise the power to formulate and adopt rules. Whereas the first step answered “who,” the second step answered “what.” More specifically, step two answered the question “*what* are the procedures that the rulemaking authorities use for creating rules that regulate lawyer-licensing?”

My goal in assessing the rulemaking procedures metric: To what extent does this jurisdiction promulgate lawyer-licensing rules within a procedural framework that includes standard rulemaking procedures? Specifically, I searched for evidence of notice-and-comment rulemaking, an express avenue to petition for rule changes, and an express declaratory relief mechanism. Within state statutory schemes, I reviewed state administrative procedure acts. The goal in examining these acts was to determine whether the act’s procedures apply to lawyer-licensing entities. Often, the answer to the question required examining how the term “agency” was defined within the state’s administrative procedure act.<sup>139</sup>

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139. In the jurisdictions researched, the term “agency” was defined with language fairly categorized as formal, functional, or hybrid. States with a hybrid definition of “agency” include both functional and formal terms that define an agency based upon how that entity functions. Approximately thirty jurisdictions define the term agency using both functional and formal language. *See* CONN. GEN. STAT. ANN. § 4-166(1) (West 2017) (defining “agency” as an entity “authorized by law to make regulations”); DEL. CODE ANN. tit. 29, § 10102(1) (West 2017) (defining “agency” as an entity “authorized by law to make regulations”); GA. CODE ANN. § 50-13-2(1) (West 2017) (defining “agency” as an entity “authorized by law expressly to make rules”); HAW. REV. STAT. ANN. § 91-1(1) (West 2017) (defining “agency” as an entity “authorized by law to . . . adjudicate contested cases”); IND. CODE ANN. § 4-22-2-3(a) (West 2017) (defining “agency” as an entity “exercising any of the executive (including the administrative) powers of state government”); KAN. STAT. ANN. § 77-502(a) (West 2017) (defining “agency” as an entity “authorized by law to administer, enforce or interpret any law of this state”); KY. REV. STAT. ANN. § 13A.010 (West 2017) (substituting “administrative body” for agency, and defining the term as “each state board, bureau, cabinet, commission, department, authority, officer, or other entity . . . authorized by law to promulgate administrative regulations”); LA. STAT. ANN. § 49:951(2) (West 2017) (defining “agency” as an entity that “makes rules”); ME. REV. STAT. ANN. tit. 5, § 8002(2) (West 2017) (defining “agency” as an entity “authorized by law to adopt rules”); MD. CODE ANN., STATE GOV’T § 10-202(b)(1) (defining “agency” as an entity “authorized by law to adjudicate contested cases”); MASS. GEN. LAWS ANN. ch. 30A, § 1(2) (West 2017) (defining “agency” as an entity “authorized by law to make regulations”); MINN. STAT. ANN. § 14.02(2) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); MO. ANN. STAT. § 536.010(2) (West 2017) (defining “agency” as an entity “authorized by law or the constitution to make rules”); MONT. CODE ANN. § 2-3-102(1) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); NEB. REV. STAT. ANN.



§ 84-901(1) (West 2017) (defining “agency” as entities “authorized by law to make rules and regulations”); NEV. REV. STAT. ANN. § 233B.031 (West 2017) (defining “agency” as an entity “authorized by law to make regulations”); N.H. REV. STAT. ANN. § 541-A:1(II) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); N.J. STAT. ANN. § 52:14B-2 (West 2017) (defining “agency” as an entity “authorized by statute to make, adopt or promulgate rules”); N.M. STAT. ANN. § 12-8-2(A) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); N.Y. A.P.A. LAW § 102(1) (McKinney 2017) (defining “agency” as an entity “authorized by law to make rules”); OHIO REV. CODE ANN. § 119.01(A)(1) (West 2017) (defining “agency” as an entity “having authority to promulgate rules”); OR. REV. STAT. ANN. § 183.310(1) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); S.C. CODE ANN. § 1-23-310(2) (West 2017) (defining “agency” as an entity “authorized by law to determine contested cases”); S.D. CODIFIED LAWS § 1-26-1(1) (West 2017) (defining “agency” as an entity “vested with the authority to exercise any portion of the state’s sovereignty”); TENN. CODE ANN. § 4-5-102(2) (West 2017) (defining “agency” as an entity “authorized or required by any statute or constitutional provision to make rules”); TEX. GOV’T CODE ANN. § 2001.003(7) (West 2017) (defining “agency” as an entity “that makes rules”); VT. STAT. ANN. tit. 3, § 801(b)(1) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); VA. CODE ANN. § 2.2-4001 (West 2017) (defining “agency” as an entity “empowered by the basic laws to make regulations”); WASH. REV. CODE ANN. § 34.05.010(2) (West 2017) (defining “agency” as an entity “authorized by law to make rules”); W. VA. CODE ANN. § 29A-1-2(a) (West 2017) (defining “agency” as an entity “authorized by law to make rules”). States with a formal definition of “agency” are characterized by using specific titles to refer to administrative entities and not focusing on the entity’s function within a governmental scheme. *See* ALA. CODE § 41-22-3(1) (West 2017) (defining “agency” as a “board, bureau, commission, department, officer, or other administrative office or unit”); ARIZ. REV. STAT. ANN. § 41-1001(1) (West 2017) (defining “agency” as a “board, commission, department, officer or other administrative unit”); ARK. CODE ANN. § 25-15-202(2)(A) (2017) (defining “agency” as “a board, commission, department, officer, or other authority of the government”); CAL. GOV’T CODE § 6252(f)(1) (West 2017) (defining “agency” as a “state body”); COLO. REV. STAT. ANN. § 24-4-102(3) (West 2017) (defining “agency” as “board, bureau, commission, department, institution, division, section, or officer of the state”); FLA. STAT. ANN. § 120.52(1) (West 2017) (defining agencies as “officers or governmental entities”); 5 ILL. COMP. STAT. ANN. 100 / 1-20 (West 2017) (defining “agency” to include an “officer, board, commission, and agency created by the Constitution” or “officer, department, board, commission, agency, institution, authority, [or] university . . . of the State”); IOWA CODE ANN. § 17A.2(1) (West 2017) (defining “agency” as an “administrative office”); MICH. COMP. LAWS ANN. § 24.203(2) (West 2017) (defining “agency” as a “department, bureau, division, section, board, commission, trustee, authority or officer”); MISS. CODE ANN. § 25-43-1.102(a) (West 2017) (defining “agency” as an “administrative unit”); N.C. GEN. STAT. ANN. § 150B-2(1a) (West 2017) (defining “agency” to include “a board, a commission, a department, a division, a council, and any other unit of government in the executive branch”); N.D. CENT. CODE ANN. § 28-32-01(2) (West 2017) (“administrative unit of the executive branch of state government”); OKLA. STAT. ANN. tit. 75, § 250.3(3) (West 2017) (“any constitutionally or statutorily created state board, bureau, commission, office, authority”); 71 PA. STAT. AND CONS. STAT. ANN. § 745.3 (West 2017) (“department, departmental administrative board or commission, independent board or commission, agency or other authority”); UTAH CODE ANN. § 63G-4-103(1)(b) (West 2017) (“board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit”); WIS. STAT. ANN. § 227.01(1) (West 2017) (“board, commission, committee, department or officer”); WYO. STAT. ANN. § 16-3-101(b)(i) (West 2017)

As most state administrative procedure acts do not apply to entities responsible for licensing lawyers, I continued researching controlling authorities within the judicial branch of government upon exhausting legislative branch authorities. The judicial branch authorities included supreme court rules, as well as rules and regulations of subordinate judicial entities with rulemaking authority. Examples of the types of subordinate entities include supreme court advisory commissions that supervise all subordinate judicial entities, boards of law (or bar) examiners created by the state's high court, and state bars which originated as private associations but were later incorporated into the judicial branch of government.<sup>140</sup>

If the answer to whether lawyer-licensing rules were promulgated according to standard rulemaking procedures was still unclear (which was often), I continued my research by exploring judicial-entity websites, including state supreme court websites. On these websites, I searched for both express provisions setting forth rulemaking procedures and indirect evidence that entities voluntarily used rulemaking procedures when promulgating rules. Worth noting here, I considered voluntary practices for notice-and-comment rulemaking procedures but not for avenues to petition or seek declaratory relief. In addition to exploring websites, I made direct contact with many jurisdictions through phone calls or email. Targets for phone calls and email included supreme court clerks, board of law examiner chairs, secretaries, and executive directors, practicing attorneys with a current law practice related to occupational licensing, and academics who study and write about lawyer-licensing issues.

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("authority, bureau, board, commission, department, division, officer or employee of the state, [or] a county, city or town or other political subdivision of the state"). The only state to define agency in purely functional terms is Alaska. See ALASKA STAT. ANN. § 44.62.040(a) (West 2017) (defining an "agency" as possessing "regulation-making authority").

140. See discussion of the origins of the Alaska Bar Association, *supra* note 58; see also NEV. SUP. CT. R. 49(1) (fixing the power of the board of bar examiners); COLO. BAR ADMISSION R. 202.2.

### 3. Step Three: Verifying Public Meetings

In step three, I shifted to answering the question posed by the second metric: To what extent do lawyer-licensing entities regularly hold meetings that are open to the public?<sup>141</sup> Similar to the process I used in step two, I began by researching primary authorities, first by examining state statutory schemes.<sup>142</sup> After locating a jurisdiction's government-in-the-sunshine act, I analyzed the language of the statute to see if the language directly addressed whether that jurisdiction's lawyer-licensing entity is required to hold open meetings. More often than not, further research was required. Even if a jurisdiction's statutory language expressly excludes "courts" from the scope of the act, it does not necessarily follow that the legislature intended the term "courts" to include judicially created administrative bodies that function more like administrative agencies than judicial branch courts.<sup>143</sup> Because executive branch authorities, such as state attorney general opinions,<sup>144</sup> frequently provided a direct answer to that question, I examined them as well.<sup>145</sup> If the jurisdiction had no attorney general opinion on point, I shifted to researching judicial branch authorities, including court rules<sup>146</sup> and court orders.<sup>147</sup> When more formal research methods did not provide a definitive answer, I explored judicial-entity websites and made direct

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141. My primary focus remained on answering this question as it related to jurisdictional entities that possess and exercise rulemaking power to adopt and amend lawyer-licensing rules.

