

**WHEN THINGS GO WRONG IN THE CLINIC:
HOW TO PREVENT AND RESPOND TO SERIOUS
STUDENT MISCONDUCT**

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INTRODUCTION

Every clinical law professor can proudly relate noteworthy student achievements. Student interns in clinical programs routinely go the extra mile for their clients. They present innovative and persuasive arguments in court. They find ways to relate to clients from different cultural backgrounds. They discover creative solutions to vexing problems. They provide highly competent legal representation.

But it is not always so. Just as all clinical professors⁴ can recount noteworthy student achievements, nearly all have also witnessed disappointing—even unprofessional—student conduct. Clinical students, like attorneys who have passed the bar, are capable of dropping the ball in spite of close monitoring by a clinical professor. The authors have witnessed, and have heard from colleagues about, serious breaches by clinical students. A survey of clinical professors, administered by the authors, yielded many reports of lapses in student conduct.⁵ A partial list of these lapses includes neglecting critical case responsibilities, abandoning a case at a pivotal juncture, encouraging a witness to testify falsely, misrepresenting facts or misrepresenting the student's role to third parties, misusing a student

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 4. The authors use the terms “clinical professor,” “clinical instructor,” and “clinical supervisor” interchangeably throughout this article as all-encompassing terms to reference any faculty members and staff attorneys who supervise law students in an in-house clinic, regardless of their rank or title.
 5. See *infra* Part I (details about the survey).

practice license, and engaging in lawyering tasks, including court appearances, while impaired.⁶

Some of those mistakes can be cured. Some may result from misunderstanding, from inexperience, or from inadvertence. Others may result from a condition such as addiction, depression, post-traumatic stress disorder (PTSD), or other mental illness. Still others may reveal a character flaw that raises a serious question of fitness. Regardless of the cause, such conduct can have serious ramifications. It can place clients in jeopardy of losing their cases. It can lead to liability for the law school.⁷ It can imperil a supervising attorney's license.⁸ And, to the extent it calls into question a student's character or fitness to practice law, it can put at risk a student's opportunity for bar admission.⁹

Clinical professors face competing responsibilities in dealing with student misconduct.¹⁰ A core responsibility is to help their students develop into ethical, competent lawyers who are ready to enter the profession.¹¹ Three landmark reports on legal education, the *MacCrate Report*,¹² *Best Practices on Legal Education*,¹³ and the

6. See *infra* Part I.

7. See Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 505–06 (2002).

8. Clinical professors are required by student practice rules to assume responsibility for the work of the law students they supervise. See, e.g., KAN. SUP. CT. R. 719 (e)(2) (outlining the professional responsibility of an attorney supervising a student's work); see also Peter Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 834–35 (2004); Joy & Kuehn, *supra* note 7, at 515. The MODEL RULES OF PROFESSIONAL CONDUCT also place responsibility on clinical professors in their capacity as supervising attorneys. The degree of that responsibility depends upon whether clinical students are viewed as “subordinate lawyers” under MODEL RULES OF PROF'L CONDUCT R. 5.2 or as “nonlawyer assistants” under RULE 5.3. See Joy & Kuehn, *supra* note 7 at 503, 515–17.

9. See *infra* Part V.

10. No single term adequately captures the universe of unprofessional behavior addressed in this article. The term “misconduct” may imply an intentionality that is not always present in a student's unacceptable behavior. Conversely, the term “error” may imply mere inadvertence, which is similarly inaccurate in some instances. Rather than choose a single term, the authors use both terms throughout the article to address a range of conduct falling below professional standards.

11. See Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 HAMLINE J. PUB. L. & POL'Y 1, 1–2 (2002).

12. A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

Carnegie Report,¹⁴ focus on the need for legal educators to improve the way they prepare students for the practice of law. Clinicians seek to help their students learn from and overcome mistakes on the way to bar admission.

But clinical professors have other duties as well—to their clients,¹⁵ to their law schools,¹⁶ and to the legal profession as officers of the court.¹⁷ Clinical professors therefore struggle with how to respond to student misconduct in a way that is consistent with their many obligations.

Little has been written on this subject. This article attempts to fill that gap by documenting the types of misconduct that students commit, exploring why serious misconduct occurs, examining whether such conduct can be anticipated and reduced by prescreening and monitoring potentially problematic students, and suggesting how misconduct might be addressed once it occurs. In addition to surveying clinical professors, the authors interviewed a number of deans and bar officials.¹⁸ The authors' analysis thus encompasses

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13. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).
 14. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].
 15. Clinical supervisors, as lawyers, are bound by the rules of professional conduct applicable to the states in which they practice. Those rules impose many duties to clients. The ABA MODEL RULES OF PROFESSIONAL CONDUCT have been adopted in some form by most states. The Preamble of the ABA MODEL RULES OF PROFESSIONAL CONDUCT reads: "As a representative of clients, a lawyer performs various functions. . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT, pmbl. (2010). Rule 1.1 provides in part that "[a] lawyer shall provide competent representation to a client." *Id.* at R. 1.1.
 16. Obligations to the law school may include protecting the law school from liability for malpractice and upholding the law school's honor code, among others.
 17. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* pmbl.
 18. The authors interviewed thirteen law school administrators. They have served as dean (five persons), associate dean (seven persons), or a university administrator with responsibility for bar reporting (one person) at fourteen separate law schools in eleven states and jurisdictions: Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Kansas, New Jersey, New Mexico, Washington, and Washington, D.C. Seven of the law schools are public; seven are private. Interview with Dean 1 (Apr. 7, 2010); Interview with Dean 2 (May 27, 2009); Telephone Interview with Dean 3 (Nov. 28, 2011); Telephone Interview with Dean 4 (Nov. 29, 2011); Telephone Interview with Dean 5 (Mar. 31, 2010); Telephone Interview with Dean 6 (Mar. 30, 2010); Interview with Dean 7 (Mar. 30, 2010); Telephone Interview with Dean 8 (Apr. 5, 2010); Interview with Dean 9 (Apr. 8, 2010); Telephone Interview with Dean 10 (Dec. 12,

both legal obligations and pedagogical considerations, and it takes account of the differing perspectives of clinical professors, law school administrators, and bar examiners.

The purpose of this article is not to prescribe how a clinical professor should deal with any particular instance of misconduct, but rather to empower clinical professors to deal thoughtfully with such situations by providing them with helpful information and an analytic framework. As clinical professors, the authors operate from a “student centered” perspective that emphasizes the support and development of law students. The authors hope that, with only rare exceptions, student errors and misconduct can be occasions for learning and improvement rather than barriers to the practice of law. This article is prescriptive, therefore, in the extent to which it emphasizes preventive actions and constructive responses. The authors do not shy away, however, from identifying circumstances under which clinical professors’ obligations to their law schools and the legal system obligate them to take actions that students would consider adverse.

Part I of this article describes the types of misconduct that students commit, reporting data collected from responses to a survey of 147 clinical legal educators. In Part II, the article delves into the causes of misconduct in student practice. These causes include a lack of experience, immaturity, substance addiction, mental health conditions, and major life events. Part III explores options to minimize the risk of student conduct falling below professional standards. Techniques considered in this section include prescreening clinic students to identify those who may need extra guidance to live up to the weighty responsibilities of being a lawyer. This section also examines legal limits and consequences of implementing a program of prescreening clinic students. Part IV describes steps clinical professors can take when supervising at-risk

2011); Interview with Dean 11 & Dean 12 (Dec. 13, 2011); Telephone Interview with Dean 13 (Jan 17, 2012). In the 2011 US News rankings, three of the schools were ranked in the top 25, nine others were ranked in the top 100, and two were ranked in the third tier. See BEST LAW SCHOOLS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 31, 2012).

In addition, the authors interviewed five state bar officials from four different states. Three of the officials were bar examiners. Two were state bar disciplinary officials. All interviews were conducted under an assurance of anonymity. Interview notes are on file with Robert Jones. Telephone Interview with Bar Examiner 1 (Sept. 23, 2008); Telephone Interview with Bar Examiner 2 (Sept. 23, 2008); Telephone Interview with Bar Examiner 3 (Oct. 3, 2008); Telephone Interview with Bar Examiner 4 (June 1, 2008); Telephone Interview with Bar Examiner 5 (Dec. 19, 2011).

students and discusses how clinical professors can respond constructively to student errors. Finally, Part V explores if or when incidents of misconduct should be reported to law school administrators or bar authorities. This section also looks at the effect that reporting to these authorities may have on students who have committed a serious error.

