MAPPING INTER-ORGANIZATIONAL BOUNDARY BUREAUCRACY AND THE NEED FOR OVERSIGHT

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The traditional paradigm of state and federal government envisions a neat separation between the legislative, judicial, and executive branches and between the public and private sectors. The heart of this Article explores the reality that some government agencies—particularly state agencies—have ambiguous and contested branch assignments and blurred hierarchical relationships with the private sector, and even other state agencies. When bureaucratic boundaries are blurred and ambiguous, an agency can become unhinged from laws that mandate transparency and accountability to the public it serves.

This Article examines two state agencies—the North Carolina State Bar and the Board of Law Examiners—as examples of a regulatory model where autonomy and self-regulation are predominant features. Drawing upon original archival research, the Article traces how branch assignment ambiguity and self-regulation allowed each agency to drift from its original statutory mandate and evolve in unanticipated, and sometimes problematic, ways.

After charting some of the negative effects of the way the agencies operate—including the Board of Law Examiners' decades-long failure to engage in public rulemaking—the Article argues that the state legislature

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should clarify the relationships and duties of these agencies, the government branch to which they belong, and whether both agencies must meet certain minimum requirements of public participation. This case study is instructive for jurisdictions regulating occupations and professions through autonomous regulatory models, particularly for jurisdictions seeking to make an informed response to the Supreme Court's federal antitrust law decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015).

TABLE OF CONTENTS

INTRODUCTION

Executive branch agencies are typically subject to a state's administrative procedure act,[1] while legislative and judicial agencies are often exempt.[2] When an agency's government branch assignment is not clear, threshold questions—like what procedures govern—can remain unresolved and, over time, be answered in inconsistent ways.[3] Juxtaposing two claims about the North Carolina State Bar's government branch assignment effectively illustrates the existing ambiguity of branch assignment identity.

The first claim is found in an interim order issued in *LegalZoom.com, Inc. v. N.C. State Bar*.[4] In 2011, LegalZoom filed suit against the North

1. *See, e.g.*, NEV. REV. STAT. § 233B.031 (2015); N.C. GEN. STAT. § 150B-2(1a) (2015).

2. *See, e.g.*, HAW. REV. STAT. § 91-1(a) (2015); IND. CODE § 4-22-2-3(a) (2015); MO. REV. STAT. § 536.010(a) (2015); OR. REV. STAT. § 183.310(1) (2015); W. VA. CODE § 29A-1-2(a) (2015).

3. *See, e.g.*, *infra* notes 4-13 and accompanying text.

4. *See* LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *8 (N.C. Super. Ct. Mar. 24, 2014); *see also* Complaint for Declaratory and Injunctive Relief, LegalZoom.com, Inc. v. N.C. State Bar, 11 CVS 15111, 2011 WL 8424700 (N.C. Super. Ct. filed Sept. 30, 2011). Notwithstanding the September 2011 filing of a complaint, the case had yet to reach the discovery stage by spring 2015. In June 2015, LegalZoom filed a lawsuit against the North Carolina State Bar in federal court, alleging Sherman Act violations. *See* Complaint for Damages and Injunctive Relief—Jury Trial Demanded, LegalZoom.com, Inc. v. N.C. State Bar,

Carolina State Bar, alleging the Bar engaged in anti-competitive and unfair conduct in violation of state law by failing to register LegalZoom's pre-paid legal services plan, a pre-requisite to offering such services in North Carolina.[5] Shortly thereafter, the case was designated a mandatory complex business case and moved to North Carolina's Business Court, which was created for the purpose of handling complex litigation matters.[6] In March 2014, the Business Court issued a pretrial order and opinion, ruling on several motions, including LegalZoom's motion for partial judgment on the pleadings.[7] Notably, the court denied LegalZoom's motion for want of subject matter jurisdiction,[8] concluding that the North Carolina State Bar was subject to[9] North Carolina's Administrative Procedure Act,[10] and presumably, part of the executive branch of government.[11]

No. 1:15-CV-439 (M.D.N.C. filed June 3, 2015). Before year's end, LegalZoom.com and the North Carolina State Bar requested entry of a consent judgment, which was ordered on October 22, 2015. *See* LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853, at *1-3 (N.C. Super. Ct. Oct. 22, 2015).

5. Complaint for Declaratory and Injunctive Relief, *supra* note 4; *see also* 27 N.C. ADMIN. CODE 01E.0302 (2015) ("Rules and Regulations of the North Carolina State Bar") (requiring registration with the North Carolina State Bar before implementation or operation of a pre-paid legal services plan).

6. *See* N.C. GEN. STAT. §§ 7A-45.3 to -45.4 (2015).

7. *See LegalZoom.com*, 2014 WL 1213242, at *8.

8. *Id.* at *17.

9. *Id.* at *9. This LegalZoom example is representative of numerous conflicting claims about the North Carolina's branch assignment. *E.g.*, *compare* Letter from David S. Crump, Assoc. Att'y Gen., Admin. Procedures Section, State of N.C. Dep't of Justice, to B.E. James, Exec. Sec'y, N.C. State Bar 3 (Apr. 15, 1976) [hereinafter Letter dated Apr. 15, 1976, from David S. Crump to B.E. James] (concluding that the Supreme Court of North Carolina "is not sufficiently involved with the State Bar to make the Bar an agency of the Court rather than an agency which exercises its powers pursuant to legislative command, just as any other administrative agency"), *with* Letter from Howard A. Kramer, Deputy Att'y Gen. for Legal Affairs, State of N.C. Dep't of Justice, to B.E. James, Exec. Sec'y, N.C. State Bar (Sept. 1, 1976) [hereinafter Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James] (stating "in our opinion the North Carolina State Bar is a member of the judicial branch"). Both letters are contained in this Article's Appendix.

10. The Business Court stated:

> The APA . . . conditions judicial review [on] a final agency decision and exhaustion of administrative remedies . . . . The Act applies to every agency except those specifically enumerated[, and agency means] an agency . . . in the executive branch of the government of this state. [North Carolina statutory law further provides:] There is hereby created as an agency of the state of North Carolina . . . the North Carolina State Bar. By this definition, the State Bar is an agency, and it is not specifically exempted from the APA.

LegalZoom, 2014 WL 1213242, at *8-9, 17.

11. *Id.* at *8. The court's claim—that the State Bar is an agency within the executive branch—was based on its reading of two statutes, one from North Carolina's Administrative Procedure Act (APA) and one from the statutory scheme creating the North Carolina State Bar and the Board of Law Examiners. *See id.* To locate the Bar within the executive branch, the court accurately indicated that the APA applies to "every agency except those specifically

In sharp contrast to this executive branch placement, a letter authored by the State Bar's executive director and published in the spring 2015 issue of the *North Carolina State Bar Journal* reads:

> The State Bar is not an executive branch agency but is an integral part of the judicial branch of government. . . . Pursuant to statute, the State Bar performs a judicial function[12] and is responsible to and supervised by the Supreme Court. Its status as a judicial agency was first recognized by our State's attorney general in 1976.[13]

How could two unequivocal claims from such authoritative sources be diametrically opposed? As this Article shows, each claim is simultaneously

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enumerated[,]" and that "agency" under the APA "means an agency . . . in the executive branch of the government of this State." *Id.* The court then accurately noted that the State Bar was not specifically exempt from the APA and quoted the General Assembly's agency organic statute: "There is hereby created as an agency of the State of North Carolina, . . . the North Carolina State Bar." *Id.* While the preceding premises are true, the court's claim—that the State Bar is an agency within the executive branch of government—does not necessarily follow as a matter of formal logic unless "agency of the state" qualifies as an "agency within the executive branch of government." *See id.*; *see also* N.C. GEN. STAT. § 84-15 (2015); N.C. GEN. STAT. § 150B-2 (1a). Accordingly, the plain language of these two statutes when read together has failed to provide a straightforward resolution to whether the State Bar (or the Board of Law Examiners) is subject to North Carolina's APA. While "agency" is defined inclusively under the APA and applies to agencies that are *included* within the executive branch of government, the term has not always been defined this way. *See* N.C. GEN. STAT. § 150A-2(1) (Supp. 1974) (defining "agency" in similar terms, except excluding those "agencies in the legislative or judicial branches of the State government").

12. The phrases "judicial function" and "judicial act" appear frequently in authorities, including those cited in this Article. *See, e.g.*, *infra* note 86 and accompanying text; *infra* notes 203-204 and accompanying text. But these phrases, as used in various authorities, are neither consistently nor clearly defined. *See, e.g.*, Caranchini v. Missouri Bd. of Law Exam'rs, 447 S.W.3d 768, 776 (Mo. Ct. App. 2014) (stating "[m]any judicial or quasi-judicial 'functions' are performed routinely by administrative agencies" (quoting State *ex rel.* Haughey v. Ryan, 81 S.W. 435, 436 (1904))); *see also* Keenan v. Bd. of Law Exam'rs, 317 F. Supp. 1350, 1355 n.5 (E.D.N.C. 1970) ("The North Carolina General Assembly . . . has delegated its rule making power to the Board of Law Examiners and has determined that the Board shall also apply its own rules 'to the particular case.' The Board is, therefore, an 'administrative agency,' Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1964), with both judicial and delegated legislative powers."). These phrases could be referring to acts or functions that emanate from the judicial branch of government. *See, e.g.*, MD. CODE ANN. § 3-101(e) (2015) (defining "judicial function" as the "exercise of any power of the Judicial Branch of the State government"). On the other hand, these phrases could refer to acts or functions that are of an adjudicatory nature. *See, e.g.*, Turnbull v. Cty. of Pawnee, 810 N.W.2d 172, 178 (Neb. Ct. App. 2011) (stating a "board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner").

13. L. Thomas Lunsford II, *Lest We Be Misunderstood*, N.C. STATE B. J., Spring 2015, at 6-9, 23 (reprinting a letter the State Bar drafted in response to a legislative report finding that more oversight was needed for the state's occupational licensing agencies and further stating, "the State Bar is widely misperceived—and . . . [i]n addition to mistaking . . . identity, many . . . fail to grasp [its] nature and [] purpose").

right and wrong, precisely because the government branch assignment for the North Carolina State Bar and the Board of Law Examiners remains unclear, with no controlling authority resolving the issue.

In examining the governmental branch assignment of North Carolina's State Bar and its Board of Law Examiners, this Article takes up a boundary bureaucracy problem present in a number of jurisdictions:[14] namely, that as entities with branch assignment ambiguity fall off the map, some continue to function without accountability and adequate oversight.[15] I argue that this lack of oversight, in the case of the North Carolina Board of Law Examiners, enables the Board to leverage the ambiguity of its intra-governmental and inter-organizational identity in problematic ways.[16] Specifically, inadequate oversight for state boundary bureaucracies has implications for open government,[17] procedural process,[18] and public participation,[19] leading to threats on the agency's democratic legitimacy.[20] For that reason, I believe the work of mapping boundaries, specifically inter-organizational ones, and charting their implications is itself a part of the solution to bureaucratic ambiguity,[21] as mapping projects like this help bring what exists at the edges to the foreground.[22]

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14. *E.g.*, Anna M. Tinsley, *Texas Lawmakers Worry State Agencies Are Going Rogue*, STAR TELEGRAM (Dec. 20, 2014), http://www.startelegram.com/news/politics-government/article4736820.html.

15. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015); *see also* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1839-40 (2015).

16. *See infra* Part IV.

17. *See infra* Parts III, V.

18. *See infra* Parts III, V.

19. *See infra* Parts III, V.

20. *See infra* Section V.B.

21. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 841-42 (2014) (acknowledging value in mapping boundaries at the federal bureaucracy level for inter-governmental, intra-governmental, and public-private borders).

22. Positive results of bringing issues like this to the foreground appear to be happening already. On December 16, 2014, a non-partisan division of the North Carolina General Assembly presented its study of the state's occupational licensing agencies to the Administrative Procedure Oversight Committee. *See* N.C. GEN. ASSEMBLY, PROGRAM EVALUATION DIV., OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED 5-7 (2014), http://www.ncga.state.nc.us/PED/Reports/documents/OccLic/OccLic_Report.pdf [hereinafter OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED]. Reporting its findings, the division concluded that stronger oversight was needed for North Carolina's occupational licensing agencies. *Id.* Approximately three weeks later, on January 11, 2015, for the first time since 1977, the North Carolina Board of Law Examiners published a public notice of a regularly scheduled meeting. *See* Notice of June 2015 Board Meeting, posted by Brian Szontagh on Jan. 11, 2015 (on file with author). By the time this Article was being prepared for print, the Board had published two more notices of regularly scheduled meetings (October 2015 and January 2016) on its website.

This Article proceeds as follows: I begin, in Part I, by describing occupational regulation by state entities where autonomy and self-regulation are predominant features, paying particular attention to regulation of the legal profession. Part II sets forth the North Carolina State Bar and the Board of Law Examiners as a case study, narrating agency development over time within the framework of North Carolina's historical approach to regulating and licensing lawyers.[23] Part III follows by mapping ambiguities of identity and status with respect to the State Bar and the Board. These comprise ambiguities related to residing at, or just beyond, three borders: (1) inter-organizational;[24] (2) intra-governmental; and (3) public-private. Immediately after mapping each boundary, I identify the legal and practical implications of entities residing along such bureaucratic borders.[25] Part IV describes perceived, if not actual, problems involving either the State Bar or the Board of Law Examiners. Part V offers suggestions about who is best suited to clarify these ambiguities of identity and status, and what might be done to manage their implications in the absence of resolution.

I. BACKGROUND

A. Regulating Occupations and Professions with Agency Models That Feature Autonomy

Each state approaches occupational licensing[26] in its own way, and states vary in how much autonomy they grant members of professions to self-regulate.[27] In fact, the amount of autonomy afforded such agencies is a

23. While not trained as a historian, it is my belief that recounting history involves much more than linking together facts about the past into a sequential narrative. In producing a historical narrative of the State Bar's and the Board's genesis and development over a span of more than eight decades, my intent is to lay the groundwork for the argument of this Article. I fully acknowledge that the interpretation of history set forth in this Article is my own, and that my views will likely continue to be refined as I learn of additional events and hear others' versions of these historical events.

24. In addition to charting the inter-organizational boundary and its implications, I explain how the presence of that boundary further complicates options for clarifying other ambiguities concerning agency identity and status.

25. *See infra* Sections III.A.2, III.B.2, III.C.2.

26. 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 Occupation Licensing on the Labor Market*, 31 J. LAB ECON. S173, S175 (2013). Between 1952 and 2009, the number of occupations requiring a license leapt from less than 5% to 29%. *Id.* at S175-76.

27. *See* BENJAMIN SHIMBERG, OCCUPATIONAL LICENSING: A PUBLIC PERSPECTIVE 25-30 app. at 191-95 (1980) (categorizing organizational models based on the level of autonomy the

primary way to distinguish states' various approaches.[28] At one end of the spectrum are autonomous agencies and boards, operating with more limited forms of oversight.[29] At the other end are centralized governmental entities that regulate and oversee occupational licensing matters for almost all the professions practiced within state borders.[30] States not occupying either end of the spectrum have hybrid models of regulating occupational licensing where power is shared.[31]

States where the predominant model of professional regulation is conducted through autonomous boards enjoy a higher degree of self-regulation.[32] Autonomous boards generally make their own decisions about staff, office location, purchasing, procedures, discipline, and admissions, including licensing qualifications and standards for practice.[33] The North Carolina State Bar and the Board of Law Examiners exemplify occupational regulation through an autonomous model.[34]

B. Regulating the Legal Profession and Inherent Judicial Power

"[T]he legal profession has achieved a degree of self-regulation far beyond either the reality or even the expectations[35] of any other professional

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governing body possesses in its operation and development and identifying five models—(1) Autonomous Boards; (2) Shared Administrative Functions; (3) Shared Authority; (4) Limited Board Authority; and (5) Centralized Licensing Authority).

28. *See id.* at 30.

29. *See id.* at 191-95 (listing the Autonomous Board Model states as Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, North Dakota, New Hampshire, New Mexico, Nevada, Ohio, South Carolina, South Dakota, Texas, West Virginia, and Wyoming).

30. *Id.* (listing the Centralized Licensing Authority Model states as Illinois and New York).

31. *Id.* (listing the Shared Administrative Functions Model states as Arizona, Georgia, Maine, Massachusetts, Minnesota, Nebraska, and Oklahoma); *id.* (listing the Shared Authority Model states as Alaska, California, Colorado, Delaware, Hawaii, Idaho, Maryland, Montana, New Jersey, Oregon, Michigan, Missouri, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, and Wisconsin); *id.* (listing the Limited Board Authority Model states as Connecticut, Florida, Utah, and Washington).

32. *See* Alexander Volokh, *The New Private-Regulation Skepticism: Non-Delegation, Due Process, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 937-38 (2014) (describing the Mississippi Board of Pharmacy as an example of an autonomous state regulatory agency with broad authority to regulate pharmacy benefit managers).

33. SHIMBERG, *supra* note 27, at 191-95 (listing North Carolina among the group of states using occupational licensing models where agencies operate with the most autonomy as compared to other jurisdictions).

34. *See* OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED, *supra* note 22.

35. The need for self-regulation of the legal profession is sometimes justified by referencing the role that lawyers play within our system of government and a claim about lawyers' unique ability to guard against the abuse of government power. This claim is sound within particular

group."[36] A primary channel through which lawyers have been able to obtain such success[37] in their degree of self-regulation is through the inherent powers doctrine.[38] Inherent judicial power refers to a court's intrinsic authority to regulate matters that are necessary for it to perform its judicial functions.[39]

Legal ethics expert Charles Wolfram describes the inherent powers doctrine as a group of "several different doctrines resembling each other only superficially."[40] Unbundling the doctrines, Wolfram lists inherent judicial powers as (1) the power to develop necessary remedies and procedures to adjudicate disputes; (2) the power to handle judicial housekeeping matters; (3) the power to promulgate rules; (4) the power to maintain court budgets; and (5) the power to regulate lawyers.[41]

Wolfram notes that there is long-standing disagreement as to what compromises the independence and impartiality of the judicial branch of government, and jurisdictions vary with respect to how courts interpret their inherent power.[42] Regarding inherent power to regulate the legal profession, Wolfram asserts that courts can tend to one of two approaches.[43] In the first approach, courts exercise inherent authority in conservative ways, acting only when necessary and when other authority does not exist.[44] The exercise of inherent power among these courts is "interstitial and incremental and . . . very similar to the normal workings of a traditional

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contexts. Thus, lawyers who service unpopular clients or advocate in support of non-dominant beliefs or positions, might be more effective when allowed to operate from a self-regulatory position that is more independent and distant from government power or other dominant viewpoints.

36. Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. LAW 7, 15 (1989).

37. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1244 (2003) (noting lawyers' "peerless success" when it comes to self-regulation).

38. Opinions vary among jurisdictions as to which branch of government has superior power regarding the licensing of lawyers. *Compare* Hanson v. Grattan, 115 P. 646, 646-47 (Kan. 1911) (concluding in a strict way 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 in North Carolina setting bar admission standards is an exercise of the state's police power and properly vested in the General Assembly). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.1, at 20-21 (practitioner's ed. 1986) [hereinafter WOLFRAM I].

39. WOLFRAM I, *supra* note 38, at 22.

40. *Id.*

41. *Id.* at 22-23.

42. *Id.*

43. *Id.*

44. *Id.*

common-law court."[45] These courts embrace what Wolfram calls the "affirmative aspects" of the inherent powers doctrine.[46]

In the second approach, which Wolfram calls "negative" inherent powers, courts claim the "exclusive"[47] authority to regulate lawyers.[48] In jurisdictions like these, legislative encroachment into lawyer regulation can be treated as a violation of separation of powers. Wolfram critiques courts' expansion of the inherent powers doctrine in this way, warning of "obvious risks of judicial abuse and maladministration."[49]

Additionally, a judicial claim to have the exclusive power to regulate lawyers, including entrance into the profession, can have implications for the duties and obligations of bar admission authorities.[50] For example, administrative agencies that derive their power from the legislative branch are routinely prohibited from acting in contravention to duly enacted statutes.[51] In contrast, agencies created by the judicial branch are not always constrained in this way.[52]

As shown below, it is not clear from where the North Carolina State Bar and the Board of Law Examiners derive their powers.[53] North Carolina's courts have never claimed exclusive power to regulate lawyers.[54] In addition, North Carolina's legislature has a long history of setting the standards for bar admission and directing or creating entities to implement those standards.[55] This division of authority raises the question: To which

45. *Id.* at 23.

46. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of The Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J., 1989-90, at 1, 4 [hereinafter WOLFRAM II] (finding this approach "sound and compatible with fundamental themes in the law").

47. *Id.* at 6.

48. *Id.* at 6-7, 14.

49. WOLFRAM I, *supra* note 38, at 23-24.

50. *E.g.*, Wilson v. Bd. of Governors, Wash. State Bar Ass'n, 585 P.2d 136, 142 (Wash. 1978) (finding Washington's state Administrative Procedure Act inapplicable to the Board of Governors of the Washington State Bar Association, as the association "acts as an arm of the court" in administering the bar application process and, as much, "is clearly within the judicial branch").

51. *See, e.g.*, Connecticut v. White, 528 A.2d 811, 815-18 (Conn. 1987).

52. *See, e.g.*, Stewart v. Miss. Bar, 84 So.3d 9, 15 (Miss. 2011) ("While these laws seemingly prevent the Bar from inquiring about an expunction, they are not necessarily the final say. We have held that statutes are trumped by contradictory rules governing matters over which this Court has exclusive authority."); Caranchini v. Mo. Bd. of Law Exam'rs, 447 S.W.3d 768, 775 (Mo. Ct. App. 2014) (stating, "the Missouri Board falls under the umbrella of judicial and not executive power").

53. *See infra* Part II.

54. *See infra* Section II.A

55. *See infra* Section II.A.

branch of government do the State Bar and the Board belong and to which laws and procedures are they subject?[56]

II. CASE STUDY: THE NORTH CAROLINA STATE BAR AND THE BOARD OF LAW EXAMINERS

The following case study uses two state agencies—the North Carolina State Bar and the Board of Law Examiners—as examples of agencies that operate under ambiguities of identity and status based upon unresolved government branch assignments and blurred hierarchical relationships with the private sector and other agencies.[57] The origins and development of these ambiguities are traced in four subsequent sections. Section A—The Early Years—highlights North Carolina's version of the then-popular nation-wide debate regarding how best to raise standards for admission to the bar. Section B—Creation of the State Bar and the Board—encapsulates North Carolina's response for how best to maintain high standards for bar admission. Section C—North Carolina Enacts Its First Administrative Procedure Act—recounts a series of convoluted events from the 1970s that gave rise to the State Bar and the Board's claims of being part of the judicial branch of government, not the executive, thus, cementing an intra-governmental ambiguity that, to this day, has never been authoritatively decided. Section D—Operating and Developing Under a Claim to be Judicial—highlights key events since the mid-1970s that have involved ambiguities of identity and legal status of the State Bar and the Board.

A. The Early Years

In 1899, more than thirty years before creating the North Carolina State Bar and the Board of Law Examiners, the North Carolina General Assembly ("General Assembly") enacted legislation incorporating[58] the

56. *See supra* Introduction.

57. *See infra* Parts II, III.