142. See, e.g., IND. CODE ANN. § 5-14-1.5-1 (West 2017) (requiring that all public agencies conduct their business in meetings open to the public). At least one jurisdiction addresses government in the sunshine and open meetings in its state constitution. See FLA. CONST. art. 1, § 24.

143. See Open Records Appeal, Ky. Att'y Gen. Op. 92-32 (1992); see also N.D. Att'y Gen. Op. 2005-0-19 (Nov. 22, 2005) (stating that North Dakota's open meeting law applies to the State Bar Board even though courts are exempt).

144. See, e.g., Application of Open Meeting Laws to Board of Trustees Created Under Ariz. Rev. Stat. § 11-952.01, Ariz. Att'y Gen. Op. 107-001 (2007).

145. See, e.g., *id.*; N.D. Att'y Gen. Op. 2005-0-19 (Nov. 22, 2005); N.D. Att'y Gen. Op. 90-04 (Jan. 23, 1990) (stating that North Dakota's open meetings law applies to the State Bar Board); N.D. Att'y Gen. Op. 2014-0-02 (Feb. 3, 2014).

146. See, e.g., MINN. BAR ADMISSION R. 3(C)(1) ("Board [of Law Examiners'] meetings are open to the public . . .").

147. See *In re Petition of Ravnitzky*, C8-97-2104 (Minn. Dec. 23, 1997) (deferring consideration of a petition for an order amending the Rules of the Supreme Court for Admission to the Bar because the board of law examiners planned to submit a petition to amend those rules).

contact, via phone or email communication, with jurisdictional representatives in order to verify whether the lawyer-licensing entity regularly holds meetings that are open to the public.

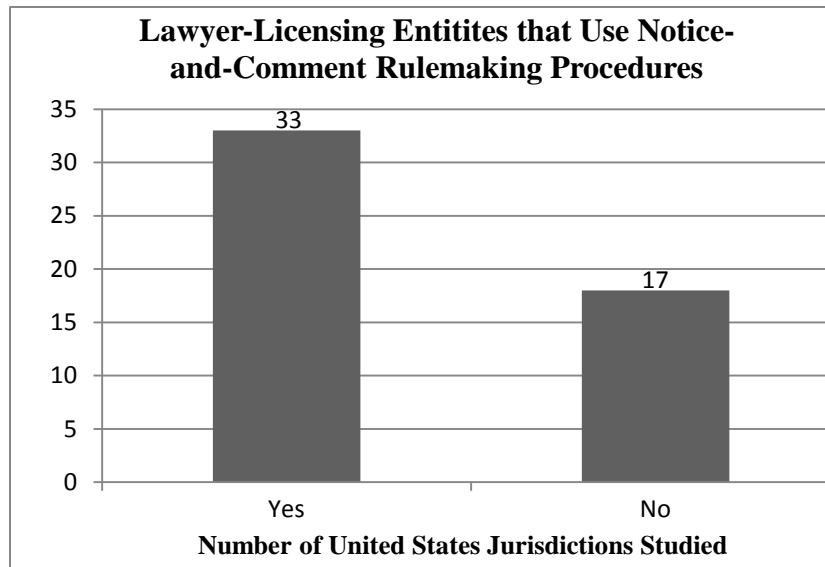
### III. STUDY FINDINGS

This section reports findings on how lawyer-licensing entities across fifty-one United States jurisdictions use rulemaking procedures and transparency practices when adopting new bar admission rules.

#### A. Use of Rulemaking Procedures

Findings on the use of rulemaking procedures include the extent to which lawyer-licensing entities (1) use notice-and-comment rulemaking procedures as a matter of actual practice; (2) provide an express avenue for outsiders to petition the entity for a rule change; and (3) have an express declaratory relief procedure in place for stakeholders to use when the meaning or application of a rule is unclear.

##### 1. Findings on Notice-and-Comment



This study's findings show that thirty-three out of fifty-one jurisdictions use notice-and-comment rulemaking procedures when changing lawyer-licensing rules and that eighteen jurisdictions do not.<sup>148</sup> Stated another way, sixty-five percent of lawyer-licensing entities provide advance notice of proposed rule changes and solicit comment from others before changing rules that govern bar admission.<sup>149</sup>

Jurisdictions that use notice-and-comment rulemaking procedures do so either (1) pursuant to express authority that directs the use of notice-and-comment rulemaking;<sup>150</sup> or (2) out of voluntary practice.<sup>151</sup> Twenty-two of the thirty-three jurisdictions that use notice-and-comment rulemaking procedures do so under express authority.<sup>152</sup> To illustrate, Alaska has a

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148. See *infra* notes 152, 159.

149. See *id.*

150. See *infra* note 152.

151. See *infra* note 159.

152. See ALASKA BAR R. 62 §§ 5, 7 (requiring thirty days' advance notice and giving interested persons the opportunity to comment in oral or written form); ARIZ. SUP. CT. R. 28 pmb1., (A)-(D) (stating that the policy of the court is to provide public notice and opportunity for comment regarding proposed changes to court rules); CAL. STATE BAR R. 1.10(A) (setting forth a presumptive period of forty-five days to receive public comment on proposed rule changes); COLO. BAR ADMISSION R. 202.2; *Adopted & Proposed Rule Changes*, COLO. JUD. BRANCH: SUP. CT., [https://www.courts.state.co.us/Courts/Supreme\\_Court/Rule\\_Changes.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm) [<https://perma.cc/3H8E-LVBC>]; CONN. SUPER. CT. R. § 1-9(b) (requiring notice to be given in the Connecticut Law Journal and a time period for comment); FLA. STATE BAR R. 1-12.1(d)-(e) (requiring a period of notice and comment prior to the adoption of proposed rules); HAW. SUP. CT. R. 17(g) (requiring the Hawaii Supreme Court to give the Board of Directors of the Hawaii state bar ninety days' prior written notice of proposed changes and granting the Board of Directors discretion to determine whether the proposed changes will "be the subject of a public hearing, written comment, or other means of public or member participation"); IND. CODE ANN. § 5-14-1.5-1 (West 2017) (declaring that official actions of public agencies must be conducted and taken openly in order to fully inform the people of Indiana); 2017 Ind. Legis. Serv. 1 (West) (defining public agency as including any "board, commission, department, agency, authority, or other entity . . . exercising a portion of the executive, administrative, or legislative power of the state."); Order Amending Trial Rule 80, No. 94S00-1701-MS-5 (Ind. May 19, 2017) (requiring the Supreme Court Committee on Rules of Practice and Procedure to publish all proposed amendments and give thirty days for written comment by the public); IND. TRIAL P. R. 81(B) (requiring a court or administrative district to give notice to the bar and public of the proposed local or administrative rules, the time period for comment, the address to which comments should be sent, and the proposed effective date); IOWA CODE ANN. § 602.4202(1) (West 2017) (requiring the supreme court to submit proposed rules to the legislative council for notice and comment prior to adoption); Order on Rules Oversight and Rulemaking Processes, No. JB-05-27 (A. 2-16) (Me. Feb. 8, 2016) (requiring the Maine Supreme Court to provide notice of proposed rule changes and solicit written comments for a fourteen-day period, absent extraordinary circumstances); MICH. CT. R. 1-201(A) (stating that, prior to

statute that specifies the exact procedure whereby rules are to be created and amended.<sup>153</sup> Alaska's law states that the Board of Governors, individual members of the Board of Governors, and members of the Alaska bar can initiate the rulemaking process.<sup>154</sup> However, the law also states that a thirty-day notice of a proposed rule change must be given before the rule can be recommended for adoption.<sup>155</sup> Notice is to be provided by publication in the Alaska Bar Brief or other bar publication, physical mail delivery to persons who have filed a request for notice, and, in some cases, physical mail delivery to other interested parties.<sup>156</sup> Additionally, the notice must include information about the time, place, and nature of the proceeding and substantive information about the

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any rule amendment adoptions, the supreme court must notify the secretary of the state bar of Michigan and state court administrator of the proposed amendment, the manner and date for submitting comments, and notice must be posted on the court's website); NEB. CT. R. § 1-103(A)-(C) (requiring new or amended rules to be submitted to the clerk of the supreme court, followed by outright denial or deferred action of the supreme court pending notice and comment to the public); NEB. CT. R. § 1-104(A) (stating that new rules, amended rules, and rules awaiting comment from the public shall be published on the court's website); N.H. SUP. CT. R. 51(e) (requiring the clerk of the supreme court to publish any proposed rules and invite comments for thirty days); N.M. SUP. CT. R. 23-106.1(A)-(B), (D) (requiring all rule-change requests to be filed with the clerk of the supreme court, which are then forwarded to the appropriate committee and published in March of each year with a thirty-day comment period); N.M. SUP. CT. R. 23-106 (A)-(J) (detailing the various committees which the supreme court may appoint for rulemaking purposes); N.D. R. P. §§ 3, 7 (stating that within forty-five days of receiving a rule petition, the supreme court shall either refer the petition to the appropriate committee or allow for notice and comment); 201 PA. CODE R. 103(a) (West 2017) (requiring, absent exigent circumstances, a notice-and-comment period prior to the adoption of any new or amended rules); S.D. CODIFIED LAWS § 16-3-5.1 (West 2017) (giving thirty days' advance notice in a publication of general circulation among active members of the bar or online prior to a rule being adopted); TENN. CODE ANN. § 16-3-405 (West 2017) (stating all rules adopted by the supreme court shall be published in a manner deemed appropriate by the court); TEX. GOV'T CODE ANN. § 551.041 (West 2017) (requiring governmental bodies to give written notice of the "date, hour, place, and subject" of upcoming meetings); TEX. GOV'T CODE ANN. § 82.003(a) (West 2017) (stating that the Texas "Board of Law Examiners is subject to . . . Chapter 551"); UTAH JUD. ADMIN. CODE R. 11-105(3)(C) (requiring notice and a forty-five-day comment period before an adoption of a proposed rule); VA. R. SUP. CT. part 6, § 4, ¶ 10-2(C) (requiring a period for notice and a thirty-day comment period); Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Admin. Order No. 11, §§ 2-3 (effective April 18, 2003) (requiring a notice-and-comment period prior to essentially any adoption of proposed rules or amendments).

