

FAILING CHARACTER AND FITNESS DUE TO LAW SCHOOL DEBT

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With law school costs climbing ever higher, current law school graduates face student debt loads that routinely top six figures. For a growing number of bar applicants in various states, the magnitude or management of this student debt is becoming a problem for purposes of the character and fitness examination required for bar admission. In extreme cases, massive student debt has alone been a reason for failing character and fitness. This Note proposes a change to the Arizona Supreme Court Rules to render student loan debt information presumptively irrelevant to a bar applicant's character and fitness.

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INTRODUCTION

Law school has never been more expensive. Tuition at U.S. law schools has increased at twice the rate of inflation in recent decades; in some years and at some schools at an even higher rate.¹ Naturally, student loan debt has mushroomed to keep pace with tuition. Average law school debt among private law school

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1. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 5 (2008). The rapid increase is attributable in large part to a sharp rise in law professor salaries, even as teaching loads have decreased. *Id.* at 6–7.

graduates today is near \$125,000.² Public law school graduates do not fare much better, facing \$75,700 in debt on average.³ Combine these sums with the ballooning undergraduate student debt burden (\$35,200 on average for the class of 2013⁴), the cost of bar review courses, and of course, accumulated interest, and a frightening picture of law graduate debt begins to emerge.⁵

Although J.D. holders' salaries vary dramatically, the cost of legal education does not. A prospective Big Law attorney gunning for six figures on Day 1 and a prospective nonprofit or public interest attorney with limited earning expectations will each assume roughly the same substantial law school debts.⁶ Even if every law student did want to work in Big Law, there would not be nearly enough high-paying law firm jobs to employ them all.⁷

Perhaps not surprisingly, the question of whether law school is still a worthwhile investment has been the subject of much ballyhoo in the news and in the blogosphere in recent years.⁸ Some graduates have complained that they took out tens or hundreds of thousands in loans to go to law school, expecting to graduate and walk right into a \$160,000 salary without breaking a sweat.⁹ When that did not in fact happen, they have been quick to critique the system.¹⁰

2. Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, ABA JOURNAL (Mar. 28, 2012, 5:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

3. *Id.*

4. Blake Ellis, *Class of 2013 Grads Average \$35,200 in Total Debt*, CNN MONEY (May 17, 2013, 12:39 PM), <http://money.cnn.com/2013/05/17/pf/college/student-debt/>.

5. See ILL. STATE BAR ASS'N, SPECIAL COMMITTEE ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES: FINAL REPORT & RECOMMENDATIONS I (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/law_school_debt_report_030813.authcheckdam.pdf (noting that combined law graduate debts routinely total \$150,000 or \$200,000).

6. Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (Or Anyone Else?)*, 82-OCT. N.Y. ST. B.J. 20, 21 (2010).

7. *Id.*

8. See, e.g., Tucker Max, *Why You Should Not Go to Law School*, HUFFINGTON POST (Feb. 18, 2013, 10:58 PM), http://www.huffingtonpost.com/tucker-max/law-school_b_2713943.html; see also Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* 10-11 (HLS Program on the Legal Profession, Research Paper No. 2013-6), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585## (cataloguing many of the critics).

9. Indeed, some of these complainants aver that law school admissions offices planted unreasonable earning and employment expectations in their heads, or at least did not try to correct what unreasonable expectations they acquired from other sources. Cf. Elie Mystal, *The Hubris of Would-Be Lawyers*, ABOVE THE LAW (Apr. 13, 2010, 10:16 AM), <http://abovethelaw.com/2010/04/the-hubris-of-would-be-lawyers/> (noting that 52% of prelaw students report that they are "very confident" that they themselves will be able to find jobs after graduating law school, but that only 16% say that they are "very confident" that the majority of their law school classmates will be able to).

10. See, e.g., Erin Fuchs, *'I Consider Law School a Waste of My Life and an Extraordinary Waste of Money'*, BUSINESS INSIDER (Dec. 14, 2013, 12:24 PM), <http://www.businessinsider.com/is-law-school-worth-the-money-2013-12>.