58. An Act to Incorporate the North Carolina Bar Association, ch. 335, 1899 N.C. Sess. Laws 923, 923-25. Worth clarifying now is the difference between the North Carolina Bar Association (Association) and the North Carolina State Bar (State Bar). Briefly, the State Bar is an agency of the state, created by the North Carolina General Assembly (General Assembly) in 1933 for the purpose of regulating the legal profession, "including the admission of lawyers to practice and their discipline and disbarment." 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, ch. 210, 1933 N.C. Sess. Laws 313 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)). Though membership in the State Bar is required, Association membership is not. The Association is a voluntary alliance of lawyers who join together to promote the profession, serve

North Carolina Bar Association ("Association").[59] Among topics first taken up by the Association were standards for admission to the bar.[60] During the Association's second meeting, a committee suggested that applicants' preparation period for studying law be increased from one year to two.[61] From the start—despite North Carolina requiring only one year of study—the proposed increase triggered controversy and heavy debate.[62] Those opposing an increase in the amount of time for pre-examination study preferred instead a "more stringent bar examination."[63] In 1900, the Supreme Court of North Carolina administered the bar examination upon the General Assembly's directive[64] as it had been doing since 1818.[65] The lawyer licensing statute that was in effect during 1900 reads:

> *Sec. 17. Attorneys licensed by justices of supreme court.* Persons who may apply for admission to practice as attorneys . . . shall undergo an examination before two or more of the justices of the supreme court; and, on receiving certificates . . . of their competent law knowledge *and upright character*, shall be admitted as attorneys in the courts specified in such certificates.[66]

By 1903, the North Carolina Bar Association was discussing a proposal to present to the General Assembly that would allow the Association an official role in administering examinations for admission to the bar.[67] Two years later, the Revisal of 1905 brought statutory change, including changes

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the public, and advance the administration of justice. The Association, except for a brief period of time, *see, e.g.*, Comm. on Grievances of State Bar Ass'n v. Strickland, 158 S.E. 110, 111 (N.C. 1931), has not undertaken the formal regulation of North Carolina's lawyers.

59. 1899 N.C. Private Laws at 923-25.

60. *See, e.g.*, REPORT OF THE SECOND ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, 2 REPORTS N.C. BAR ASS'N 49 (J. Crawford Biggs ed., 1900).

61. *Id.*

62. *Id.*

63. J. EDWIN HENDRICKS, SEEKING LIBERTY AND JUSTICE: A HISTORY OF THE NORTH CAROLINA BAR ASSOCIATION 1899–1999, at 44 (1999); *see also* REPORT OF THE SECOND ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, *supra* note 60.

64. *See* 1 WILLIAM T. DORTCH ET AL., THE CODE OF NORTH CAROLINA § 17 (New York, Banks & Bros. Law Publishers 1883).

65. *See* 1 LAWS OF THE STATE OF NORTH CAROLINA (Henry Potter et al., eds., 1821). Prior to this date and for a brief interval from 1869 to 1871, admission to the bar was handled on a more local level, requiring applicants to appear before two superior court judges. *See* DEPARTMENT OF CULTURAL RESOURCES DIVISION OF ARCHIVES AND HISTORY ARCHIVES AND RECORDS SECTION, GUIDE TO RESEARCH MATERIALS IN THE NORTH CAROLINA STATE ARCHIVES: STATE AGENCY RECORDS 781-82 (1995).

66. DORTCH ET AL., *supra* note 64 (emphasis added).

67. *See* REPORT OF THE FIFTH ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, 5 REPORTS N.C. BAR ASS'N 31 (J. Crawford Biggs ed., 1903).

to lawyer licensing statutes.[68] While the high court would still administer examinations for admission to the bar, the General Assembly's directives were noticeably different:

> *207. Examination.* No person shall practice law without first obtaining [a] license . . . from the Supreme Court. Applicants for license shall be examined only on the first Monday of each term of the Supreme Court. All examination shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in all the courts of the state.[69]
>
> *208. Conditions precedent to examination.* Before being allowed to stand an examination each applicant must . . . *file with the clerk of the court a certificate of good moral character* signed by two attorneys who practice in that court.[70]

Within one year, these statutory changes would spark litigation about which entity in North Carolina—the General Assembly or the Supreme Court of North Carolina—held the power to set bar admission standards, since the new statute did not involve the supreme court in assessing a bar applicant's character.[71]

In early 1906, several upstanding licensed members of the bar filed a petition in the supreme court.[72] In the petition, the members challenged the admission of several new applicants on the grounds that the applicants lacked the requisite moral character, despite having filed certificates of good moral character as directed by the 1905 statute.[73] The members argued that the newly enacted statute[74] was unconstitutional because it violated the separation of powers doctrine.[75] Specifically, the members contended the independence of the judiciary would be compromised if the court were not allowed to set its own requirements for admission to the bar,[76] as the new statute did not direct the court to inquire into an applicant's character and fitness.[77]

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68. *Compare* 1 THOMAS WOMACK ET AL., REVISAL OF 1905 OF NORTH CAROLINA § 207, *with* DORTCH ET AL., *supra* note 64.

69. WOMACK ET AL., *supra* note 68.

70. *Id.* § 208 (emphasis added).

71. *See In re* Applicants for License, 55 S.E. 635 (N.C. 1906).

72. *Id.* at 635.

73. *Id.*

74. *Compare* DORTCH ET AL., *supra* note 64, *with* WOMACK ET AL., *supra* note 68.

75. *See In re* Applicants for License, 55 S.E. at 636-37. *See generally* WOMACK ET AL., *supra* note 68, at §§ 207-08.

76. *In re* Applicants for License, 55 S.E. at 635-37.

77. *Id.*

A divided court responded.[78] Three of the five justices found the separation of powers argument unpersuasive, with one inquiring:

> How can the right to pass on an applicant's previous conduct or his character be considered as a power essential to a court's existence, when he has never become an attorney or been given an opportunity to have his demeanor observed or considered?[79]

In a concurring opinion, the Chief Justice acknowledged that bar admission matters are often entrusted to courts,[80] but that North Carolina took a different approach, and considered the matter "wholly subject to legislative action . . . [not] a necessary or inherent part of the . . . judicial power."[81]

A majority of the justices agreed that the power to set standards and procedures for admission to the bar was an exercise of the state's police power and was properly vested in the legislative branch.[82] They further agreed that the General Assembly's exercise of such power did not compromise the court's status as a separate and independent branch of government charged primarily with interpreting the law and impartially adjudicating disputes.[83] *In re Applicants for License* demonstrates that North Carolina's courts do not claim the exclusive power to regulate the practice of law. Summarizing the point, the Chief Justice wrote:

> [T]his court cannot add to the requirements of the lawmaking body as to lawyers any more than it can to the requirement for entering upon the practice of medicine or dentistry. It is true lawyers are officers of the courts, but so are sheriffs, clerks, and the like, over whose selection the court has no control.[84]

Two justices dissented, stating that because admission to the bar was a judicial act, the court retained its authority to ensure that "immoral" persons were not admitted.[85] While most of the justices agreed, "admission to the

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78. *Id.*

79. *Id.* at 637.

80. *See, e.g.*, VT. CONST. ch. II, § 30 ("The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the state.").

81. *In re* Applicants for License, 55 S.E. at 635, 640 (Clark, C.J., concurring) (citing *In re* Cooper, 22 N.Y. 67 (N.Y. 1860)).

82. *Id.* at 636-39 (majority opinion), 640 (Clark, C.J., concurring).

83. *Id.* at 636-37 (majority opinion), 640 (Clark, C.J., concurring).

84. *Id.* at 640 (Clark, C.J., concurring) (noting further that "since 1754 an oath has also been required by statute, the administering of which is the 'act of admission to the bar,' . . . [and] [o]f course, as the oath is required by statute, that, like any other requirement can be repealed" by the General Assembly).

85. *Id.* at 642 (Brown, J., dissenting).

bar was a judicial act," they did not agree on the meaning of that phrase—"judicial act"—or the implications of that function.[86]

As demonstrated with the *In re Applicants for License* case, North Carolina, is one of a handful of jurisdictions[87] wherein its high court has acknowledged that the power to set standards for admission to the bar resides with the legislature,[88] rather than a judicially created administrative entity.[89]

In 1932, however, the North Carolina Bar Association proposed legislation that would make the legal profession self-governing[90] and create the North Carolina State Bar and the Board of Law Examiners as state government entities.[91]

B. Creating the State Bar and the Board

The North Carolina Bar Association's 1932 proposed legislation was modified by the General Assembly and culminated in the passage of a decisive Act in 1933.[92] The Act served the important function of creating

86. "We exercise our judicial functions in determining whether the applicant possesses the required qualifications, and here, our power in the premises end." *Id.* at 636-37 (majority opinion). "I am of the opinion . . . that when the power to grant licenses is possessed by this court, from whatever source derived, the exercise of it by the court is a judicial act, and cannot be controlled in any material feature by the Legislature." *Id.* at 641 (Brown, J., dissenting). "[T]he power to decide finally who possesses sufficient character for admission is a judicial function from the nature of the question. *Id.* at 645 (Walker, J., dissenting). *Contra id.* at 641 (Clark, C.J., concurring) ("We do not examine applicants for license by virtue of our judicial functions . . . but . . . only out of courtesy and respect to the Legislature.").

87. *Compare* State *ex rel.* Robeson v. Or. State Bar, 632 P.2d 1255, 1258 (Or. 1981) (taking a restrained approach), *with* Harlen v. City of Helena, 676 P.2d 191, 193 (Mont. 1984) (taking a more radical approach).

88. *See In re* Applicants for License, 55 S.E. at 635-39.

89. *See id.* at 641 (Clark, C.J., concurring); *In re* Ebbs, 63 S.E. 190, 196 (N.C. 1908) ("The courts of this state will exhaust their power to purge the bar of unworthy members, but dare not assume power to do so.").

90. *See* REPORT OF THE THIRTY-FOURTH ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, 34 REPORTS N.C. BAR ASS'N 1, 199, 213 (H.M. London, ed., 1932). The 1932 proposal, as originally presented, had the deans of the various law schools within the state serving as members of the Board of Law Examiners. *Id.* This aspect of Board composition was noticeably controversial. *Id.* In what was perhaps somewhat of an over-correction, the final version of the Bar Association's 1932 proposal, much of which would be enacted into law by the General Assembly, contained a provision stating, "but no teacher at any law school shall serve on the Board." *Id.*

91. PROCEEDINGS FIRST ANNUAL MEETING NORTH CAROLINA STATE BAR, 1-4 N.C. STATE BAR 1, 5 (H.M. London, ed., 1934).

92. 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

and organizing the North Carolina State Bar as an "agency of the state."[93] The state agency provided for the long-desired self-regulation of the legal profession.[94] The full title of the twenty-one-section Act indicates that the Act covered both admission to the bar and the disciplining of lawyers:

> *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.*[95]

The structure of the North Carolina State Bar, as set forth by the Act, entailed a governing Council[96] composed of elected attorney representatives from each of the state's twenty judicial districts.[97] According to the explicit wording of the Act, these members were not to be considered "public officers."[98] Council members served three-year terms and were elected by other licensed attorneys practicing or residing in the candidate's judicial district.[99] The original Act directed the Council to elect, upon its organization, three officers—a president, a vice-president, and a secretary.[100]

Within the organizing Act of the North Carolina State Bar, the General Assembly also created the Board of Law Examiners for the related but distinct purpose "of examining applicants and providing rules and regulations for admission to the state bar."[101] The Board would be

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Admission of Lawyers to Practice and Their Discipline and Disbarment, ch. 210, 1933 N.C. Sess. Laws 313 (codified as amended at N.C. GEN. STAT. § 84-15 to -38 (2015)).

93. *See id.*

94. *See id.*

95. *Compare id.*, *with* REPORT OF THE THIRTY-FOURTH ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, *supra* note 90, at 199.

96. *See* 1933 N.C. Sess. Laws at 313-14; *see also* N.C. GEN. STAT. §§ 84-15, -17 (2015) (identifying the State Bar as an agency with powers vested in a Council).

97. *See* 1933 N.C. Sess. Laws at 315. A "judicial district" comprises a "district bar." *Id.* District bar boundaries co-exist with boundaries for prosecutorial districts. *See* N.C. GEN. STAT. § 84-19 (2015). In 1934, there were twenty judicial districts, providing for a Council of about the same number. *See* PROCEEDINGS FIRST ANNUAL MEETING NORTH CAROLINA STATE BAR, *supra* note 91, at 6. Presently there are forty-five. *See* N.C. GEN. STAT. § 7A-60(a)(1) (2015); *see also* N.C. GEN. STAT. § 84-19.

98. "Neither a Councillor [sic] nor any officer of the Council or of [t]he North Carolina State Bar shall be deemed as such to be a public officer as that phrase is used in the Constitution and laws of the State of North Carolina." *See* 1933 N.C. Sess. Laws at 315.

99. *See id.* at 314-15.

100. *See id.* at 318-19.

101. This section contained a savings clause keeping the presently existing statutory standards for admission to the bar "in force until superseded, changed, or modified." *Id.* at 319.

comprised of six licensed attorneys,[102] elected by, but not necessarily members of, the Council.[103] Finally, the Act provided, "the secretary of the North Carolina State Bar shall be the secretary of the Board, and serve without additional pay."[104] The single-secretary structure would be in place during the State Bar and the Board's first forty years of existence.[105]

The General Assembly delineated the specific powers of the State Bar's governing Council, provided certain procedural safeguards, and delegated veto power to the state supreme court with respect to the State Bar's rulemaking power.[106] The Act described the Council's powers as follows: "the Council shall be competent to exercise the *entire* powers of the North Carolina State Bar in respect to the interpretation and administration of this Act."[107]

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102. Ratified in April 1933, the original Act indicated that "[t]he Chief Justice of the Supreme Court shall be Chairman of the Board." *Id.* One month later, and before the Act had taken effect, the General Assembly ratified a supplemental act. *See* Act to Amend H.B. 221, Sess. 1933, Entitled "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," so as to Provide for the Issuance of License to Practice and for the Constitution of the Board of Law Examiners, ch. 331, 1933 N.C. Sess. Laws 492. The supplemental act struck the language directing the Chief Justice to serve as chairman. *See id.* at 493. The substituted language provides: the Board shall consist of six members of the bar and "such member of the Supreme Court of North Carolina as that court . . . may select and commission for such special purpose. . . . The member . . . selected and commissioned . . . shall be and act as chairman ex-officio." *See id.* Within the language of the supplemental act, the General Assembly indicated that the supplemental act "shall be . . . deemed and construed as a part of [the original act] as fully and to the same extent as if the provisions had been included in [the original act] when ratified." *See id.* By 1935, the General Assembly enacted yet another law. This one struck all language about any supreme court justice serving on the Board. *See* An Act to Authorize the Board of Law Examiners to Elect Its Own Chairman, ch. 61, § 1, 1935 N.C. Sess. Laws 56. This amendment changed the number of elected members from the practicing bar from six to seven and authorized the Board to elect its own chairman. *See id.* § 3.

103. *See* 1933 N.C. Sess. Laws at 319. *But see* Certificate of Organization of the North Carolina State Bar, *published in* 205 N.C. 853 app. at 853-54 (1933) [hereinafter Certificate of Organization of the North Carolina State Bar] (stating that "[n]o member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council").

104. *See* 1933 N.C. Sess. Laws at 319.

105. *Compare id.*, *with* An Act to Amend G.S. 84-24 Pertaining to the Board of Law Examiners, ch. 13, 1973 N.C. Sess. Laws 6 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)) (stating "the Board may employ an Executive Secretary").

106. *See, e.g.*, N.C. GEN. STAT. §§ 84-15 to -24 (2015).

107. *See* 1933 N.C. Sess. Laws at 314 (emphasis added); *see also* N.C. GEN. STAT. § 84-17:

> The Council shall be composed of a variable number of councilors equal to the number of judicial districts plus 16, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president.

Despite the powers provided to the State Bar, the Council's power was subordinate to that of the General Assembly.[108] The Act reads: "Subject to the superior authority of the General Assembly to legislate thereon by general laws, and except as herein otherwise limited, the Council is hereby vested, as an agency of the State, with control of the discipline and disbarment of attorneys practicing law in the State."[109] Moreover, any rules promulgated by the North Carolina State Bar Council[110] would be subject to the approval of the supreme court and must be certified as being consistent with the Act creating and describing the powers of the State Bar and the Board.[111]

Under the structure provided by the original organizing Act, the North Carolina State Bar and the Board of Law Examiners was born.[112] With the General Assembly having delegated power[113] and independent rulemaking authority to each,[114] the State Bar and the Board jointly claimed the privilege of self-regulation for North Carolina's legal profession. In June 1934, during the State Bar's first annual meeting, President I.M. Bailey noted its significance, stating, despite eight years of:

> Continuous[]… doubt as to what would be the outcome of the effort to bring to the profession the right of self-government . . . the grant of power was extended; . . . for the first time, we are met to determine for ourselves, individually and collectively, what disposition we shall make of . . . [the General Assembly's] . . . grant of power.[115]

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108. 1933 N.C. Sess. Laws at 319.

109. 1933 N.C. Sess. Laws at 319. *But see* An Act to Amend the Authority of 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, ch. 174, 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 laws, and except as herein otherwise limited" from N.C. GEN. STAT. § 84-23). With this introductory clause now eliminated, the statute concerning the powers of the State Bar Council now reads: "The Council is vested, as an agency of the State, with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. . . . The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law." N.C. GEN. STAT. § 84-23 (2015).

110. The Council is the governing body of the North Carolina State Bar and is comprised of three public members who are appointed by the Governor and approximately sixty attorney members who are elected by their attorney peers. *See* N.C. GEN. STAT. § 84-18.

111. The statutes that create and describe the powers of the State Bar and the Board are found in Article 4 of Chapter 84 of the North Carolina General Statutes. Chapter 84 is the section of the state's General Statutes that governs attorneys. *See* N.C. GEN. STAT. § 84-21.

112. 1933 N.C. Sess. Laws at 313.

113. *Id.*

114. *Id.*

115. PROCEEDINGS FIRST ANNUAL MEETING NORTH CAROLINA STATE BAR, *supra* note 91, at 5-6.

The shift to self-regulation brought the bar new independence but not complete autonomy,[116] as it recognized that it must cooperate with both the judiciary and the public.[117]

In 1937, three years after the State Bar and the Board were created, the General Assembly added a new provision to the State Bar and Board's enabling statutes.[118] This provision clarified that the General Assembly's creation of the State Bar and the Board in no way affected the inherent powers of North Carolina's courts.[119] This Act[120] clarifies that the power delegated to the Bar and the Board could not supersede the inherent powers doctrine.[121] While the statute acknowledges the inherent powers of the Court,[122] important questions remained unanswered, as the 1937 provision did not set forth a protocol about how the court's power would be exercised alongside the Bar and the Board's power.[123]

Over the next several decades, the State Bar and the Board would go on to operate, during which their identities and status would be gradually refined.

C. Enacting North Carolina's Administrative Procedure Act (APA)

Approximately forty years after the General Assembly created the North Carolina State Bar and the Board of Law Examiners, North Carolina enacted its first Administrative Procedure Act (APA).[124] The purpose of North Carolina's APA, both at the time of its original enactment and today, is to establish a uniform system of procedures[125] for agencies[126] to follow in

116. *Id.* at 4-6.

117. *Id.* at 7. This recognition was reflected in the opening remarks made by President Bailey at the State Bar's first annual meeting: "While we must maintain a position of leadership, we cannot undertake our work alone. On the one hand stands a Judiciary which has no superior. . . . ; and on the other hand, a public intelligent and quick . . . ."

118. An Act to Amend Chapter 210 of the Public Laws of 1933 Relating to the Authority of the North Carolina State Bar, ch. 51, 1937 N.C. Sess. Laws 98, 99 (codified at N.C. GEN. STAT. § 84-36 (2015)) (reserving the court's inherent power "to deal with its attorneys").

119. *Id.* ("Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.").

120. *Id.*

121. *See id.*

122. *Id.*

123. *See id.*

124. An Act to Establish Procedures for the Conduct of Proceedings Before Administrative Agencies and to Establish a Code of Administrative Regulations, ch. 1331, 1973 N.C. Sess. Laws 691, 691.

125. *Id.* at 692 ("The purpose and intent of this Chapter shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies."). *Accord* N.C. GEN. STAT. § 150B-1(a) (2015) ("This Chapter establishes a uniform system of administrative rule

both the rulemaking and adjudicatory context.[127] Immediately set forth below are several features to North Carolina's APA that are both longstanding and relevant to the arguments set forth in this Article.

Under North Carolina's APA, agency rulemaking is limited to adopting only those rules[128] "that are expressly authorized by federal or State law and necessary to serve the public interest."[129] Rules must be "reasonably necessary" to implement or interpret such law,[130] and they must be written "in a clear and unambiguous manner."[131] Agencies are required to establish and publish their procedures in advance so that others may be instructed on how to participate in the rulemaking process.[132] Other features that foster public engagement include requirements for agencies to adopt rules that allow stakeholders to petition for rule changes,[133] and seek declaratory relief.[134]

In the mid-1970s, the passage of North Carolina's APA was a significant event for state government regulatory entities; evidence confirms

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making and adjudicatory procedures for agencies. The procedures ensure that the functions of rulemaking, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.").

126. "'Agency' means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch." N.C. GEN. STAT. § 150B-2(1a). Although "agency" is currently defined as a unit of government that is expressly within the executive branch, North Carolina's APA did not originally define agency in this way. *See* N.C. GEN. STAT. § 150A-2(1) (Supp. 1974) (excluding from the definition of "agency" those agencies within either the legislative or judicial branches of government and not referencing the executive branch of government when defining the term).

127. *See, e.g.*, Overton v. Goldsboro City Bd. of Educ., 283 S.E.2d 495, 498 (N.C. 1981) (applying APA standards for judicial review "in the interest of uniformity in reviewing administrative board decisions").

128. N.C. GEN. STAT. § 150B-2(8a) (2015) ("'Rule' means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule.").

129. *Id.* § 150B-19.1(a)(1).

130. *Id.* § 150B-19.1(a)(3).

131. *Id.*

132. *Id.* § 150B-19.1(c) (requiring an agency to post the text of a proposed rule on its website as well as instructions on how and where to submit oral or written comments on the proposed rule); *see also id.* § 150B-21.2 (setting forth requirements for agencies with respect to receiving public comments, holding public hearings, maintaining public mailing lists, and keeping public records of rule making proceedings).

133. *Id.* § 150B-20(a) ("A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption.").

134. *Id.* § 150B-4(a) ("On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a . . . rule or order of the agency.").

that several entities were unaware of the Act's implications or how to comply with its requirements.[135] The General Assembly, responding to widespread struggle among agencies to comply with the new APA, extended the deadline for agencies to file APA-compliant rules.[136] While agencies labored to draft new rules,[137] their assigned government branch became suddenly and considerably significant, as the APA exempted from its reach those agencies that were within either the legislative or judicial branches of state government.[138] The following sections within this case study part of the Article describe a series of events relating to the passage of the APA and the government branch assignments for the North Carolina State Bar and the Board of Law Examiners.

1. The Board Files APA-Compliant Rules

Meeting the filing deadline,[139] the North Carolina Board of Law Examiners filed new APA-compliant[140] rules with the Office of the

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135. *See, e.g.*, Letter from Jimmie E. Clemmons, Sec'y, Bd. of Comm'r Navigation & Pilotage, to Millard R. Rich, Jr., Ass't Att'y Gen., State of N.C. Dep't of Justice (Oct. 23, 1975) [hereinafter Letter dated Oct. 23, 1975, from Jimmie E. Clemmons to Millard R. Rich, Jr.] (on file with author):

> This Board has been unofficially informed that there now exist [sic] a new law titled, "North Carolina Administrative Procedures Act." . . . Admittedly we know very little about this new act and specifically request clarification on the following: (1) Can the Attorney General's Office advise this Board as to the particulars of this act, and better yet forward a copy? (2) Should legal services be required by this Board to assist in formulating such rules and regulations for approval, can this Board employ the services of an attorney?

136. *See* An Act to Delay the Effective Date of, "An Act to Establish Procedures for the Conduct of Proceedings Before the Administrative Agencies and to Establish a Code of Administrative Regulations," ch. 69, 1975 N.C. Sess. Laws 44.

137. *See* Memorandum from Norma S. Harrell, Assoc. Att'y Gen., Admin. Procedures Section, State of N.C. Dep't of Justice, to All State Agencies Covered by the Admin. Procedures Act 30-31 (May 5, 1975) [hereinafter Memorandum dated May 5, 1975, from Norma S. Harrell to All State Agencies Covered by the APA] ("We realize that many of you are having difficulty sorting out the numerous provisions of the new North Carolina Administrative Procedure Act, G. S. 150A, and the ways in which it will affect your agency. To help you in the task of bringing your agency into compliance with the Act, we are distributing the following guidelines . . . .") (on file with author).