I. THE TYPES OF ERRORS STUDENTS COMMIT

The genesis of this article was a conversation among the authors in which one sought guidance from the others concerning how to deal with a particularly serious incident of student misconduct. In the course of that conversation, the authors learned that each was aware of incidents of serious student misconduct that had occurred in his own clinic over the years. The authors presented a concurrent session at the 2008 Association of American Law Schools (AALS) Conference on Clinical Legal Education at which a number of other clinical professors shared stories of student errors and how they attempted to respond.¹⁹

During the fall semester of 2009, the authors conducted an anonymous online survey of clinical professors (hereinafter the “Serious Errors Survey” or “survey”) to determine what types of student errors they had observed in clinical courses, what strategies they had adopted to prevent or respond to such errors, and under what circumstances they reported such errors to either law school administrators or bar examiners.²⁰ One hundred forty-seven professors from 38 states and the District of Columbia responded to the survey.²¹ More than half of respondents had eleven or more years

19. John J. Francis, Gerard Francis Glynn & Robert L. Jones, Jr., *The Worst-Case Scenario: Malpractice and Serious Ethical Breaches by Students*, AALS Conference on Clinical Legal Education (May 5, 2008).

20. The study was conducted in 2009 through an online service named “Survey Monkey.” A request to participate in the survey was directed to clinical legal educators via the Lawclinic listserv, an internet-based e-mail discussion group for clinical legal educators with approximately 1500 members. Participation in the survey was voluntary. The 147 respondents were self-selected from the larger group of clinicians solicited. See Robert L. Jones, Jr., Gerard F. Glynn & John F. Francis, *Serious Errors in Clinical Practice – Survey Summary and Responses* (Jan. 22, 2010) [hereinafter *Serious Errors Survey*]. The Appendix includes all quantifiable responses, including responses to multiple choice and yes/no questions. It excludes narrative responses. A complete report with all survey responses is on file with Professor Jones at Notre Dame Law School.

21. *Infra* App. at 512.

of clinical teaching experience.²² Sixty-eight respondents (53.1%) reported that they had experienced “student misconduct or dereliction during a clinical course” that was serious enough to report to a law school administrator.²³

The survey methodology was not designed to quantify or to measure the frequency of serious student errors in clinical practice. Nonetheless, the survey responses, together with the discussion at the 2008 conference session,²⁴ interviews with law school administrators,²⁵ interviews with bar examiners,²⁶ and many other informal conversations convinced us that serious student misconduct occurs in clinical practice (just as misconduct occurs among admitted attorneys), and that many clinical professors struggle with how to respond.

Most incidents of student misconduct reported in the survey fell into one of three categories: egregious neglect of case responsibilities, dishonesty, or deliberate misuse of a student practice license.

A. *Neglect of Case Responsibilities*

Twenty-seven out of 147 respondents reported incidents of students who egregiously neglected client matters.²⁷ Some of those incidents involved failing to attend client meetings, to communicate with clients, to prepare adequately for court hearings, or to complete

22. *Infra* App. at 512. Forty-three respondents had 1–5 years of clinical teaching experience; twenty-three had 6–10 years of experience; twenty-four had 11–15 years; and fifty-six had fifteen or more years of clinical teaching experience. *Infra* App. Responses to Question A.3.

23. *Infra* App. Responses to Question E.1.

24. Francis, Glynn & Jones, Jr., *supra* note 19. A separate conference session on this topic was organized by clinical faculty members from the University of Maryland at the 2010 AALS Conference on Clinical Legal Education in Baltimore, Maryland, further emphasizing the importance of this topic to clinical professors. Douglas L. Colbert, Jerome Deise, Renee M. Hutchins, Maureen A. Sweeney, What Do We Expect from Faculty and Law Students when Faced with a Student Who Lacks the Competency or Ethical Commitment to Practice Law?, AALS Conference on Clinical Legal Education (May 5, 2010).

25. In addition to the reports from clinical professors, three of the deans interviewed by the authors recounted instances of serious student misconduct in a clinical course. For details on how the dean interviews were conducted, see *supra* note 18.

26. The authors conducted a series of interviews with bar admission and bar disciplinary officials to gain their perspectives on how to deal with clinical student misconduct. Notes from Bar Admissions Interviews are on file with Professor Robert Jones at Notre Dame Law School [hereinafter Notes from Bar Interviews]. See *supra* note 18 for details on interviews.

27. *Infra* App. Responses to Question E.3.

other assignments.²⁸ Four respondents described students who left town for extended periods and essentially abandoned active cases.²⁹ Four others reported instances where students missed court appearances for which they were responsible.³⁰ One reported that a student failed to meet or communicate with a client during the client's three-week detention.³¹ Some respondents emphasized that students had persisted in such neglect in spite of remedial efforts by the supervising attorney.³²

B. Dishonesty

Two respondents reported instances of student dishonesty with respect to a tribunal, including a student who encouraged a witness to lie³³ and another who prepared an affidavit that deliberately understated a client's income.³⁴ At least ten others reported incidents of dishonesty in connection with a clinical course that would arguably relate more to a law school's honor code than to rules of professional conduct.³⁵ Those incidents included stealing clinic resources, forging a letter from a clinical professor about clinic enrollment in order to obtain public benefits, forging an email from a

28. See *infra* App. Question E.3. The details of specific incidents are related in narrative answers that are not included in the survey report appended to this article.

29. See *infra* App. Question E.3. One respondent reported that "Student abandoned case in weeks before hearing and blocked all attempts by faculty, client, and judge to contact him. Lied about preparing pre-hearing brief. Apparently took case file." See *infra* App. Question D.3. Another respondent described student behavior that included "leaving town for days without notice, missing multiple meetings and appointments, creating instability and uncertainty about whether deadlines would be met, and failing to take corrective action (in fact, being insubordinate) when the issues were addressed verbally and, eventually, in writing." See *infra* App. Question D.3.

30. See *infra* App. Question D.3.

31. The respondent stated that:

Student failed to meet or otherwise communicate with her client who was detained for several weeks. Then student lied to me and said she did meet with him but confessed to not meeting with him after several rounds of questions from me. Student then failed to meet an internal deadline for that client assessing his case based in large part on student's continued failure to meet with client.

See *infra* App. Question D.3.

32. See *infra* App. Question D.3.

33. See *infra* App. Question D.3. One of the deans interviewed by the authors also reported an incident in which a student encouraged a witness to lie. Telephone Interview with Dean 5, *supra* note 18.

34. See *infra* App. Questions D.3, E.3.

35. See *infra* App. Questions D.3, E.3.

clinical professor to the student's parents, and lying to a professor about work performed in a case (numerous reports).³⁶

C. Misuse of Student Practice Licenses

Two respondents reported that students had engaged in unauthorized practice by using their student practice licenses to represent clients outside of the clinic.³⁷ A third reported that a student had created his own letterhead and communicated with his clinic client and an opposing attorney without the supervisor's knowledge or permission.³⁸

II. CAUSES OF ERRORS IN STUDENT PRACTICE

Although some of the misconduct described above may be the result of lack of experience or immaturity, other causes may include mental health problems, substance abuse problems, or serious life events.³⁹ Nine survey respondents volunteered that they attributed

36. See *infra* App. Question E.3.

37. See *infra* App. Question D.3.

38. See *infra* App. Question D.3.

39. See *infra* App. Questions D.3, E.3. Alcohol abuse or substance addiction account for the majority of lawyer discipline cases. See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 266–67 (1997). Disabilities like Attention Deficit Disorder can lead to misconduct such as missing deadlines, failing to communicate with a client, and taking actions in a case without client approval. See Stephen M. Hines, Note, *Attorneys: The Hypocrisy of the Anointed—The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Law to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731, 736–39, 743–49 (1997) (discussing attorney-discipline cases involving lawyers mental health problems and proposing a plan for attorney discipline proceedings). Law students have elevated levels of depression, anxiety, stress, and psychological distress. Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 358–59. (2009). They also suffer from higher levels of alcohol and drug use than their peers. *Id.* It stands to reason that factors that impede attorney conduct can also impede conduct by clinical students. When mentioning immaturity, this includes lack of maturity in the world of professionalism such as a lack of understanding what standard of conduct is expected in a professional environment. *60 Minutes: The Age of the Millennials* (CBS Television Broadcast May 25, 2008), available at <http://www.cbsnews.com/video/watch/?id=4126233n&tag=mncol;lst;1> (opining that young adults brought up in the “Millennial” generation have been brought up such a way that makes them ill-prepared for the expectations of traditional professional work environments). Immaturity also includes conduct that is more consistent with adolescence rather than adulthood. See Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 YALE L.J. POCKET PART 53 (2007), available at <http://thepocketpart.org/2007/09/08/morris.html>.

students' poor conduct to substance abuse or other mental health problems.⁴⁰

It is important for clinical professors to be aware of the possible causes of misconduct when designing systems to minimize risks of errors and when evaluating and responding to misconduct.