153. ALASKA BAR R. 62, § 1.

154. ALASKA BAR R. 62, §§ 2, 3.

155. ALASKA BAR R. 62, § 5.

156. ALASKA BAR R. 62, § 5.

proposed rule or proposed rule change.<sup>157</sup> The law requires that “interested persons or their authorized representatives, or both” be given an opportunity to provide comment.<sup>158</sup> In this manner, Alaska, via express authority, promulgates rules according to detailed notice-and-comment rulemaking procedures.

In contrast to the twenty-two jurisdictions that have express provisions about lawyer-licensing entities using notice-and-comment rulemaking procedures, there are twelve jurisdictions that follow notice-and-comment rulemaking procedures out of voluntary practice.<sup>159</sup> For example, in the District of Columbia,

157. ALASKA BAR R. 62, § 6.

158. ALASKA BAR R. 62, § 7.

159. See *Court of Appeals Notices*, D.C. CTS., <https://www.dccourts.gov/court-of-appeals/about-court-appeals/notices> [<https://perma.cc/8778-MHQH>] (providing notice of proposed rule changes and an avenue for comment); *Rules Adopted by the Supreme Court*, KAN. JUD. BRANCH, <http://www.kscourts.org/rules/default.asp> [<https://perma.cc/3KFF-42N9>] (evidencing access to comment on proposed or amended rules); Standing Committee on Rules of Practice and Procedure, *Proposed Rules Changes and Recent Rules Orders*, MD. CTS., <http://www.mdcourts.gov/rules/ruleschanges.html> [<https://perma.cc/SC6X-S76J>] (evidencing access to comment on proposed or amended rules); *Rule Changes & Invitations to Comment*, MASS.GOV: MASS. CT. SYS., <http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/> [<https://perma.cc/H2ZE-U9HM>] (showing a clear avenue for notice and comment on proposed rule changes, including a change to the rules of the Board of Bar Examiners); *Case Management System*, MINN. APP. CTS., <http://macsnc.courts.state.mn.us/ctrack/view/publicCaseMaintenance.do?csNameID=69135&csInstanceID=75906> [<https://perma.cc/R3DJ-Y3TC>] (providing access to all filings related to the amendment or adoption of rules regulating bar admission); *New Rules*, MONT. JUD. BRANCH, [http://courts.mt.gov/supreme/new\\_rules](http://courts.mt.gov/supreme/new_rules) (presenting orders of the supreme court amending rules to the bar, each of which states that the rule was or will be distributed for public comment prior to adoption); Advisory Comm. on the Unif. Bar Examination, *Overview*, NY STATE UNIFIED CT. SYS., <http://www.nycourts.gov/ip/bar-exam/> [<https://perma.cc/9CV9-X8CA>] (“In fulfillment of its mission and in the interests of transparency, the committee held four public hearings and informational presentations throughout the state, posted a podcast with the chair of the New York State Board of Law Examiners, disseminated ‘tweets’ on the court system’s Twitter account to notify interested parties of upcoming hearings and informational sessions, created this web site, and promptly posted transcripts, witness statements and other comments received from those in favor of as well as those opposed to the proposal.”); *Proposed Rule Amendments*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/RuleAmendments/> [<https://perma.cc/8PYB-HHEB>] (publicizing rules that are open for public comment); *Final Rule Amendments*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/RuleAmendments/Archive.aspx> [<https://perma.cc/A345-JJTV>] (indicating that past amendments to the bar-admission rules were published for public comment); Order Adopting the Uniform Bar Examination, No. 2016-01-2101 (S.C. Jan. 21, 2016), <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2016-01-21-01> [<https://perma.cc/64H9-S9FA>] (“[A]fter consultation with the Board of Law Examiners and representatives of the South Carolina Bar, the Charleston School of Law, the University of South Carolina School of

the court of appeals website provides an opportunity for notice and comment on proposed rule changes.<sup>160</sup> Website visitors can click on the proposed-rule-change links, and the visitor will be directed to the desired order that provides the proposed rule or text of the proposed rule amendment and instructions for submitting comments.<sup>161</sup> Thus, the District of Columbia exercises notice-and-comment rulemaking procedures as a matter of practice. However, thorough research did not produce any express provisions requiring the court to follow such procedures.

While adhering to notice-and-comment rulemaking procedures as a matter of voluntary practice is superior to changing bar-admission rules without any advance notice or opportunity to be heard, voluntary practices are subject to selective use. Thus, less than half of our country's lawyer-licensing entities have express notice-and-comment procedures in place.<sup>162</sup>

In addition to confirming the number of lawyer-licensing entities that use notice-and-comment rulemaking procedures, this study's findings demonstrate that the substance of the various rulemaking procedures and the discretion to forego using the

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Law, and the National Conference of Bar Examiners"); *Requests for Public Comment*, W. VA. JUDICIARY, <http://www.courtswv.gov/legal-community/requests-for-comment.html> [<https://perma.cc/AW9E-ZDPY>] (posting notice and soliciting comments on proposed rules, including some related to bar admission, stating that "[c]omments from the public, the bench, and the bar are important to the judicial rule making process"); *Recent Rules Orders*, W. VA. JUDICIARY, <http://www.courtswv.gov/legal-community/recent-rules-orders.html> [<https://perma.cc/Z6QK-RHYK>] (identifying proposed bar-admission rules that are currently open for comment or that have been previously adopted after a period for comment); *In re Matter of Publication of Supreme Court Orders*, No. 12-09 (Wis. Aug. 7, 2015), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=146023> [<https://perma.cc/QL4-KSF3>] (providing an example of a petition filed proposing rule changes which were later opened for public comment). *Compare* COLO. BAR. ADMISSION. R. 202.2 ("The [Supreme Court] Advisory Committee shall recommend to the Supreme Court proposed changes or addition to the rules . . . governing admission to the practice of law."), with *Adopted & Proposed Rule Changes*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/Supreme\\_Court/Rule\\_Changes.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm) [<https://perma.cc/XD4X-SXDF>] (posting notice of proposed rule changes and inviting public comment).

160. See *Court of Appeals Notices*, D.C. CTS., <http://www.dccourts.gov/internet/appellate/notices/main.jsf> [<https://perma.cc/J758-4HRZ>].

161. See *id.* For an example of an amendment passed using the notice-and-comment method, see Order Amending Rule XI of the District of Columbia Rules Governing the Bar, No. M-251-15 (D.C. Ct. App. Feb. 4, 2016), <https://www.dccourts.gov/court-of-appeals/orders> [<https://perma.cc/JCN2-6Y9V>].

162. *Supra* note 152.



procedures varies widely across jurisdictions. Selected variations are highlighted below.

As a preliminary matter, lawyer-licensing entities tend to follow one of two approaches when initiating rulemaking proceedings. In the first approach, lawyer-licensing entities promulgate rules during a predetermined cycle of time that lasts one year or longer before the cycle repeats itself.<sup>163</sup> For example, in Maine all proposed rule changes must be submitted to the Maine Supreme Judicial Court by the first day of May in any given year.<sup>164</sup> Proposed amendments submitted in advance of this deadline are handled by the Court during the summer months, which allows adopted changes to take effect by September.<sup>165</sup> In the second approach, lawyer-licensing entities engage in rulemaking action at any time of the year.<sup>166</sup>

Furthermore, the length of time for advance notice of a proposed rule change varies considerably from one lawyer-licensing entity to another.<sup>167</sup> Some jurisdictions, like Hawaii, provide ninety days' advance notice to the state bar's board of directors, who then have the authority to provide the public with notice of potential rule changes and an opportunity to express their opinion on the proposals.<sup>168</sup> In Utah, the rulemaking entity provides a forty-five-day comment period.<sup>169</sup> In jurisdictions like Alaska, Indiana, New Hampshire, and New Mexico, public notice is posted thirty days in advance of any formal administrative action.<sup>170</sup> But some jurisdictions, like Vermont, require notice of

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163. See Rules Oversight and Rulemaking Processes, Admin. Order No. JB-05-27 (A. 2-16) (Me. Feb. 8, 2016); ARIZ. SUP. CT. R. 28 pmb1. (adopting an annual rulemaking cycle to implement rule changes); N.M. SUP. CT. R. 23-106.1(B).

164. Rules Oversight and Rulemaking Processes, Admin. Order No. JB-05-27 (A. 2-16) (Me. Feb. 8, 2016).

165. See *id.*

166. See Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Admin. Order No. 11 (effective April 18, 2003).

167. Compare HAW. SUP. CT. R. 17(g) (requiring ninety days' advance notice to the Board of Directors of the Hawai'i state bar and thirty days' notice to the public), with DEL. BD. BAR EXAM'RS. R. 4(a) (requiring only two days' notice before a meeting of the board).