138. *See* N.C. GEN. STAT. § 150A-2(1) (Supp. 1974) (excluding from the definition of "agency" those agencies within either the legislative or judicial branches of government). *Cf.* N.C. GEN. STAT. § 150B-2(1a) (2015) (stating that agency "means an agency or an officer in the executive branch of government").

139. N.C. GEN. STAT. § 150A-59 (Supp. 1975) (reflecting the extended deadline for filing new rules). *C.f.* N.C. GEN. STAT. § 150A-59 (Supp. 1974) (reflecting the original deadline as July 1, 1975); *see also* Memorandum from Norma S. Harrell, Assoc. Att'y Gen., Admin. Procedures Section, State of N.C. Dep't of Justice, to All A.P.A. Coordinators and Licensing Boards (Jan. 16, 1976) [hereinafter Memorandum dated Jan. 16, 1976, from Norma S. Harrell to All A.P.A. Coordinators and Licensing Boards] ("This memo is merely to remind you that the deadline for filing rules with the Attorney General's office pursuant to the Administrative Procedure Act is

Attorney General, on January 30 1976.[141] The Board's new rules[142] displayed a numbering system that anticipated their inclusion in North Carolina's Administrative Code.[143] Throughout its rules, the Board cited to APA provisions requiring specific rules,[144] as well as other statutory

almost here. . . . Your rules must be filed by 5:30 p.m. Friday, January 30, since January 31 is a Saturday.") (on file with author).

140. *Compare* N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974), *with* Regulation Certification from Fred P. Parker III, Exec. Sec'y, N.C. Bd. of Law Exam'rs, to Rufus L. Edmisten, Att'y Gen. (filed Jan. 30, 1976, by Bd. of Law Examr's with Admin. Procedures Section, Office of Att'y Gen., pursuant to Feb. 1, 1976, filing deadline set forth in N.C. GEN. STAT. § 150A-59) [hereinafter Regulation Certification from N.C. Bd. of Law Exam'rs filed with N.C. Office of Att'y Gen. Admin. Procedures Section on Jan. 30, 1976] (on file with author).

141. *See* Regulation Certification from N.C. Bd. of Law Exam'rs filed with N.C. Office of Att'y Gen. Admin. Procedures Section on Jan. 30, 1976, *supra* note 140.

142. This note explains how this Article cites to current and previous versions of the *Rules Governing Admission to the Practice of Law* promulgated by the North Carolina Board of Law Examiners. The Board's current Rules are available on its website. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, N.C. BD. OF LAW EXAM'RS, http://ncble.org/wp-content/uploads/2015/09/rules.pdf (last visited Jan. 24, 2016). When citing current rules, this Article uses the following citation form: RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142. When citing to previous versions of the Board's rules, this Article cites to the appendix of the North Carolina Reports volume in which the Board's rules are published. The following example is illustrative: RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 289 N.C. 735 app. at 738-61 (1976). Readers should be aware that within the *North Carolina Reports*, the *Rules Governing Admission to the Practice of Law* are labeled in a variety of ways, including *Rules and Regulations of the Board of Law Examiners* and *Rules of Board of Law Examiners: State of North Carolina*. Related to the problem identified in Part IV.B of this Article regarding the Board's somewhat private mode of operation, I assert that the Board's rules should be numbered by title, chapter, and section and published in the North Carolina Administrative Code pursuant to statutory directive. *See* N.C. GEN. STAT. § 84-21 (2015) ("Copies of all the rules and regulations . . . adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: . . . ."); *id.* § 84-24 ("The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: . . . .").

143. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 289 N.C. 735 app. at 735-37 (1976) (including the heading: "North Carolina Administrative Code; Title 21 Occupational Licensing Boards; Chapter 30 Board of Law Examiners" and a numbering system evincing administrative code conventions set forth in a table of contents with fourteen separate sections of Board rules numbered for placement within Chapter 30 of Title 21 of North Carolina's Administrative Code). Title 21 of the North Carolina Administrative Code was, and still is, the title reserved for state occupational licensing board rules. *See, e.g.*, 21 N.C. ADMIN. CODE ch. 58 (2016) (N.C. Real Estate Commission).

144. *See generally* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 289 N.C. 735 app. at 738-61 (1976).

provisions authorizing Board rules, a practice that complied with APA directives.[145]

Significantly, the Board's new rules contained an entire section devoted to rulemaking procedures.[146] These procedures had democratic benefits, including notice-and-comment rulemaking and declaratory relief mechanisms.[147]

Under the new notice-and-comment-type procedures, the Board was required to maintain a mailing list to which anyone, upon request, could be added.[148] Those on the list would receive advance notice of any hearing related to rulemaking.[149] List members and others could then either submit comments in writing or attend the hearing.[150] Forms of public participation that were contemplated by the procedures included the presentation of oral data, views, or arguments on proposed bar admission rules.[151] Under these procedural process rules, written advance notice of such a rulemaking proceeding would be given to all of the State's law schools.[152] Further, anyone who wished to request the adoption, amendment, or repeal of a rule was provided an avenue to petition.[153]

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145. Such citation is required for agencies engaged in rulemaking. *See* N.C. GEN. STAT. § 150A-60(1) (Supp. 1974); Memorandum dated May 5, 1975, from Norma S. Harrell to All State Agencies Covered by the APA, *supra* note 137; *accord* N.C. GEN. STAT. § 150B-21.2(c)(3) (2015) ("A notice of the proposed text of a rule must include…[a] citation to the law that gives the agency the authority to adopt the rule.").

146. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *in* 289 N.C. 735 app. at 736 (1976) (titling Section .1100 Rulemaking Procedures; and including subsections for Petitions (Section .1101); Notice (Section .1102); Hearings (Section .1103); and Declaratory Rulings (Section .1104)).

147. *Id.* By the end of July 1977, North Carolina's Attorney General had acknowledged the Board's decision to withdraw the rules it had filed eighteen months prior. Letter from Rufus L. Edmisten, Att'y Gen., State of N.C. Dep't of Justice, to Fred P. Parker III, Exec. Sec'y, N.C. Bd. of Law Exam'rs (July 27, 1977) [hereinafter Letter dated July 27, 1977, from Rufus L. Edmisten to Fred P. Parker III]. In addition to no longer being filed alongside other occupational licensing entities' rules, the Board had amended its rules, repealing the entire chapter dedicated to rulemaking procedures. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 293 N.C. 760 app. at 762 (1977).

148. 21 N.C. ADMIN. CODE 30.1102 (1976) (withdrawn 1977). No such provision is included in the Board of Law Examiners' current *Rules Governing Admission to the Practice of Law*. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, N.C. BD. OF LAW EXAM'RS, http://ncble.org/wp-content/uploads/2015/09/rules.pdf (last visited Jan. 24, 2016).

149. *See* 21 N.C. ADMIN. CODE 30.1102 (1976) (withdrawn 1977).

150. *See* 21 N.C. ADMIN. CODE 30.1103 (1976) (withdrawn 1977).

151. *See* 21 N.C. ADMIN. CODE 30.1103(b) (1976) (withdrawn 1977).

152. *See* 21 N.C. ADMIN. CODE 30.1102(c) (1976) (withdrawn 1977).

153. 21 N.C. ADMIN. CODE 30.1101 (1976) (withdrawn 1977). No such avenue to petition is included in the Board of Law Examiners' current Rules. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142.

In addition to notice-and-comment-type rulemaking procedures, the Board's procedural process rules set forth an express avenue for declaratory relief.[154] A person who was substantially affected by a rule could request a declaratory ruling regarding whether or how the rule applied to a given factual situation.[155] Finally, as is typical within notice-and-comment-type rulemaking frameworks, a record was to be kept.[156] Such record would allow others a view into the Board's decision-making process over a period of time.[157]

By February 1, 1976, these rules, which included procedural safeguards, were approved by the North Carolina State Bar Council[158] and certified by the chief justice of the supreme court as being "not inconsistent" with the Bar and the Board's enabling statutes.[159] Although the Board of Law Examiners filed APA-compliant rules by the January 30, 1976, deadline, nothing suggests that the State Bar did so.[160]

2. The State Bar Receives a Report and Letters from the Office of the Attorney General

Approximately two months after the APA rule-filing deadline, on April 15, 1976, Mr. David Crump, an Associate Attorney General from the Administrative Procedures Act Division, drafted an eight-page letter addressed to Mr. B.E. James, the Executive Secretary of the North Carolina State Bar. The letter begins:

> Dear Mr. James:
>
> This is in response to your inquiry as to whether, and to what extent the North Carolina State Bar is subject to the Administrative Procedure Act, Chapter 150A of the General Statutes. . . . It has [] been suggested, because of the involvement of the Supreme Court in making rules for the Bar, and because of the inherent powers of the court to discipline members

154. 21 N.C. ADMIN. CODE 30.1104 (1976) (withdrawn 1977).

155. *See* 21 N.C. ADMIN. CODE 30.1104(a) (1976) (withdrawn 1977).

156. *See* 21 N.C. ADMIN. CODE 30.1403 (1976) (withdrawn 1977).

157. *See* 21 N.C. ADMIN. CODE 30.1403 (1976) (withdrawn 1977).

158. N.C. State Bar, Unpublished Minutes of N.C. State Bar Council Meeting, (Jan. 16, 1976) [hereinafter Unpublished Minutes of N.C. State Bar Council Meeting] (on file with author; also available at N.C. State Bar headquarters); *see* Memorandum dated May 5, 1975, from Norma S. Harrell to All State Agencies Covered by the APA, *supra* note 137; *see also* Memorandum from Norma S Harrell, Assoc. Att'y for the Att'y Gen. Admin. Procedures Section, State of N.C. Dep't of Justice, to All State Agencies Subject to the Admin. Procedures Act 3, § 5 (Oct. 7, 1975) (on file with author).

159. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 289 N.C. 735 app. at 761-62.

160. Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 1.

> of the bar, that the Bar is exempt from Chapter 150A under the judicial exception to the definition of agency [as set forth in the APA]. After careful research and consideration, we find this argument unpersuasive.[161]

In support of this conclusion Associate Attorney General Crump noted that the State Bar was created as an "agency of the State;" that the APA defined "agency" broadly; and that the legislature had not specifically exempted the State Bar.[162] Acknowledging that other entities, like the Supreme Court of North Carolina and the General Assembly, were also agencies of the state,[163] Attorney Crump reasoned that the APA targeted agency rulemaking, a power which the General Assembly had delegated to the Bar.[164] Commenting on the relationship between the State Bar and the General Assembly, Attorney Crump noted that the State Bar was a creature of the legislature "[s]ubject to [its] superior authority,"[165] and that "the debates of the organizers of our bar seem to indicate that they believed that legislative action was required to organize the Bar."[166]

Referencing the supreme court's veto power over the passage of State Bar rules,[167] Attorney Crump concluded that this provision did not sufficiently involve the court "with the State Bar to make the Bar an agency of the court rather than an agency which exercises its powers pursuant to legislative command."[168]

A few weeks later, on May 3, 1976, Attorney Crump sent the following follow-up letter to the Secretary of the North Carolina State Bar:

> Dear Mr. James:
>
> Attached hereto please find the letter which I did for you sometime ago concerning the application of the Administrative Procedure Act to the North Carolina State Bar. This letter was circulated among the three Senior Deputies and represents the best thinking of this Office on the subject. We will be glad to work with you in any way that we can to determine what needs to be filed by the State Bar and how best to go about putting the material in an appropriate form for filing.[169]

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161. *Id.*

162. *Id.* at 1-3.

163. *Id.* at 1.

164. *Id.* at 4-6; s*ee also* N.C. GEN. STAT. § 150A-9 (Supp. 1975).

165. Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 2-3.

166. *Id.* at 2. *See generally* REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, 29 REPORTS N.C. BAR ASS'N 134, 134-37 (H.M. London ed., 1927).

167. Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 3.

168. *Id.*

169. Letter from David S. Crump, Assoc. Att'y Gen., Admin. Procedures Section, State of N.C. Dep't of Justice, to B.E. James, Exec. Sec'y, N.C. State Bar (May 3, 1976) [hereinafter

Minutes from the State Bar's July 1976 meeting indicate that Associate Attorney General Crump appeared and presented the views of the Attorney General's Office regarding the Administrative Procedure Act and its possible application to the operations of the State Bar.[170] After receiving Attorney Crump's report, the State Bar's Executive Committee recommended that the Council appoint a special committee "to draft amendments to [its] rules for presentment to the Supreme Court of North Carolina to seek inclusion of the North Carolina State Bar and the North Carolina Board of Law Examiners as part of the judicial branch of state government."[171]

Approximately six weeks later on August 30th, Rufus L. Edmisten, the Attorney General at the time, signed a letter to the Honorable J. William Copeland, the junior Associate Justice on the Supreme Court of North Carolina.[172] The letter reads: "In the opinion of this office, the North Carolina State Bar *could be found* to be exempt from . . . the Administrative Procedure Act, as [the Act] excludes from the definition of 'agency,' 'those agencies in the . . . judicial branches of the state government.'"[173]

Found with the letter in state archives was a spiral bound notebook containing the State Bar's position paper in support of their intention to be declared a part of the judicial branch.[174] There is no evidence to suggest that Justice Copeland or any other member of the supreme court responded to this statement—that the State Bar could be found to be an agency of the judicial branch.[175] But, this comes as no surprise since the letter was worded as a statement rather than a request for the court to take action.[176]

Letter dated May 3, 1976, from David S. Crump to B.E. James]. Except for the cover page, this letter from Attorney Crump to the State Bar is identical to the April 15, 1976, eight-page letter. *See* Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9.

170. Unpublished Minutes of N.C. State Bar Council Meeting (July 1976), *supra* note 158.

171. *Id.*

172. Letter from Rufus L. Edmisten, Att'y Gen., N.C. Dep't of Justice, to The Hon. William Copeland, Assoc. J., N.C. (Aug. 30, 1976) [hereinafter Letter dated Aug. 30, 1976, from Rufus L. Edmisten to Justice Copeland] (on file with author and available in the Appendix).

173. *Id.* (emphasis added).

174. N.C. State Bar Memorandum found alongside Letter from Rufus L. Edmisten, Att'y Gen., N.C. Dep't of Justice, to The Hon. William Copeland, Assoc. J., N.C. (Aug. 30, 1976) [hereinafter N.C. State Bar Memorandum found alongside Justice Copeland Letter] (on file with author and available in the Appendix). A photocopy of this spiral-bound notebook was found on Aug. 5, 2015. *Id.* The notebook begins with the word "Preamble," which appears to be a proposed amendment to the North Carolina State Bar's Certificate of Organization. *Id.* The proposed preamble amendment is followed by a nine-page position paper signed by four State Bar Councilors and the Secretary. *Id.* Five appendices follow the position paper. *Id.*

175. Telephone Interview with David S. Crump, Retired Att'y, N.C. State Bar (June 2, 2014). During the interview, Mr. Crump stated that as far as he knew, neither Justice Copeland nor the Supreme Court of North Carolina responded to the August 30, 1976, letter that was sent to Justice

Two days later on the first of September, a letter was drafted by Howard Kramer, the Deputy Attorney General for Legal Affairs.[177] Attorney Kramer's letter, in its entirety, reads:[178]

> In the opinion of this Office, the North Carolina State Bar is found to be exempt from chapter 150A of the General statutes for the reason that the Administrative Procedure Act, 150A-2(1), excludes from the definition of agency "those agencies in the . . . judicial branches of State Government," and in our opinion the North Carolina State Bar is a member of the judicial branch.[179]

Important to note here is that the letter addressed to the supreme court informed the court that it could find the State Bar as part of the judicial branch, while the letter addressed to the State Bar declared that in the opinion of the Office of the Attorney General, the State Bar was part of the judicial branch and exempt from the APA.[180]

The letters from Attorney Crump and Attorney Kramer highlight the ambiguity of government branch assignment for State Bar and the Board.[181] Attorney Kramer's letter is the clearest attempt to locate the North Carolina State Bar within the judicial branch of government. What is not clear, however, is whether the Office of the Attorney General possessed the authority to make such a call.[182]

Three months later, during the State Bar's October 1976 meeting, a report concerning the State Bar's government branch assignment declared that the Attorney General had *ruled* that the State Bar was exempt from the provisions of the APA.[183] Using this *ruling* concerning the State Bar, the Board of Law Examiners would soon withdraw its APA-compliant rules.

Copeland from the Office of the Attorney General. *Id.* The inability to locate any evidence of a court response after conducting thorough research suggests Mr. Crump's claim is a credible one. *Id.*

176. *See* Letter dated Aug. 30, 1976, from Rufus L. Edmisten to Justice Copeland, *supra* note 172.

177. Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9.

178. *Id.*

179. *Id.* ("[I]n our opinion the North Carolina State Bar is a member of the judicial branch.").

180. *Id.*

181. *Compare* Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9 (reasoning the State Bar is not within the Judicial Branch), *with* Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9 (reasoning the State Bar is within the Judicial Branch).

182. Attorney General opinions are advisory in nature and not binding on a court. *See In re* J.E., 643 S.E.2d 70, 72 n.1 (N.C. Ct. App. 2007) (noting that Attorney General opinions have an inherent "non-binding nature").

183. Unpublished Minutes of N.C. State Bar Council Meeting (October 21, 1976), *supra* note 158 ("Your executive committee reports that the Attorney General has *ruled* that the State Bar is

3. The Board of Law Examiners Withdraws Its APA-Compliant Rules

The fall of 1976 would prove to be eventful for both the North Carolina State Bar and the Board of Law Examiners.[184] For the Board of Law Examiners, September of 1976 included new litigation.[185] The case of *Mitchiner v. North Carolina Board of Law Examiners* involved an examinee who had taken, but not passed, the July 1976 bar exam.[186] In September 1976, the examinee requested a contested case hearing pursuant to the Administrative Procedure Act[187] and the Board's recently filed APA-compliant rules,[188] which provided for such hearings "without undue delay."[189] After six weeks passed without a hearing being scheduled, the examinee filed a petition and application in superior court, seeking an order compelling the Board to grant his request.[190] The Board, now being represented by Associate Attorney General David Crump from the APA Division, filed its response on December 6, 1976.[191] In the response, the Board asserted that while it was an agency of the state it operated as a part of the judicial branch of government.[192] For this reason, the Board claimed to be exempt from the APA, despite its new APA-compliant rules.[193]

Referencing the binding nature of the Board's own rules, the court remanded the matter to the Board for further proceedings in compliance with such rules.[194] But in so doing, the court addressed, in its unpublished order, the government branch assignment question for the Board of Law Examiners.[195]

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part of the judicial branch of State government and exempt from the provisions of the Administrative Procedure Act.") (emphasis added).

184. *See infra* text accompanying notes 185-208.

185. *See* Mitchiner v. Bd. of Law Exam'rs, 76 CvS 5386 (N.C. Super. Ct. filed Dec. 20, 1976) (order remanding to Board of Law Examiners for further proceedings) (unpublished and not available through mainstream electronic databases).

186. *See Mitchiner*, 76 CvS 5386.

187. *See* Petition and Application for Order, *Mitchiner*, 76 CvS 5386, para. 4, at 1-2.

188. *See* Amendment to Petition and Application, *Mitchiner*, 76 CvS 5386, at 1.

189. *See* 21 N.C. ADMIN. CODE 30.1201-.1202 (1976) (withdrawn 1977) ("*Rules Governing Admission to the Practice of Law*") (stating, "[u]pon receipt of request for a hearing by any party to a contested case, the [Board's] secretary will promptly acknowledge said request and schedule a hearing").

190. *See* Petition and Application for Order, *supra* note 187.

191. *See* Respondent's Answer, *Mitchiner*, 76 CvS 5386.

192. *See id.* at 3 (under Fourth Defense).

193. *Id.*

194. *See Mitchiner*, 76 CvS 5386 (order remanding to Board of Law Examiners for further proceedings).

195. *See id.*

The court concluded that both the North Carolina State Bar[196] and the Board of Law Examiners "are a part of the judicial branch of government."[197] In support of its conclusion, the court made several findings.[198] First, the trial court found that the State Bar and the Board "are agencies of the state."[199] It also found that the General Assembly possesses the authority to set standards for admission to the bar,[200] stating that setting standards was "an appropriate legislative function," but that "application of those [standards] to a specific applicant to be admitted to the North Carolina Bar is a judicial act and function."[201]

Based on this finding alone—that admission to the bar is a "judicial act"—the court concluded that the State Bar and the Board were part of the judicial branch.[202] Essentially, the court claimed that because the actual admission of an applicant to the bar was a "judicial act," that the rulemaking agency charged with examining and investigating applicants was within the judicial branch of government.[203] This logic ambiguity[204] found in the unpublished December 1976 *Mitchiner* order is indicative of the type of logic ambiguities that several other bodies have made when trying to locate the State Bar or the Board within a particular branch of government.[205] The *Mitchiner* matter would end without a trial or published opinion.[206] Its only trace would be an unpublished trial court order remanding the matter to the Board of Law Examiners for further proceedings,[207] which would never take place.[208]

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196. The North Carolina State Bar was not a named party in this action.

197. *See Mitchiner*, 76 CvS 5386, at 2 (order denying permissive intervention).

198. *See id.* at 1-2.

199. *See id.* at 1.

200. *See id.* at 2.

201. *Id.*

202. *See id.* at 2-3.

203. *See supra* note 12 (laying out the ambiguity of phrases like "judicial act" and "judicial function," which may have multiple meanings).

204. North Carolina's State Constitution provides, "The judicial power of the State shall, except as provided in section 3 . . . , be vested in a . . . General Court of Justice. *See* N.C. CONST. art. IV, § 1. Section three reads: "The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." *See id.* § 3. At best, the phrase "judicial act" is ambiguous in light of these provisions, with its meaning reflecting the function of adjudication, rather than an assigned government branch.

205. *See, e.g.*, *LegalZoom*, 2014 WL 1213242, at *7-9 (N.C. Super. Mar. 24, 2014).

206. *See Mitchiner*, 76 CvS 5386 (order remanding to Board of Law Examiners for further proceedings).

207. *See id.*

208. Interview with Joseph Mitchiner, Attorney, in Raleigh, N.C. (July 2014).

Six months later, on July 14, 1977, the Board of Law Examiners sent a letter to the Office of the Attorney General.[209] In the letter, the Board advised the Attorney General that it no longer considered itself subject to the Administrative Procedure Act and was withdrawing the rules it had filed with the Office eighteen months prior.[210] Supporting its own decision to withdraw its rules and consider itself exempt from the Administrative Procedure Act, the Board cited its consideration of Deputy Attorney General Howard Kramer's September 1, 1976, letter that located the North Carolina State Bar in the judicial branch of government and the December 1976 unpublished trial court order issued in the *Mitchiner* case.[211]

On July 27, 1977, the Attorney General responded to the Board of Law Examiners' letter.[212] The Attorney General's letter in response reads:

> This will acknowledge receipt of and thank you for your letter of 14 July 1977 advising me that the Board of Law Examiners is withdrawing the rules filed with my office under the Administrative Procedure Act, and that the Board no longer considers itself subject to the Administrative Procedure Act.
>
> In light of the opinion rendered by my office on 1 September 1976 which concluded that the State Bar was exempt from Chapter 150A of the General Statutes of North Carolina, I concur with the recent action of the Board of Law Examiners.[213]

As demonstrated here, the enactment of the state's first APA[214] was a significant, even identity-shifting, event for North Carolina's government agencies.[215] For the State Bar and the Board, it appears that the value of not having a branch assignment was, at this point in time, outweighed by the value of having one. From this point forward, they would maintain their claim to be part of the judicial branch of government.[216]

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209. *See* Letter from Fred P. Parker III, Exec. Sec'y, N.C. Bd. of Law Exam'rs, to Rufus L. Edmisten, Att'y Gen., State of N.C. Dep't of Justice (July 14, 1977) [hereinafter Letter dated July 14, 1977, from Fred P. Parker III to Rufus L. Edmisten] (on file with author and included in the Appendix).