A. *Lack of Maturity*

Clinical professors should be mindful of how little law students know about the practice of law when they begin a clinical course.⁴¹ Students in their mid-twenties or younger may know very little about expectations in a professional environment.⁴² Clinical professors should guide students through situations with which they presumably have little experience.⁴³ Supervisors should not expect students to be

40. See *infra* App. Questions D.3, E.3.

41. By the time they enroll in law clinic course, law students may have little or no contextual understanding of how to practice law. See CARNEGIE REPORT, *supra* note 14, at 6 (describing the Landellian case book method of teaching in law schools). Their entire professional development may have been in a classroom. They may have never met a client, deconstructed a client problem, interviewed a witness, drafted a document, or seen the inside of a courtroom. See *id.*

Law schools use Socratic case-dialogue instruction in the first phase of their students' legal education. During the second two years, most schools continue to teach, by the same method, a number of elective courses in legal doctrine. In addition, many also offer a variety of elective courses in seminar format, taught in a way that resemble graduate courses in the arts and sciences.

Id. at 3. "Law school instruction will always be only one segment of the continuum of learning in the life of a lawyer Law school education is only the first step in the process of becoming an effective responsible lawyer." STUCKEY ET AL., *supra* note 13 at 11. Even law students who have part-time work experience in legal settings may not have been truly educated about the practice of law if learning in that environment was not coupled with academic inquiry. *Id.* at 165.

42. See Peter Toll Hoffman, *The Stages of Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301, 303–04 (1986). See also ED. MAGAZINE, *Report Calls for National Effort to Get Millions of Young Americans onto a Realistic Path to Employability*, HARV. GRAD. SCH. OF EDUC. (Feb. 2, 2011), <http://www.gse.harvard.edu/news-impact/2011/02/report-calls-for-national-effort-to-get-millions-of-young-americans-onto-a-realistic-path-to-employa/>.

43. [I]n the initial stages of a clinical course, most students do not possess the knowledge necessary to make appropriate decisions about what course of action to follow in a case, or how to implement a plan of action. If forced to make decisions beyond their capabilities, students often become overwhelmed with anxiety and frustration.

Hoffman, *supra* note 42, at 304. American Bar Association standards provide guidance to the role of clinical supervisors in that the Standards require law schools to

proficient in conducting legal work assigned to them in clinic courses. Indeed, law students come to clinics to obtain the experience they lack and to prepare themselves, under a supervisor's guidance, for the complicated world of law practice.⁴⁴ Clinical supervisors should always be on the lookout for possible miscues that stem from students' lack of familiarity with the customs, procedures, and substance of law practice.⁴⁵ Responsibility for avoiding errors originating from lack of experience should rest largely with the clinic supervisors.⁴⁶ Careful guidance should go a long way toward avoiding mistakes resulting from lack of maturity. Most of the following discussion will therefore focus on errors that have their genesis in areas less within the supervisor's control.

B. Substance Abuse and Addiction

Substance abuse is prevalent in the legal profession.⁴⁷ Among lawyers, the incidence of alcohol-related abuse is significantly higher

provide "live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence." AM. BAR ASS'N, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(b)(1) (2011-2012 ed. 2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.authcheckdam.pdf.

44. See Hoffman, *supra* note 42, at 301.

45. See CARNEGIE REPORT, *supra* note 14, at 3 (observing that in the first year and a half of law school, students study doctrinal topics through Socratic instruction, but do not begin apprenticeship-type learning about the profession until later in the law school curriculum).

46. "The clinical teacher should take special care to protect the client from the immature or emotionally unstable student." George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty To Intervene*, 26 GONZ. L. REV. 415, 434 (1990-91). "[T]here will be times when clinical supervisors simply must step in and intervene to protect the client when a student is unable to acquit a particular task" Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 350 (2010) (discussing supervision of writing projects in clinic); see also William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 479, (1995) (discussing that clinical teachers must help students learn realistic expectations when students do not possess the experience of reality).

47. Studies suggest that as many as 18% of practicing lawyers are problem drinkers. Connie J.A. Beck, Bruce D. Sales, & G. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 5-6 (1995-96).

than that of the general population.⁴⁸ Although current data on substance abuse rates among law students is elusive, an AALS report from the early 1990s reflects numbers prevalent enough to be of concern.⁴⁹ This is significant because substance abuse and dependence have consequences directly detrimental to the effective and ethical practice of law.⁵⁰ A person suffering from dependence on alcohol can experience “paranoia, aggressiveness, extreme lack of confidence, and an inability to accept criticism, or to see how behavior is affecting others.”⁵¹ The attention span and judgment of

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48. The level of alcohol abuse in the United States is often estimated to be 9%. *Id.* at 5. More recent statistics compiled by the National Institutes of Health indicate alcohol abuse levels of the general population to be 4.65%. *Twelve-month prevalence and population estimates of DSM-IV alcohol abuse by age, sex, and race-ethnicity: United States, 2001–2002* (NESARC), NAT’L INST. ALCOHOL ABUSE & ALCOHOLISM (Jan. 2005), available at <http://pubs.niaaa.nih.gov/publications/aeds/aodprevalence/abusdep1.htm>, (last visited May 31, 2012). A study in Washington State concluded that 25% of lawyers who practiced 20 years or longer were problem drinkers. An Arizona study showed similar levels of alcohol abuse among young lawyers. G. Andrew H. Benjamin, Bruce D. Sales & Elaine Darling, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCHOL. REV. 113, 115 (1992).
49. In a 1991 survey of over 13,000 law students, 30.9% reported that they had abused alcohol at some time in their lives. 11.7% reported that they had abused alcohol since entering law school. ASS’N OF AM. LAW SCH., REPORT OF THE AALS SPECIAL COMMITTEE ON PROBLEMS OF SUBSTANCE ABUSE IN THE LAW SCHOOLS 10 (1993), available at <http://www.aals.org/documents/substanceabusereport.pdf>. 21.9% of the respondents indicated they had used an illicit drug during the last year and 8.8% reported they had done so in the previous month. *Id.* at 11. Particularly relevant to clinicians is data from this study demonstrating that alcohol use among third-year law students was significantly higher than that of their first- and second-year colleagues. *Id.* at 12.
50. See Allan, *supra* note 39, at 268–69.
51. *Id.* at 270 (quoting *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987)). A substance abuse information page distributed by the Indiana Judges and Lawyer’s Assistance Program lists symptoms of early stage substance abuse by lawyers to include “client neglect, unreturned phone calls, late for depositions, cancelled appointments, numerous ‘sick’ days, . . . late for hearings, ‘technical’ trust violations, . . . ‘last minute’ filings, [and] failure to diligently prosecute/defend.” *Substance Abuse: Signs and Symptoms in Attorneys*, IND. JUDGES & LAWYERS ASSISTANCE PROGRAM, <http://www.in.gov/judiciary/ijlap/2357.htm> (last visited May 31, 2012). Late stage symptoms include “failure to come to the office and/or appear for hearings, intoxicated in court, unprofessional appearance/hygiene, inappropriate mood (depressed, angry, withdrawn), abandonment of practice, . . . substantive trust violations (misappropriation), statute of limitations violations, [and] dishonesty to tribunal.” *Id.*

an alcoholic can become impaired.⁵² Those abusing alcohol may have poor attendance or display poor performance in school or on the job. They may neglect responsibilities and experience legal difficulties caused by intoxicated behavior.⁵³