But a lesser-known and more sinister problem with the current law school financing regime is brewing, and already starting to boil over. More and more bar applicants with massive law school debt are facing problems during the character and fitness review required for bar membership, precisely because of the magnitude or management of the debt that they incurred to go to law school in the first place. This Note will examine the problem and propose a solution: a rule change establishing a presumption that student loan debt is irrelevant to the character and fitness analysis.

The Note proceeds in three Parts. Part I provides an overview of the character and fitness process in Arizona, both procedurally and substantively. Part II looks at relevant character and fitness cases from around the country that illustrate character and fitness committees' increasing willingness to view matters related to student loan debt as demerits in the character and fitness review. The status quo on the ground in Arizona is also considered. Finally, Part III ventures an amendment to the Comment to Arizona Supreme Court Rule 36 aimed at protecting ordinary bar applicants with high debts from unjust outcomes like those highlighted in Part II. The proposed amendment would create a presumption that matters related to student loan debt are not "germane"¹¹ to the character and fitness review, except in rare cases.

I. THE CONTOURS OF THE CHARACTER AND FITNESS PROCESS IN ARIZONA

The Arizona Supreme Court regulates the practice of law in Arizona,¹² including the character and fitness process. Character and fitness review is conducted by the Committee on Character and Fitness, a body comprised of at least eleven members of the state bar in good standing and at least four nonlawyer members of the public.¹³ Members serve four-year terms.¹⁴ The Committee reviews bar applicants' character and fitness pursuant to the procedural and substantive provisions of Arizona Supreme Court Rule 36.¹⁵

Under Rule 36, an applicant for admission to the Arizona bar must prove her good moral character and fitness for the practice of law by clear and convincing evidence.¹⁶ The applicant must show that she possesses certain positive qualities, such as trustworthiness and honesty, which are important to ethical lawyering.¹⁷ She must also overcome any revelations of past negative conduct, such as criminal convictions, academic or employment misconduct, substance abuse, or "neglect of financial responsibilities."¹⁸ In evaluating a bar applicant, the Committee focuses primarily on her past actions and behavior, not merely her "character" in some

11. See ARIZ. SUP. CT. R. 36 cmt. (2012).

12. *Id.* R. 31.

13. *Id.* R. 33(a).

14. *Id.*

15. See *i.d.* R. 36.

16. *Id.* R. 36(b), (f)(2)(E).

17. *Id.* R. 36(b)(1).

18. See *id.* R. 36(b)(2)–(3).

abstract or ethereal sense.¹⁹ If there are no red flags among the applicant's prior conduct, then the Committee shall recommend her for admission.²⁰

If, however, the applicant has prior criminal convictions or other prior conduct of concern, then the Committee conducts further detailed investigation of the incidents.²¹ An informal hearing may follow, and if the Committee is still not ready to recommend admission, then the applicant has a formal hearing.²²

In cases involving serious allegations of "neglect of financial responsibilities due to circumstances within the control of the applicant," an informal hearing is required at a minimum before the Committee will make a final recommendation.²³ If, after an informal hearing and a formal hearing, the Committee declines to admit the applicant, that decision is final, absent a petition for review by the Arizona Supreme Court.²⁴

II. CASE STUDIES OF STATE BAR APPLICANTS WHO FAILED CHARACTER AND FITNESS BECAUSE OF LAW SCHOOL DEBTS

Thankfully, Arizona authorities to date have not explicitly construed "neglect of financial responsibilities" to include debts merely for their magnitude. Rather, "neglect" of financial responsibilities has been read to refer to questionable management of debts, or in some cases, the decision to take out the loans to begin with.²⁵ But there is nothing in the language of Rule 36 that would foreclose a broader reading—one that would allow the Committee to examine debt magnitude alone as a possible basis for a finding of neglect of financial responsibilities. And as this Section will show, such a rule would not be without precedent among the states.