210. See *id.*

211. *See id.*

212. Letter dated July 27, 1977, from Rufus L. Edmisten to Fred P. Parker III, *supra* note 147.

213. *Id.*

214. *See generally* N.C. GEN. STAT. § 150A (Supp. 1974).

215. *See supra* Section II.C.

216. *See* Lunsford, *supra* note 13.

D. Operating and Developing Under a Claim to be Judicial

The Attorney General would keep the September 1976 letter to the State Bar and the July 1977 letter to the Board of Law Examiners private.[217] Three months after the Attorney General sent the July 1977 letter "concurring" with the Board of Law Examiners claims to be judicial, the Office of the Attorney General published a formal opinion in response to a series of inquiries, two of which asked about the legal status for the North Carolina State Bar and the Board of Law Examiners.[218] In the formal, published opinion, the Office of the Attorney General stated:

> The North Carolina State Bar is an agency of the State of North Carolina. . . . The Board of Law Examiners is a separate but related state administrative agency with judicial and legislative powers relating to admission to the practice of law.[219]

The opinion does not mention a government branch.[220] Nor does the opinion reference the recent, yet unpublished, legal status letters that were sent to the State Bar and the Board.[221] The October 1977 Opinion is significant in terms of inter-organizational ambiguities of identity and status as it captures the complexity of the relationship between "separate but related administrative agencies."[222]

Thus it comes as no surprise that with Deputy Attorney General Kramer's 1976 opining on the State Bar's government branch kept private, the State Bar and the Board of Law Examiners continued with some frequency to be treated like other professional regulators subject to legislative oversight.[223] For example, in 1977 the General Assembly created the Government Evaluation Commission, also known as the Sunset Commission.[224] The Commission was charged with evaluating existing

217. *See infra* notes 218-222 and accompanying text.

218. *See* J.K. Sherron, Jr., 47 N.C. Op. Att'y Gen. 101, 1977 WL 26213, at *1-2 (1977) (identifying a missed opportunity in Oct. 1977 to clarify the governmental branch assignment question for the State Bar and the Board of Law Examiners in a published Attorney General opinion).

219. *Id.* (citing Keenan v. Bd. of Law Exam'rs, 317 F. Supp. 1350, 1355 n.5 (E.D.N.C. 1970)).

220. *Id.*

221. *Id.*

222. *Id.*

223. *See, e.g.*, N.C. GEN. STAT. § 143-34.10 (1979) (repealed 1981) (creating a Sunset Commission that would evaluate all of North Carolina's administrative agencies, including the North Carolina State Bar and the Board of Law Examiners).

224. *See id.*

state regulatory bodies,[225] and recommending whether their continued existence was warranted.[226]

Soon after its creation, the Sunset Commission evaluated both the North Carolina State Bar and the Board of Law Examiners.[227] The Commission concluded that the continued existence of the State Bar and the Board was warranted,[228] but noted that neither the Bar nor the Board provided for notice-and-comment-type rulemaking procedures, lifetime term limits for its governing members, or substantial participation by non-lawyers.[229]

The Commission also noted concerns about a late 1979 Board of Law Examiners rule change that altered the dates of the bar exam, the costs for applicants to sit for the exam, and its rules for allowing applicants access to bar exam scoring data.[230] Based on its study, the Sunset Commission recommended that the Bar and the Board operate with greater transparency and increased public participation.[231] The Commission, however, was met with significant resistance and is not considered in retrospect to have had a substantial impact in the agency evaluation and adequate oversight endeavor.[232]

Two years after the Sunset Commission issued its report, the question, to which branch of government do the bar and board belong arose in

225. *See id*.

226. *See id.* ("The General Assembly finds that the state government actions have produced a substantial increase in numbers and agencies, growth of programs, and proliferation of rules and regulations and that the whole process developed without sufficient legislative oversight, regulatory accountability, or a system of checks and balances.")

227. *See* GOV'T EVALUATION COMM'N, FINAL COMMISSION REPORT NORTH CAROLINA STATE BAR 1-44 (1980).

228. *See id*. at 1.

229. *See id*. at 2, 24.

230. *See id*.

231. *See id.* at 15. A similar recommendation was echoed in a December 2014 report on Occupational Licensing Agencies presented by the Program Evaluation Division of the North Carolina General Assembly. *See* OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED, *supra* note 22.

232. MICHAEL CROWELL & MILTON S. HEATH, JR., THE GENERAL ASSEMBLY OF NORTH CAROLINA: A HANDBOOK FOR LEGISLATORS 96-102 (1981). Versions of a few early recommendations made their way into statutory amendments. *See, e.g.*, An Act to Amend Chapter 84 of the General Statutes of North Carolina Relating to the North Carolina State Bar and to Remove Article 4 of that Chapter from the Automatic Termination Provisions of G.S. 143-34.12, ch. 788, 1981 N.C. Sess. Laws 1162 (codified as amended at N.C. GEN. STAT. § 84-17 (2015) (adding three public members to the North Carolina State Bar Council, its governing body, thirteen months after the government evaluation commission report suggested that one third of the Council be comprised of public members).

litigation again, this time making its way to North Carolina's high court.[233] The context of the litigation was an attorney disciplinary case.[234] The North Carolina State Bar had instituted disciplinary action against attorney Harry DuMont.[235] That action was heard before the then newly formed Disciplinary Hearing Commission,[236] which issued an order of discipline on March 3, 1980, suspending Mr. Dumont from the active practice of law for six months.[237] Attorney DuMont appealed the Commission's order, bringing into question the proper standard of judicial review for a final decision made by the State Bar's Disciplinary Hearing Commission, an issue of first impression.[238]

The supreme court recognized the novelty and significance of this question.[239] In fact, the case was resolved on grounds that did not require the court to address this novel issue, but the court chose to do so anyway.[240] Supporting its action in deciding an issue beyond what was required to resolve the dispute, the court noted the "serious conflict in contentions" between the parties, stating the resolution of the question would provide future guidance to the State Bar and its Disciplinary Hearing Commission.[241]

The standard of review question that had sparked such serious contentions relates to the nature of the State Bar's status and functions as well as to the degree of oversight that the agency receives.[242] In resolving the proper standard of review, the court first examined the enabling statutes that created the North Carolina State Bar and the Disciplinary Hearing Commission.[243] The court found that within these statutes there was no adequate procedure for judicial review.[244] Consequently, the court held that the Administrative Procedure Act's provisions for judicial review were controlling and that the "whole record" test, not the "any competent evidence" test, was the proper standard.[245] Thus, the court effectively subjected the State Bar's Disciplinary Hearing Commission to the same

233. *See* N.C. State Bar v. DuMont, 286 S.E.2d 89, 91 (N.C. 1982).
234. *Id.* at 90-91.
235. *Id.* at 90.
236. *See* N.C. GEN. STAT. § 84-28.1 (1975).
237. *See DuMont*, 286 S.E.2d at 91.
238. *Id.* at 91-93.
239. *Id.* at 98.
240. *Id.*
241. *Id.*
242. *See infra* Section III.B.2.
243. *See* N.C. GEN. STAT. § 84-15.
244. *See DuMont*, 286 S.E.2d at 98.
245. *See id.*

type of judicial oversight that most other agencies within the executive branch of government receive.[246]

In litigating the standard of review issue, the State Bar argued that the Administrative Procedure Act and its whole record test did not apply because the State Bar and the Disciplinary Hearing Commission were not part of the executive branch of government.[247] In response, the court refused to comment on the State Bar's branch assignment, but found the State Bar's argument "unpersuasive."[248]

In essence, the court's opinion makes known that the State Bar's Disciplinary Hearing Commission functions like an agency in the executive branch of government and its actions, regardless of formal branch assignment, are subject to APA-like requirements.[249] This functional treatment of State Bar action, as being subject to the type of judicial oversight set forth in the APA, has broader applications.[250]

Presumably prompted by the court's opinion in the *DuMont* case, a handwritten note was added to the State Bar's September 1976 letter from Attorney Kramer—the letter claiming the State Bar is a part of the judicial branch of government.[251] The note questions[252] Attorney Kramer's assertion that the North Carolina State Bar "is found to be exempt from Chapter 150A of the General Statutes . . . and in our opinion the North Carolina State Bar is a member of the judicial branch."[253] The handwriting reads:

> Mr. James—Looks like the Supreme Court disagrees w/ Kramer. See Dumont, 304 N.C. at pp 642-643 Tx, CB[254]

A review of the note's identified pages in the *Dumont* opinion confirms that the note refers to that portion of the opinion where the court commented that the State Bar's argument about being within the judicial

246. *See id.*; *see, e.g.*, Lunsford, *supra* note 13.

247. *See DuMont*, 286 S.E.2d at 98.

248. *See id.*

249. *See generally id.* at 98-99.

250. In that same opinion, the supreme court stated that it "should not meddle in matters [that had been] left to the State Bar by [the] Legislature." *Id.* at 92. This statement suggests that the supreme court considers the State Bar to be a creature of the legislature and not necessarily the judicial branch entity that the State Bar believes itself to be.

251. Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9 ("[I]n our opinion the North Carolina State Bar is a member of the judicial branch.").

252. *Id.*

253. *Id.*

254. *Id.* (handwritten note) (CB stands for Carolin Bakewell who was in the Office of the Counsel for the North Carolina State Bar at the time).

branch was unpersuasive.[255] But again, the court resolved the *Dumont* case on grounds not requiring it to reach the standard of review question.[256]

This note confirms that the Attorney General's attempt to locate the State Bar within the judicial branch was likely without final authority[257] and is not necessarily consistent with the supreme court's view on the matter.[258] While the note explicitly acknowledges inconsistent opinions about the legal status of the State Bar, its presence marks a larger issue of inadequate agency oversight as the supreme court reached a different conclusion than the Attorney General's Office.[259] Questions about the State Bar's compliance with APA-like procedures would rise again; this time the context would be admission to the bar.[260]

In June 1995, Attorney Ellen Bring petitioned the State Bar for approval of a new law school to be added to the Council's approved list of law schools.[261] Graduates of law schools that appeared on the Council's list satisfied the Board's legal education requirements to be eligible to sit for the bar examination. In July 1995, the Council denied Ms. Bring's application, despite the fact that Ms. Bring had practiced law in good standing in another state for fifteen years.[262]

Relevant to note here is that up until 1971, the Board of Law Examiners made the approval of law school decisions.[263] In 1968, the Board amended its rules to provide that it would delegate the approval of law schools task to the State Bar beginning in 1971.[264] According to the Board's amended rules, the State Bar Council's list of approved law schools would be available in the office of Secretary.[265] In 1971, the single-secretary provision was still in effect, rendering the location of the list of

255. *Compare id.* ("In the opinion of [the Office of the Attorney General]. . . the North Carolina State Bar is a member of the judicial branch."), *with DuMont*, 286 S.E.2d at 98-88 (finding unpersuasive the State Bar's arguments that the Bar and the Disciplinary Hearing Commission were not within the executive branch of government).

256. *See DuMont*, 286 S.E.2d at 98-99.

257. *See* Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9.

258. *See id.*

259. *See id.*; *see also infra* Sections III.B, IV.A, V.B.

260. Bring v. N.C. State Bar, 501 S.E.2d 907, 908 (N.C. 1998).

261. *See id.*

262. *See id.* at 907-12.

263. *See, e.g.*, RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 243 N.C. 785 app. at 789 (1956).

264. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 275 N.C. 692 app. at 697, 701 (1968) (indicating that the approval of law schools, beginning with the 1971 bar examination, would be managed by the State Bar Council).

265. *See Bring*, 501 S.E.2d at 909 ("A list of the approved law schools is available in the office of the secretary." (quoting *Rules Governing Admission to the Practice of Law* .0702)).

approved law schools immaterial, since the same secretary who served the State Bar also served the Board.[266]

But in 1995, when Ms. Bring petitioned the State Bar Council for approval of the law school from where she graduated, separate secretaries served the State Bar and the Board.[267] In addition, by 1995, the State Bar had ceased approving law schools on a case-by-case basis; instead, the Bar's policy was to allow only those applicants who had graduated from an ABA-accredited law school to sit for the exam.[268]

Presumably because the task of approving law schools now resided with the State Bar Council, Ms. Bring brought suit against the North Carolina State Bar,[269] not the Board of Law Examiners.[270] Ms. Bring, who had graduated from a law school that was fully accredited in another state, challenged the State Bar Council's list of only ABA-approved law schools on constitutional and procedural grounds.[271] Ms. Bring did not succeed in

266. *Compare* 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, ch. 210, 1933 N.C. Sess. Laws 313 (establishing that a single secretary would serve both the State Bar and the Board), *with* An Act to Amend G.S. § 84-24 Pertaining to the Board of Law Examiners, ch. 13, 1973 Sess. Laws 6 (providing "The Board of Law Examiners . . . may employ an Executive Secretary. . . . This act shall be in full force and effect . . . this the 12th day of February, 1973").

267. *See id.*

268. *See Bring*, 501 S.E.2d at 908. Although Ms. Bring's request to take the North Carolina Bar Examination was denied in 1995, twenty years later, the North Carolina State Bar reversed course, amending its rules to allow applicants in the same situation as Ms. Bring to sit for the North Carolina Bar Exam. *See* 27 N.C. Admin. Code 01C.0105 (2016) (amended effective March 5, 2015) (allowing an applicant to take the North Carolina bar examination if the applicant holds a "J.D. degree from a law school that was approved for licensure purposes in another state . . . , was licensed in such state . . . , and, at the time of the application for admission to the North Carolina State Bar, has been an active member in good standing of the bar in that state . . . in each of the 10 years immediately preceding application"). Unlike in 1995, when facts like these sparked a legal battle that divided the Supreme Court of North Carolina, the 2015 rule changes appeared to come about without noticeable debate. Pending before the state supreme court for approval in January 2016 is another proposed rule change—this one initiated by the Board of Law Examiners rather than the State Bar—that will eliminate 10 year requirement from the 2015 approval of law schools rule. *See Proposed Rule Amendments*, N.C. STATE BAR, http://www.ncbar.gov/rules/proprul.asp (last visited Jan. 24, 2016).

269. *See id.* at 907.

270. Interesting to note, but beyond the scope of this Article, is whether the Board's delegation to the State Bar of the approval of law schools task is within its intended scope of authority delegated by the General Assembly. *See generally* F. Andrew Hessick & Carissa Byrne Hessick, *The Non-ReDelegation Doctrine*, 55 WM. & MARY L. REV. 163 (2013) (calling into question the legality of an agency re-delegating its legislatively-delegated tasks).

271. *See id.* at 907-10, 912.

making her claims and she was not allowed to take the North Carolina bar examination.[272]

Specifically, the state's supreme court found that the General Assembly's enabling statutes did not violate the non-delegation doctrine.[273] Additionally, a majority of the court found Ms. Bring's argument that the State Bar did not create its approved law school list under APA procedures irrelevant.[274] According to the court, the State Bar's original rulemaking authority provision provided more specific rulemaking instructions than the APA, and those specific "directions must govern over the general rule-making provision of the APA."[275] Relevant here is the fact that the majority did not base its decision on the State Bar's government branch assignment.[276] Rather, the court based its decision on the State Bar's enabling statutes containing a process that included supreme court publication and approval of the State Bar and the Board's rules.[277] The court would have ruled the same way for any executive branch agency or independent licensing board, as "the specific trumps the general" is the rule for this administrative law question and it does not relate to government branch assignment.[278] As discussed below, although the supreme court veto provides some oversight, it is inadequate, as this procedural process does not allow for public participation or foster principles of open government at the time these rules are made—a key to maintaining democratic legitimacy.[279] Thus, as in *Dumont*, the court[280] again remained silent about whether the North Carolina State Bar and the Board of Law Examiners were part of the judicial branch of government.[281]

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272. *Id.* at 910.

273. *Id.*

274. *Id.* (citing Nat'l Food Stores v. N.C. Bd. of Alcoholic Control, 151 S.E.2d 582, 585-86 (1966)).

275. *Id.*

276. *See id.*

277. *Id.*

278. *See Nat'l Food Stores*, 151 S.E.2d at 586.

279. *Bring*, 501 S.E.2d at 910; *see* David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 620 (2012) (discussing democratic legitimacy).

280. *See Bring*, 501 S.E.2d at 910. As of March 2015, currently pending before the Supreme Court of North Carolina is a proposed change for the Rules of the North Carolina State Bar. That proposal, which was approved by the State Bar's executive committee in October 2014 would create an exception that would allow applicants in the same situation as Ms. Bring to sit for the North Carolina Bar Exam.

281. *See also* Telephone Interview with David S. Crump, *supra* note 175 (affirming lack of response to the Justice Copeland letter).

III. BOUNDARY BUREAUCRACIES: MAPPING AMBIGUITIES AND CHARTING IMPLICATIONS

The previous section provided extensive background information on the creation and development of the North Carolina State Bar and the Board of Law Examiners. This part maps three boundary-related ambiguities: "separate, but related"[282] administrative agencies (inter-organizational);[283] the tripartite branches of government (intra-governmental);[284] and the public and private sectors (public-private).[285] As administrative law scholar Anne Joseph O'Connell notes in *Bureaucracy at the Boundary*, "labels" matter.[286] Part III confirms that labels do matter and explains how boundary bureaucracies can take shape at the state level in the context of regulating the legal profession.[287] The goal here is to map the inter-organizational, intra-governmental, and public-private ambiguities, not necessarily resolve them. In other words, Part III highlights the "fish or fowl" ambiguities by contrasting the evidence of one label with evidence of another.

In addition to mapping ambiguities, this section reveals the dynamic nature of agencies as they develop or "drift," over time.[288] As used here, "agency drift" refers to shifts in agency identity and position over the course of the agency's existence.[289] This evolutionary phenomenon seemingly transforms what was, at one time, distinct into the obscure.[290] I begin by mapping the inter-organizational boundary, for two reasons: First, this ambiguity keenly illustrates the phenomenon of agency drift,[291] and second, inter-organizational ambiguity must be resolved before turning to the other boundaries.

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282. *See* Sherron, *supra* note 218, at *2.

283. *See infra* notes 292-348 and accompanying text.

284. *See infra* notes 349-389 and accompanying text.

285. *See infra* notes 390-417 and accompanying text.

286. *See* O'Connell, *supra* note 21, at 894.

287. *See infra* notes 292-417 and accompanying text.

288. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1170 (2009).

289. *See, e.g.*, O'Connell, *supra* note 21, at 871-74.

290. *See id.*

291. *See supra* text accompanying notes 288-290.

A. The Inter-Organizational Boundary: How Do the State Bar and the Board Relate?

1. A "Separate but Related" Ambiguity

The "Separate, but related"[292] phrase, while seemingly convoluted, captures the complex nature of the relationship between the North Carolina State Bar and the Board of Law Examiners.[293] In both form and function, the State Bar and the Board remain simultaneously distinct and inter-dependent. There remains a lack of clarity about the extent to which their relationship is, or once was, lateral or hierarchical.[294] On one hand, the relationship could be seen as hierarchical, with the Board of Law Examiners acting as one subservient part of the State Bar.[295] On the other hand, the Bar and Board could be viewed as two separate entities, interacting only when their separate purposes overlap,[296] with the Board of Law Examiners overseeing those who wish to be admitted to the Bar and the State Bar overseeing those admitted. With respect to the inter-organizational boundary between the State Bar and the Board, one thing is clear: confusion abounds.[297]

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292. *See* Sherron, *supra* note 218 (describing the Board of Law Examiners, vis-à-vis the North Carolina State Bar, as "a separate but related state administrative agency with judicial and legislative powers relating to admission to the practice of law").

293. *See infra* notes 298-348 and accompanying text.

294. *See infra* notes 298-343 and accompanying text.

295. *See infra* notes 298-323 and accompanying text.

296. *See infra* notes 324-343 and accompanying text.

297. *See* Lunsford, *supra* note 13, at 6 ("[Q]uite a few folks, including many aspiring attorneys, appear to believe that we're the North Carolina Board of Law Examiners[,] . . . [and] [t]hough [the State Bar] famously takes licenses for various reasons, including professional misconduct, it does not admit anyone to the legal profession. That is the exclusive province of the Board of Law Examiners."). *But see* 27 N.C. ADMIN. CODE 01C.0103 (2015) (State Bar Rule titled, *Admission to Practice*, and instructing on admission subsequent to receiving a license from the Board of Law Examiners); 27 N.C. ADMIN. CODE 01C.0105 (2015) (titled, *Approval of Law Schools*, and setting educational requirement standards for admission to the bar). *See also* OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED, *supra* note 22, at 16 (treating the State Bar and Board of Law Examiners jointly, and as an occupational licensing agency, for its purpose of studying independent North Carolina government entities charged with professional regulation); *see also* JOAN G. BRANNON, THE JUDICIAL SYSTEM IN NORTH CAROLINA 28 (1977) ("The North Carolina State Bar is the official organization of attorneys for the state. This organization, through *its* Board of Law Examiners, licenses attorneys.") (emphasis added). Indeed, there is no shortage of historical material suggesting a hierarchical relationship between the State Bar and the Board. Similarly, there is no shortage of evidence establishing the intra-governmental ambiguity as well. *See id.* at Contents (placing the North Carolina State Bar, within the publication's table of contents, among private organizations, such as the North Carolina Bar Association and the North Carolina

i. Evidence of a Hierarchical Relationship

Some historical evidence suggests that the original relationship between the North Carolina State Bar and the Board of Law Examiners was intended to be hierarchical.[298] Four reasons support such an interpretation, many of which are derived from features within the original organizing Act.[299] These include: (1) the single-secretary provision;[300] (2) plain language of the organizing Act;[301] (3) the supervisory role for the State Bar over the Board;[302] and (4) the structure of both the original and codified versions of the Act.[303]

First, in the original organizing Act, the General Assembly provided for a single secretary to serve both the State Bar and the Board.[304] "[T]he secretary of the North Carolina State Bar shall be the secretary of the Board, and serve without additional pay."[305] This provision remained in effect from 1933 until 1973.[306] The single-secretary provision evinces the General Assembly's intent for the State Bar's hierarchical role over the Board.[307] This provision is not included in the Bar Association's proposed version of the bill that it submitted to the Association's members during the 1932 annual meeting.[308]

Second, the plain language from the Act further supports the claim that the intended structure for the entities was envisioned in a more hierarchical form. The original Act reads: "The [State Bar] Council shall be competent to exercise the *entire* powers . . . in respect to the interpretation and administration of this Act."[309] This same language remains to this day.[310]

Association of Clerks of Superior Court and not under table of contents headings such as: *The General Court of Justice, Related Agencies* (*e.g.*, The Department of Justice)).

298. An Act to Provide For the Organization As An Agency of the State of North Carolina State Bar, and For its Regulation Powers, and Government, Including the Admission of Lawyers to Practice and Their Discipline and Disbarment, ch. 210, 1933 N.C. Sess. Laws 313 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

299. *Id.* at 319.

300. *Id.*

301. *Id.*

302. *Id.* at 320.

303. *See id.* at 319; *see also* N.C. GEN. STAT. §§ 84-15 to -26 (2015).

304. 1933 N.C. Sess. Laws at 319.

305. *See id.*

306. *Compare* N.C. GEN. STAT. § 84-24 (1965), *with* N.C. GEN. STAT. § 84-24 (1975). *See also* 1933 N.C. Sess. Laws at 319.

307. *See* 1933 N.C. Sess. Laws at 319.

308. *See* REPORT OF THE THIRTY-FOURTH ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, *supra* note 90, at 199-213.

309. *See* 1933 N.C. Sess. Laws at 314-15.

310. *See* N.C. GEN. STAT. § 84-17 (2015).

In addition, the General Assembly chose different words to describe the nature of the State Bar and the Board.[311] In creating the State Bar, the General Assembly used the phrase "agency of the state."[312] In contrast, the General Assembly used the term "Board" when creating the Board of Law Examiners.[313] This difference in terminology suggests a relationship that is not necessarily of a lateral status.