Not surprisingly, there is a correlation between claims of lawyer misconduct and substance abuse and dependency.⁵⁴ Conservative estimates maintain that fifty to seventy percent of lawyer discipline cases involve alcoholism.⁵⁵ Chemical dependence can cause a law practitioner to ignore clients, neglect filing deadlines, mishandle trust money, and perform poorly during trials.⁵⁶ These consequences of chemical dependence line up with student errors observed by clinicians responding to the survey conducted for this article.⁵⁷ This is not to say that all, or even most, student misconduct in clinical settings is the result of substance abuse or dependence. Clearly, there are other causes. However, when considering the rate of substance problems in the general population and compared to the estimated rate among law students, as well as observations by clinical professors responding to the survey who have had clinic students battling substance problems,⁵⁸ this is an issue to which clinicians must be attentive. Specific substance related problems referenced in answers to the Serious Errors Survey provide anecdotal evidence of this concern. For example, one clinician reported that alcohol abuse led a student to miss a scheduled mediation.⁵⁹ Another survey response referenced a student who missed a major court appearance due to alcohol abuse.⁶⁰

52. Andrew H. Benjamin, Elaine J. Darling & Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 234–35 (1990).

53. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 214 (4th ed. 2000) [hereinafter DSM IV-R]. A diagnosis of abuse requires fewer symptoms than a diagnosis of dependence and may therefore be less severe. When the symptoms of abuse are accompanied by tolerance to alcohol, withdrawal symptoms, or compulsive behavior stemming from alcohol use, dependence, rather than abuse, may be implicated. *Id.*

54. See Allan, *supra* note 39, at 268–69.

55. Benjamin, *supra* note 48, at 118.

56. Anne McDonald, *Women, Addiction, and Recovery*, 78 J. KAN. B. ASS'N, Mar. 2009, at 14, 14 n.2.

57. See *infra* App. Question E.3 (noting that survey participants reported incidents of case neglect, dishonest conduct, and missing court appearances).

58. See *infra* App. Questions C.2., D.3, D.6 (narrative responses referencing students recovering from or battling alcohol or substance problems).

59. See *infra* App. Question E.3.

60. See *infra* App. Question C.2.

Clinical professors keep close tabs on work done by students—most likely closer than supervisors review the work of admitted attorneys.⁶¹ But closer supervision does not act as a total bulwark against the negative effects of alcoholism. Supervisors face the challenge of recognizing the root problem before it manifests into conduct harmful to a clinic client. This task is made more difficult by a significant characteristic of substance dependence: denial. Victims of alcoholism often deny a connection between their problems and alcohol.⁶² This trait is amplified among lawyers.⁶³

If students do not, on their own initiative, reveal current problems with substance abuse, a clinical supervisor may have difficulty determining when such a situation exists.⁶⁴ Yet challenges in discovering whether a student has an issue with chemical abuse or dependence does not absolve clinic supervisors from the consequences caused by that condition.⁶⁵ The clinician's role as mentor to clinic students and the clinician's professional responsibility to clinic clients require vigilance.⁶⁶

C. Other Mental Health Problems

Mental health problems that are not directly related to substance abuse pose an even greater potential challenge to the legal profession.⁶⁷ Among lawyers, 20% of men and 15% of women test

61. This can be explained by the framework that makes clinic supervisors professionally responsible for work their students do on behalf of clients. Some supervisors describe this to clinic students as having them practice on the supervisor's license. Many student practice rules contain language making the supervising attorney professionally responsible for the work of the student. For example, the Kansas student practice rule states the supervising attorneys shall "[a]ssume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work . . . [and] [a]ssist the student to the extent necessary to assure proper performance of the duties entrusted to the legal intern." KAN. SUP. CT. R. 719(e)(2)(3). The Arkansas student practice rule contains very similar language. ARK. BAR ADMIS. R. XV(H)(2)(3) (West 2011).

62. Allan, *supra* note 39, at 268.

63. *Id.*

64. *See id.* (explaining that a salient characteristic of alcoholism is that even when fully aware of their addiction and its effects, alcoholics deny it, making outside detection and intervention difficult).

65. *See supra* note 8 (detailing student practice and professional responsibility rules that hold clinical supervisors responsible for work performed by students).

66. *See supra* notes 11, 15–17, and accompanying text (explaining clinical supervisors' responsibilities).

67. However, substance abuse and other mental health problems can present themselves together. *See DSM IV-R, supra* note 53, at 208–12.

above the cutoff for obsessive-compulsiveness.⁶⁸ Similarly, 21% of the male attorneys and 16% of female attorneys tested above the cutoff for depression.⁶⁹ By comparison, 2.27% of the general population is estimated to be above the cutoff level of psychological distress symptoms.⁷⁰ Studies of law students demonstrate levels of anxiety, depression, and hostility at eight to fifteen times that of the general population.⁷¹ One analysis of previous studies concluded that law students reported levels of anxiety “comparable to psychiatric populations.”⁷²

As students progress in law school, their rate of depression increases.⁷³ An Arizona study concluded that by the spring semester of the third year of law school, depression rates among law students rise to 40%.⁷⁴ Fortunately, the same study shows that two years after graduation, depression rates fall back to 17%.⁷⁵ While the reduction in depression rates after graduation may be good news for the profession, the spike in depression during law school’s third year should be of particular concern to clinical supervisors. Since many, if not most, law schools permit only upper-level students to participate in clinical programs, enhanced rates of depression among upper-level students pose an increased risk of negative effect on clinical law practice.⁷⁶

68. Beck et al., *supra* note 47, at 49.

69. *Id.* Testing above the cutoff for a psychiatric symptom is not the same thing as a diagnosis for a psychiatric condition. *Id.* at 49 n.200; see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874 (1999) (reciting data from a study demonstrating that lawyers have “major depressive disorder” at 3.6 times the rate of non-lawyers who shared their socio-demographic traits).

70. Beck et al., *supra* note 47, at 49.

71. Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002); see also Schiltz, *supra* note 69 at 875 (citing a study that concluded that, by the end of their first year, 32% of law students experience depression).

72. Matthew Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 LAW & HUM. BEHAV. 55, 63 (1999).

73. Schiltz, *supra* note 69, at 875.

74. *Id.*

75. *Id.* This rate is still approximately double that of the general population. *Id.*

76. See, e.g., FLA. STAT. ANN., BAR R. 11–1.3 (West 2011) (students must have completed at least four semesters of study); KS SUP. CT. RULES 719(b)(2) (students must have completed at least sixty credit hours of study); PA. BD. OF LAW EXAM’RS R. 321 (students must have completed at least three semesters of study); see also Schiltz, *supra* note 69, at 875.

Victims of depression may experience a loss of concentration, may have difficulty completing tasks, and may withdraw from responsibilities.⁷⁷ As such, students experiencing these symptoms are at risk for falling short of professional obligations to their clients. Considering the symptoms that accompany depression and statistics indicating the prevalence of this condition among law students, it is not surprising that clinical professors responding to the survey reported incidents of case neglect.⁷⁸ Failing to communicate with clients, lack of preparation for hearings, missing client meetings, and even court appearances⁷⁹ are all behaviors that are characteristic of a person suffering from depression.⁸⁰

Mental health problems caused by traumatic events have long been a concern to clinical educators.⁸¹ Students who work with victims of traumatic events, such as domestic violence or human rights atrocities, can experience vicarious trauma.⁸² Students who

77. See DSM IV-R, *supra* note 53, at 349–52 (discussing the features of a major depressive episode).

78. See *infra* App. Questions D.3, E.3. While a logical connection may exist between mental health conditions and incidents of misconduct reported in response to the Serious Errors Survey, the survey did not ask about or attempt to determine causation of any particular instance of misconduct.