Perhaps the only reported case where student loan debt was the sole factor resulting in failure of character and fitness is the 2009 New York case of *In re Anonymous*.²⁶ Robert Bowman, the bar applicant in the case, (who chose not to remain "anonymous"²⁷), had amassed some \$480,000 in student loan debt over the course of more than twenty years, between undergraduate studies, master's studies,

19. Telephone Interview with Emily Holliday, Manager of Attorney Admissions Process, Ariz. Supreme Court Certification and Licensing Div. (Feb. 11, 2014). For instance, the Committee will not inquire whether the applicant has any mental health issues per se. *Id.* Mental health is only relevant to the character and fitness process inasmuch as it leads to problematic *behavior* that could endanger clients or their interests. *Id.*

20. ARIZ. SUP. CT. R. 36(c). The rule alternatively allows the Committee to recommend the applicant for admission pending receipt of a passing bar examination score. *Id.*

21. *Id.* R. 36(b)(3).

22. *Id.* R. 36(e)–(f).

23. *Id.* R. 36(d)(4).

24. *Id.* R. 36(f)(8), (g).

25. See *infra* notes 50–55 and accompanying text (discussing the Committee's interpretation of requirements in Ariz. Sup. Ct. R. 36(b)(3)(G)).

26. 67 A.D.3d 1248 (N.Y. App. Div. 2009) (per curiam); see also Jonathan D. Glater, *Finding Debt a Bigger Hurdle than Bar Exam*, N.Y. TIMES, July 2, 2009, at A1 (telling character and fitness applicant Robert Bowman's side of the story in the case).

27. See Glater, *supra* note 26, at A1.

and law school.²⁸ He made no “substantial” payments on the loans during this time.²⁹ A Character and Fitness subcommittee’s recommendation that Bowman nevertheless be admitted to practice³⁰ apparently went ignored, and the Character and Fitness Committee rejected him. The Appellate Division of New York’s Supreme Court (the state’s intermediate court) affirmed the Committee’s decision,³¹ and later refused either to vacate or reconsider its affirmance, holding that the applicant’s “recalcitrance in dealing with the lenders” and “neglect of financial responsibilities” were “incompatible with a lawyer’s duties and responsibilities as a member of the bar.”³² The circumstances surrounding the applicant’s (admittedly large and delinquent) student debt load were the only considerations the court relied upon in denying admission.³³ Several commentators maintain that such circumstances are an improper or at least insufficient basis for such denial.³⁴

In Ohio, \$170,000 in student loan debt seemed to be the primary reason an applicant failed character and fitness in *In re Application of Griffin*.³⁵ Griffin faced about \$150,000 in law school student loans and \$20,000 in undergraduate student loans by the time he finished law school.³⁶ He also had \$16,500 in credit card debt.³⁷ Rather than seeking full-time employment to help him pay down the debt faster and possibly qualify him for additional student loan deferment, he continued his part-time job at the public defender’s office, where he earned \$12 per hour.³⁸ The court ruled that on these facts, Griffin had “neglected his personal financial obligations” and did not possess the character and fitness to practice law.³⁹ This decision, too, has been roundly criticized—one author calls the court’s decision, which essentially penalizes Griffin for valuing his commitment to public interest law over his duty to pay off his debts at a faster rate, “particularly heinous.”⁴⁰

28. *In re Anonymous*, 67 A.D.3d at 1249.

29. *In re Anonymous*, 61 A.D.3d 1214, 1214 (N.Y. App. Div. 2009), *aff’d*, 67 A.D.3d 1248 (N.Y. App. Div. 2009).

30. See Memorandum from Subcomm. Members Beth Davies Carpinello, James M. Conboy & Cynthia Feathers to Comm. on Character & Fitness 3 (Jan. 23, 2009), available at <http://documents.nytimes.com/report-on-robert-a-bowman-s-application-for-admission-to-the-new-york-state-bar#p=1> (finding after personal interview with Bowman that he “has exceptional character, with exceptional perseverance, tenacity and humility” and recommending him for admission to practice).

31. *In re Anonymous*, 61 A.D.3d at 1214.

32. *In re Anonymous*, 67 A.D.3d at 1249.