Third, though the General Assembly concurrently created the State Bar and the Board to oversee the entirety of North Carolina's legal profession, from licensing to retirement, it tasked the State Bar with supervisory authority over the Board of Law Examiners.[314] Statutory language has always directed the Council of the State Bar to elect the members of the Board of Law Examiners.[315] Furthermore, the Council must approve the Board's rules before those rules are forwarded to the supreme court for final approval.[316]

Finally, the structure of the original Act and currently existing codification suggests a hierarchal relationship, with the State Bar having superior powers over the Board of Law Examiners. Thus, as codified, the enabling statutes for the State Bar and Board appear within a single Article of Chapter 84, titled, *North Carolina State Bar*.[317] In addition to the title of the Article, the first statute appearing within the article, is titled, *Creation of North Carolina State Bar as Agency of the State*.[318] Nowhere within the Article 4 Table of Contents is there parallel language evincing the creation of, or lateral form for, the Board of Law Examiners.[319] Rather, the General Assembly titled the statute that creates the Board of Law Examiners, *Admission to Practice*.[320] Further, in both the original session law and current statutory codification, provisions creating the State Bar precede those that create the Board of Law Examiners.[321] In addition, the provisions

311. *Compare* N.C. GEN. STAT. § 84-15, *with* N.C. GEN. STAT. § 84-24.

312. *See* 1933 N.C. Sess. Laws at 313; *see also* N.C. GEN. STAT. § 84-15.

313. *See* 1933 N.C. Sess. Laws at 319; *see also* N.C. GEN. STAT. § 84-24.

314. *See* 1933 N.C. Sess. Laws at 319-20.

315. *See* N.C. GEN. STAT. § 84-24.

316. *See id.*

317. N.C. GEN. STAT. §§ 84-15 to -38.

318. *See* N.C. GEN. STAT. § 84-15.

319. *See id.*

320. *See* N.C. GEN. STAT. § 84-24.

321. *See generally* N.C. GEN. STAT. §§ 84-15 to -38. The session law creating the State Bar and the Board is titled "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 at 313 (codified as amended at N.C. GEN. STAT. §§ 84-24 to -38 (2015)).

regarding the Board of Law Examiners are not set off from the rest of the statutory scheme.[322] Rather, they are flanked on both sides by ten or more statutes regarding the power of the State Bar.[323]

ii. Evidence of a Lateral Relationship

Conversely, there is also evidence that rather than being subservient to the State Bar, the Board of Law Examiners is instead a lateral organization that is, indeed, "separate but related."[324] Like the evidence supporting a hierarchical relationship, evidence supporting this interpretation—that the State Bar and the Board relate on a more lateral level—is found in the plain language of the organizing Act and subsequent amendments thereto.[325] Additionally, evidence supporting this interpretation comes from the independent actions of both the State Bar and the Board.[326]

First, despite the fact that the General Assembly granted the State Bar supervisory powers over the Board of Law Examiners, it also unmistakably granted independent rulemaking authority to both the Bar and the Board.[327] The current provision delegating rulemaking authority to the State Bar reads:

> The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article.[328] The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article.[329]

322. *See generally* N.C. GEN. STAT. §§ 84-15 to -38 (governing admission to the bar are sections 84-24 to -25).

323. *See id.*

324. Sherron, *supra* note 218 (citing *Keenan v. Bd. of L. Exam'rs*, 317 F. Supp. 1350, 1355 n.5 (E.D.N.C. 1970)).

325. *See* 1933 N.C. Sess. Laws at 313 (codified as amended at N.C. GEN. STAT. §§ 84-15 to -38 (2015)).

326. *See, e.g.*, Regulation Certification from N.C. Bd. of Law Exam'rs filed with N.C. Office of Att'y Gen. Admin. Procedures Section on Jan. 30, 1976, *supra* note 140. Letter dated Apr. 15, 1976, from David S. Crump, to B.E. James, *supra* note 9. Letter dated May 3, 1976, from David S. Crump to B.E. James, *supra* note 169.

327. N.C. GEN. STAT. § 84-21 (granting rulemaking authority to the State Bar); N.C. GEN. STAT. § 84-24 (granting independent rulemaking authority to the Board of Law Examiners). Rulemaking authority is not granted to any subdivision of the State Bar. *See, e.g.*, N.C. GEN. STAT. § 84-3 (2015) (establishing the Disciplinary Hearing Commission as a separate adjudicatory commission within the State Bar but not providing the Commission with independent rulemaking authority).

328. N.C. GEN. STAT. § 84-17.

329. N.C. GEN. STAT. § 84-21.

Alongside this delegation of rulemaking authority for the State Bar, the General Assembly delegated separate rulemaking authority to the Board of Law examiners.[330] The provision granting such authority to the Board reads:

> The Board of Law examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law. . . . The Board . . . subject to the approval of the Council, shall by majority vote . . . make, alter, and amend such rules and regulations for admission to the bar as in their judgment shall promote the welfare of the state and the profession.[331]

The General Assembly's delegation of independent rulemaking authority to both the State Bar and the Board suggests a relationship between the two that is more lateral, rather than hierarchal, in nature. Moreover, the State Bar's authority to oversee the Board's rulemaking power[332] is limited to a veto power, and does not include the ability to make substantive amendments.[333] Having authority to oversee an agency's actions does not necessarily mean that the entity tasked with oversight is one in the same as the entity that is subject to the oversight.[334]

Further supporting a lateral relationship between the State Bar and the Board is the General Assembly's amendment to the original staffing structure of the Bar and the Board.[335] The single-secretary provision provided an internal connection between the entities.[336] When the General Assembly amended the single-secretary provision, to give the Board of Law Examiners the power to employ its own secretary a more lateral relationship between the entities emerged.[337]

Second, and in addition to the plain language set forth above, independent actions of both the State Bar and the Board confirm that the entities have seen themselves in both separate and related ways.[338] As a

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330. N.C. GEN. STAT. § 84-24.

331. *Id.*

332. *Id.*

333. *See id.*

334. *See id.* Other examples include a Presidential Veto of a Congressional Act. *See* U.S. CONST. art. VII, § 7, cl. 2.

335. *See* 1933 N.C. Sess. Laws at 319-20 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

336. *See id.*

337. *See* 1973 N.C. Sess. Laws at 6 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

338. *See, e.g.*, Regulation Certification from N.C. Bd. of Law Exam'rs filed with N.C. Office of Att'y Gen. Admin. Procedures Section on Jan. 30, 1976, *supra* note 140. Letter dated Apr. 15,

practical matter, since being created, there have been periods of time during which the State Bar and the Board have shared physical office space, as well as times when they have not.[339] Sharing office space does not have legal implications for inter-organizational identity, but it can affect perceived identity.

Third, the independent often conflicting actions of the entities demonstrated their lateral relationship.[340] As described previously, in 1976 the Board acted independently by filing APA-compliant rules with the Office of the Attorney General.[341] Additionally, the Bar's own rules note the entities' separate, lateral nature. For example, in its original Certificate of Organization, the State Bar promulgated rules forbidding anyone serving as a member of the Council to simultaneously serve as a member of the Board of Law Examiners.[342] The rules further provide that the Bar and the Board may jointly consider proposed rules, but "[n]o action, however, shall be taken by the joint meeting but each shall act separately."[343]

1976, from David S. Crump, to B.E. James, *supra* note 9. Letter dated May 3, 1976, from David S. Crump to B.E. James, *supra* note 169.

339. *Compare* 289 N.C. 738 (1976) (stating the address for the Board of Law Examiners as 107 Fayetteville Street, P.O. Box 25427, Raleigh, N.C. 27611), *and* 298 N.C. 813 (1979) (stating the address for the Board of Law Examiners as 208 Fayetteville Street, P.O. Box 25427, Raleigh, N.C. 27611), *with* Letter dated May 3, 1976, from David S. Crump, to B.E. James, *supra* note 169, and Letter from L. Thomas Lunsford, II, Exec. Director, N.C. Bd. of Law Exam'rs, to M. Keith Kapp, President, N.C. State Bar (Apr. 12, 2013). *See also* Letter from Fred P. Parker III, Exec. Sec'y, N.C. Bd. of Law Exam'rs, to Elaine Marshall, N.C. Sec'y of State (Apr. 17, 2012) [hereinafter Letter dated Apr. 17, 2012, from Fred P. Parker III to Elaine Marshall] (stating the Board of Law Examiners was exempt from open meetings laws) (stating the address of the Board of Law Examiners as One Exchange Plaza, Suite 700, P.O. Box 2946, Raleigh, N.C. 27602); The N.C. Bd. of Law Exam'rs, htts://ncble.org/ (last visited Oct. 17, 2015) (stating the current address of the Board of Law Examiners as 5510 Six Forks Rd., Suite 300, Raleigh, N.C. 27609); N.C. STATE BAR, http://www.ncbar.com/ (last visited Oct. 17, 2015) (stating the current address for the State Bar as 217 E. Edenton Street, P.O. Box 25908, Raleigh, N.C. 27611).

340. *See, e.g.*, Regulation Certification from N.C. Bd. of Law Exam'rs filed with N.C. Office of Att'y Gen. Admin. Procedures Section on Jan. 30, 1976, *supra* note 140. Letter dated Apr. 15, 1976, from David S. Crump, to B.E. James, *supra* note 9. Letter dated May 3, 1976, from David S. Crump to B.E. James, *supra* note 169.

341. It is true that the Board withdrew its rules eighteen months later and cited the status of the State Bar in support of its action in withdrawing the rules. Thus, it seemingly appears that the Board acts separately when such separateness is organizationally advantageous, but leverages its relatedness to the Bar when that aspect provides traction for Board goals. *See, e.g.*, Brief for N.C. State Bar et al. as Amici Curiae Supporting Petitioner, N.C. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2014) (No. 13-534). The Board of Law Examiners signed an amicus curiae brief written by the State Bar, which featured procedural processes that although followed by the State Bar are not necessarily features of the Board's processes. *Id.*

342. *See* 27 N.C. ADMIN. CODE 01C.0101 (2015); *see also* Certificate of Organization of the North Carolina State Bar, *supra* note 103, at 860.

343. Certificate of Organization of the North Carolina State Bar, *supra* note 103, at 860.

Admittedly here, the rules of the State Bar that note the separateness between the Bar and the Board are of its own making. Still, the weight of evidence in support of each interpretation reveals a complex and ambiguous relationship, making resolution of the ambiguity less intuitive than expected.

2. Implications at Inter-Organizational Borders

There are practical implications of the ambiguities of identity and status related to the inter-organizational boundaries between the North Carolina State Bar and the Board of Law Examiners. A primary implication is widespread confusion and misunderstanding about the nature of the relationship between the Bar and the Board.[344] Managing that confusion has proved difficult.[345] Thus, though the State Bar and the Board might share the same views about the entities' separate nature, that same separateness is difficult to discern by reading the statutory scheme that the General Assembly enacted to create the Bar and the Board.

Moreover, statutory reporting obligations must sometimes be met by referencing separate reports submitted by the State Bar and the Board. Though most of the confusion causes no more than mild inefficiency, practical implications can lead to problems.[346]

In addition to practical implications, the inter-organizational ambiguity has potential legal implications. To the extent that the identities of the State Bar and the Board are conflated, adjudicating bodies who "say what the law is"[347] might mistakenly presume that the law applies—or should apply—equally to both entities. But over the past forty years, the operations of the State Bar and the Board have not mirrored one another. The State Bar, for example, has a lengthier record of engaging in public rulemaking, complying with the open meetings laws, and fulfilling statutory duties with respect to filing notices of regularly scheduled meetings.[348]

344. *See, e.g.*, Lunsford, *supra* note 13.

345. *See id.*; *see also* Bring v. N.C. State Bar, 501 S.E.2d 907 (N.C. 1998); N.C. State Bar v. DuMont, 286 S.E.2d 89 (N.C. 1982).

346. Those problems are discussed in Part IV of this Article.

347. Marbury v. Madison, 5 U.S. 137, 176 (1803).

348. *See, e.g.*, Brief for N.C. State Bar et al. as Amici Curiae Supporting Petitioner, *supra* note 341 (including the Board but arguing on procedures of the State Bar that differ from the Board's).

B. The Intra-Governmental Boundary

1. A Branch Assignment Ambiguity

In addition to residing along inter-organizational boundaries, the North Carolina State Bar and the Board of Law Examiners reside along an intra-governmental boundary, specifically the boundary between the executive and judicial branches of state government.[349] This boundary ambiguity places the State Bar and the Board of Law Examiners without governmental "place" and they "cannot effectively operate if [they] are neither fish nor fowl."[350]

This section establishes that the State Bar and the Board's government branch assignment has never been authoritatively decided.[351] Though the entities are often assumed or claimed to be either part of the executive[352] or judicial branch,[353] the various assumptions and claims conflict with one another and lack substantial evidence to support them.[354]

There are two reasons that support that this intra-governmental boundary ambiguity exists. First, the sole power to assign an entity, like the North Carolina State Bar or the Board of Law Examiners, to a particular branch of government resides in one of three places: (1) the language of the state constitution; (2) with the General Assembly; or (3) with the Supreme Court of North Carolina. Second, any authoritarian entity that has attempted to clarify the intra-governmental placement of either the State Bar or the Board of Law Examiners holds no binding authority to place either agency under a governmental branch.

i. Power to Assign Government Branch for Entities

The power to assign an entity like the State Bar or the Board of Law Examiners to a government branch lies within the state constitution, the General Assembly, or within the inherent powers of the state supreme court.[355]

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349. *See supra* Section III.B.

350. Memorandum from the N.C. State Bar (Aug. 30, 1976) (on file with the author, the North Carolina State Archives, and available in the Appendix).

351. *See infra* Section III.B.1.i.

352. ANN L. SAWYER, INTERNAL ORGANIZATION OF NORTH CAROLINA STATE EXECUTIVE DEPARTMENTS, THE GENERAL ASSEMBLY, AND THE JUDICIAL SYSTEM (1982).

353. Brief for N.C. State Bar et al. as Amici Curiae Supporting Petitioner, *supra* note 341, at 13 n.5.

354. *See infra* notes 355-389 and accompanying text.

355. *See supra* Section III.B.1.i.

The North Carolina Constitution, which would have absolute authority, is silent on the issue of branch assignment for entities such as the State Bar and the Board of Law Examiners.[356] This silence separates the State Bar and the Board of Law Examiners in North Carolina from those in jurisdictions such as Ohio or Vermont, where the state constitution does specifically assign a branch of government over the entities.[357]

Perhaps the North Carolina General Assembly came the closest to designating the State Bar and the Board to a governmental branch when it created the entities.[358] Within the State Bar and the Board's agency organic statute is the following qualification: "Subject to the superior authority of the General Assembly to legislate thereon by general law . . . the council is hereby vested, as an agency of the state."[359] And although the General Assembly did not create the State Bar or the Board as an executive agency, the omission by the General Assembly is commonplace, as it has not made express governmental branch assignments for most of the State's occupational licensing agencies.[360] Rather, regulatory entities charged with regulating a profession have been described as "unassigned."[361] These independent entities are usually treated as being within the executive branch of government.[362] In establishing the various practice acts, the General Assembly has used a variety of terminology,[363] including agency, board, and commission;[364] however, none of these terms necessarily designate an entity for a specific branch assignment.

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356. *See generally* N.C. CONST.

357. *See, e.g.*, OHIO CONST. art. IV, § 2(B)(1)(g)*; see also* VT. CONST. ch. 11, § 30.

358. *See* 1933 N.C. Sess. Laws at 313 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

359. N.C. GEN. STAT. § 84-23; *see also* Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9.

360. The General Assembly has routinely created independent professional regulatory entities and not included within a professional practice act an express assignment to a specific government branch. *See, e.g.*, N.C. GEN. STAT. § 89(A) (2015) (creating the North Carolina Board of Landscaping Architects, but not assigning the Board to a specific governmental branch).

361. *See, e.g.*, SAWYER, *supra* note 352 (categorizing the N.C. State Bar and the Bd. of Law Exam'rs as a single entity and labeled an unassigned licensing board (ULB)).

362. *Id.*

363. "Agency of the state" is used four times. Additionally, there are six occasions when the General Assembly characterized an occupational licensing entity a part of a specific government department or another agency. *See infra* note 364.

364. The practice acts referenced here are from the official version of the North Carolina General Statutes, most recently published in 2015 by LexisNexis. *See* N.C. GEN. STAT. §§ 90-453 to -459 (N.C. Acupuncture Licensing Bd.); N.C. GEN. STAT. §§ 74D-1 to -14 (Alarm Sys. Licensing Bd.); N.C. GEN. STAT. §§ 93E-1-1 to -1-14 (N.C. Appraisal Bd.); N.C. GEN. STAT. §§ 83A-1 to -17 (N.C. Bd. of Architecture); N.C. GEN. STAT. §§ 90-522 to -540 (N.C. Bd. of Athletic Trainers); N.C. GEN. STAT. §§ 85B-1 to -9 (N.C. Auctioneers Comm'n); N.C. GEN. STAT. §§

Finally, the state supreme court could, through its inherent powers, claim the State Bar and the Board of Law Examiners to be an official arm of the judicial branch, as it did the Judicial Standards Commission in *In re Nowell*.[365] As Associate Attorney General Crump's letter notes, the supreme court has never held the state bar to be an "arm of the court" or an

86A-1 to -27 (State Bd. of Barber Exam'rs); N.C. GEN. STAT. §§ 93-1 to -13 (State Bd. of Certified Pub. Accountant Exam'rs); N.C. GEN. STAT. §§ 90-139 to -157.3 (State Bd. of Chiropractic Exam'rs); N.C. GEN. STAT. §§ 143-151.8 to -151.21 (N.C. Code Officials Qualification Bd.); N.C. GEN. STAT. §§ 88B-3 to -29 (N.C. Bd. of Cosmetic Art Exam'rs); N.C. GEN. STAT. §§ 90-22 to -48.3 (N.C. State Bd. of Dental Exam'rs); N.C. GEN. STAT. §§ 90-350 to -370 (N.C. Bd. of Dietetics/Nutrition); N.C. GEN. STAT. §§ 87-39 to -51 (State Bd. of Exam'rs of Elec. Contractors); N.C. GEN. STAT. §§ 88A-1 to -23 (N.C. Bd. of Electrolysis Exam'rs); N.C. GEN. STAT. §§ 90-500 to -511 (Bd. of Emp. Assistance Prof'ls); N.C. GEN. STAT. §§ 89C-1 to -24 (State Bd. of Exam'rs for Eng'rs & Surveyors); N.C. GEN. STAT. §§ 90A-50 to -69 (State Bd. of Envtl. Health Specialist Exam'rs); N.C. GEN. STAT. §§ 89B-1 to -15 (State Bd. of Registration for Foresters); N.C. GEN. STAT. §§ 90-210.18A to -210.29B (N.C. Bd. of Funeral Serv.); N.C. GEN. STAT. §§ 87-1 to -15.4 (State Licensing Bd. for Gen. Contractors); N.C. GEN. STAT. §§ 89E-1 to -24 (N.C. Bd. for Licensing of Geologists); N.C. GEN. STAT. §§ 93D-1 to -16 (N.C. State Hearing Aid Dealers & Fitters Bd.); N.C. GEN. STAT. §§ 143-151.43 to -151.64 (N.C. Home Inspector Licensure Bd.); N.C. GEN. STAT. §§ 90D-1 to -14 (N.C. Interpreter & Transliterator Bd.); N.C. GEN. STAT. §§ 89G-1 to -13 (N.C. Irrigation Contractors Licensing Bd.); N.C. GEN. STAT. §§ 89A-1 to -8 (N.C. Bd. of Landscape Architects); N.C. GEN. STAT. §§ 89D-1 to -10 (N.C. Landscape Contractors' Registration Bd.); N.C. GEN. STAT. §§ 84-24 to -26 (N.C. Bd. of Law Exam'rs); N.C. GEN. STAT. §§ 74F-1 to -18 (N.C. Locksmith Licensing Bd.); N.C. GEN. STAT. §§ 143-143.8 to -143.54 (N.C. Mfr. Housing Bd.); N.C. GEN. STAT. §§ 90-270.45 to -270.63 (N.C. Marriage & Family Therapy Licensing Bd.); N.C. GEN. STAT. §§ 90-620 to -636 (N.C. Bd. of Massage & Bodywork Therapy); N.C. GEN. STAT. §§ 90-1 to -18.7 (N.C. Med. Bd.); N.C. GEN. STAT. §§ 90-178.1 to -178.7 (Joint Subcommittee of the N.C. Med. Bd. & N.C. Bd. of Nursing regarding Midwifery Practice); N.C. GEN. STAT. §§ 90-171.19 to -171.49 (N.C. Bd. of Nursing); N.C. GEN. STAT. §§ 90-275.1 to -288.01 (State. Bd. of Exam'rs for Nursing Home Adm'r); N.C. GEN. STAT. §§ 90-270.65 to -270.81 (N.C. Bd. of Occupational Therapy); N.C. GEN. STAT. §§ 90-234 to -255.1 (N.C. State Bd. of Opticians); N.C. GEN. STAT. §§ 90-114 to -127.3 (N.C. State Bd. of Exam'rs in Optometry); N.C. GEN. STAT. §§ 90-380 to -396 (N.C. State Bd. of Exam'rs of Fee-Based Practicing Pastoral Counselors); N.C. GEN. STAT. §§ 90-85.2 to -85.44 (Bd. of Pharm.); N.C. GEN. STAT. §§ 90-270.24 to -270.39 (N.C. Bd. of Physical Therapy Exam'rs); N.C. GEN. STAT. §§ 87-16 to -27.1 (State Bd. of Exam'rs of Plumbing, Heating, & Fire Sprinkler Contractors); N.C. GEN. STAT. §§ 90-202.2 to -202.14 (Bd. of Podiatry Exam'rs); N.C. GEN. STAT. §§ 74C-1 to -23 (Private Protective Serv. Bd.); N.C. GEN. STAT. §§ 90-329 to -345 (N.C. Bd. of Licensed Prof'l Counselors); N.C. GEN. STAT. §§ 90-270.1 to -270.22 (N.C. Psychology Bd.); N.C. GEN. STAT. §§ 93A-1 to -13 (N.C. Real Estate Comm'n); N.C. GEN. STAT. §§ 90C-20 to -37 (N.C. Recreational Therapy Licensing Bd.); N.C. GEN. STAT. §§ 87-52 to -64.1 (State Bd. of Refrigeration Exam'rs); N.C. GEN. STAT. §§ 90-646 to -666 (N.C. Respiratory Care Bd.); N.C. GEN. STAT. §§ 90B-1 to -16 (N.C. Social Work Certification & Licensure Bd.); N.C. GEN. STAT. §§ 89F-1 to -25 (N.C. Bd. for Licensing of Soil Scientists); N.C. GEN. STAT. §§ 90-292 to -307 (Bd. of Exam'rs for Speech & Language Pathologists & Audiologists); N.C. GEN. STAT. §§ 90-113.30 to -113.46A (N.C. Substance Abuse Prof'l Practice Bd.); N.C. GEN. STAT. §§ 90-179 to -187.15 (N.C. Veterinary Med. Bd.); N.C. GEN. STAT. §§ 90A-70 to -81 (N.C. On-Site Wastewater Contractors & Inspectors Certification Bd.).

365. *See, e.g.*, 237 S.E.2d 246, 252 (N.C. 1977) (stating that the Judicial Standards Commission was "created as an arm of the court").

"agency of the court."[366] The court has also never "held the act integrating the Bar an act necessarily only in the aid of the inherent powers of the court."[367] The court, while never designating a governmental branch, has recognized two distinct methods of attorney discipline, one through the statutory power granted to the State Bar, and another within the inherent power of the court, and in this manner the court has separated itself rather than integrated itself with the State Bar.[368]

ii. Non-Binding Opinions

Where authorities have attempted to designate the State Bar and the Board of Law Examiners within a governmental branch, the opinions have been non-binding.[369] This provides persuasive voice, but leaves the ambiguity of governmental branch designation unsolved.