79. *Supra* Part I.

80. See DSM IV-R, *supra* note 53, at 349–52 (noting that inhibited occupational functioning is a characteristic of a major depressive episode).

81. Professionals and first responders who work with victims of traumatic events can themselves experience vicarious or secondary trauma. Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245 (2003) (discussing a study done in collaboration with the Pace Women's Justice Center of the incidence of secondary trauma among legal and mental health professionals). Attorneys specializing in domestic violence, family law, and criminal cases experienced higher rates of secondary trauma than comparison groups. *Id.* at 250. Symptoms related to secondary trauma can include "fatigue, poor sleep and headaches, emotional changes including anxiety, irritability, depression and hopelessness, and behavioral manifestations including aggression, cynicism, and substance abuse, leading to poor job performance, deterioration in interpersonal relationships, and significant attrition among professionals working with traumatized populations." *Id.* at 248–49. See also Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 288–89 (1999) (summarizing literature addressing the phenomenon of emotional transference and counter-transference among legal professionals—including clinic students—who work with traumatized clients).

82. Levin & Greisberg, *supra* note 81, at 245–47. See also Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship*, 19 Touro L. REV. 847, 859–62 (2004).

Do clinical instructors and law professors have a duty of care to their students who are exposed to vicarious trauma to minimize

themselves have lived through violent experiences may be susceptible to being re-traumatized when engaged in lawyering activities dealing with traumatic events.⁸³

Issues related to students exposed to trauma may take on increasing concern. As military service people return from deployment in Iraq and Afghanistan, many choose to pursue or complete higher education.⁸⁴ A significant number of combat veterans have returned with post-traumatic stress disorder (PTSD) or injuries that affect brain functions.⁸⁵ The RAND Corporation estimates that 20% of the veterans of these operations have PTSD or depression and 19% have suffered a traumatic brain injury.⁸⁶ In

that trauma by effectively training the students about vicarious trauma and self-care? Do these same instructors and professors have a duty of care to the clients, with whom their students work, to minimize re-traumatization of the clients by adequately training their law students?

Lynette M. Parker, *Increasing Law Students' Effectiveness when Representing Traumatized Clients: A Case Study of the Katherine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 180 (2007).

83. "[P]rior to working with a traumatized client, students should explore their own personal, unresolved traumatic experiences, which might make them more vulnerable to re-traumatization. Training [of students] should thus explore the reality of re-traumatization and vicarious trauma in the legal setting." *Id.* at 182-83.
84. The American Council on Education estimates that nearly two million military personnel returning from Iraq and Afghanistan will pursue higher education in the coming years. Joseph W. Madaus, Wayne K. Miller II & Mary Lee Vance, *Veterans with Disabilities in Postsecondary Education*, 22 THE JOURNAL OF POSTSECONDARY EDUCATION AND DISABILITY 1, 10, (2009); *Serving Those who Serve: Higher Education and America's Veterans*, ACE Issue Brief (Am. Council on Educ.) Nov. 2008, at 1, available at http://www.acenet.edu/Content/NavigationMenu/ProgramsServices/MilitaryPrograms/serving/Veterans_Issue_Brief_1108.pdf.
85. The Congressional Research Service reports that 66,935 United States military service members who had been deployed were diagnosed with post-traumatic stress disorder during the years 2002 to 2010. HANNAH FISCHER, CONG. RESEARCH SERV., RS 22452, MILITARY CASUALTY STATISTICS: OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2 (2010), available at <http://www.fas.org/sgp/crs/natsec/RS22452.pdf>. Between the years 2000 and 2010, 178,876 service members received traumatic brain injuries. Of this number 30,893 were classified as moderate, 1891 were classified as severe, 3175 were penetrating, and 5589 were not classified. *Id.* at 3.
86. Madaus et al., *supra* note 84, at 10; RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS: MENTAL HEALTH AND COGNITIVE CARE NEEDS OF AMERICA'S RETURNING VETERANS 2 (2008), available at http://www.rand.org/content/dam/rand/pubs/research_briefs/2008/RAND_RB9336.pdf. Seven percent of returning veterans have traumatic brain injury combined with symptoms of depression. Thomas E. Church, *Returning Veterans on Campus with War Related*

addition to depression, those suffering from PTSD may experience problems with concentration, anxiety, irritability, and social withdrawal.⁸⁷ People with traumatic brain injury can experience cognitive impairments affecting “judgment, attention, concentration, processing new information, distraction, language abilities, sequencing, [and] short-term memory.”⁸⁸ People with PTSD or brain injuries may require coping mechanisms or accommodations to help them meet their professional responsibilities.⁸⁹ Failure to employ such techniques may result in omissions that could adversely affect clinic clients.

An incident communicated to the authors involved a clinic student who was a combat veteran suffering from a traumatic brain injury.⁹⁰ The student applied some adaptive measures to law clinic work and was diligent in most case responsibilities. However, two days before a scheduled court hearing, the student dropped out of contact with the client and the clinic supervisor. The student did not respond to multiple attempts at contact by the supervisor and friends. The student ultimately did not show up for the hearing. It turned out that the student had suffered an anxiety attack coupled with an episode of substance abuse. Because the student had responsibly worked on the case up to that point and the supervisor appeared in place of the student in court, the client’s goals were achieved. However, the potential for harm to the client was significant. Soon after the episode, the student sought and received treatment for the combination of symptoms.

Although the student’s conduct fell below professional standards, guidance from the clinic supervisor, associate deans, and campus counselors enabled the student to navigate through a very difficult episode without harming the client. This was possible because the clinic professor was not blind-sided by the incident. Information about the student’s combat injury, volunteered by the student at the beginning of the semester, had prompted closer supervision of the student’s work. Although the professor did not anticipate the specific nature of the student’s crisis, close monitoring of casework permitted

Injuries and the Long Road Back Home, J. POSTSECONDARY EDUC. AND DISABILITY, no. 1, 2009, at 43, 45.

87. Church, *supra* note 86, at 48 tbl. 4.

88. *Id.* at 46 tbl. 2.

89. *Cf. id.* at 49 tbl. 5 (stating potential occupational difficulties).

90. To preserve anonymity of the student, identifying details of this incident are omitted from this discussion.

the professor to execute and complete the litigation strategy developed by the student.

When conveying this cautionary tale, it is important to point out that even though there is a higher than normal rate of mental health issues among law students, this does not mean misconduct is likely to follow.⁹¹ The statistical rate of mental health problems cited above, coupled with the relatively few incidents of misconduct that clinicians experience with their students, indicates this is merely a possibility, not a probability.⁹² Yet awareness of problems and a plan of action can minimize the likelihood of misconduct actually occurring.

D. *Serious Life Events*

There is growing movement in legal education to recognize, respect, and work with the human nature of law students.⁹³ Doing so necessarily acknowledges that, as with other adults, serious events in a student's life can exact a toll on his or her ability to meet obligations. Such events include death of a family member, serious illness, marital problems, childcare issues, caring for an ailing parent, and a host of other matters.

Several years ago, a colleague related an example of such an instance, describing a student who missed an initial deadline for filing a jury demand in a criminal case. This student, who began the semester very motivated, was surprisingly dismissive regarding the seriousness of the oversight and withdrew from the professor's attempts to uncover specifics of the incident and discern the cause for the uncharacteristic omission and reaction. After continual probing on the matter, the student eventually revealed that in the aftermath of the terror attacks of September 11, 2001, a family member who

91. See Krieger, *supra* note 71, at 114.

92. One associate dean of students interviewed for this article indicated that he encountered many students suffering from depression or other mental health problems. This dean observed however, that "the mere fact a person is ill does not mean that person can't carry out lawyering activities in a professional way." Interview with Dean 2, *supra* note 18.

93. This is known as the "Humanizing Legal Education" movement. See generally Symposium, *Humanizing Legal Education*, 47 WASHBURN L.J. 235 (2008); Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L. J. 235 (2008); Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L. J. 247 (2008); Barbara Glesner Fines, 47 WASHBURN L. J. 313 (2008); *Humanizing Law School*, FLA. ST. U. SCH. OF L., http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html (last visited May 31, 2012).

worked in the World Trade Center in New York City was missing. The magnitude of this tragedy certainly places the student's conduct in perspective. However, there was still a professional omission adversely affecting a client. The student's lack of action endangered the client's fundamental rights and raised the possibility of malpractice liability for the clinic.