168. HAW. SUP. CT. R. 17(g).

169. See UTAH JUD. ADMIN. CODE R. 11-103(2).

170. ALASKA BAR R. 62, § 5; IND. TRIAL P. R. 80(D) (requiring the Supreme Court Committee on Rules of Practice and Procedure to publish all amendments and give a thirty-day period for written comment); N.H. SUP. CT. R. 51(e)(2); N.M. SUP. CT. R. 23-106.1(B)(2).

proposed rule changes without specifying the amount of time.<sup>171</sup> Still other jurisdictions provide notice a mere two days in advance of administrative action.<sup>172</sup>

In addition to length of time for advance notice, jurisdictions vary in the manner in which comments are received.<sup>173</sup> Some jurisdictions allow only written comment;<sup>174</sup> other jurisdictions allow comment to be contributed in either oral or written form, depending on whether a meeting is held.<sup>175</sup> Many lawyer-licensing entities with rulemaking power exercise discretion with respect to whether a public hearing on a proposed rule change will occur.<sup>176</sup> When those entities decide not to hold a public hearing, all comments must be submitted in writing.<sup>177</sup>

Discretion regarding whether to hold a public hearing is not infrequently supplemented by discretion to forego notice-and-comment rulemaking procedures altogether.<sup>178</sup> In jurisdictions where the amount of discretion given is this broad, procedural process safeguards preserved by notice-and-comment rulemaking procedures at times disappear. When this happens, jurisdictions that promulgate rules according to notice-and-comment procedures transform into jurisdictions that conduct agency operations behind closed doors. Thus, the jurisdictions that only voluntarily hold open meetings can become more akin to the group of seventeen other jurisdictions that do not use notice-and-comment rulemaking procedures when promulgating lawyer-licensing rules and regulations.

The next section reports findings on whether lawyer-licensing entities have rules that allow those outside the agency

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171. Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Sup. Ct. Admin. Order No. 11 (effective Apr. 18, 2003).

172. *See, e.g.*, DEL. BD. OF BAR EXAM'RS R. 4(a) (stating that meetings of the board can be called upon two days' notice).

173. UTAH JUD. ADMIN. CODE R. 11-103; Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Sup. Ct. Admin. Order No. 11 (effective Apr. 18, 2003).

174. *See, e.g.*, UTAH JUD. ADMIN. CODE R. 11-103.

175. *See, e.g.*, Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Sup. Ct. Admin. Order No. 11 (effective Apr. 18, 2003) (stating that members of the bar or public "may reserve time in which to make oral comments upon the proposals" if a hearing is held).

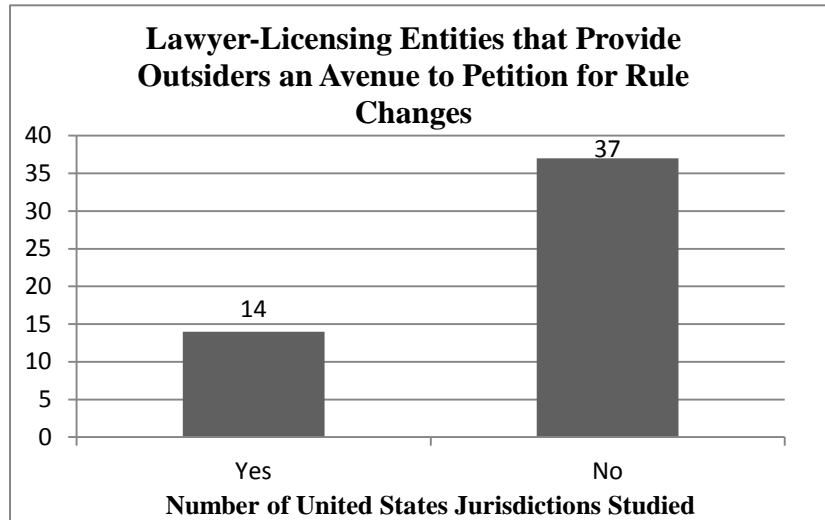
176. *Id.*; *see also* NEB. CT. R. § 1-103(D).

177. *See* Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Sup. Ct. Admin. Order No. 11 (effective Apr. 18, 2003).

178. *See* NEB. CT. R. § 1-103(B)(1).

to petition the licensing entity to change or repeal an existing rule or adopt a new rule.

## 2. *Findings on Avenues to Petition*



For purposes of this article, jurisdictions are considered to provide outsiders an avenue to petition for rule changes when there is an authority specifically stating that someone outside the rulemaking entity can petition for rule changes. Contrastingly, jurisdictions that might read random petitions sent to them, merely based upon a potentially momentary and entirely voluntary basis have not been categorized as providing outsiders an avenue to petition. Thus, while a jurisdiction may be considered as having notice-and-comment procedures by voluntarily following those practices, for a jurisdiction to be considered as providing an avenue to petition, there must be express authority allowing for petition. An example of such express authority is New Hampshire's rule, which specifically states that anyone can petition the court for a rule change and

instructs petitioners what information their petition should include.<sup>179</sup>

The data collected on petition shows that fourteen of fifty-one jurisdictions allow those outside the agency to initiate rulemaking proceedings.<sup>180</sup> This means that twenty-seven percent of jurisdictions allow outsiders to have a direct say in the regulation of lawyer-licensing. In contrast, thirty-seven of fifty-one jurisdictions do not provide an avenue for outsiders to petition for purposes of making changes to administrative rule.<sup>181</sup> In other words, roughly seventy-three percent of jurisdictions do not allow

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179. N.H. SUP. CT. R. 51(c)(1) (allowing anyone to initiate the rulemaking process and instructing petitioners what information their petitions should contain).

180. See ALASKA BAR R. 62, § 3 (allowing members of the Alaska Bar and members of the Board of Governors to petition for rule changes); ARIZ. SUP. CT. R. 28(A)(1) (allowing anyone to initiate the rulemaking process); FLA. STATE BAR R. 1-12.1(b) (allowing members of the Florida Bar in good standing and members of sections and committees of the Florida Bar to initiate the rulemaking process); Order Amending Trial Rule 80, No. 0009 (Ind. May 19, 2017) (stating that rule-amendment proposals are to be presented to the Supreme Court's Chief Administrative Officer and that the applicable form can be found at the court's website); *Committee on Rules of Practice and Procedure*, IND. JUD. BRANCH, <http://www.in.gov/judiciary/admin/2432.htm> [<https://perma.cc/6BFZ-QQY9>] (providing access to the court's proposed rule-amendment form); Order on Rules Oversight and Rulemaking Processes, No. JB-05-27 (A. 2-16) (Me. Feb. 8, 2016) (stating that rule amendments can originate with "any source"); MINN. STAT. ANN. §§ 480.05, 480.054 (West 2017) (stating that the supreme court has the power to promulgate bar-admission rules and has the discretion to grant hearings upon receiving a petition from any person); Order Promulgating Amendments to the Rules for Admission to the Bar, ADM10-8008 (Minn. Jan. 24, 2017) (demonstrating that the supreme court considers petitions from those outside the rule-promulgating entity, such as the Minnesota State Board of Law Examiners); MONT. CONST. art. VII, § 2(3) (giving the supreme court the power to promulgate bar-admission rules); MONT. SUP. CT. INTERNAL OPERATING R. § 6(1) (allowing outsiders to apply for rule changes); *In re* Petition to Adopt Uniform Bar Examination, No. AF 11-0244 (Mont. July 3, 2012) (demonstrating that the supreme court considers petitions from those outside the rulemaking entity, such as the Montana Board of Law Examiners and Committee on Character and Fitness); NEB. CT. R. § 1-103(A) (allowing any interested party to petition for rule changes "unless an existing rule contains specific language" stating that a different procedure is to be followed); NEB. ADMIN. R. & REGS. § 002.01 ("Any person may petition an agency requesting the promulgation, amendment, or repeal of a rule or regulation."); N.H. SUP. CT. R. 51(c)(1) (allowing anyone to initiate the rulemaking process); N.M. SUP. CT. R. 23-106.1(A) (allowing outsiders to apply for rule changes); N.D. R. P. R. § 3.1 (allowing anyone to initiate the rulemaking process); UTAH JUD. ADMIN. CODE R. 11-105(2) ("The Supreme Court shall consider petitions and petitioners' memoranda and adopt, modify, or reject the proposals made and enter an appropriate order."); VA. R. SUP. CT. pt. 6, § 4, ¶ 10-2(B) (allowing the Standing Committee on Legal Ethics to suggest rule changes); *Supreme Court Rules: How to File a Rule Petition*, WIS. CT. SYS., <https://www.wicourts.gov/scrules/petitionfile.htm> [<https://perma.cc/YP2Q-VVMS>] (stating that anyone can initiate the rulemaking process).

181. See *supra* note 180.

those outside the rulemaking entity to initiate the rulemaking process. Thus, nearly two-thirds of jurisdictions deny the right to petition for rule creation, changes, and repeal.<sup>182</sup>

Jurisdictions that offer an avenue for outsiders to petition for rule changes vary with respect to whom they explicitly allow to petition.<sup>183</sup> Many jurisdictions specifically state that they allow “anyone,” “any person,” “any source,” or “any interested party” to petition for rule changes.<sup>184</sup> In contrast, a few jurisdictions couple the ability to petition for rule changes with membership in a select segment of the population.<sup>185</sup> For example, Florida links the right to petition for rule changes to membership of the Florida State Bar.<sup>186</sup> However, it is important to note that even these jurisdictions supply some means of petition, unlike the vast majority of their peers, and thereby provide an increased measure of oversight.

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182. *See id.*

183. *See infra* notes 184-85.

184. ARIZ. SUP. CT. R. 28(A)(1) (allowing anyone “interested in the adoption, amendment, or repeal of a court rule” to initiate the rulemaking process); Order on Rules Oversight and Rulemaking Process, No. JB-05-27 (A. 2-16) (Me. Feb. 8, 2016) (stating that rule amendments can originate with “any source”); MINN. STAT. ANN. §§ 480.05, 480.054 (West 2017) (stating that the supreme court has the power to promulgate bar-admission rules and the discretion to grant hearings upon receiving a petition from any person); Order Promulgating Amendments to the Rules for Admission to the Bar, ADM10-8008 (Minn. Jan. 24, 2017) (demonstrating that the supreme court considers petitions from those outside the rule-promulgating entity, such as the Minnesota State Board of Law Examiners); MONT. CONST. art. VII, § 2(3) (giving the supreme court the power to promulgate bar-admission rules); NEB. CT. R. § 1-103(A) (allowing any interested party to petition for rule changes “unless an existing rule contains specific language” stating that a different procedure is to be followed); NEB. ADMIN. R. & REGS. § 002.01 (“Any person may petition an agency requesting the promulgation, amendment, or repeal of a rule or regulation.”); N.H. SUP. CT. R. 51(c)(1) (allowing anyone to suggest rule changes); N.D. R. P. R. § 3.1 (allowing anyone to petition for rule changes); *Supreme Court Rules: How to File a Rule Petition*, WIS. CT. SYS., <https://www.wicourts.gov/scrules/petitionfile.htm> (stating that anyone can initiate the rulemaking process).