As stated above, Associate Attorney General Crump sent letters on April 15, 1976, and May 3, 1976, which provided his legal interpretation, and a basis for placing the State Bar and Board of Law Examiners in the Executive Branch.[370] The letter laid out two reasons for this placement: First, that the "agency" designation is evidence of an executive entity, but noting that it is not definitive.[371] Second, Attorney Crump reasoned that the State Bar is a creature of the legislature, and that the Bar could not be created without an act of the legislature.[372] "The letter also recognized that the courts had given deference to the legislative power to regulate . . . law."[373] Thus, Attorney Crump's letter reasoned that the State Bar and

366. Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 2; *see also* North Carolina State Bar v. DuMont, 286 S.E.2d 89, 92 (N.C. 1982) ("We agree with the Court of Appeals . . . that the courts should not meddle in matters left to the State Bar by our Legislature."); North Carolina State Bar v. Rogers, 596 S.E.2d 337, 341 (N.C. Ct. App. 2004) (referring to the State Bar as a state agency to which the Legislature has delegated the power to regulate attorneys); Swenson v. Thibaut, 250 S.E.2d 279, 299 (N.C. Ct. App. 1978) ("North Carolina is different from many other jurisdictions in that there is a dual mechanism for the regulation and discipline of attorneys practicing in the state courts . . . [W]hile the interests of the [State Bar and the courts] may, and often do, overlap, they are not always identical.").

367. *See* Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 2. *Swenson*, 250 S.E.2d at 299.

368. *See* Letter dated Apr. 15, 1976, from David S. Crump to B.E. James, *supra* note 9, at 2-3.

369. *See, e.g.*, *id.* at 1.

370. Letter dated May 3, 1976, from David S. Crump to B.E. James, *supra* note 169.

371. *Id.* at 1.

372. *Id.* at 2.

373. *Id.* at 3; *see also In re* Ebbs, 63 S.E. 190, 195 (N.C. 1908) ("Even for so laudable an end as purging the bar of unworthy members, we should not exercise doubtful power or unnecessarily come into conflict with the Legislature.").

Board of Law Examiners should be placed within the executive branch, and subject to the APA.[374]

Attorney Crump's letter, however, is in direct conflict with Attorney Kramer's letter placing the State Bar and Board within the judicial branch.[375]

2. Implications at Executive-Judicial Borders

Generally speaking, ambiguities of identity and status stemming from an agency residing along various bureaucratic borders can have considerable legal and practical implications.[376] Legal issues pertaining to constitutional law include the delegation doctrine[377] and separation of powers issues.[378] Government branch ambiguity can also effect agency obligations and available defenses upon being sued.[379] Statutory implications can be significant, too. As O'Connell notes:

> [T]here are no bright lines for boundary organizations. This ambiguity derives from a dearth of decisions as well as inconsistency among the tests used and decisions made. Administrative law scholars have said little about this confusion. They seemingly have failed to note the circuit split on how to analyze whether boundary organizations are subject to the APA.[380]

The APA implication applies to state boundary bureaucracies as well. As stated previously, North Carolina's APA applies to agencies within the executive branch of government. Furthermore, legislatively-created independent occupational licensing agencies are uniformly considered subject to the APA unless expressly exempt.[381] Thus, if the State Bar or the Board is within the executive branch of government, then presumably, it is subject to North Carolina's APA, as the General Assembly has never specifically exempt the Bar or the Board.[382] Being subject to APA-like procedures would not make much difference with respect to the State Bar's

374. *Id.* at 1-7.

375. *See supra* notes 160-183 and accompanying text.

376. *See generally* O'Connell, *supra* note 21, at 894-918.

377. *See id.* at 900-02.

378. *See id.* at 897-901.

379. *See id.* at 906-08.

380. *Id.* at 917.

381. *See, e.g.*, N.C. Bd. of Pharm. v. Rules Review Comm., 620 S.E.2d 893, 895 (N.C. Ct. App. 2005) (evincing the Pharmacy Board's compliance with the State's APA by publishing a notice of rulemaking proceedings in the North Carolina Register); Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 571 S.E.2d 52, 55 (N.C. Ct. App. 2002) (evincing the same type of APA publication compliance by the Dental Board).

382. *See* N.C. GEN. STAT. § 150B-1(c) (2015).

current operations, but in significant ways, it could change how the Board of Law Examiners develops and operates.[383] Indeed, engaging in notice-and-comment-type rulemaking procedures would allow for public participation.[384] Procedural process avenues for notice, petition, and declaratory relief would allow stakeholders to seek clarity and suggest amendments based on data and other evidence.[385]

Without the clarity of a branch assignment, the extent to which an agency promulgates its rules in conformity with APA-like standards of notice-and-comment rulemaking can be left, as a matter, to self-regulation. Self-regulation coupled with limited accountability oversight does not necessarily result in an agency's ability to maintain its democratic legitimacy. In fact, sometimes self-regulation is not "good regulation."[386] With branch assignment unclear, judges, litigants, and others are left guessing at the State Bar and the Board's legal status.[387]

As a practical matter, the addition of rulemaking procedures for the Board of Law Examiners may meet a legitimate need for increased transparency, as the Board has historically received numerous complaints about its procedures, many of which are addressed in the APA.[388] These complaints are not necessarily trivial; they originate from applicants seeking state-issued licenses to engage in an occupation.[389] Maintaining ambiguity with respect to identity or status is better avoided. Our legal

383. *See infra* Part IV.

384. N.C. GEN. STAT. § 150B-19.1 (requiring notice and comment rulemaking).

385. *See id.*

386. *Contra* Lunsford, *supra* note 13.

387. *See, e.g.*, LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *7-8 (N.C. Super. Ct. Mar. 24, 2014).

388. For example, from 1973 through 1975, an applicant to the Bar who was visually impaired and did not receive testing accommodations for his disability was unsuccessful in passing the North Carolina Bar Exam. Letter from Theodore R. Bryant, President, N.C. Council of the Blind, to Fred P. Parker III, Exec. Sec'y of the Bd. of Law Exam'rs (Nov. 1, 1975) (on file with author). In November 1975, the applicant wrote to the Executive Director of the Board of Law Examiners, "No exemptions or considerations were given in areas where it was impossible for a Blind individual to give the correct answers," although such accommodations were given on the bar exam in other jurisdictions, and on other exams in North Carolina. *Id.* In May 1976, the governor's legal counsel acknowledged receipt of the applicant's correspondence and recommended that the applicant seek relief directly from the Board of Law Examiners. Letter from Samuel H. Long, III, Legal Counsel. to the Governor of N.C., to Theodore R. Bryant, President, N.C. Council of the Blind (May 13, 1976) (on file with author). But apparently that avenue of relief had not worked. *See* Letter from Joe E. Covington, Dir. of Testing, Nat'l Conf. of Bar Exam'rs, to Theodore R. Bryant, President, N.C. Council of the Blind (Oct. 1, 1975) (on file with author).

389. *See generally* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1127 (2014).

system depends on certainty, not ambiguity. The normative value judgment is that law should be certain, and of all people, lawyers should be following the rules and providing for fair rulemaking procedures.

C. The Public-Private Boundary

1. A Public-Private Sector Ambiguity

The North Carolina State Bar and the Board of Law Examiners also operate along a boundary that delineates the public and private sectors.[390] As stated in this Article's Introduction, many of North Carolina's professional practice acts typify a regulatory model where autonomy and self-regulation are predominant features.[391] The need for expertise among members of a regulatory body is a primary justification that supports using such a model.[392] But this need for expertise can result in a regulatory body composed of members, a majority of whom are active market participants.[393] For members with dual roles—regulatory and private—potential and realized conflicts of interest must be managed.[394]

The governing body of the North Carolina State Bar and the Board of Law Examiners comprises mostly licensed members of the legal profession.[395] The 1933 session law that created and organized the State Bar and the Board of Law Examiners acknowledged the councilors' status as active market participants and specifically included a provision in the session law to clarify that the members are not "public officers as that phrase is used in the Constitution and laws of the State of North Carolina."[396] Approximately forty-five years after creating the State Bar and the Board, the General Assembly amended the Act to allow three public members to serve on the State Bar's Council.[397] As stated previously, when

390. *See supra* Section III.C.

391. *See supra* Part I.

392. Supreme Court Justice William Breyer captured the expertise justification with the following statement: "I don't want a group of bureaucrats deciding . . . who can practice brain surgery in this State. . . . I would like brain surgeons to decide that." Transcript of Oral Argument at 31, N,C. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2014) (No. 13-534), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_768c.pdf.

393. *N.C. Bd. of Dental Exam'rs*, 135 S. Ct. at 1108-14.

394. *See generally id.* at 1101-23.

395. *See* N.C. GEN. STAT. § 84-17.

396. *See* 1933 N.C. Sess. Laws at 313 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

397. *See* 1981 N.C. Sess. Laws at 1162 (codified as amended at N.C. GEN. STAT. § 84-17 (2015)).

first formed, the Council comprised a group of twenty.[398] That number has grown, and today, yields more than sixty members who are licensed lawyers.[399] Though public members still exist, their numbers remain at three.[400]

2. Implications at Public-Private Borders

Legal implications associated with residing along the public-private border demonstrate an inherent downside to self-regulation. The public-private boundary carries risks of increased exposure to litigation and its defense, particularly regarding alleged violations of anti-competitive statutes, including federal antitrust laws. As demonstrated in *North Carolina Board of Dental Examiners v. Federal Trade Commission*,[401] the availability of a state action immunity defense can hinge on factors found exclusively at this public-private border.[402] A brief summary of the case follows.

The North Carolina Board of Dental Examiners was created for the purpose of regulating and licensing dentists.[403] The governing board consists of eight individuals, six of whom "must be licensed, practicing dentists."[404] The Board sent cease-and-desist letters to non-dentist teeth-whitening service providers who operated out of shopping mall kiosks.[405] In response to the Board's conduct, the Federal Trade Commission filed a complaint alleging that the Board had violated anti-competitive and unfair competition prohibitions under the Federal Trade Commission Act.[406] The Dental Board moved to dismiss the complaint, claiming immunity based on its status as a state actor.[407] This motion was denied by an administrative law judge for want of active state supervision.[408] The case was then heard on its merits, and the Board was found to be in violation of antitrust laws based on its unreasonable restraint of trade regarding the teeth-whitening

398. 1933 N.C. Sess. Laws at 314.

399. *See* N.C. GEN. STAT. § 84-17; *see also Councilors*, N.C. BD. OF LAW EXAM'RS, http://www.ncbar.gov/contacts/c_councilors.asp (last visited Sept. 26, 2015).

400. *See* N.C. GEN. STAT. § 84-17.

401. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (denying antitrust immunity to members of the board who were also private actors for lack of state supervision).

402. *See id.* at 1117.

403. *Id.* at 1104.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

kiosk cease-and-desist letters.[409] Both the Fourth Circuit and the Supreme Court of the United States found that the active state supervision requirement for an immunity defense was not met.[410] The Court noted that the Board of Dental Examiners was not actively supervised by the state when it interpreted teeth-whitening as a form of practicing dentistry and when it sent cease-and-desist letters to teeth-whitening kiosk owners.[411]

In its opinion, the Supreme Court of the United States stated that antitrust immunity is granted out of respect for federalism.[412] The Court further stated that when sovereign states delegate regulatory authority to market participants, then the fact that those market participants are regulating from within a state agency does not, in itself, cloak the market participants with state action immunity.[413] The Court pointed out the inherent dangers of allowing active market participants to regulate their own profession, and it emphasized the need for accountability of such self-interested regulators.[414] In the case of the Dental Board, accountability meant exposure to antitrust violations.[415]

The Court's discussion illustrates the implications of having a professional regulatory board operate on the public-private boundary. While the entity regularly acts from its position as a state agency, it has the ability to act as a more private group of self-interested professionals.[416] Thus, when a state bestows the title of "state agency" upon an entity, it has the responsibility to actively supervise private market participants who are naturally self-interested.[417]

IV. PROBLEMS REVEALED

The previous section mapped ambiguities associated with the North Carolina State Bar and the Board of Law Examiners' existence along various state-level boundaries.[418] These boundaries delineate (1) the public sector from the private sector (public-private); (2) the tripartite branches of government (intra-governmental); and (3) one government entity from

409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 1110.
413. *Id.* at 1104-05.
414. *Id.* at 1111.
415. *Id.*
416. *Id.*
417. *Id.* at 1112.
418. *See supra* Part III.

another (inter-organizational). This section reveals three problems that stem from those ambiguities: the lack of access to existing authority regarding the State Bar and the Board's assigned government branch;[419] the Board of Law Examiners' somewhat private mode of operation;[420] and the Board's decades-long ability to finesse applicants' disclosure of expunged criminal records.[421]

A. Lack of Controlling Authority and Lack of Access to Non-Controlling Authority

The first problem associated with the government branch assignment ambiguity is that, in the face of differing opinions on the branch assignment, people who are deciding how to handle inherent ambiguities or conflicting claims do not have easy access to controlling authority to inform their decisions.[422] The lack of efficient access to information contributes to confusion regarding the legal status of the North Carolina State Bar and the Board of Law Examiners.[423] The document upon which the State Bar relies to support its claim that it is an integral part of the judicial branch of state government—the Attorney General's private letter from September 1, 1976—is all but inaccessible to the public, with very few people even knowing of the letter's existence.[424] A practical result of this confusion is increased cost to litigants who must navigate the branch assignment question without efficient access to controlling authority.[425]

As an example, I turn back to the 2014 LegalZoom case mentioned in the Introduction of this Article.[426] In a pretrial order and opinion for the case, North Carolina's Business Court identified the North Carolina State Bar as an agency within the executive branch of government.[427] The court's

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419. *See infra* Section IV.A.

420. *See infra* Section IV.B.

421. *See infra* Section IV.C.

422. *See* Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9.

423. *See, e.g.*, LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *8 (N.C. Super. Ct. Mar. 24, 2014).

424. *But see* Lunsford, *supra* note 13.

425. *See, e.g.*, *LegalZoom*, 2014 WL 1213242, at *8.

426. *See supra* Introduction.

427. *Id.* In its written order, the court accurately noted that North Carolina's Administrative Procedure Act (APA) applies to "every agency except those specifically enumerated[,]" and that "agency" under the APA "means an agency . . . in the executive branch of the government of this State." *Id.* at *8-9. Next, the court rightly observed that the General Assembly had not provided the State Bar with an APA-exemption. *See id.* at *8. Thereafter, the court quoted the General Assembly's 1933 enabling statute: "There is hereby created as an agency of the State of North Carolina, . . . the North Carolina State Bar." *Id.* While these premises are true, the court's claim

characterization of the State Bar as an executive agency focused on the agency's function rather than its form,[428] as the characterization was made in the context of determining whether the State Bar had rendered a final decision, and if so, whether LegalZoom had exhausted its administrative remedies.[429] Concluding that jurisdiction was lacking, the court noted that LegalZoom had not exhausted its administrative remedies.[430] Presumably, both the State Bar and LegalZoom were left to bear financial costs for legal proceedings, some of which were futile. As the LegalZoom opinion illustrates, as long as the State Bar's branch assignment is ambiguous, trial courts risk issuing inconsistent decisions and decisions that are contrary to the State Bar's point of view. I now turn to two perceived problems with respect to the Board of Law Examiners.

B. The Board of Law Examiners' Somewhat Private Mode of Operation

The Board of Law Examiners is faced with the weighty task of regulating admission to the legal profession.[431] The Board's work is important in protecting the public[432] and also involves handling a vast amount of private information regarding applicants.[433] Despite the important and sensitive nature of the Board's work, it is a public body[434] and, like other public bodies, has obligations to comply with open government laws,[435] regardless of whether it is subject to the APA or judicial oversight.

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that the State Bar is an agency within the executive branch of government does not necessarily follow. For the claim to be valid, an additional unstated premise must be true—that an "agency of the state" qualifies as an "agency within the executive branch of government." But the court neither expressed this premise nor cited authority to support its truth. *See id.* at *8-9.

428. *See also* N.C. State Bar v. DuMont, 286 S.E.2d 89, 98 (N.C. 1982) (treating the State Bar Disciplinary Hearing Commission's findings like any other administrative agency's findings and reviewing those findings using the APA whole record standard).

429. *See LegalZoom*, 2014 WL 1213242, at *8.

430. *Id*. at *9.

431. *See* N.C. GEN. STAT. § 84-24.

432. *See id*.

433. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142; *Character and Fitness Guidelines*, N.C. BD. OF LAW EXAM'RS, https://ncble.org/character-fitness/ (last visited Sept. 26, 2015); *General Application Instructions*, N.C. BD. OF LAW EXAM'RS, https://ncble.org/application-information/general-applications/instructions/ (last visited Sept. 26, 2015). All three of these items support the existence of ample disclosure requirements.

434. *See* N.C. GEN. STAT. § 84-24.

435. *See* N.C. GEN. STAT. §§ 143-318.9 to -318.18 (2015).

1. Transparency and Open Government

A 2012 correspondence between the North Carolina Secretary of State's office and the Board of Law Examiners reveals that the Secretary of State's office contacted the Board about its failure to file a notice of regularly scheduled meetings.[436] Such notices by occupational licensing entities and other public bodies are posted on the Secretary of State's website pursuant to North Carolina's open meetings law.[437] These notices of regularly scheduled meetings provide one way that members of the public can find out when and where public bodies meet.[438]

In an initial e-mail, an official from the Secretary of State's office contacted the North Carolina State Bar, seeking the Bar's assistance in relaying the above-mentioned notice requirements to the appropriate representative of the Board of Law Examiners, as the Secretary's office was not able to find specific contact information on the Board's website.[439] In the e-mail to the State Bar, the Secretary of State official noted that the Board had not filed anything about regularly scheduled meetings as required by all public bodies.[440] The following day, a State Bar official responded to the Secretary of State's office e-mail and copied the Executive Director of the Board of Law Examiners, alerting the director "to the possibility that the Board of Law Examiners may have a filing requirement pursuant to North Carolina statute 143-318.12."[441]

One day later, another public record reveals a communication from the Board of Law Examiners to the Secretary of State's office.[442] That communication confirms receipt of the filing requirement e-mail and states: "haven't read the stat[ute]; don't set meetings that far in advance."[443] It also identifies the five times during the year in which the Board conducts its meetings.[444]

436. E-mail from Ann Wall, Gen. Counsel, N.C. Dep't of the Sec'y of State, to L. Thomas Lunsford, II, Exec. Director, N.C. State Bar (Apr. 3, 2012, 2:16 PM) [hereinafter E-mail dated Apr. 3, 2012, from Ann Wall to L. Thomas Lunsford, II] (on file with author).

437. *See* N.C. GEN. STAT. § 143-318.18; *see* N.C. DEP'T SEC'Y STATE, http://www.secretary.state.nc.us (last visited Sept. 26, 2015).

438. *See, e.g.*, N.C. DEP'T SEC'Y STATE, *supra* note 437.

439. E-mail dated Apr. 3, 2012, from Ann Wall to L. Thomas Lunsford, II, *supra* note 436.

440. *Id.*

441. *Id.*; *see also* N.C. GEN. STAT. § 143-318.18.

442. E-mail dated Apr. 3, 2012, from Ann Wall to L. Thomas Lunsford, II, *supra* note 436.

443. *Id.*

444. *See* Letter dated Apr. 17, 2012, from Fred P. Parker III to Elaine Marshall, *supra* note 339.

Two weeks later, the Board sent a letter further following up on the Secretary's office filing requirement reminder.[445] The Board's letter states, "the Board holds its regular meetings each year in January, June, and October. Additionally, a business meeting is conducted during each bar examination grading session, in March and August of each year."[446] The letter goes on to specifically include the dates and locations of the remaining regularly scheduled meetings for 2012.[447] Thereafter, the letter makes two claims.[448]

First, the Board claims to be exempt from North Carolina's open meetings since "[d]uring its meetings, the Board discusses issues involved with preparing, approving, administering and/or grading examinations and issues dealing with confidential information relating to individual applicants."[449] The Board's claimed exemption does not appear to be supported by the plain language of the statute that qualifies the scope of North Carolina's open meetings law.[450] According to the language of the statute, public bodies who are authorized to prepare, approve, administer, and grade occupational licensing exams and investigate, examine, and determine the character and fitness qualifications of individual applicants are exempt from the open meetings law *while* performing those functions.[451] The Board claims that because "during" its meetings it conducts business that is exempt from the open meetings law that all of its operations are exempt.[452]

Second, the Board states that "during" its meetings it discusses confidential information that is not subject to the Public Records Act.[453] "[T]o prevent the disclosure of such information, the [Board's] meetings are closed pursuant to 143-318.11[(a)](1)."[454] That statute allows public bodies to hold closed sessions "only upon a motion duly made and adopted at an

445. *Id.*

446. *Id.*

447. Arguably, the Board's annual "off-site" location for its August meeting violates North Carolina's open meetings laws, as any meeting that is subject to the open meetings law needs to occur within the state of North Carolina. Portions of the cost are available in the Board's financial audit statements. The 2012 letter was the only notice of a regularly scheduled meeting on file based on a public records request spanning ten years.

448. Letter dated Apr. 17, 2012, from Fred P. Parker III to Elaine Marshall, *supra* note 339.

449. *Id.*

450. *See* N.C. GEN. STAT. § 143-318.18.

451. *See id.*

452. Letter dated Apr. 17, 2012, from Fred P. Parker III to Elaine Marshall, *supra* note 339 (stating the Board of Law Examiners was exempt from open meeting laws).

453. *Id.*

454. *Id.*

open meeting."[455] The Board's assertion that it uses the closed session provisions of the open meetings law suggests by its own admission that it is a public body that is subject to the open meetings law.[456] While it may be true that much of what the Board does is confidential in nature, not all of its operations can reasonably be regarded as private.[457]

2. Fairness and Procedural Process

The Board's 2012 claimed exemption and historic non-compliance with North Carolina's Open Meetings Laws has compromised the Board's transparency and perceived fairness as a government entity.[458] Perhaps in response to the December 2014 Legislative report concluding that occupational licensing agencies need more oversight or the February 2015 decision in the Dental Board case, the State Bar has been noticeably more transparent in 2014, 2015, and 2016. Even still, the Board presumably makes decisions that would benefit from notice-and-comment-type rulemaking, such as decisions regarding conditional admission, admission by comity, or whether the Board should re-delegate its exclusive authority

455. *See* N.C. GEN. STAT. § 143-318.18 (emphasis added). If that motion is based on (a)(1), then the motion must state the name or citation of the law that renders the information confidential.

456. *See* Letter dated Apr. 17, 2012, from Fred P. Parker III to Elaine Marshall, *supra* note 339; *see also* N.C. GEN. STAT. §§ 143-318.9 to -318.18.

457. *See, e.g.*, Meeting Agenda of the N.C. Bd. of Law Exam'rs (June 10-12, 2015) (copy of agenda on file with author) (including agenda items such as finance and audit reports, admission by comity reports, and action to determine passing score on July 2015 administration of bar examination).