33. *See id.*

34. See, e.g., Tyler R. Martinez, Comment, *The Effects of Student Loan Debt on State Bar Admission—Recalibrating the “Good Moral Character” Requirement*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 37, 49 (2011) (“Though the amount of student loan debt is not supposed to be the only dispositive factor in deciding moral character, it seems like the New York court is telling Bowman that he has too much student loan debt to be a lawyer.” (citation omitted)).

35. See *In re Application of Griffin*, 943 N.E.2d 1008, 1009–10 (Ohio 2011).

36. *Id.* at 1009.

37. *Id.*

38. *Id.* at 1009–10.

39. *Id.* at 1010.

40. John Zulkey, *Character & Fitness & Credit History: Failing the Character and Fitness Review over Student Loan Debt*, 21 No. 1 PROF. LAW. 4, 4 (2011).

Although reported cases in which student loans alone prevented bar admission are still rare, numerous reported cases show states' increasing willingness to view high student loan debt as at least one adverse factor against a finding of character and fitness. For example, in *In re G.W.*, the New Hampshire Supreme Court denied admission to an applicant with \$138,471.42 in student loan debt, 90% of which was interest.⁴¹ Though multiple criminal convictions and lack of candor with the Committee also worked against a finding of good moral character, the court concluded that the applicant's student loan problems were "equally of concern."⁴² His debt burden, the court said, evidenced an "inability to handle his own affairs," which did not bode well for his ability to handle the affairs of clients.⁴³ The court held that the applicant had not carried his burden of proving his character and fitness by clear and convincing evidence.⁴⁴

The Maryland Court of Appeals reached a similar result in *In re Stern*, rejecting an applicant with \$58,000 in student loans, plus some ten credit card or other accounts, with balances ranging from a few hundred dollars to tens of thousands of dollars.⁴⁵ He also had \$68,500 in assets, including \$10,000 of artwork, which could have been liquidated to pay off much of the debt,⁴⁶ and he offered no explanation for why he thought he had enough money in his budget to take a trip to Jamaica in 2003.⁴⁷ His lack of fiscal responsibility, together with a lack of candor toward the Committee and an inappropriate relationship with a fifteen-year-old, foreclosed a finding of character and fitness.⁴⁸ A number of other cases tell similar stories, with student loan debt as one adverse factor in the decision not to admit bar applicants.⁴⁹

A search for reported Arizona cases dealing specifically with bar applicants' student loan debt returned no results. However, Arizona attorney Scott Rhodes, who often represents character and fitness applicants before the Committee, reports that student debt is an issue the Committee often asks about in informal or formal hearings.⁵⁰ This is particularly the case for state bar applicants from the for-

41. *In re G.W.*, 13 A.3d 194, 195, 199 (N.H. 2011).

42. *Id.* at 199–200.

43. *Id.* at 200.

44. *Id.* at 201.

45. *In re Stern*, 943 A.2d 1247, 1248–50, 1253 (Md. App. 2008).

46. *Id.* at 1251–52, 1257–58.

47. *Id.* at 1251.

48. *Id.* at 1252–59.

49. *See, e.g.*, Fla. Bd. of Bar Examiners v. G.M.C., 658 So.2d 76 (Fla. 1995); Character & Fitness Comm. Office of Bar Admissions v. Jones, 62 S.W.3d 28 (Ky. 2001); *In re Application of Martin*, 980 N.E.2d 1005 (Ohio 2012); *In re Application of Wilson*, 980 N.E.2d 1018 (Ohio 2012); *In re Application of Grachanin*, 912 N.E.2d 1128 (Ohio 2009); *In re Application of Ford*, 854 N.E.2d 501 (Ohio 2006); *In re Application of Parry*, 647 N.E.2d 774 (Ohio 1995).

50. Telephone Interview with Scott Rhodes, Managing Attorney, Jennings, Strauss & Salmon (Feb. 24, 2014) [hereinafter Rhodes] (explaining that the Committee interprets the financial responsibility requirement to include management of debts and, in some cases, declining to take on debt in the first place).

profit Arizona Summit Law School,⁵¹ the state's lowest-ranked and most expensive law school.⁵² Arizona Summit students graduating in the Class of 2013 racked up a median law school debt of \$184,825,⁵³ and many had difficulty finding employment as lawyers upon graduation.⁵⁴ Mr. Rhodes reports that, remarkably, the Committee's line of inquiry with his Arizona Summit clients does not usually focus on either the magnitude or the management of their debt, but rather, on why they decided to go to Arizona Summit in the first place, despite such sobering figures about Arizona Summit graduates' high debt loads and bleak job prospects.⁵⁵ Apparently the Committee is wrestling with whether the choice to take out massive debt to go to a lower-tier law school might itself evince neglect of financial responsibilities in some cases.