Doing what clinicians often do, the colleague turned the incident into a teachable moment and, through vigilant monitoring of the student and careful steps to protect the client's rights, was able to remedy the problem without harm to the client. Yet it's easy to imagine circumstances in which the outcome might not have been as good.⁹⁴

A supervisor's ability to provide an effective safety net for students experiencing some form of distress may depend on awareness of the nature of the distress.⁹⁵ Becoming aware may not be so easy, however. Serious life events, by their nature, may be very personal. A student may consider such incidents private and keep the matter to him or herself, impeding the supervisor's ability to act as a safety net. In some instances, without student disclosure the problem may go undetected until it is too late. Implementing prophylactic measures to uncover hidden problems runs the risk of alienating clinic students who may feel intruded upon by the probing of personal matters. Moreover, such probing may conflict with the school's educational mission as well as the students' interests.⁹⁶ Nevertheless, survey responses demonstrate that some clinical programs already implement measures to identify students who may require closer supervision than is standard.⁹⁷ The practices of these clinics constitute forms of prescreening of prospective clinic students.⁹⁸ Various prescreening methods can help identify students with circumstances or conditions that may unusually challenge their ability to practice law.

94. This incident occurred in the fall semester of 2001. To preserve anonymity of the student, names and identifying details are omitted from this account.

95. See discussion *infra* Part III.B.

96. See discussion *infra* Part III.C.

97. See *infra* App. Questions B.1–2.

98. See Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 210 (1996) (explaining different ways that clinics choose participants, including: using a lottery system, reviewing short papers about why applicants want to participate in the clinic, conducting personal interviews, or requiring a minimum grade-point average).

III. PREVENTING ERRORS—CONSTRUCTIVE PRESCREENING AND MONITORING

It is obviously preferable to anticipate and avoid serious errors than to attempt to fix them—and to rehabilitate a student's academic or professional career—after the fact. A number of clinical programs have developed methods to identify and monitor students who may be deemed at higher risk of substandard performance.⁹⁹ This section examines the rationale for instituting prescreening methods to identify such students and more closely monitor them once they are enrolled in clinic. This discussion analyzes the legal context in which such efforts occur and legal limitations on implementing prescreening procedures.

A. *Rationale for Prescreening Clinic Students*

There are a variety of reasons why a law school might prescreen students prior to participation in a clinic.¹⁰⁰ The majority of states require a dean to certify good moral character of any student seeking to practice under the student practice rule.¹⁰¹ Other states require even more substantial background clearance, mandating a screening as a state-imposed condition of obtaining a student practice license. For example, in Florida, the student practice rules require students to apply to the Florida Board of Bar Examiners and receive a background clearance.¹⁰² Even if they have received this clearance, student applicants must report any prior misconduct to the Florida Supreme Court as part of the student practice approval process.¹⁰³

Apart from student practice rule requirements, some law schools engage in prescreening to allocate limited spots in clinical courses.¹⁰⁴

99. See *infra* Part III.C–D; App. Questions C.1–2.

100. See ALA. CODE, LEGAL INTERNSHIP PAR. IV(C) (2011); (certifying a student's good moral character and legal competence); Schrag, *supra* note 98, at 210 (explaining how some clinics might interview their students to determine whether they are mature, committed, or creative enough to succeed in the clinic and if they have good enough grades to participate).

101. See LEGAL INTERNSHIP PAR. IV(C); ARIZ. SUP. CT. R. 38 (d)(5)(A)(iv); ARK. BAR ADMIS. R. XV(E)(2) (West 2011); FLA. STAT. ANN., BAR R. 11–1.3(d) (West 2011); KAN. SUP. CT. R. 719 (b)(4); LA. SUP. CT. R. 20 § 6(d); ME. R. CIV. P. 90(b)(3). In some states, deans have to verify that they have no knowledge of bad character. See COLO. REV. STAT. ANN. § 12-5-116.2(c) (West 2011); MO. SUP. CT. R. 13.02(d).

102. FLA. STAT. ANN., BAR R. 11-1.3 (a).

103. See Application for Certification Under the Student Practice Rule of the Florida Bar, Question 2 (form on file with Professor Glynn at Barry University).

104. See WILLARD L. BOYD ET AL., CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 16 (1980) (explaining

Contemplating these limitations decades ago, the AALS and the American Bar Association (ABA) set out guidelines for admission and selection of students into clinical programs.¹⁰⁵ The guidelines recognized that “[t]here are instances in which an individual’s academic record, physical or mental health, or outside commitments may raise serious questions about capacity to fulfill his or her professional responsibility to clients.”¹⁰⁶ Thus, one of the criteria to consider was “capacity of the student to satisfy professional responsibility to the clients.”¹⁰⁷

Schools have adopted a variety of prescreening methods, including an application to the clinic outside the usual course registration process.¹⁰⁸ Some schools have a detailed application that seeks background information about the students, their academic performances,¹⁰⁹ and their future career goals, along with an explanation of why the students wish to take the clinic.¹¹⁰ Other schools have adopted an interview process.¹¹¹ Less rigorous methods may involve review of prospective clinic students’ records on file

that there may be a limited number of openings for students to participate in clinics); Schrag, *supra* note 98, at 210 (elaborating that some clinics interview applicants, have them write a short paper, or require a certain grade-point average in order to allocate clinic spots).

105. BOYD ET AL., *supra* note 104 at 16–17 (1980). The guidelines contemplated that enrollment in clinic courses would be limited due to the need to supervise students and meet responsibility to clients. The committee opined that more students would want to participate in clinics than there would be room for. This dynamic would create a need for a selection process. *Id.* at p. 16. The suggested guidelines were:

Requirement of student practice rules; 2. completion of prerequisites by the student; 3. student seniority; 4. career goals of the student; 5. capacity of the student to satisfy professional responsibility to the clients; and 6. whether a student has already taken a comparable course in the clinical legal studies curriculum.

Id. at 16–17. The criteria also included “consideration of student practice laws and rules.” *Id.*

106. *Id.* at 56. In making this recommendation, the committee relied on former Code of Professional Responsibility which had specific clauses regarding a lawyer’s mental or physical limitations to carry out the work. See MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110 (B)(3) (1980).
107. BOYD ET AL., *supra* note 104, at 17.
108. See Schrag, *supra* note 98, at 210.
109. But see *infra* Part III.C.1 (discussing privacy rights of students under Family Education Rights and Privacy Act).
110. Schrag, *supra* note 98, at 210.
111. See *id.*

with the dean's office or an informal inquiry about students to the dean's office.¹¹²

There is a dispute amongst clinicians whether it is appropriate to prescreen students for clinics.¹¹³ Some argue that clinical courses should be treated like any other courses at the law school and selection should be the same.¹¹⁴ Some are also concerned that prescreening leads to a political litmus test,¹¹⁵ while others do not believe that prescreening can predict whether a student will be successful in the clinic or commit errors in the clinic.¹¹⁶

Prescreening that may be used to exclude a student altogether from clinical practice, as suggested by the AALS/ABA guidelines discussed above, raises particularly serious questions. If a supervisor excludes a student from clinic practice based upon something in the student's background, what would be the justification for doing so? Is the decision made because the clinician does not believe the student is fit to practice law? If so, are there implications for that student's admission to the bar?¹¹⁷ Moreover, as discussed in more detail below, excluding a student may raise legal issues under the Americans with Disabilities Act (ADA)¹¹⁸ and Section 504 of the Rehabilitation Act of 1973.¹¹⁹ While prescreening to further the educational mission of the clinic may be permissible under the ADA,

112. See Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 297 (1996) (discussing how prescreening placed a strong emphasis on students in good and appropriate academic standing).

113. See David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 267 (2003); Schrag, *supra* note 98, at 210; Hans P. Sinha, *Prosecutorial Externship Programs: Past, Present and Future*, 74 MISS. L.J. 1297, 1323–24 (2005).