458. For example, in April 2015, the board made numerous amendments to its rules, regulations, and code of conduct for bar examinees. *See* Proposed Amendments to Rules Governing the Admission to Practice Law in the State of N.C. (on file with author); *see also Bar Examination Code of Conduct*, N.C. BD. OF LAW EXAM'RS, http://ncble.org/wp-content/uploads/2015/09/codeofconduct.pdf (last visited Oct. 9, 2015); Bd. of Law Exam'rs of the State of N.C. Policy Manual (last updated June 2015) (red-lined version on file with author). Some of these changes were effective immediately. For example, the Code of Conduct for Applicants was revised to prohibit examinees from wearing hats or scarves during the examination absent prior written approval from the board. *See Bar Examination Code of Conduct*, *supra* (Regulation 6). Notwithstanding the new regulation prohibiting scarves, an existing regulation remained in the code which permits examinees to "wear a lightweight outer garment, WITH NO POCKETS OF ANY KIND, into the examination room." *See id.* Neither the regulation prohibiting scarves nor the regulation permitting light-weight outer garments with no pockets cross-referenced each other. *See id.* Like previous changes to the Board's rules, regulations, and application questions, these changes were not publicized in substantial compliance with APA-like requirements, such as posting red-lined versions of changes and notifying other interested parties, such as law school deans, staff, and faculty.

to set standards for bar admission to the "separate but related" State Bar.[459] Thus, in 1971, the task of deciding which law schools' graduates would be permitted to sit for the exam was delegated by the Board to the State Bar.[460] Prior to this time, the Board made approval of law school decisions.[461] Even assuming that the Board did not make policy-type decisions that would benefit from notice-and-comment-type rulemaking, the need for other types of procedural process mechanisms remain. To illustrate, the Board's current rules lack an obvious declaratory relief avenue to engage the Board for written and publicly available clarification.[462] Moreover, efficient and timely access to information that often can clarify matters is still limited.[463] For example, access to a copy of the current application is notably inefficient.[464]

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459. *See, e.g.*, N.C. Bd. Law Exam'rs, Meeting Agenda of the North Carolina Board of Law Examiners (June 10-12, 2015) (on file with author) (meeting agenda and author's notes concerning the Board's status of not granting admission by comity with twenty-one states and action to recommend granting admission by comity with seven of those twenty-one states).

460. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 275 N.C. 692 app. 697 (1970) (Rule IX) ("Every general applicant . . . , commencing with the examination in August 1971, shall file with the Secretary a certificate from . . . [a] Law School approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary."). Relevant here is the fact that the Secretary of the North Carolina State Bar was, at this time, also the Secretary of the Board of Law Examiners, as the single-secretary provision would be in effect until 1973. *See* 1973 N.C. Sess. Laws at 6 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

461 *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* 208 N.C. 857 app. 861 (1935) (Rule 12) (emphasis added).

> 12. Approved Law Schools.
>
> The law schools maintained by the University of North Carolina, Duke University, and Wake Forest College are hereby approved; other law schools will be approved if and when they satisfy the *Board* that their standards, work, and equipment are substantially the equivalent of those of one or the other of the above-mentioned law schools. The *Board* may, from time to time, withdraw approval from law schools previously approved, if and when it determines that they do not conform to the foregoing requirements.

462. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW (Sept. 24, 2015), http://ncble.org/wp-content/uploads/2015/09/rules.pdf.

463. *See* examples cited *infra* notes 464-466.

464. Visitors who search the Board's website for information about the bar exam are directed to the website for the National Conference of Bar Examiners, where it is necessary to establish a username and password to access the Board's current application. Thus, visitors must act consistent with the intention to sit for the North Carolina Bar Examination in order to access the contents of the application. The inability to readily access the Board's current admission application effectively prevents various stakeholders from gaining access to relevant and needed information. Notifications on the National Conference of Bar Examiners' website, which visitors who wish to establish a username and password must acknowledge, anecdotally, have effectively deterred law students and others from accessing the current application for fear of consequences associated with seeking access to the application absent a subjective intent to sit for the examination in the near future.

People would benefit from timely and efficient access to the application and the important information that it contains that is not found elsewhere.[465] For example, a hypothetical judge presiding over a session of court in Kentucky, who before entering an order of expunction for someone who had expressed an intention to seek a North Carolina law license, would be able to efficiently discern whether applicants seeking admission to North Carolina's bar were required to disclose such records. Pre-law advisors; law school administrators, faculty, and staff; mental health professionals, and even lawyer assistance program personnel would be better equipped to accurately answer questions received, with regularity, from potential applicants seeking admission to the bar.[466]

C. A Perceived Finesse of Expunged Criminal Record History Disclosures

A more troubling concern, however, is my belief that the Board of Law Examiners has finessed[467] applicant disclosures of certain information, including expunged criminal record histories, for decades, by failing to clarify, in writing, the scope of applicant disclosure requirements prior to July 2013.[468]

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465. *See, e.g.*, N.C. STATE BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION TO THE NORTH CAROLINA BAR EXAMINATION (2013) (sample questions from N.C. Bar Exam Application) (on file with author).

466. As a hypothetical example of a consequence of this set-up, consider an out-of-state law professor who has a student in her Professional Responsibility course who cannot ascertain, in writing, what North Carolina's passing score is for the MPRE. The only place where this information (a score of 80) is found in writing is on the first page of North Carolina's Character and Fitness Application, which is only accessible after creating the aforementioned password-protected account with the National Conference of Bar Examiners. Such an account creates a "unique identifier" for each account holder, and "state bar admission offices may use the NCBE Number as an identifier for other admission-related purposes." Presumably, then, the Board could discover when an individual created an account, when the individual accessed applications from particular jurisdictions, and so on.

467. As a card playing technique, "finesse" is an action applied to the card game known as Contract Bridge. The technique involves chance, working only fifty percent of the time, but enables card players to win additional tricks should there be favorable positioning of one or more cards in the hands of opponents. Finesses win tricks by using lower-valued cards than normally would be required, saving higher-valued cards for later play as needed. Significantly, a successful finesse requires opponents to question normal rules of Bridge play; thus, turning what was clear into the obscure. Bridge players who finesse use the technique as a last resort, as overusing the tactic does not prove successful.

468. North Carolina is one of only four states to explicitly instruct applicants with expunged criminal record histories that they need not disclose such histories for bar admission purposes. This was the case in North Carolina as of 2014. The other three states are New Hampshire, Virginia, and Texas. Presumably, Texas's exemption is based on a provision in its state constitution that empowers the judicial branch to promulgate rules that are "not inconsistent with the laws of the state." *See* TEX. CONST. art. 5, § 31 ("[Texas] Supreme Court is responsible for

Prior to July 2013, the Board's written rules, guidelines, and application questions did not specify whether the Board's disclosure requirements mandated applicants reveal criminal record histories that had been judicially expunged.[469] This omission left applicants guessing, which was problematic because applicants seeking admission were, and are, required to be completely forthright in their responses to the Board's questions about prior conduct.[470] Two of the Board's bar admission application questions read:

> 19. Have you EVER IN YOUR LIFE been arrested, given a written warning, or taken into custody, or accused, formally or informally, of the violation of an offense other than traffic violations?[471]
>
> 24. FULL DISCLOSURE: Is there any other incident or occurrence in your life which is not otherwise referred to in this application which you would like to acknowledge in the interest of full disclosure? It is crucial that you honestly and fully answer all questions, regardless of whether you believe the information is relevant.[472] [sic]

In addition to this application question, the Board's rules explicitly state that applicants who fail to fully disclose "any and all facts relating to any civil or criminal proceedings" will not "be licensed to practice law . . . or permitted to sit for the bar examination."[473]

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the efficient administration of the judicial branch and shall promulgate rules of administration *not inconsistent with the laws of the state* as may be necessary for the efficient and uniform administration of justice in the various courts.") (emphasis added).

469. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *published in* appendix of various pre-2013 N.C. Reports; *see also* numerous pre-2013 versions of the Board's Rules, Guidelines, Applications, FAQs, & Codes of Conduct printed from the Board's website (on file with author).

470. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142; *Character and Fitness Guidelines*, N.C. BD. OF LAW EXAM'RS, https://ncble.org/character-fitness/ (last visited Sept. 26, 2015):

> No one shall be licensed to practice law in this state by examination or comity . . . who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or . . . who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

Id.

471. N.C. State Bd. of Law Exam'rs, Application for Admission to the North Carolina Bar Examination (2013) ("Question 19(a)").

472. *See id.* ("Question 24" of Aug. 2014 version) (this catch-all question is still included in the bar application questions).

473. *See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142; *Character and Fitness Guidelines*, N.C. BD. OF LAW EXAM'RS, https://ncble.org/character-fitness/ (last visited Sept. 26, 2015).

The Board's failure, in the wording of these application questions, to explicitly state the limits of its authority under state law to ask applicants about their expunged criminal record histories placed applicants in an awkward and risky position, in that unnecessarily reporting an offense could lead to character and fitness questions, while mistakenly failing to disclose prior history could be grounds for denial of the applicant's license.[474] Over decades, applicants disclosed criminal record histories that had been expunged, not because the applicants had planned to do so or no longer wanted to use the statutory non-disclosure benefit that had been conferred by the General Assembly, but rather because applicants feared an accusation of not being fully candid.[475]

The Board benefitted from its failure to expressly address disclosure requirements for applicants with expunged criminal record histories. By comparison, most other jurisdictions' bar admission authorities regularly include express instructions to applicants about the extent to which disclosure requirements apply to expunged records. Indeed, the National Conference of Bar Examiners' sample character and fitness questionnaire explicitly instructs applicants that they must disclose criminal record histories that have been expunged.[476] Following the national conference's lead, at least thirty-five states expressly instruct applicants that expunged criminal record histories must be disclosed.[477]

In 2013, the Board's ability to finesse applicants' information on expunged criminal record histories ended.[478] In May of that year, the North Carolina General Assembly enacted legislation to clarify the extent and value of North Carolina's expunction remedy.[479] The legislation applies to government agencies and expressly requires agencies who ask about criminal record histories to first advise that state law allows applicants with expunged criminal records to exercise their statutorily conferred

474. *See generally* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character Requirement*, 82 ST. JOHN'S L. REV. 1037 (2008).

475. *E.g.*, Interview with Scott Harkey, July 2012 Applicant for Admission to the N.C. State Bar (Dec. 2011) (notes on file with author).

476. *See* NAT'L CONFERENCE BAR EXAM'RS, REQUEST FOR PREPARATION OF A CHARACTER REPORT 19 (2015), *available at* www.ncbe.com (sample character and fitness application).

477. An Act to Prohibit Expunction Inquiry, ch. 53, 2013 N.C. Sess. Laws 136, 137-38 (codified as amended at N.C. GEN. STAT. § 15A-153 (2015)).

478. *See* 2013 N.C. Sess. Laws at 136-37.

479. *Id.*

nondisclosure benefit.[480] Part of the legislation involved codifying case law that had been part of North Carolina's jurisprudence for years.[481]

Soon after the clarifying legislation was passed, the existing Chair of the Board of Law Examiners sent a letter to the then current president of the North Carolina State Bar and the North Carolina Bar Association. In the letter, the Board's Chair requested assistance from the regulatory agency and the trade association in petitioning the General Assembly during its next session for a statutory exemption from the new legislation.[482] In support of its request, the Chair stated that the new legislation "effectively negate[d]" the Board of Law Examiners' disclosure requirements.[483] This claim confirms that up until the 2013 clarifying legislation the Board had been "effectively requiring" applicants to disclose expunged criminal records and wished to continue to do so.[484] Although an instruction to applicants about disclosing expunged criminal record histories appears on the Board's application, it is notably inefficient to access the application. Additionally, the Board made significant amendments to its rules in June 2015. Despite an opportunity to incorporate rulemaking procedures or add clarifying provisions regarding disclosure requirements vis-à-vis expunged records, the Board chose not to address these issues.[485]

V. SUGGESTIONS AND CONCLUSION

The problems and ambiguities described in this Article are multi-layered and complex. They did not emerge overnight, and they do not lend themselves to simple or intuitive solutions. Thus, the ambiguities of identity and status mapped here—inter-organizational, intra-governmental, and public-private—though seemingly subtle on the surface cause harm and should not be maintained.

A. Resolving Ambiguities

To the extent that the North Carolina State Bar continues to claim a judicial status, authority in support of that claim needs to be more accessible. Limited access to the letter, and the story behind it, is evidence

480. *Id.*

481. *See* State v. Swann, 676 S.E.2d 654, 657 (N.C. Ct. App. 2009).

482. *See* Letter from James R. Van Camp, Chairman, N.C. Bd. of Law Exam'rs, to M. Keith Kapp, R. Michael Wells, Sr., Alan W. Duncan (June 26, 2013).

483. *See id.*

484. *See id.*

485. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, *supra* note 142.

that these ambiguities of identity and status persist. Having access to authority in support of this claim will reduce confusion.[486]

Yet, still lingering is the question of whether the September 1, 1976, privately issued letter from Deputy Attorney General Kramer can, or should, be used to resolve a government branch assignment question. The body of the letter contains a single sentence.[487] The substance of that sentence is a claim that the North Carolina State Bar is part of the judicial branch and, therefore, exempt from the strictures of the APA.[488] Nothing in the letter, either in text or citation, supports Attorney Kramer's claim.[489] The July 1977 letter from the Attorney General to the Board of Law Examiners is silent with respect to a government branch claim.[490] The letter establishes that the Attorney General "concurred" in the Board's recent decision to withdraw its APA-compliant rules.[491] Thus, the Board's APA exemption is one that was self-served. As shown below, with agency drift and inadequate oversight, not many would come to know this.

The State Bar holds a supervisory role vis-à-vis the Board of Law Examiners, and the State Bar's claim to be judicial has implications for the Board. To the extent that the entities are "related" on an inter-organizational or government branch axis, obligations and precedent applied to one entity may, as a matter of automaticity, be applied to the other entity. But these entities do not follow the same procedural process rules. Thus, cases condoning one entity's procedures may not be applicable to the other entity's operations. It is here that the additional ambiguities stemming from inter-organizational boundaries can complicate implications. For example, while the State Bar, since at least 2007, has acted in conformity with APA-type procedures and complies with open meetings laws, the same cannot be said for the Board of Law Examiners.[492]

In my view, the entity that is the best situated to resolve the inter-organizational boundary ambiguity, specifically the extent to which the relationship between the State Bar and the Board is both lateral and hierarchical, is the General Assembly. The State Bar and the Board are

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486. One goal in writing this Article is to make the Office of the Attorney General 1976 letters, including the September 1, 1976, branch assignment letter, searchable on mainstream electronic legal databases.

487. Letter dated Sept. 1, 1976, from Howard A. Kramer to B.E. James, *supra* note 9.

488. *Id.*

489. *Id.*

490. Letter dated July 27, 1977, from Rufus L. Edmisten to Fred P. Parker III, *supra* note 147.

491. *Id.*

492. *See supra* notes 434-466 and accompanying text.

creatures of the legislature.[493] It was the General Assembly that originally structured the entities this way—one as an agency with supervisory powers and the other as a subservient board, but also delegating independent rulemaking authority to both the agency and the board. Likewise, it was the General Assembly's 1973 law that repealed the single-secretary provision from 1933 and in 2004 did provide a separate secretary for both the State Bar and the Board.[494] Clarifying legislation could address inter-organizational ambiguities, spelling out the statutory obligations for the State Bar and the Board, particularly with respect to oversight-related obligations.

As with the resolution of inter-organizational ambiguity, the resolution of intra-governmental ambiguity best lies in the body that first established the entities, the General Assembly. As O'Connell notes, "labels have consequences, and the authority to label can be significant."[495] I suggest the General Assembly contribute to the resolution of the State Bar and the Board's intergovernmental ambiguity by focusing on the entities' function rather than their form. While both entities perform adjudicatory, and thus judicial function, the State Bar and the Board also set standards that are policy making in nature.[496] This shift in attention to the entities' function could be accomplished by having a test, besides branch assignment, to determine whether an entity is subject to the APA.[497]

Although I argue that the General Assembly is the entity best situated to resolve the intra-governmental ambiguity, the counter-argument might be made that the supreme court is equally well positioned to address the branch assignment question. Indeed, if the court were to pre-emptively affirm the claim that the State Bar and the Board are part of the judicial branch of government, questions regarding legislative acquiescence or

493. *See* 1933 N.C. Sess. Laws at 313 (codified as amended at N.C. GEN. STAT. § 84-24 (2015)).

494. *Compare* N.C. GEN. STAT. § 84-24 (1965), *with* N.C. GEN. STAT. § 84-24 (1975). *See also* 1933 N.C. Sess. Laws at 319.

495. *See generally* O'Connell, *supra* note 21, at 894.

496. For example, the North Carolina State Bar enacts rules concerning the educational minimal qualifications for applicants seeking admission to the bar and the North Carolina Board of Law Examiners enacts rules pertaining to admission by comity. *See* 27 N.C. ADMIN. CODE .0500 (2015).

497. *See, e.g.*, VA. CODE ANN. § 2.2-4001 (2015) (defining "agency" as "any . . . unit of the state government empowered by the basic laws to make regulations or decide cases"); TENN. CODE ANN. § 4-5-102(2) (2015) (defining "'agency' [as] any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases").

agency interpretation deference might be avoided.[498] Though the court may hypothetically be able to resolve the branch assignment ambiguity, practically speaking, such an action would not resolve the Bar and the Board's inter-organizational ambiguity.

The resolution that I propose to the public-private ambiguity of the Board of Law Examiners is somewhat different from the legislative resolution that I suggest for the other two forms of boundary bureaucracy. Specifically, I propose that the public-private ambiguity be addressed by the State Bar and Board themselves. The State Bar should continue its course, operating in ways that promote transparency and fairness.[499] The State Bar and the Board can watch actions that other professional regulators take.[500]

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498. In *Duggins v. North Carolina State Board of Certified Public Accountant Examiners*, the court held that "our courts *often* have held that '[a]n administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts.'" 212 S.E.2d 657, 662 (N.C. Ct. App. 1975) (emphasis added) (quoting 7 STRONG, N.C. INDEX 2D, STATUTES, § 5, 75), *cert. granted*, 214 S.E.2d 430 (N.C. 1975), *aff'd*, 240 S.E.2d 406 (N.C. 1978). But the acquiescence in *Duggins* concerned a somewhat more mundane agency interpretation issue, as the question related to an experience pre-requisite, not a tripartite branch assignment. *See id.* at 662. The *Duggins* court further indicated that its decision hinged upon the fact that the Board's interpretation of the statute was consistent with legislative intent. *Id.*; *accord* Duke Power Co. v. Clayton, 164 S.E.2d 289, 294 (N.C. 1968) (citing *In re* Vanderbilt University, 114 S.E.2d 655, 658 (N.C. 1960) (stating the court "will not follow an administrative interpretation which, in its opinion, is in conflict with the clear intent and purpose of the statute under consideration")). Thus, while the State Bar appears to have operated under the branch assignment claimed in the Office of the Attorney General's September 1976 letter, it is quite possibly in conflict with the clear intent and purpose of the original enabling statute. *See* 1933 N.C. Sess. Laws at 319 (defining the State Bar Council's powers as an agency of the state that is "[s]ubject to the superior authority of the General Assembly . . . .").

499. The North Carolina Medical Board is currently in the process of implementing lifetime limits for board members in order to better share diversity of governance in the self-regulating context.

500. For example, in December 2014, the North Carolina Medical Board presented a report to the Administrative Procedure Oversight Committee of the North Carolina General Assembly. Counsel for the Medical Board forecasted proposed rule changes for the Medical Board that included lifetime limits for Medical Board members. Medical Board Handouts, APO Meeting (Dec. 17, 2014) (on file with author). Such limits would allow for an increase in the proportion of physicians who during their career would serve as members of the Board. *Id.* Lawyer-members of the North Carolina State Bar Council serve three-year terms, are eligible to serve three consecutive three-year terms, and may then serve again in that same way upon not serving for one three year period. *See* N.C. GEN. STAT. § 84-18 (2015). Like members of the State Bar Council, members of the North Carolina Board of Law Examiners serve three-year terms, but up until October 2015, Board member terms were consecutively renewable without limit. At the time of this Article's printing, pending before the Supreme Court of North Carolina is a proposed amendment to North Carolina State Bar Rules that would cap Board of Law Examiner member service to four consecutive three-year terms. *See Proposed Rule Amendments*, N.C. STATE BAR, http://www.ncbar.com/rules/proprul.asp (last visited Sept. 26, 2015).

B. The Need for Oversight

The fundamental problem that is caused by the State Bar and the Board's branch assignment ambiguity is inadequate oversight. This lack of oversight is manifested in several ways. First, the statutorily created oversight that requires the chief justice to certify the Board's rules is too limited in its scope to be a useful check on the Board's rulemaking power.[501] To illustrate, to certify the Board's rules as being consistent with the provisions found within the Board's enabling statutes does not require the court to find the rules consistent with other duly enacted law. Additionally, prior to the 1970s, the supreme court certified that the rules complied not only with the State Bar and Board statutes as currently codified, but also were consistent with the expressed intent of the original organizing Act of 1933.[502]

To address the inadequate oversight problem, the General Assembly needs to ensure that its statutory language that provides for supreme court oversight is proper in scope. Moreover, for agencies like the State Bar and the Board of Law Examiners, questions regarding what type and extent of oversight is deemed adequate warrant periodic review, as adequate oversight of independent and self-regulatory entities is valuable to the organization and those within or outside its walls.[503]

The General Assembly itself is currently studying whether more oversight is needed and, assuming it decides to take action, is poised to have a plan implemented as early as 2016. In 2013, the North Carolina General Assembly charged its non-partisan Program Evaluation Division with evaluating the structure, organization, and operation of occupational licensing agencies within the state.[504] The Division's report, which identified fifty-five[505] occupational licensing agencies in North Carolina, was delivered to the General Assembly in December 2014 and again in March 2015.[506] Based on its findings, the Program Evaluation Division

501. *See* N.C. GEN. STAT. §§ 84-15 to -24.

502. *See, e.g.*, RULES OF BOARD OF LAW EXAMINERS: STATE OF NORTH CAROLINA, *supra* note 263.

503. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1108, 1117 (2015) (denying antitrust immunity for lack of adequate state supervision to members of North Carolina's Board of Dental Examiners where a majority of seats on the eleven member board were designated to be filled by member-elected licensed dentists who were also private market participants in dentistry).

504. An Act Entitled, "Regulatory Reform Act of 2013," ch. 413, sec. 10(a), 2013 N.C. Sess. Laws 1759.

505. There may be slightly more than fifty-five. *See supra* note 364.

506. OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED, *supra* note 22, at 16.

found that stronger oversight was needed for occupational licensing agencies and recommended the establishment of an occupational licensing commission.[507] Notably, the North Carolina State Bar and the Board of Law Examiners was jointly considered one of the fifty-five occupational licensing entities[508] identified by the Division's study.

As occupations appear, evolve, and disappear, licensing regimes cycle through periods of regulation and deregulation.[509] Despite this flux, one aspect of occupational licensing regulation that has been long-lasting is the uniform procedures provided by APA-like statutory schemes. In my view, the Board of Law Examiners, like other North Carolina occupational licensing boards, should be subject to the state's APA. Even if the Board of Law Examiners is not required to act in a manner that is consistent with notice-and-comment-type rulemaking procedures, there are valid reasons why the Board should voluntarily comply with such procedures. Assuming the Board of Law Examiners is within the judicial branch of government, its operations should still be subject to notice-and-comment-type rulemaking procedures and its meetings should be open. Models in other states show that Boards of Bar Examiners can operate successfully, and perhaps better, with public participation.

Having established that the current oversight of the North Carolina Board of Law Examiners is insufficient, it is worth pointing out why sufficient oversight is useful. At least four reasons present themselves. First, sufficient oversight helps to maintain the democratic legitimacy of administrative agencies;[510] second, it preserves, rather than threatens, the ability to self-govern;[511] and third, sufficient oversight ensures fairness and fosters public participation that can, through a sort of crowd-sourcing way, result in superior outcomes. Finally, sufficient oversight is particularly necessary for occupational licensing because despite the fact that licensing is established to test on competencies, history demonstrates that people

507. *Id.* at 1. The report found that moving to a centralized authority would not be efficient and could come at a significant cost, but that the current oversight of occupational licensing agencies was lacking, especially with regard to compliance with reporting requirements. *Id.*

508. The position of the North Carolina State Bar is that it is not an occupational licensing entity. *See* Lunsford, *supra* note 13, at 6-7; *see also* N.C. GEN. STAT. § 93B (2015).

509. *See, e.g.*, *The De-licensing of Occupations in the United States*, MONTHLY LABOR REV., BUREAU OF LABOR STATISTICS OF THE U.S. DEP'T OF LABOR (May 2015), http://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm (identifying watchmakers as one of several de-regulated professional occupations within select states since 1975).