III. PROTECTING BAR APPLICANTS FROM THE 99%: THE REASONS FOR AND MAKINGS OF A RULE CHANGE

A primary purpose of character and fitness requirements is the protection of the public from unscrupulous, dishonest, and incompetent lawyers.⁵⁶ Few would dispute the importance of this goal. Lawyers regularly handle large sums of client money, and this power brings with it some degree of temptation. Lawyers also frequently serve as fiduciaries entrusted to manage clients' assets prudently. And

51. Formerly known as Phoenix School of Law. *See Phoenix School of Law Announces New Name: Arizona Summit Law School*, ARIZ. SUMMIT LAW SCH. (Nov. 4, 2013), <https://www.azsummitlaw.edu/news-events/phoenix-school-law-announces-new-name-arizona-summit-law-school>.

52. Rhodes, *supra* note 50; *compare Tuition and Fees for J.D. Program*, ARIZ. STATE UNIV. SANDRA DAY O'CONNOR COLL. OF LAW, <https://www.law.asu.edu/Default.aspx?TabID=993> (last visited Apr. 5, 2014) (listing 2013–14 Arizona State University law school in-state tuition and fees at \$26,268), and *Program Costs*, UNIV. OF ARIZ. JAMES E. ROGERS COLL. OF LAW, <http://choosearizonalaw.com/becoming-a-student/program-costs> (last visited Apr. 5, 2014) (listing University of Arizona law school in-state tuition and fees at \$24,381), with *Cost of Attendance*, ARIZ. SUMMIT LAW SCH., <https://www.azsummitlaw.edu/admissions/tuition-and-financial-aid/cost-attendance> (last visited Apr. 5, 2014) (listing Arizona Summit law school tuition and fees at \$41,114); *see also Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Apr. 5, 2014) (ranking ASU and UA in the top 40 nationwide and not even ranking Arizona Summit). For a critique of the debt burden incurred by students attending Arizona Summit Law School, see Sarah Ann Schade, Note, *Reining in the Predatory Nature of For-Profit Colleges*, 56 ARIZ. L. REV. 317, 329 (2014).

53. *Gainful Employment and ABA Required Disclosures*, ARIZ. SUMMIT LAW SCH., <https://www.azsummitlaw.edu/gainful-employment-and-aba-required-disclosures> (last visited Apr. 5, 2014).

54. *See Employment Summary for 2013 Graduates*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.azsummitlaw.edu/sites/default/files/aba_employment_summary_report_140226.pdf (last updated Feb. 26, 2014, 4:49 PM) (noting that only 126 out of 279 graduates of Arizona Summit, or 45%, found full-time, long-term, bar-passage-required positions).

55. Rhodes, *supra* note 50.

56. *See, e.g., In re Application of Maria C.*, 451 A.2d 655, 656 (Md. 1982) (Smith, J., dissenting).

crooked lawyers may also be in a position to take advantage of unsophisticated clients when billing hours. There is thus every reason to be concerned about the fitness of a bar applicant with a history of serious financial impropriety.