114. See Chavkin, *supra* note 113, at 267.

115. See Sinha, *supra* note 113, at 1323–24.

116. Cf. John Pray & Bryan Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School's Remington Center*, 75 MISS. L.J. 795, 807–08 n.23 (2006) (noting a weak correlation between grade point average and quality of work conducted by clinic students, and also observing that some students with poor grade point averages nevertheless excelled in the clinic).

117. If a law school believes a student is not fit for admission to the bar, that judgment raises questions about whether the student should be allowed to continue to matriculate. See Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 729–30 & n.53 (2004) (explaining that law school's seek information about applicants' backgrounds to help determine if the applicants will be fit to gain admission to the bar).

118. 42 U.S.C. § 12182(a) (2006).

119. 29 U.S.C. § 794 (2006).

barring the student from clinic practice may be a thornier proposition.¹²⁰

Although one could prescreen prospective students for the purpose of excluding some from clinic participation, prescreening can be used for a wholly different purpose—to identify the needs of incoming clinic students and to help the clinical professor shape a supervisory approach that will give each student the maximum chance of succeeding in the clinic. Such an approach, which the authors refer to as “constructive prescreening,” can be a valuable teaching tool and a means to facilitate improvement of legal services to clients. The authors urge that prescreening methods be used primarily as a means to achieve those constructive goals. Prescreening students for purposes of excluding some from clinic poses both ethical and legal issues.

B. *Constructive Prescreening: What It Is*

Prescreening for the purpose of augmenting the quality of education provided to each clinic student is a term the authors refer to as “constructive” prescreening. Constructive prescreening is not done with an eye towards excluding students from clinic participation.¹²¹ Rather, it is designed to identify students who may benefit from or require modified or enhanced supervision methods.¹²² For example, questioning students about obligations outside of clinic that carry significant time demands may reveal serious life events, such as caring for an ill loved one or preparing for a wedding. With this knowledge, supervisors can work with students on time

120. See discussion *infra* Part III.C.2 (Americans with Disabilities Act).

121. Although determination of grade point average (GPA) could be part of the constructive prescreening process, this would not be the key component of the constructive prescreening proposed here. We suggest prescreening to help develop a positive educational experience that can address potential difficulty a student may have that could lead to errors or misconduct. Some students with lower grades may do better in clinic because it is a different educational environment than the classroom instruction typical in much of law school. Clinical pedagogy may better meet the learning style of some students. See Pray & Lichstein, *supra* note 116, at, 807–08 n.23 (noting that some students with poor GPAs excelled in the clinic). But see Schrag, *supra* note 98, at 210 (“Some clinics require students to have grade-point averages above a minimum level, to protect the students from receiving poor grades in other courses under the increased work load that the clinic will impose . . .”).

122. See generally Alexis Anderson & Norah Wylie, *Beyond the ADA: How Clinics Can Assist Law Students with “Non-Visible” Disabilities to Bridge the Accommodations Gap Between Classroom and Practice*, 15 CLINICAL L. REV. 1 (2008) (explaining how identifying students with disabilities leads to better clinic accommodations).

management issues or devise ways to balance family obligations and work responsibilities.

Identifying students who receive test-taking accommodations for a learning disability creates an opening to help such students determine whether they would benefit from adaptive measures in their clinic practice.¹²³ Such techniques learned by the student will lead to rewards throughout his or her legal career. Prescreening facilitates this goal. Indeed, a primary purpose of clinic participation is to prepare students for the practice of law after graduation.¹²⁴ Identifying students who will need to develop coping mechanisms in their post-graduation law practice to compensate for learning disabilities is as valuable a learning process to that student as is learning to conduct an effective cross examination.¹²⁵ Ongoing meetings between the clinic supervisor and the student can evaluate the effectiveness of adaptive measures being used and modify them as necessary.¹²⁶ The student will benefit from the development of lifelong work habits and the clinic will benefit by having a more effective advocate working on behalf of the client.¹²⁷

Similarly, a prescreening process that reveals prior criminal conduct indicative of a substance problem may provide an opportunity for the clinic instructor to have a discussion with the student that would not otherwise occur. The exchange can permit the student to reflect on whether he or she perceives a substance problem and whether evaluation for treatment or support should be sought. Knowledge of a student's criminal history and an ensuing

123. Any screening procedure that is likely to uncover disabilities or any other protected status or condition must be done within the limits of the Family Educational Right to Privacy Act, 20 USCA § 1232g (2006). See *infra* Part III.C.1. As a general matter, students cannot—and should not—be compelled to disclose whether they receive test taking accommodations. However, voluntary disclosure of that information can facilitate accommodations that improve their clinic experience and augment the student's learning.

124. Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (REDUX): A History of Clinical Education at Northwestern*, 100 NW. U. L. REV. 231, 232 (2006) (reporting that in 1920, Dean Wigmore of Northwestern University School of Law supported student participation in the law clinic to prepare students for the practice of law upon graduation).

125. See Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 138 (1999).

126. See Anderson, *supra* note 122, at 31 (explaining how increased supervisory contact helped a student cope with her disability).

127. See Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 562 (2004).

conversation with the student will give the supervisor insight that will help to more effectively guide the student through clinic practice and ensure that the student's clients are well served. The supervisor can determine whether closer monitoring of the student's work is appropriate and can be on the lookout for signs of relapse. The supervisor can also address a criminal history that raises issues of honesty and integrity. This can create opportunities to discuss the duty and trust placed on lawyers and highlight the need to live up to the highest standards of the profession.

To the extent that graduates from law schools will be in a position to apply for admission to the bar, as long as law schools accept tuition money from students, they should do all that is reasonably possible to prepare students to achieve success and improve the caliber of the profession. Helping students overcome disabilities and learn to manage substance problems are both measures that guide students toward professional success. This is a way that schools can set students on a path of lifelong success. It is also a means of preparing students to clear hurdles at the entry point of the profession.

When applying to the bar, students will be required to supply information about criminal history and substance abuse.¹²⁸ While such issues do not completely bar applicants from admission,¹²⁹ if bar examiners perceive that the problems are not being addressed, they may conclude that applicants with such histories are not fit for the practice of law.¹³⁰ Encouraging students to take steps during law

128. Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 546–47 (2008).

129. Fifty-two states and territories report to the National Conference of Bar Examiners (NCBE) that a felony conviction is not an absolute bar to admission. Only Mississippi, Missouri, Texas, and the Northern Mariana Islands indicate conviction for a felony is a total obstacle to admission. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 4–5 (Erica Moeser & Claire Huisman eds., 2011), available at http://www.ncbex.org/assets/media_files/Comp-Guide/Comp Guide.pdf. “[M]ost applicants are unaware that there is a low risk of denial of admission where treatment [for mental health or substance abuse problems] (rather than misconduct) is at issue.” Rothstein, *supra* note 128, at 543.

130. Twenty states provide conditional admission for people with substance abuse problems. Nineteen provide for conditional admission for applicants with mental health histories. NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 128, at 4–5; see also *Why Is Evidence of Rehabilitation So Important?*, PA. BD. OF L. EXAMINERS, http://www.pabarexam.org/c_and_f/cffaq/7.htm (stating that the standard for

school to demonstrate they are addressing matters that, if left ignored, might hinder admission to the bar, is consistent with other measures law schools take to maximize the success of students.¹³¹ Doing so not only helps students and clinic clients, it also helps raise the standards of the profession in the long run.¹³² Additionally, if a student's criminal record, substance abuse, or mental health condition causes the clinical supervisor to have concerns, that history will also likely raise red flags for bar admission authorities.¹³³ Remedial steps taken while still in school may actually help the student through the bar admission process.¹³⁴ Seeking treatment is often viewed by bar authorities as a positive step.¹³⁵ Furthermore, if the student demonstrates during the clinical internship that he or she can be a competent attorney, the student may thereby demonstrate to bar authorities that he or she is fit for practice.¹³⁶ A supervisor who oversees the student's work on a daily basis will be in a good position to attest to bar authorities whether the student has abided by the rules of professional responsibility while in clinic and can continue to do so in the future.¹³⁷

admission is current good character and fitness and whether problems are unlikely to recur).