185. *See* ALASKA BAR R. 62, §§ 1, 3 (stating that the rule provides an avenue “whereby the Board of Governors of the Alaska Bar and the Alaska Bar” can directly petition for rule changes); FLA. STATE BAR R. 1-12.1(b) (stating that members of the Florida Bar in good standing and members of sections and committees of the Florida Bar can initiate the rulemaking process); VA. R. SUP. CT. pt. 6, § 4, ¶ 10-2(B) (allowing the Standing Committee on Legal Ethics to suggest rule changes).

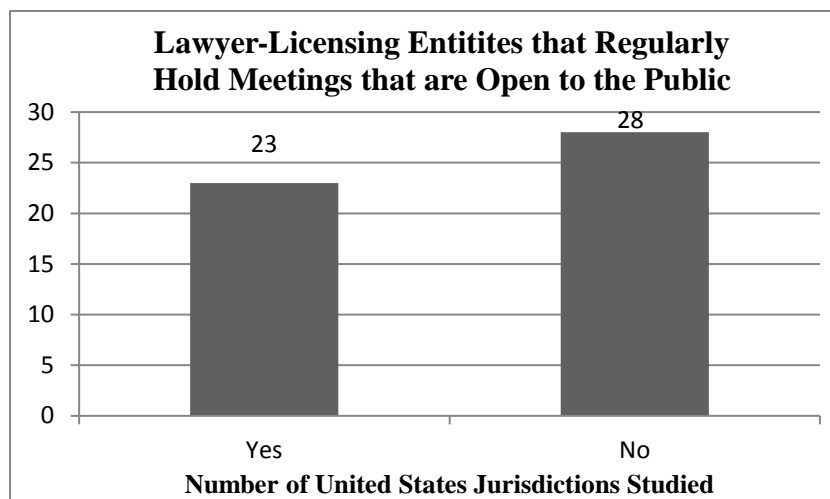
186. *See* FLA. STATE BAR R. 1-12.1(b) (stating that members of the Florida Bar in good standing and members of sections and committees of the Florida Bar can initiate the rulemaking process).

### 3. Findings on Avenues for Declaratory Relief

Research findings regarding whether a jurisdiction's lawyer-licensing entity provides rules instructing people on how to request declaratory relief are noticeably different than the data collected in the preceding sections. No lawyer-licensing entities have express rules, regulations, or procedures by which people outside the agency can seek clarification on the validity, meaning, or application of an existing rule.<sup>187</sup>

Declaratory relief procedures help provide oversight regarding agency rulemaking.<sup>188</sup> In addition, while all jurisdictions provide statutory avenues to seek declaratory relief from courts in the context of rules of civil procedure, when dealing with administrative entities there is value in having procedural rules of engagement explicitly expressed within that particular agency's governing rules.<sup>189</sup>

#### B. Holding Open Meetings



187. I reached this conclusion after studying a wide variety of sources for each state, including legislative statutes, rules of state supreme courts, board of bar examiners' rules, and bar-association rules.

188. 39 GERALD A. McDONOUGH, MASSACHUSETTS PRACTICE SERIES: ADMINISTRATIVE LAW & PRACTICE § 12:58, Westlaw (updated Aug. 2017); *see also* Powell, *supra* note 111, at 294.

189. *See, e.g.*, MISS. R. CIV. P. 57(a) ("Courts . . . may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed."); RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (AM. LAW. INST. 1982) (noting that "[v]irtually all" states empower their courts to grant declaratory relief).

The second metric upon which data was collected is the extent to which lawyer-licensing entities hold meetings that are open to the public. The findings revealed here respond to the following question: Does this lawyer-licensing entity regularly hold meetings that are open to the public as a matter of practice?

In order to qualify as an open meetings adherent, a lawyer-licensing entity must affirmatively demonstrate that it holds open meetings as a matter of actual practice, regardless of whether it technically falls within its state open meetings statute. In other words, even if the statute appears to apply to the jurisdiction's lawyer-licensing entity, this study treated the entity as a non-open-meetings entity if it made no affirmative indications that it regularly holds meetings that are open to the public.

The findings show that twenty-three out of fifty-one jurisdictions regularly hold open meetings.<sup>190</sup> As with the other metrics measured, a range exists in open meeting practices.<sup>191</sup>

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190. ALASKA STAT. ANN. § 08.08.075 (West 2017) (providing that the Board of Governors' meetings are subject to the Opening Meeting Law of Alaska); ARIZ. REV. STAT. ANN. §§ 38-431(6), 431.01(A) (West 2017) (stating any meeting of a public body shall be open to the public and defining public body to include "all quasi-judicial bodies"); CAL. BUS. & PROF. CODE §§ 6010, 6026.5(a), 6026.7 (West 2017) (requiring that every meeting of the board of the state bar must be open to the public, unless an enumerated exception exists); COLO. REV. STAT. ANN. § 24-6-402(2)(a) (West 2017) (mandating that all multimember meetings of any "state public body" be open to the public if the public body is to discuss "public business" or take "formal action"); *Lanes v. State Auditor's Office*, 797 P.2d 764, 766 (Colo. App. 1990) (finding that the State Personnel Board is subject to the open meeting law even when it acts in a quasi-judicial capacity); CONN. GEN. STAT. ANN. §§ 1-200, -225(a) (West 2017) (providing that all meetings of all public agencies shall be open to the public, and defining public agencies to include any judicial entity engaged in an administrative function); IDAHO CODE ANN. §§ 74-202, -203(1), -204 (West 2017); 5 ILL. COMP. STAT. ANN. 120/1, § 1, 120/1.02, 120/2, § 2(a)-(c) (West 2017); Ill. Att'y Gen. Op. 99-005 (Mar. 15, 1999); IND. CODE ANN. §§ 5-14-1.5-1, 2, 2.1, 3 (West 2017); MD. CODE ANN., GEN. PROVISIONS §§ 3-101, 102, 301 (West 2017); MASS. GEN. LAWS ANN. ch. 30A, §§ 18, 20(a), 21 (West 2017); MINN. STAT. ANN. § 13D.01(1)(a) (West 2017); MINN. BAR ADMISSION R. 3(C)(1); N.H. REV. STAT. ANN. §§ 91-A:1-a, A:2 (2017); N.H. SUP. CT. R. 42, 51; N.C. GEN. STAT. ANN. § 143-318.10(a)-(b) (West 2017); N.D. CENT. CODE ANN. § 44-04-19 (West 2017); N.D. Att'y Gen. Op. 90-04 (Jan. 23, 1990); OKLA. STAT. ANN. tit. 25, §§ 302-04 (West 2017); OR. REV. STAT. ANN. §§ 192.610-630(1), .690 (West 2017); Or. Att'y Gen. Op. 2014-02 (Dec. 10, 2014); S.D. CODIFIED LAWS § 1-25-1 (West 2017); TEX. GOV'T CODE ANN. §§ 82.003, 551.002 (West 2017); UTAH CODE ANN. §§ 52-4-102(2), -103 (West 2017); VA. CODE ANN. § 2.2-3701, 3705.7, 3707(A) (West 2017); VA. SUP. CT. R. pt. 6, § 4, ¶¶ 8-9; WASH. REV. CODE ANN. §§ 42.30.020-.030 (West 2017); WASH. GEN. CT. R. 12.2; W. VA. CODE § 6-9A-1, -2(7) (West 2017); WIS. STAT. ANN. §§ 19.81(2), .82(1) (West 2017); WIS. SUP. CT. R. 10.01, .02.

191. See *infra* notes 192-93.

For example, out of the twenty-three jurisdictions that regularly hold open meetings, seventeen<sup>192</sup> of those jurisdictions do so pursuant to an express statute or rule, leaving six jurisdictions regularly holding open meetings out of voluntary practice.<sup>193</sup> Twenty-eight jurisdictions do not regularly hold open meetings.<sup>194</sup>

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192. The seventeen jurisdictions are: Alaska, Arizona, Colorado, Idaho, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Virginia, Washington, West Virginia.