But it is here that the logic of cases like *In re Anonymous* and *In re Application of Griffin* begins to falter. One thing cases like these fail to recognize is that there is a fundamental difference between someone who takes out personal loans or credit card debt in order to live extravagantly beyond his means, and someone who takes out student loans in order to finance an education. There is ample reason to think twice about whether it is prudent to entrust clients' finances to the former. But the latter? His decision to take out student loans suggests something about his own socioeconomic status. It suggests something about the skyrocketing costs of higher education. But it does not suggest that the borrower is irresponsible.⁵⁷ Indeed, one could well argue that if anything, it tends to show that he *is* responsible—he is taking initiative to better himself and improve his outlook through education, in reliance on data showing that despite all the naysayers, a J.D. still greatly increases average lifetime earning potential.⁵⁸

Along the same lines, the Arizona Committee's willingness to consider high-magnitude law school debt, particularly from lower-tier law schools, as potentially sufficient neglect of financial responsibilities, does not withstand closer scrutiny. For instance, many law graduates from schools of all stripes are willing to take out large student loans based in part on their reliance upon new repayment assistance programs and loan forgiveness programs, most prominently the federal Public Service Loan Forgiveness program (PSLF).⁵⁹ In a nutshell, the PSLF program allows law graduates who work in public service or public interest jobs for ten years and who make steady loan payments during that time to have their remaining student loan debts forgiven at the conclusion of the ten years.⁶⁰ In addition, more and more law schools are implementing their own loan repayment assistance programs along roughly the same lines.⁶¹ Even Robert Bowman's \$480,000 in student loans would

57. See Zulkey, *supra* note 40, at 5 (“[S]tudent loan debtors do not take out their loans just to pocket the money or fritter it away on luxuries, but ironically they would be better off if they did. After all, student loan debts remain non-dischargeable in bankruptcy even after the applicant has been disqualified from practice, while debtors who squander away their creditors’ money on personal expenses remain free to emancipate themselves from their obligations by filing Chapter Seven.”).

58. See, e.g., Simkovic & McIntyre, *supra* note 8, at 38–41 (finding that the lifetime, pretax, mean added value of a J.D. is about \$1 million, relative to lifetime earning potential with just a bachelor’s degree, and concluding that “even at the 25th percentile, the value of a law degree exceeds typical net-tuition costs by hundreds of thousands of dollars”).

59. See generally *Public Service Loan Forgiveness*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (last visited Apr. 5, 2014).

60. See *id.*

61. See, e.g., *Loan Repayment Programs*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/financialaid/Pages/loanrepaymentprograms.aspx> (last visited Apr. 5, 2014). The Michigan program provides that the University will make *all* payments on the student loans of grads in J.D.-required jobs paying below the federal GS-11 level (\$50,287 in 2012), and will make a sliding-scale contribution toward the student loan payments of grads making up to 175% of GS-11. *Id.* Qualifying students in public sector or public interest jobs

seem less daunting and less questionable were it incurred today in reliance on such programs. Loan forgiveness and loan repayment assistance programs are just one reason why a perfectly honest and responsible person might take out very large student loans, even if it is to attend a low-tier school in the face of a bleak legal job market.

And finally, it is difficult to miss the irony of bar applicants being rejected precisely because of their bar application preparation efforts, namely attending law school at great cost. Courts and committees are essentially telling applicants they cannot practice law to earn money because they borrowed a lot of money to prepare to practice law. Of course, as the New Hampshire Supreme Court was quick to sermonize in *In re G.W.*, “the duty to pay one’s debts is not contingent upon finding the employment of one’s choice.”⁶² But in an age where six-figure law school debt is already the rule rather than the exception, and where wages at nonlegal middle-class jobs have long stagnated in real terms, that is an unsatisfying argument. One judge wondered, with good reason, “how a young law graduate with poor parents and a substantial student loan debt is expected to earn the money to pay that debt if denied the opportunity to practice the profession which was the *raison d’etre* for the incurrence of the debt.”⁶³ Students take out large law school loans in hopes of making even larger lawyer salaries with which to pay those loans off. To wait until after they have already incurred the loans to pull the rug out from under the best hope they had of repaying those loans “seems almost perverse.”⁶⁴

In the final analysis, what can be done? Surely there is a more sensible approach to the character and fitness evaluation that takes account of the realities of contemporary education financing while still protecting clients. What safeguards are appropriate in the character and fitness process not only to protect the public from unfit lawyers, but also to protect perfectly decent bar applicants from the 99%, for whom large student loans are a necessary evil?