510. *See infra* text accompanying notes 513-514.

511. *See infra* text accompanying notes 516-18.

have been excluded from professions for a variety of reasons unrelated to competency.[512]

First, adequate oversight for government entities helps to maintain the democratic legitimacy of the entity, ensuring the "sunshine" of an open government.[513] According to scholar David Arkush, of the three available methods for achieving democratic legitimacy for administrative agencies, the most promising one is "the democracy ideal," which rests upon "enhanced citizen participation" in an agency's rulemaking process.[514]

Second, sufficient oversight for government entities can help preserve a profession's ability to self-regulate, rather than threaten it. Today, agency action taken in a manner inconsistent with notice-and-comment-type rulemaking procedures stands out, and not in a positive way.[515] Thus, the Board of Law Examiners has appeared as noticeably out-of-step with other occupational licensing agencies, including vis-à-vis agencies that issue licenses for more traditional professions.[516] Current technology allows government actors to share information with the public quickly and easily. If anything, public expectations for transparency in government have increased.[517] The Government agencies tasked with regulating state professions share considerably more information with members of the public as compared to fifty years ago.

Third, when oversight is sufficient, fairness and public participation is fostered. This is why compliance with open government laws and APA-like procedural processes matter.

Finally, sufficient oversight is necessary for occupational licensing entities. Transparent rulemaking procedures that create avenues for public

512. *See e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 38 (1961) (holding it unconstitutional to deny an applicant membership to the California State Bar based upon his political views).

513. David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 620 (2012).

514. *Id.* at 612, 620.

515. *E.g.*, Daniel Hubbard, *Grassroots Group Wants Planning Board Decision Reversed: Report*, PATCH (Aug. 18, 2015), http://patch.com/new-jersey/ridgewood/grassroots-group-wants-planning-board-decision-reversed-report.

516. *Compare* N.C. STATE GOV'T WEB SITE ARCHIVES & ACCESS PROGRAM, Board Meetings (http://wayback.archive-it.org/org-67/20091121011108/http://www.ncmedboard.org/board_meetings/), *with* N.C. STATE GOV'T WEB SITE ARCHIVES & ACCESS PROGRAM, July 2009 Bar Exam Applicants- Important Information for When Results are Released (http://wayback.archive-it.org/org-67/20091121010658/http://www.ncble.org/) (last updated Sept. 29, 2009).

517. *See generally* Edward Wyatt and Claire Cain Miller, *Tech Giants Issue Call for Limits on Government Surveillance of Users*, N.Y. TIMES (Dec. 9, 2013), http://www.nytimes.com/2013/12/09/technology/tech-giants-issue-call-for-limits-on-government-surveillance-of-users.html?pagewanted=all&_r=0.

participation and engagement help preserve the perceived legitimacy of the law licensing process because standards can be different for applicants seeking a law license as compared to those who have already obtained a law license.[518] Conduct that would not constitute professional misconduct or facts that could not justify lawyer discipline could easily be relevant to the moral character and professional fitness inquiry for bar admission authorities.

Occupational licensing provides significant benefits, but it comes with costs as well. Costs are passed along to end users in the form of higher rates for professionals' services, and to applicants in the form of tuition and fees, which can even prohibit entry into the profession.[519] In addition, occupational licensing can reduce mobility, as workers can be deterred from moving to new jurisdictions where they are unlicensed.[520] Courts have recognized that the costs of occupational licensing regulation do not always outweigh the benefits.[521] One cost associated with occupational licensing that we can avoid, however, is the cost of compromised democratic legitimacy for state entities charged with regulating the professions within their borders. When those models of regulatory boards are characterized by autonomy and self-regulation, risks associated with residing along bureaucratic boundaries are likely to arise. To the extent that regulatory entities involved with self-regulation of the legal profession reside along various bureaucratic boundaries, conditions are ripe for developing ambiguities of identity and status regulatory entities. As stated above, of the three available methods for achieving administrative agency democratic legitimacy, the most promising one is "the democracy ideal," resting upon

518. *Compare* Murphy v. Ky. Bar Ass'n, 431 S.W.3d 428, 429 (Ky. 2014) (holding that an attorney with three DUI convictions could be publicly reprimanded), *with* Frasher v. W. Va. Bd. of Law Exam'rs, 408 S.E.2d 675, 680 (W. Va. 1991) (holding that there are substantive differences between those who are already lawyers and those who are applying to be lawyers).

519. *See, e.g.*, Kathryn Watson, *Occupational Licensing Doesn't Really Benefit Consumers, Study Finds*, LAWATCHDOG.ORG, http://watchdog.org/201019/occupational-licensing-licensure-consumers/ (Feb. 19, 2015) (citing a study from George Mason University showing that "opticians . . . in [] the 21 states with licensure requirements . . . made 2 or 3 percent more than their counterparts").

520. New Mexico recognized the issue of mobility with regard to military members and offers has an expedited licensure in some of its licensing provisions for members of the military. *See, e.g.*, N.M. CODE R. § 16.10.2.17 (LexisNexis 2015) (providing expedited licensure for occupational therapy).

521. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924); *accord* State v. Ballance, 51 S.E.2d 731, 735-36 (N.C. 1949) (taking photos in downtown Raleigh is not an occupation subject to state regulation).

principles of open government, procedural process, public participation, and agency accountability.

APPENDIX

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
RALEIGH
27602

3 May 1976

Mr. B.E. James
Executive Secretary
North Carolina State Bar
107 Fayetteville Street
Raleigh, North Carolina 27602

Dear Mr. James:

Attached hereto please find the letter which I did for you sometime ago concerning the application of the Administrative Procedure Act to the North Carolina State Bar. This letter was circulated among the three Senior Deputies and represents the best thinking of this Office on the subject. We will be glad to work with you in any way that we can to determine what needs to be filed by the State Bar and how best to go about putting that material in an appropriate form for filing.

Very truly yours,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

David S. Crump
Associate Attorney General

DSC/ch

Enc.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
RALEIGH
27602

3 May 1976

Mr. B.E. James
Executive Secretary
North Carolina State Bar
107 Fayetteville Street
Raleigh, North Carolina 27602

Dear Mr. James:

This is in response to your inquiry as to whether, and to what extent the North Carolina State Bar is subject to the Administrative Procedure Act, Chapter 150A of the General Statutes.

The critical issue in determining whether the State Bar is subject to the provisions of Chapter 150A is whether the Bar is an "agency" as that term is defined in the Act, G.S. 150A-2(1):

> "Agency" means every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the state government of the State of North Carolina but does not include those agencies in the legislative or judicial branches of the state government; ...

In G.S. 84-15 the General Assembly declared, "there is hereby created as an agency of the State of North Carolina, ... the North Carolina State Bar." It has nevertheless been suggested, because of the involvement of the Supreme Court in making rules for the Bar, and because of the inherent powers of the court to discipline members of the bar, that the Bar is exempt from Chapter 150A under the judicial exception to the definition of agency. After careful research and consideration, we find this argument unpersuasive. There are essentially two reasons for which we reject this argument.

The first reason is that G.S. 84-15 fits hand in glove with the definition of "agency" contained in G.S. 150A-2(1). That statutory harmony does not, however, answer the question in full, for the General Assembly and Supreme Court are "agencies of the State of North Carolina," and no one contends that they are subject to the Administrative Procedure Act.

The second reason is that the State Bar is created by an act of the General Assembly, G.S. §84-15 to -38. The Supreme Courts of other states have accepted the argument:

> The fundamental functions of the Court are the administration of justice and the protection of rights guaranteed by the Constitution. To effectively perform such functions, as well as its other ordinary duties, it is essential that the Court have the assistance and cooperation of an able, vigorous, and honorable bar. It follows that the Court has not only the power, but the responsibility as well, to make any reasonable order, rules, or regulations which will aid in bringing this about, and that the making of regulations and rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to the Court ...
>
> Petition for Integration of Bar, 216 Minn. 195, 12 N.W.2d 517 (1943).

The debates of the organizers of our Bar seem to indicate that they believed that legislative action was required to organize the Bar, see generally, Bryson, "The Organized Bar in North Carolina," 30 N.C.L. Rev. 335 (1952); Note, 11 N.C.L. Rev. 191 (1934).

Perhaps because the Bar was integrated by legislative act, perhaps because our Supreme Court has always "recognized the power of the legislature and the statutes enacted by it as the 'State's collected will,' "In re Ebbs, 150 N.C. 44, 63 SE 190 (1908), the consequences which have attached to orders and statutes integrating the Bar in other jurisdictions have not obtained here. Our Court, for example, has never referred to the State Bar as "an arm of the court," Re Edwards, 50 Idaho 238, 294 P. 847 (1930), nor has it ever held the State Bar an agency of the court, Re Mundy, 202 La. 41, 11 So.2d 398 (1942), nor has our Court held the act integrating the Bar an act necessarily only in aid of the inherent powers of the court, Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 604 (1943). In fact, our court has construed the provisions of G.S. §84-36 as providing for the creation of two methods of attorney discipline; the one, within the jurisdiction of the State Bar being statutory, and the other, within the jurisdiction of the courts, judicial, In re Burton 257 N.C. 534, 126 SE2d 581 (1962); In re Gilliland, 248 N.C. 517, 103 SE2d 807 (1958); State v. Spivey 213 N.C. 45, 195 SE2d 1 (1937); In re Ebbs, 150 N.C. 44, 63 SE 190 (1908); In re Bonding Co., 16 N.C. App. 272, 192 SE2d 33 (1972). Thus, the Court does not treat the integrated Bar as its own agency, but as an agency created by act of the General Assembly; in many respects no different from licensing boards established for the regulation and discipline of "medicine, dentistry, pharmacy, piloting, engineering, or any other profession, calling or vocation [which] rests within the police power of the General Assembly." In re Applicants, 143 N.C. 1, 55 SE

635 (1906). The Court has said that "questions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., . . ." McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956) but has not required all questions of ethics and discipline other than those which are the proper subjects of contempt, to be referred to the Bar, as it might, if it regarded the Bar as its own agency. Our Court, has in fact shown great deference to the legislative power to regulate the practice of law and the discipline of its practitioners, Ex Parte Moore, 63 N.C. 397 (1869), Ex Parte Biggs, 64 N.C. 202 (1870), Ex Parte Schenck, 65 N.C. 353 (1871), Ex Parte Haywood, 66 N.C. 1 (1872). Given these observations and actions on the part of our Court, and given the primacy of the General Assembly in establishing administrative agencies, we feel compelled to conclude that the North Carolina State Bar is an administrative agency within the meaning of G.S. 150A-2(1).

G.S. 84-23 even begins with the words, "Subject to the superior authority of the General Assembly to legislate thereon by general law . . . the council is hereby vested, as an agency of the State."

The only objection to this conclusion of which we are aware is the role of the Supreme Court in the rule approval process. G.S. 84-21 provides:

> Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this article.

At first blush, this objection to regarding the State Bar as an agency seems to be substantial. However, this objection we do not find sufficient. The Supreme Court is not, by the terms of the statute, given any authority to make rules for the State Bar; it has only a veto power over rules made by the council. Furthermore, this somewhat unique procedure merely allows the Chief Justice to give an advance opinion on the subjects concerning which the Court could make a decision, where the issue of the consistency of the administrative rules with the statute is raised in a proper proceeding. Therefore, we conclude that the Supreme Court is not sufficiently involved with the State Bar to make the Bar an agency of the Court rather than an agency which exercises its powers pursuant to legislative command, just as any other administrative agency.

A final reason that the State Bar must be regarded as an administrative agency is found in Chapter 150A itself. G.S. 150A-1(b) provides, "the purpose and intent of this Chapter is to establish as nearly as possible a uniform system of administrative procedure for State agencies." As noted at the outset, the definition of "agency" is a broad one. In G.S. 150A-1(a) the General Assembly provided specific exemptions from the provisions of the Chapter for certain administrative agencies; the State Bar is not among those the General Assembly provided an exemption.

G.S. 150A-1(a) provides, "[t]his Chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary." (emphasis added). The question therefore arises, to what extent has the General Assembly enacted statute in Chapter 84 making specific provisions to the contrary of Chapter 150A.

At the outset it is plain that the State Bar is exempt from the provisions of Article 4 of Chapter 150A, entitled "Judicial Review." G.S. 150A-43 provides that the provisions of Article 4 apply "unless adequate procedure for judicial review is provided by some other statute, in which case the review is under such other statute." In G.S. 7A-29 the General Assembly has provided that final orders of the North Carolina State Bar made pursuant to G.S. 84-28 may be appealed directly, as of right, to the Court of Appeals. Therefore, it is plain that G.S. 7A-29 is "a statute making specific provisions to the contrary" and a statute providing "adequate procedure for judicial review" thus exempting the State Bar from the provisions of Article 4.

Three provisions of Chapter 84 concern the rulemaking power of the State Bar. These provisions are G.S. 84-21, G.S. 84-23 and G.S. 84-23.1. G.S. 84-23 provides:

> Subject to the superior authority of the General Assembly to legislate thereon by general law, and except as herein otherwise limited, the council is hereby vested, as an agency of the State, with the control of the discipline, disbarment and restoration of attorneys practicing law in this State. The council shall have power to administer this Article; to formulate and adopt rules of professional ethics and conduct; to formulate and adopt rules and procedures for discipline, incapacity and disability hearings; to publish an official journal concerning matters of interest to the legal profession; and to do all such things necessary in the furtherance of the purposes of this Article as are not prohibited by law.

G.S. 84-21 provides in relevant part:

> A copy of the certificate of organization, as spread upon the minutes of the Court, shall be published in the next ensuing volume of the North Carolina Reports. The rules snd regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this Article, may be amended by the council from time to time in any matter not inconsistent with this Article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided that the Court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.

G.S. 84-23.1 gives the council authority to approve certain plans for prepaid legal services. G.S. 150A-9 provides:

> It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules .... The provisions of this Article are applicable to the exercises of any rulemaking authority conferred by any statute, ... No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.

These statutes read in pari materia tend, we think, to fortify the conclusion that the North Carolina State Bar is subject to the provisions of the Administrative Procedure Act, because G.S. 150A-9 provides that the Article shall apply "to the exercise of any rulemaking authority conferred by any statute". The referenced portions of Chapter 84 plainly vest rulemaking authority and tell the Bar what to do with the rules as formulated, but do not describe the manner in which the rules are to be formulated.

Article 5 of Chapter 150A, the Registration of State Administrative Rules Act, is closely related to Article 2, and many of the same considerations are involved in determining the necessity for compliance with Article 5. We believe that the State Bar is subject to the requirements of Article 2 because it is an agency which exercises rulemakin

authority. G.S. 150A-59 requires that rules adopted by agencies subject to the Act be filed with the Attorney General. However, an argument can be made that G.S. 84-21 is, in the language of G.S. 150A-1(a) a "statute making specific provisions to the contrary," in that it provides for the filing of the rules of the State Bar with the Supreme Court. Since an alternate system for the filing of the rules of the State Bar is provided for by G.S. 84-21 we cannot state with certainty that the penalty attaching to any noncompliance of the State Bar with the filing requirements of Chapter 150A would necessarily be the invalidity of unfiled rules. We believe, however, that the more conservative course to follow, especially in light of G.S. 150A-59(c), is for the Bar to file its rules with the Attorney General's Office whether such filing be considered required or permissive.

It should be noted, however, that the definition of "rule" in G.S. 150A-10 is slightly different from the definition of "rule" in G.S. 150A-58, and that certain rules are required to be filed which do not require rulemaking hearings for their adoption. Also because of the differences in the definition of "rule" for Article 2 and Article 5 purposes, it may be that some rules are required to be filed under the terms of Article 5 of Chapter 150A which are not "rules" for the purposes of G.S. 84-21.

This leads us to a consideration of the application of Article 3 of the Act, concerning administrative hearings, to the State Bar. A determination of the impact, if any, of Article 3 on the council and Grievance Committee disciplinary procedures requires detailed analysis of Article 3, of Chapter 84 and of the rules of the State Bar concerning discipline, disability and incapacity procedures now appearing in Article IX of the certificate of organization of the State Bar.

G.S. 84-28(a) provides:

> Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the council of the North Carolina State Bar under such rules and procedures as the council shall promulgate as provided in G.S. 84-21.

G.S. 84-28(b) sets forth certain causes for discipline. G.S. 84-28(g) provides for the transfer of an attorney to inactive status for mental incompetence, or physical disability "under such rules and procedures as the council shall promulgate as provided in G.S. 84-21."

Mr. James
Page 7
3 May 1976

G.S. 84-28.1 establishes the Grievance Committee and authorizes it to hold hearings in matters of discipline, incapacity and disability matters. G.S. 84-29 gives to the council, the Grievance Committee, or any committee of either certain powers: the power to administer oaths and affirmations, the power to subpoena, and the power to direct the taking of depositions.

Careful examination of Chapter 84, the rules of the Bar relating to disciplinary, disability and incapacity hearings, and Article 3 of Chapter 150A discloses that neither the rules nor Chapter 84 deal with the following subject matters which are dealt with in Chapter 150A. G.S. 150A-23(d) provides:

> Any person may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

The rules of the Bar provide no procedure for intervention.

G.S. 150A-24 provides that when a hearing in a contested case is conducted by less than a majority of an agency, the hearing is to be conducted in the county where the person whose rights are the subject matter of the hearing maintains his residence. The rules of the State Bar do not appear to speak to the venue of the hearing, nor does Chapter 84. Should the Grievance Committee exercise its option to appoint a three person hearing committee to hear the discipline case, then it would appear that G.S. 150A-24 would require the hearing to be conducted in the county where the attorney to be disciplined maintains his residence. However, should the Grievance Committee continue to hold hearings as a group of the entire committee, hearings may be held in Wake County.

Just as the rules of the Bar do not provide for intervention in disciplinary proceedings, they also do not seem to provide for the consolidation of cases as provided for in G.S. 150A-26.

Rule 14(17) provides that the rules of evidence applicable in the Superior Courts of this State shall be followed in the conduct of disciplinary hearings. G.S. 150A-29 would appear to give the Bar, should it choose to exercise the option, the authority to use broader rules of evidence. That rule, however, probably is sufficiently broad to porvide for the committees' taking "official notice" of any facts of which judicial notice might be taken, as provided for in G.S. 150A-30.

These are the only subject matters dealt with by the Administrative Procedure Act concerning which there seems to be some imparallelism between Article 3 of Chapter 150A, Chapter 84 and the rules of the Bar

If we can be of any further assistance to you in the matter of the Bar's compliance with Chapter 150A please do not hesitate to call on us. As members of the Bar we have not reached these conclusions lightly. After careful consideration, however, we believe that these conclusions best allow us to discharge that obligation of our oaths of office that we "will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof."

Very truly yours,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

David S. Crump
Associate Attorney General

DSC/pm

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

RUFUS L. EDMISTEN
ATTORNEY GENERAL

August 30, 1976

Honorable J. William Copeland
Associate Justice
Supreme Court of North Carolina
2 East Morgan Street
Raleigh, North Carolina 27602

Dear Mr. Justice Copeland:

In the opinion of this office, the North Carolina State Bar could be found to be exempt from Chapter 150A of the General Statutes, the Administrative Procedure Act, as G.S. 150A-2(1) excludes from the definition of "agency," "those agencies in the . . . judicial branches of the state government."

Very truly yours,

Rufus L. Edmisten
Attorney General

RLE/ppb

cc: Mr. David S. Crump
Associate Attorney
Administrative Procedures Section

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
RALEIGH 27602

RUFUS L. EDMISTEN
ATTORNEY GENERAL

September 1, 1976

The Honorable B. E. James
Executive Secretary
N. C. State Bar
107 Fayetteville Street
Raleigh, North Carolina 27602

Dear Mr. James:

In the opinion of this Office, the North Carolina State Bar is found to be exempt from Chapter 150A of the General Statutes for the reason that the Administrative Procedure Act, 150A-2(1) excludes from the definition of agency "those agencies in the ... judicial branches of the State Government", and in our opinion the North Carolina State Bar is a member of the judicial branch.

Very truly yours,

RUFUS L. EDMISTEN
Attorney General

Howard A. Kramer
Deputy Attorney General
for Legal Affairs

HAK/ds

The Board of Law Examiners

of The

State of North Carolina

July 14, 1977

Honorable Rufus Edmisten
Attorney General of North Carolina
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Attention: Mr. Andrew A. Vanore, Jr.
Chief Deputy Attorney General

Dear Mr. Attorney General:

This is to advise that the Board of Law Examiners is withdrawing the rules filed with your office under the Administrative Procedure Act, and the Board no longer considers itself subject to the Administrative Procedure Act.

This decision was made by the Board at a recent meeting after considering your opinion letter to Mr. B. E. James, Secretary-Treasurer of the North Carolina State Bar, dated September 1, 1976 which found that the State Bar was exempt from Chapter 150A of the General Statutes of North Carolina and the order entered on the 20th day of December, 1976 by the Honorable Donald L. Smith, Judge of Wake County Superior Court, in the case of MITCHINER v. BOARD OF LAW EXAMINERS.

With best wishes I am

Very truly yours,

Fred P. Parker III
Executive Secretary

FPP/rab
cc: Mr. Emerson P. Dameron

July 27, 1977

Mr. Fred P. Parker, III
Executive Secretary
The Board of Law Examiners
of the State of North Carolina
P.O.Box 25427
Raleigh, North Carolina 27611

Dear Mr. Parker:

This will acknowledge receipt of and thank you for your letter of 14 July 1977 advising me that the Board of Law Examiners is withdrawing the rules filed with my office under the Administrative Procedure Act, and that the Board no longer considers itself subject to the Administrative Procedure Act.

In light of the opinion rendered by my office on 1 September 1976 which concluded that the State Bar was exempt from Chapter 150A of the General Statutes of North Carolina, I concur with the recent action of the Board of Law Examiners.

With best wishes, I remain

Very truly yours,

RUFUS L. EDMISTE
Attorney General

RLE:js

The Board of Law Ex
of The
State of North Carolina

April 17, 2012

The Honorable Elaine Marshall
Office of the Secretary of State
P.O. Box 29622
Raleigh, NC 27626

Re: Notice of 2012 Official Meetings of the Board of Law Examiners of the State of North Carolina

Dear Ms. Marshall:

Please find below a listing of the dates of the official meetings of the Board of Law Examiners of the State of North Carolina for the remainder of 2012.

The Board holds its regular meetings each year in January, June and October. Additionally, a business meeting is conducted during each bar examination grading session, in March and August of each year.

For the remainder of 2012, the Board's regular meeting schedule will be as follows:

Date	Location of Meeting
June 6-8, 2012	Board's Offices at One Exchange Plaza, Suite 700 Raleigh, NC 27602
October 24-26, 2012	Board's Offices at One Exchange Plaza, Suite 700 Raleigh, NC 27602

Suite 700, One Exchange Plaza, Box 2946, Raleigh, North Carolina 27602
Telephone 919-828-4886 • Fax 919-828-2251

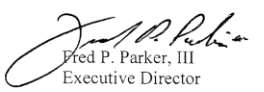
Additionally, a business meeting of the Board will be held during the grading session for the July 2012 bar examination, between the dates of August 11-23, 2012 at an off-site location.

The Board of Law Examiners is authorized to investigate, examine and determine the character and other qualifications of applicants seeking admission to the North Carolina State Bar. During its meetings, the Board discusses issues involved with preparing, approving, administering and/or grading examinations and issues dealing with confidential information relating to individual applicants. As such, pursuant to N.C.G.S. Section 143-318.18, Article 33 of the General Statutes involving Meetings of Public Bodies does not apply to the Board.

Moreover, confidential information which is not considered public record within the meaning of Chapter 132 of the General Statutes, is discussed during meetings of the Board. To prevent the disclosure of such information, these meetings are closed, pursuant to N.C.G.S. Section 143-318.11(1).

If you have any questions, or need any additional information, please do not hesitate to contact me.

Sincerely,



Fred P. Parker, III
Executive Director

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