193. The six jurisdictions are: California, Connecticut, Indiana, New Hampshire, Utah, & Wisconsin.

194. ALA. CODE § 36-25A-1 to -2 (West 2017); ARK. CODE ANN. §§ 25-19-102 to -103 (Repl. 2014); DEL. CODE ANN. tit. 29, §§ 10001-10002 (West 2017); Del. Att’y Gen. Op. 07-IB02 (Feb. 1, 2007); Del. Att’y Gen. Op. 95-I001 (Jan. 18, 1995); D.C. CODE ANN. § 2-574 to -575 (West 2017); Telephone Interview with Jharonte James, Office Receptionist, Fla. Supreme Court Clerk (Mar. 16, 2016) (stating that Florida does not hold open meetings); GA. CODE ANN. § 50-14-1 (West 2017); HAW. REV. STAT. §§ 92-1, -2, -6 (West 2017); IOWA CODE ANN. §§ 21.1-2 (West 2017); KAN. STAT. ANN. §§ 75-4317 to -4318 (West 2017); LA. STAT. ANN. §§ 42:12-13 (West 2017); MICH. COMP. LAWS §§ 15.261-.262 (2017); MISS. CODE ANN. §§ 25-41-3, -5 (West 2017); MO. ANN. STAT. §§ 610.010-.011, .020 (West 2017); MONT. CODE ANN. §§ 2-3-201 to -203 (West 2017); NEB. REV. STAT. ANN. §§ 84-1408 to -1410 (West 2017); NEV. REV. STAT. §§ 241.010, .015 (West 2017); N.J. STAT. ANN. § 10:4-8 (West 2017) (excluding the judicial branch from those “public bodies” subject to the state’s open-public-meetings act); N.M. STAT. ANN. § 10-15-1 (West 2017); N.Y. PUB. OFF. LAW §§ 100, 102, 108 (McKinney 2017); 65 PA. STAT. AND CONS. STAT. ANN. §§ 703-704 (West 2017); 42 R.I. GEN. LAWS §§ 42-46-3 to -5 (West 2017); *Roberts v. City of Cranston Zoning Bd.*, 448 A.2d 779, 780 (R.I. 1982); VT. STAT. ANN. tit. 1, § 312 (West 2017); WYO. STAT. ANN. §§ 16-4-402, -403, -405 (West 2017); *see also* Telephone Interview with Joel Biron, Deputy Clerk, Maine Supreme Judicial Court (March 23, 2016). In Kentucky, the Office of Bar Admissions possesses the “power to adopt and amend rules and regulations” governing admission to the bar. KY. SUP. CT. R. 2.000. The Office of Bar Admissions was created by the Kentucky Supreme Court and includes the Kentucky Board of Bar Examiners and the Character and Fitness Committee. *Id.* Furthermore, the Kentucky Constitution grants the exclusive authority to regulate admission to the bar to the judiciary branch, KY. CONST. § 116, and expressly prohibits one department of the commonwealth of Kentucky from exercising any power belonging to another department. *See* KY. CONST. § 28. The Kentucky Open Meetings of Public Agencies law applies to “public agencies,” but public agencies as defined under the statute neither expressly includes nor excludes judicial-department entities. *See* KY. REV. STAT. ANN. §§ 61.805(2), .810 (West 2017). Indeed, the only statute in Kentucky which defines “public agencies” to include courts is the Public Records law, *see* KY. REV. STAT. ANN. § 61.870(1)(e) (West 2017), but this statute’s constitutionality has been questioned as to its inclusion of courts within the definition of “public agency.” *See Ex parte Farley*, 570 S.W.2d 617, 624-25 (Ky. 1978); *accord Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 683-84, 686, 688-89 (Ky. 1980) (voiding state auditor’s power to audit Kentucky Bar Association since state constitutional amendment had removed subject of attorney regulation from legislative control and placed it within the Judicial Department, of which bar association was an integral part). Thus, one of two conclusions is plausible. Either “public agencies” as defined under the Open Meetings of Public Agencies law does not include courts, as the



Important to note here is the difficulty in finding the answer to this metric by assessing language from state open meeting statutes. For example, in some states, open meeting statutes do not expressly exclude courts or the judicial branch of government and are worded broadly enough to appear on their face to apply to judicial branch entities.<sup>195</sup> Kentucky's Open Meetings of Public Agencies law applies to "public agencies," and "public agencies" as defined under the statute neither expressly includes nor excludes judicial-department entities.<sup>196</sup>

## V. COMPARATIVE ANALYSIS

This section discusses this study's findings on the lawyer-licensing entities researched. Lawyer-licensing entities are

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Kentucky legislature expressly includes courts when it intends to do so, or the law does portend to include courts as "public agencies" and is of suspect constitutionality. In any event, no evidence suggests that the Office of Bar Admissions holds meetings that are open to the public. In Ohio, no express court rule or evidence of actual practice suggests the Ohio Supreme Court or any of the judicially created lawyer-licensing entities hold regular meetings that are open to the public. Although the open meetings statute does not expressly exclude the judicial branch from its reach, *see* OHIO REV. CODE ANN. § 121.22 (West 2017), the only judicial branch entity expressly included as being subject to the act is "[a] court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for" specified purposes. *See* OHIO REV. CODE ANN. § 121.22 (West 2017). This statutory feature, along with additional evidence, confirms that the Ohio Supreme Court and judicially created lawyer-licensing entities do not consider themselves subject to sunshine laws. *See State ex rel. Richfield v. Laria*, 4 N.E.3d 1040, 1042 (Ohio 2014) (finding Ohio's Public Records Act inapplicable to obtaining court records); Telephone Interview with John VanNorman, Senior Policy and Research Counsel, Supreme Court of Ohio (Mar. 6, 2017). In South Carolina, neither the Board of Law Examiners nor the Supreme Court holds regular meetings that are open to the public. *See* Email from Michael Virzi, Attorney, Columbia, South Carolina, to Author (Mar. 8, 2016) (on file with author). In Tennessee, the Public Meetings statute applies to any "governing body," *see* TENN. CODE ANN. § 8-44-102(a) (West 2016), a term that has been interpreted to "include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action," *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976), but has not been expressly extended to governmental or public bodies within the judicial branch of government. The Supreme Court of Tennessee controls admission to practice law within the state and promulgates the rules related to lawyer licensing. *See, e.g.,* TENN. SUP. CT. R. 7. The Tennessee Supreme Court created the Board of Law Examiners as part of the judicial branch of government. *See id.* The Board of Law Examiners has the authority to adopt "statements of policy and procedure" related to its task of issuing certificates of eligibility to applicants seeking admission to practice law in Tennessee. *See* TENN. SUP. CT. R. 7 §§ 1.02, 12.05.

195. *See, e.g.,* KY. REV. STAT. ANN. § 61.805(2) (West 2017).

196. *See id.*

evaluated based on the extent to which they use standard rulemaking procedures and transparency practices when making changes to bar-admission rules.

#### A. Discussion of Study Findings

As set forth above, none of the fifty-one jurisdictions researched currently has an express provision that provides stakeholders with instructions on how to seek declaratory relief about the meaning or application of an existing rule.<sup>197</sup> This finding is troubling. A declaratory relief mechanism is neither difficult to establish nor a foreign concept to lawyer-licensing entities.<sup>198</sup> At least one jurisdiction previously utilized declaratory relief before abandoning the ideal rulemaking function.<sup>199</sup> The jurisdiction's previous procedure provides an excellent example of how a jurisdiction could provide for a declaratory relief mechanism. Essentially, a declaratory relief mechanism can be established by setting forth a provision that grants stakeholders the right to request a declaratory ruling from the relevant lawyer-licensing entity.<sup>200</sup> A sample provision could read as follows: "any person substantially affected by a statute administered or rule promulgated by the Board of Law Examiners may request a declaratory ruling as to either: whether or how the rule applies to a given factual situation or whether a particular board rule is valid."<sup>201</sup> Thereafter, the declaratory relief statute should provide basic directives that instruct stakeholders on how to format their request and the substantive information required to be included in their request.

Unfortunately, no jurisdiction currently utilizes a declaratory relief mechanism, meaning an ideal jurisdiction does not yet exist.<sup>202</sup> In light of this fact, the analysis set forth below is based upon whether the jurisdiction's lawyer-licensing entity (1) engages in notice-and-comment rulemaking; (2) provides an express avenue allowing outsiders to petition for a rule change; and (3) holds meetings that are open to the public.

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197. *See supra* note 187.

198. RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (AM. LAW. INST. 1982).

199. *See* N.C. BAR R. § .1104(a) (effective 1976); N.C. BAR R. § .1400 (2017).

200. *See* N.C. BAR R. § .1104(a) (effective 1976).

201. *See id.*

202. *See supra* note 187.

Upon evaluating each jurisdiction, I have characterized its performance based on these three metrics and placed the jurisdiction within one of three categories—sufficient, questionable, and insufficient.

## B. Categorizing Lawyer-Licensing Entities

By chance, approximately one-third of jurisdictions landed into each of the three categories—sufficient, questionable, and insufficient.

### 1. *Sufficient*

Jurisdictions within this category uniformly use notice-and-comment rulemaking procedures when making changes to bar-admission rules. Lawyer-licensing entities acting within a “sufficient” procedural due process framework also have express avenues allowing outsiders to petition for rule changes. While some jurisdictions categorized as sufficient regularly hold meetings that are open to the public, others do not. The seventeen states in the highest-ranked category of sufficient are the following: Alaska, Arizona, Connecticut, Indiana, Minnesota, New Hampshire, North Dakota, Utah, Virginia, Wisconsin, Florida, Maine, Montana, New Mexico, South Carolina, Tennessee, and Nebraska.

Alaska and Florida serve as representative examples of lawyer-licensing entities with sufficient use of standard rulemaking procedures and transparency practices. Alaska follows a model whereby the supreme court possesses and retains sole power to adopt rules regarding bar admission,<sup>203</sup> but works in tandem with a Board of Governors of the Alaska Bar, which serves in an advisory role.<sup>204</sup> The Board of Governors has authority to approve and recommend rules concerning lawyer licensing to the supreme court.<sup>205</sup> Both the Board and supreme

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203. ALASKA CONST. art. IV, § 15.

204. ALASKA STAT. ANN. § 08.08.080 (a)(1) (West 2017); *see also* ALASKA STAT. ANN. § 08.08.010 (West 2017) (creating the Alaska Bar Association as “an instrumentality of the state . . . [and] referred to . . . as the Alaska Bar”); ALASKA STAT. ANN. § 08.08.030 (West 2017) (providing for a Board of Governors to govern the Alaska Bar).