This Note proposes a rule amendment to address the issue. The Comment to Arizona Supreme Court Rule 36 already recognizes that some information not “germane” to the question of bar licensure may arise during the character and fitness

can have any outstanding loans forgiven after 10 years of work, as can certain students who work 25 years in the private sector. *Id.* See also *The Columbia Law School Loan Repayment Assistance Program*, COLUMBIA LAW SCH., (Dec. 2010), <http://web.law.columbia.edu/sites/default/files/microsites/financial-aid/files/LRAP%20Policy.%20JD%20Classes%20Graduating%20On%20or%20After%20May%202008.%20Rev%20Dec%202010.pdf>. Columbia provides loans directly to grads with which to make their student loan payments, and the loans from Columbia need not be repaid as long as the grad stays in qualifying public sector or public interest employment. *Id.* Participants are also still able to enjoy the federal PSLF program. *Id.*

62. *In re G.W.*, 13 A.3d 194, 199 (N.H. 2011).

63. Character and Fitness Committee Office of Bar Admissions v. Jones, 62 S.W.3d 28 (Ky. 2001) (Cooper, J., dissenting); see also Zulkey, *supra* note 40, at 4.

64. Zulkey, *supra* note 40, at 4–5; see also *id.* at 5 (“Instead of turning potential students away from law school before they sign over their first tuition check, the courts must wait until those students have already taken on their massive debts before destroying their only hope for repayment.”).

review, and instructs that the Committee is to disregard such information.⁶⁵ The Court should move to amend the Comment to Rule 36,⁶⁶ adding the following language to the end of the first paragraph of the Comment:

Matters related to student loan debt are presumptively not germane to the Committee's assessment under subparagraph (3)(G) of this subsection, and such matters shall not be sufficient in themselves to constitute cause for further detailed investigation pursuant to subsection (d) of this section. If serious allegations of conduct unrelated to student loan debt are present pursuant to subparagraph (d)(4)(C) of this section, then matters related to student loan debt may be considered only if the Committee member or appointed special investigator described in paragraph (f)(2) of this section first presents independent evidence on account of which a reasonable Committee member could find that the applicant has neglected his or her financial responsibilities.

The purpose of this amendment—unapologetically—is to prevent Arizona from ever having its own *In re Anonymous* or *In re Application of Griffin*. In light of the foregoing analysis, the proposed rule would implement a presumption that student loan debt is not germane to the initial inquiry as to whether the applicant has neglected his or her financial responsibilities. It would allow the Committee to consider student loan debt only after a showing of independent cause for concern about the applicant's financial responsibilities. In effect, student loan debt could only be used as an aggravating factor against a small segment of bar applicants with serious allegations of other, independent neglect of financial responsibilities.

This rule would protect the average law student, recognizing that student loan debt simply reflects the mushrooming cost of legal education and bears little relevance to the client-protection rationale of the character and fitness process. But it would not go so far as to make a bright-line rule that student loan debt is in no case relevant to a bar applicant's character and fitness. The rule leaves the door open for the Committee to consider student loan debt as one factor in the totality of the circumstances in cases in which there is a well-founded independent concern about the applicant's financial propriety. For instance, in a case with facts like *In re Stern*,⁶⁷ where the applicant's conduct showed a well-established pattern of irresponsible credit card usage, the proposed rule would allow the Committee to look at the applicant's law school debt magnitude and management as “icing on the cake.”

CONCLUSION

Student loan debt is at an all-time high, and will likely only continue to rise in the coming years. While client protection is a commendable goal underpinning the character and fitness portion of the bar, the magnitude of student loan debt is

65. ARIZ. SUP. CT. R. 36 cmt. (2012).

66. The Arizona Supreme Court Rules (and their comments) can be amended based on the proposals of members of the public, or on the Court's own motion, according to the process outlined in Arizona Supreme Court Rule 28.

67. 943 A.2d 1247, 1248–50 (Md. 2008).

presumptively not germane to an applicant's character and fitness and ought not to be considered. The management of student loan debt is also irrelevant to character and fitness in all but the smallest minority of cases, in which other independent reasons for concern about the applicant's financial responsibility are established first. The Arizona Supreme Court should recognize this concern and strongly consider adopting a rule similar to the one proposed here.