205. ALASKA BAR R. 62, § 1.

court use notice-and-comment procedures.<sup>206</sup> Notices of proposed rule changes, along with an invitation to comment on such proposals, are posted on the supreme court's website.<sup>207</sup> To the extent that recommendations to adopt or amend lawyer-licensing rules come by way of the Board of Governors of the Alaska Bar, the recommended proposals are a result of a regulatory process that sets forth specific notice-and-comment protocols.<sup>208</sup> In its advisory role, the Board of Governors also has procedures by which members of the bar can file a petition for a rule change.<sup>209</sup> In Alaska, participation by way of notice-and-comment rulemaking is available to all members of the public.<sup>210</sup> Both the Alaska Supreme Court and the Board of Governors are subject to open meeting requirements.<sup>211</sup>

Jurisdictions that do not provide open meetings can still be deemed to have sufficient rulemaking procedures. Consider Florida, for example, which does not hold open meetings.<sup>212</sup> In Florida, the power to promulgate rules regarding admission to the practice of law resides exclusively within the jurisdiction of the Florida Supreme Court.<sup>213</sup> In exercising such jurisdiction, the Florida Supreme Court promulgated the Rules of the Supreme Court Relating to Admissions to the Bar<sup>214</sup> and created the Florida Board of Bar Examiners "to handle matters of bar admission."<sup>215</sup> The Florida Supreme Court provides notice of proposed rules and amendments regarding rules for admission to the bar and invites written comment concerning those rules.<sup>216</sup> Additionally, the Rules of the Supreme Court allow for modifications through "the

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206. ALASKA BAR R. 62 §§ 5, 7; *Current Rules of Court*, ALASKA CT. SYS., <http://courts.alaska.gov/rules/rules.htm#comments> [<https://perma.cc/UTB2-6TWT>].

207. *Current Rules of Court*, *supra* note 206.

208. *See* ALASKA BAR R. 62 §§ 5, 7.

209. *See* ALASKA BAR R. 62, § 3.

210. *See* ALASKA BAR R. 62 §§ 5, 7.

211. ALASKA STAT. ANN. §§ 08.08.075, 44.62.310(a) (West 2017).

212. Telephone Interview with Jharonte James, Office Receptionist, Fla. Supreme Court Clerk (Mar. 16, 2016).

213. FLA. CONST. art. V, § 15.

214. FLA. SUP. CT. BAR ADMISSION R. 1-12.

215. FLA. BD. OF BAR EXAM'RS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/4185C019FBDF17AC85257C0700649F91> [<https://perma.cc/4TDH-6TSK>].

216. *Proposed Rules (Updated 9/14/2017)*, FLA. SUP. CT., <http://www.floridasupremecourt.org/decisions/proposed.shtml#admissions> [<https://perma.cc/6PQ7-LS87>].

filing of a petition with the Supreme Court of Florida and subsequent order by the court.”<sup>217</sup> Florida does not hold open meetings.<sup>218</sup>

## 2. Questionable

Based on the study findings, seventeen jurisdictions use rulemaking procedures and transparency practices that are sufficient in some ways but deficient in others. These jurisdictions are labeled as “questionable” to note their dual characteristics. The following jurisdictions have been categorized as questionable: California, Colorado, Maryland, Texas, West Virginia, South Dakota, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Missouri, New York, Ohio, Vermont, Pennsylvania, and the District of Columbia. To their credit, all jurisdictions in this category use notice-and-comment rulemaking procedures.<sup>219</sup> None, however, has an express avenue for outsiders to petition for rule changes.<sup>220</sup> While a handful of

217. FLA. SUP. CT. BAR ADMISSION R. 1-12.

218. Telephone Interview with Jharonte James, Office Receptionist, Fla. Supreme Court Clerk (Mar. 16, 2016).

219. CAL. STATE BAR R. 1.10(a); *Adopted & Proposed Rule Changes*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/Supreme\\_Court/Rule\\_Changes.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm) [<https://perma.cc/9HL4-VG7T>]; Standing Comm. on Rules and Procedure, *Proposed Rules Changes and Recent Rules Orders*, MD. CTS., <http://www.mdcourts.gov/rules/ruleschanges.html>; TEX. GOV'T CODE ANN. §§ 82.003(a), 551.001, .041, 2001.003(7), .023, .029 (West 2017); *Requests for Public Comment*, W. VA. JUDICIARY, <http://www.courtswv.gov/legal-community/requests-for-comment.html> [<https://perma.cc/9C2J-BCCA>]; S.D. CODIFIED LAWS § 16-3-5.1 (West 2017); HAW. SUP. CT. R. 17(g); IOWA CODE ANN. § 602.4202(1) (West 2017); *Rules Adopted by the Supreme Court*, KAN. JUD. BRANCH, <http://www.kscourts.org/rules/default.asp> [<https://perma.cc/632S-VZRC>]. *Rule Changes & Invitations to Comment*, MASS. CT. SYS., <http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/> [<https://perma.cc/84AA-EBTL>]; MICH. CT. R. 1.201(A); MO. ANN. STAT. §§ 610.010(4), .011 (West 2017); Advisory Comm. on the Unif. Bar Examination, *Overview*, NY STATE UNIFIED CT. SYS., <http://www.nycourts.gov/ip/bar-exam/> [<https://perma.cc/9CV9-X8CA>]; *Proposed Rule Amendments*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/RuleAmendments/> [<https://perma.cc/BE7P-E5MB>]; Public Notice and Opportunity to Comment Relative to Proposed Rules or Changes in Rules, Vt. Admin. Order No. 11, §§ 2-3 (effective Apr. 18, 2003); PA. R. JUD. ADMIN. 103(a); *Court of Appeals Notices*, D.C. CTS., <https://www.dccourts.gov/court-of-appeals/about-court-appeals/notices> [<https://perma.cc/55T6-ZN7E>].

220. See *supra* note 180.

questionable jurisdictions regularly hold meetings that are open to the public, most do not.<sup>221</sup>

### 3. *Insufficient*

Jurisdictions were characterized as “insufficient” when their lawyer-licensing entities did not promulgate rules using a framework of procedural safeguards. More specifically, jurisdictions with insufficient rulemaking procedures and transparency practices do not provide advance notice of proposed changes to rules before exercising the authority to change bar-admission rules. In addition, insufficient lawyer-licensing entities do not solicit public comment for a period of time after publication of proposed changes and before taking official action in making rule changes. Jurisdictions falling within the “insufficient” category do not have an express avenue instructing outsiders how to petition for rule changes. While some of these jurisdictions may publish public minutes of prior meetings, they typically do not post meeting agendas in advance.<sup>222</sup> As with questionable jurisdictions, a handful of insufficient jurisdictions hold meetings that are open to the public, but most do not.<sup>223</sup> The

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221. Compare CAL. BUS. & PROF. CODE §§ 6026.5(a), .7 (West 2017); COLO. REV. STAT. ANN. § 24-6-402(1)(d)(I), (2)(a) (West 2017); MD. CODE ANN., GEN. PROVISIONS § 3-101(e)(3), (h)(1)-(2), -102 to -103 (West 2017); MASS. GEN. LAWS ANN. ch. 30A, § 18 (West 2017); S.D. CODIFIED LAWS § 1-25-1 (West 2017); TEX. GOV'T CODE ANN. §§ 82.003(a), 551.002 (West 2017); W. VA. CODE ANN. § 6-9A-1, -2(7) (West 2017), with D.C. CODE ANN. § 2-574(3)(B) (West 2017); HAW. REV. STAT. ANN. §§ 92-1, -2, -6(a)(1) (West 2017); IOWA CODE ANN. §§ 21.1, .2(1)(a),(c) (West 2017); KAN. STAT. ANN. § 75-4318(a) (West 2017); N.Y. PUB. OFF. LAW §§ 100, 102, 108 (McKinney 2017); VT. STAT. ANN. tit. 1, § 312(e) (West 2017); *In re* the “Sunshine Law”, 255 N.W.2d 635, 636 (Mich. 1977); *In re* 42 PA. C. S. § 1703, 394 A.2d 444, 446-47 (Pa. 1978); discussion of Ohio, South Carolina, and Tennessee law, *supra* note 194.

222. See, e.g., *Board of Bar Commissioners: Board Minutes*, ALA. STATE BAR, <https://www.alabar.org/about-the-bar/board-of-bar-commissioners/board-minutes/> [<https://perma.cc/C2VZ-82CP>]; *Board of Bar Commissioners: Upcoming Meeting Dates*, ALA. STATE BAR, <https://www.alabar.org/about-the-bar/board-of-bar-commissioners/upcoming-meeting-dates/> [<https://perma.cc/TD4Z-ECW5>]; *Board of Law Examiners*, MICH. CTS., <http://courts.mi.gov/courts/michigansupremecourt/ble/pages/default.aspx> [<https://perma.cc/J2CK-C62V>] (failing to indicate meeting dates, agendas, or minutes).

223. Compare 5 ILL. COMP. STAT. ANN. 120/1, /1.02 (West 2017); Ill. Att’y Gen. Op. 99-005 (Mar. 15, 1999); N.C. GEN. STAT. ANN. § 143-318.10(a)-(b) (West 2017); OR. REV. STAT. ANN. §§ 192.610(4), .620, .690 (West 2017); Or. Att’y Gen. Op. 2014-02 (Dec. 10, 2014); WIS. STAT. ANN. §§ 19.81, .82(1) (West 2017); MINN. BAR ADMISSION R. 3(C)(1), with ALA. CODE § 36-25A-2(4)(b) (West 2017); ARK. CODE ANN. §§ 25-19-103(6), -106(a) (Supp. 2015); DEL. CODE ANN. tit. 29, § 10002(h) (West 2017); Del. Att’y Gen. Op. 07-

following constitute insufficient jurisdictions: Idaho, Illinois, North Carolina, Oklahoma, Oregon, Washington, Alabama, Arkansas, Delaware, Georgia, Kentucky, Louisiana, Mississippi, Nevada, Rhode Island, Wyoming, and New Jersey.

Oregon provides an example of an insufficient jurisdiction. In Oregon, the power to promulgate bar-admission rules resides with the Oregon Supreme Court.<sup>224</sup> A Board of Bar Examiners committee, whose members are appointed by the supreme court, may recommend to the court rules governing the qualifications, requirements and procedures for admission to the bar by examination or otherwise.<sup>225</sup> In addition to the Board of Bar Examiners serving in an advisory role, the Board of Governors of the Oregon State Bar has authority, subject to supreme court approval, to adopt procedural rules regarding its investigatory powers with respect to bar admission.<sup>226</sup> No evidence suggests that either the Supreme Court of Oregon or the Board of Bar Examiners uses notice-and-comment procedures when adopting or recommending rule changes.<sup>227</sup> In addition to having no procedural process with respect to rulemaking initiated from within the judicial branch, no evidence suggests that there is any avenue to petition for change from outside the judicial branch.<sup>228</sup> Furthermore, none of the authorities examined for the Oregon Supreme Court, the Board of Bar Examiners, or the Board of Governors of the Oregon State Bar contains an express provision

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IB02 (Feb. 1, 2007); Del. Att’y Gen. Op. 95-I001 (Jan. 18, 1995); Del. Op. Att’y Gen. 96-IB03 (Jan. 2, 1996); IDAHO CODE ANN. § 74-202(4)(a) (West 2017); LA. STAT. ANN. § 42:13(A)(3), :17(B) (West 2017); MISS. CODE. ANN. § 25-41-3(a)(i) (West 2017); N.J. STAT. ANN. § 10:4-8(a) (West 2017); OKLA. STAT. ANN. tit. 5 § 14, tit. 25 § 304(1) (West 2017); 42 R.I. GEN. LAWS ANN. §§ 42-46-3, -5(c) (West 2017); WYO. STAT. ANN. §§ 16-4-402(ii), -403 (West 2017); *Fathers are Parents Too, Inc. v. Hunstein*, 415 S.E.2d 322, 323 (Ga. Ct. App. 1992); *Goldberg v. Eighth Jud. Dist. Court in & for Clark Cty.*, 572 P.2d 521, 521-22 (Nev. 1977); discussion of Kentucky law *supra* note 194.

224. See OR. REV. STAT. ANN. § 9.210 (West 2017); OR. BAR. R. 1.2.

225. OR. REV. STAT. ANN. § 9.210(1) (West 2017); OR. BAR. R. 1.2.

226. OR. REV. STAT. ANN. § 9.542(1) (West 2017).

227. See generally OR. ST. BD. OF BAR EXAM’RS, RULES FOR ADMISSION OF ATTORNEYS (Rev. Aug. 1, 2017), [https://www.osbar.org/\\_docs/rulesregs/admissions.pdf](https://www.osbar.org/_docs/rulesregs/admissions.pdf) [<https://perma.cc/924K-S6ZB>].

228. *Id.*

allowing parties who are substantially affected by the rules to seek clarification through a declaratory relief mechanism.<sup>229</sup>

Another example of an “insufficient” jurisdiction is Alabama. In Alabama, the power to promulgate rules relating to the licensing of lawyers resides with the Board of Commissioners of the State Bar.<sup>230</sup> The Board of Commissioners holds the power in Alabama “[t]o determine, by rules, the qualifications and requirements for admission to the practice of law.”<sup>231</sup> The Board of Examiners, a subordinate entity the Commissioners were directed to create,<sup>232</sup> possesses its own authority to adopt rules “governing the control, methods, and details of conducting examinations.”<sup>233</sup>

## VI. CONCLUSION

This study has measured the use of rulemaking procedures and transparency practices of lawyer-licensing entities across United States jurisdictions. The research shows a lack of uniformity as to which branch of government, i.e. who, has the power to regulate lawyer-licensing entities. Presented findings also include observations about a lack of uniformity in the way that lawyer-licensing entities exercise rulemaking authority. Confusion as to who and by what procedures rules are to be promulgated contributes to a lack of transparency incompatible with the American democratic ideal. In addition to widespread variation, a substantial number of lawyer-licensing entities do not exercise rulemaking authority under procedural-process rules that

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229. See OR. REV. STAT. ANN. § 9.542 (West 2017); OR. BAR R. 1.2; OR. ST. BD. OF BAR EXAM’RS, RULES FOR ADMISSION OF ATTORNEYS (Rev. Aug. 1, 2017), [https://www.osbar.org/\\_docs/rulesregs/admissions.pdf](https://www.osbar.org/_docs/rulesregs/admissions.pdf) [<https://perma.cc/924K-S6ZB>].

230. ALA. CODE § 34-3-2, -40(a), -43(a)(1) (West 2017) (establishing the Board of Commissioners as the governing body of the Alabama State Bar).

231. ALA. CODE § 34-3-43(a)(1) (West 2017) (delineating the powers of the Board of Commissioners and expressly providing it the power “[t]o determine, by rules, the qualifications and requirements for admission to the practice of law”).

232. ALA. CODE § 34-3-2 (West 2017) (“The Board of Commissioners . . . shall provide for a Board of Examiners on Admission to the State Bar and may prescribe rules and regulations governing the [examining board’s] . . . authority . . .”).

233. ALA. BAR ADMISSION R. VI(B)B(2) (“The Board of Bar Examiners shall have the right, power, and authority to adopt rules consistent with the laws of the State of Alabama or orders of the Supreme Court or the Board of Bar Commissioners governing the control, methods, and details of conducting examinations”).



are frequently used by other occupational licensing agencies.<sup>234</sup> Lack of notice-and-comment procedures in several jurisdictions deprives both lawyers and the public of an ideal democratic process. Furthermore, most jurisdictions lack petition procedures, and not even one jurisdiction offers a declaratory relief procedure.<sup>235</sup> A lack of these procedures results in a system that prevents outsiders—outsiders who are still valid stakeholders—from taking part in the essential process of lawyer-licensing regulation. Additionally, some jurisdictions appear to carry out administrative tasks behind closed doors.<sup>236</sup> This practice hampers meaningful communication and hinders the creation and refinement of appropriate regulation. In today's globalized and digital world, the legal profession is facing increasing demands for change in the way that legal services are delivered.<sup>237</sup> Changes like these deserve thoughtful consideration and meaningful participation from the public.

I recommend that all lawyer-licensing entities exercise the power to promulgate rule changes regarding who may be licensed as a lawyer, but only under a framework that allows for advance notice of changes and an opportunity to comment on those changes. With twenty-six jurisdictions now using the Uniform Bar Exam, remaining jurisdictions are pressed to consider the issue.<sup>238</sup> Alterations in such lawyer-licensing rules can change who becomes an attorney and where they practice. As attorneys, these individuals will go forth to represent individual members of the public and, often, the public at large. Thus, for decisions such as adopting a different method of examining lawyers, all voices should be heard. Put simply, notice-and-comment opportunities for the public are particularly essential to the proper functioning of our justice system.

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234. See *supra* note 36 and section IV.

235. See *supra* note 180.

236. See *supra* note 190.

237. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3041 (2014) (describing the potential effects of automation on the practice of law); Andrew M. Perlman, *Towards the Law of Legal Services*, 37 *CARDOZO L. REV.* 49, 87-88 (2015) (noting the increasing number of non-lawyer legal service providers).

238. *Jurisdictions That Have Adopted the UBE*, NAT'L CONFERENCE OF BAR EXAM'RS, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/JJS4-AGGK>].

Finally, the lack of uniformity among jurisdictions demonstrates that there is no single way to effectively accomplish lawyer-licensing schemes. Moreover, the variation across jurisdictions demonstrates that a judicial branch claiming exclusive power to regulate the licensing of lawyers is not essential to its function as a court. To the contrary, an exclusive claim to regulate may contribute to a lack of adequate oversight for lawyer-licensing entities such as those that serve as gatekeepers to the legal profession and the judicial branch of government. In fact, the judicial branch, as a rule-interpreting body, is often underequipped to handle rule creation, which is historically a function of the legislative branch.<sup>239</sup>

Regardless of a lawyer-licensing scheme's precise details, jurisdictions should work to ensure that their rulemaking procedures incorporate democratic ideals, such as public participation in representation. This will ensure that the profession maintains and promotes its primary goals: protecting individual rights, promoting the public good, and serving the public.<sup>240</sup>

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239. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); H. John Proud, *Right Decision, Wrong Constitutional Law: Taking the Better Path with Equal Protection Jurisprudence*—*Lawrence v. Texas*, 123 S. Ct. 2472 (2003), 29 U. DAYTON L. REV. 447, 461 (2004).

240. See MODEL RULES OF PROF'L CONDUCT pmb1. (AM. BAR ASS'N 1983).

*Appendix*

**Use of Rulemaking Procedures and Transparency Practices  
for Lawyer-Licensing Entities Across Fifty-One United  
States Jurisdictions**

	Jurisdiction	Notice & Comment	Petition	Declaratory Relief	Open Meetings
	<b>Total</b>	33	14	0	23
1.	Alabama				
2.	Alaska	✓	✓		✓
3.	Arizona	✓	✓		✓
4.	Arkansas				
5.	California	✓			✓
6.	Colorado	✓			✓
7.	Connecticut	✓			✓
8.	Delaware				
9.	District of Columbia	✓			
10.	Florida	✓	✓		
11.	Georgia				
12.	Hawaii	✓			
13.	Idaho				✓
14.	Illinois				✓
15.	Indiana	✓	✓		✓
16.	Iowa	✓			
17.	Kansas	✓			
18.	Kentucky				✓
19.	Louisiana				
20.	Maine	✓	✓		
21.	Maryland	✓			✓
22.	Massachusetts	✓			
23.	Michigan	✓			

	Jurisdiction	Notice & Comment	Petition	Declaratory Relief	Open Meetings
24.	Minnesota	✓	✓		✓
25.	Mississippi				
26.	Missouri				
27.	Montana	✓	✓		
28.	Nebraska	✓	✓		
29.	Nevada				
30.	New Hampshire	✓	✓		✓
31.	New Jersey				
32.	New Mexico	✓	✓		
33.	New York	✓			
34.	North Carolina				✓
35.	North Dakota	✓	✓		✓
36.	Ohio	✓			
37.	Oklahoma				✓
38.	Oregon				✓
39.	Pennsylvania	✓			
40.	Rhode Island				
41.	South Carolina	✓			
42.	South Dakota	✓			✓
43.	Tennessee	✓			
44.	Texas	✓			✓
45.	Utah	✓	✓		✓
46.	Vermont	✓			
47.	Virginia	✓	✓		✓
48.	Washington				✓
49.	West Virginia	✓			✓
50.	Wisconsin	✓	✓		✓
51.	Wyoming				