131. Schools provide bar preparation courses and career services support, among other forms of assistance to students. See *Bar Preparation*, BARRY U., <http://www.barry.edu/law/future/academicprogram/barpreparation.htm> (last visited May 31, 2012); *Bar Exam Preparation*, WASHBURN UNIVERSITY SCHOOL OF LAW, <http://washburnlaw.edu/career/barexam/requirements.php> (last visited May 31, 2012).
132. See *Evolution of the Board*, PA. BOARD OF L. EXAMINERS, http://www.pabarexam.org/board_information/history/evo.htm (last visited May 31, 2012).
133. See *What Is Conduct Showing a Potential Deficiency in the Necessary Qualities of Honesty, Trustworthiness, Diligences or Reliability?*, PA. BOARD OF L. EXAMINERS, http://www.pabarexam.org/c_and_f/cffaqs/3.htm (last visited May 31, 2012).
134. See *Why Is Evidence of Rehabilitation So Important?*, *supra* note 130; *Will It Delay My Admission if I Seek Alcohol or Drug Treatment During Law School?*, PA. BOARD OF L. EXAMINERS, http://www.pabarexam.org/c_and_f/cffaqs/7.htm (last visited May 31, 2012).
135. *Will It Delay My Admission if I Seek Alcohol or Drug Treatment During Law School?*, *supra* note 134; see Telephone Interview with Dean 4, *supra* note 18; Telephone Interview with Dean 8, *supra* note 18; Aaron M. Clemens, *Facing the Klieg Lights: Understanding the Good Moral Character Examination for Bar Applicants*, 40 AKRON L. REV. 255, 294–95 (2007) (stating “[t]hose who seek treatment early and voluntarily fare better than those who seek treatment only in reaction to bar proceedings”).
136. See *infra* App. Questions D.1, D.5.
137. Twenty-three (17.6%) respondents to the Serious Errors Survey report providing testimony to bar authorities regarding a student's performance in clinic. Seven respondents characterize the testimony as supportive of the student. *Infra* App. Questions D.4–5.

While we do not suggest there are never circumstances under which admission to clinic should be denied,¹³⁸ enrolling challenging students in a legal clinic creates an opportunity to enhance—and perhaps even salvage—individual careers of students who may otherwise face significance challenges in launching and sustaining successful careers.

C. Legal Considerations of Prescreening

Legal implications surround any decision to prescreen prospective clinic students. Analysis in this section considers these implications through the following means: exploring how laws protecting student privacy are involved in the discussion of prescreening; providing an overview of disability rights laws that protect student participation in academic programs; discussing limitations on information that can permissibly be sought when screening students for clinic participation; and examining appropriate implementation of enhanced mentoring and accommodations for at-risk clinic students.

1. Privacy Issues in Prescreening

The Family Educational Right to Privacy Act, also known as FERPA,¹³⁹ shields the privacy of educational records.¹⁴⁰ Academic files for law students fall under FERPA's definition of educational records.¹⁴¹ If a student's law school record is protected as private, clinic faculty or staff wishing to view prospective clinic students'

138. For example, there may be circumstances in which a student cannot obtain a student practice license or circumstances in which a student is currently abusing illegal drugs in a way that renders him or her unfit to practice. Alternatives to permanently barring a student from clinic participation may include delaying admission to clinic. If a student is currently under criminal prosecution for a pending charge or is on probation, there may be reason to temporarily deny admission to the clinic and reassess the matter when the case or sentence is completed. *See infra* App. Questions B.3–4. However, if the law clinic denies admission to the student, unless done on a temporary basis, is that tantamount to deciding that the student should not be admitted into the bar? If so, is it ethical to continue to accept tuition money from the student?

139. 20 U.S.C. § 1232g (2010).

140. *See id.*

141. FERPA defines educational records as follows:

(4)(A) For the purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. §1232g(a)(4)(A).

files must consider whether they can review those files without violating FERPA.¹⁴² A file that is otherwise deemed confidential can be viewed if the adult student gives consent.¹⁴³ Therefore, one option would be to ask students applying to participate in a clinical program to sign a release granting a clinic screener access to the academic file. However, making participation in clinic contingent upon signing a release might be considered coercive and might also set a distasteful tone for the clinic.¹⁴⁴

Other provisions of FERPA might make such a release unnecessary. For example, files may be viewed by “school officials, including teachers,” if there is a “legitimate educational interest.”¹⁴⁵ If screening student files for issues that might be relevant to a student’s participation in a clinical program were deemed to be a legitimate educational interest, then the viewing would be permissible. To the extent that a student’s ability to function in a clinical environment affects her educational experience, that of other students in the program, and the quality of the legal services provided (and by extension the program’s academic viability), the standard for disclosure under FERPA is arguably met.¹⁴⁶ If student academic files are reviewed for the purpose of discerning issues that affect the student’s academic and professional performance in the clinic, that may be considered to serve a “legitimate educational interest.”¹⁴⁷

142. See 20 U.S.C. § 1232g.

143. 20 U.S.C. § 1232g(d).

144. See generally 34 C.F.R. § 99.12(c)(1)(i) (2011) (restricting the authority of an educational institution to require a FERPA waiver as a condition for admission or receipt of a benefit or service); *A Student Family Guide to FERPA*, EMBRY-RIDDLE AERONAUTICAL U., <http://daytonabeach.erau.edu/about/directory/dean-of-students/FERPA-Guide.pdf> (last visited May 31, 2012) (stressing that students are not mandated to waive FERPA rights and may do so only without pressure or coercion); *FERPA Regulations*, U. TULSA, <http://www.utulsa.edu/student-life/Office-of-Student-Affairs/FERPA-Regulations.aspx> (last visited May 31, 2012) (stressing that the school does not mandate or coerce students into waiving FERPA privacy rights); *University FERPA Records Access Policy*, GA. ST. U., <http://www.gsu.edu/registrar/FERPA.html> (last visited May 31, 2012) (stressing that a student may only waive FERPA rights without pressure or coercion).

145. 20 U.S.C. § 1232g(b)(1)(A).

146. See Jennifer C. Wasson, Recent Development, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?*, 81 N.C. L. REV. 1348, 1368 (2003) (noting that schools are given the discretion to determine what constitutes a “legitimate educational interest”).

147. This is not a clear-cut analysis, however. Among officials at schools consulted for this article there are differing views on the question of whether screening educational records of prospective clinic students constitutes a legitimate educational interest. One Associate Dean interviewed takes the position that such prescreening does not

Finally, FERPA excludes certain information from its definition of protected material. Items not protected by FERPA include campus law enforcement records, as well as records of psychiatrists or psychologists treating a student.¹⁴⁸ The confidential nature of the latter would be subject to other provisions of the law. While the limitations of FERPA should be evaluated in the context of the purpose contemplated, reviewing law students' academic files for the purpose of prescreening may be permissible.¹⁴⁹

A legitimate educational interest may involve review of a student's academic records to assure compliance with prerequisites. For example, a student should take immigration law or criminal procedure before being placed in an immigration clinic or a criminal clinic, respectively. How a student performed in a foundation class

meet the legitimate educational interest test. That dean opines that allowing a clinical professor to view student files would open the door for *any* professor to do so, which would undermine FERPA's intent. Telephone Interview with Dean 13, *supra* note 18. Meanwhile, university counsel at school 5 (of the schools providing information for this article) takes a more permissive view of FERPA's restrictions of circumstance under which a faculty or staff member may view academic information regarding a prospective students' academic information.

148. Clinicians and deans concerned with safety of clients and others in the clinical program may have an interest in viewing these types of records. One of the deans interviewed for this article referenced campus safety as a concern. Telephone Interview with Dean 4, *supra* note 18.

(B) The term "education records" does not include--

....

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

.... OR

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B).

149. See 20 U.S.C. § 1232g(b)(1)(B) (permitting school officials to review FERPA protected education records of students for prescreening for acceptance into an institution); 20 U.S.C. § 1232g(b)(1)(D) (permitting release of FERPA protected educational records for prescreening for financial aid).

for clinic may be of interest to a clinician as well.¹⁵⁰ A minimum academic review of records may also be required by student practice rules of applicable jurisdictions. Some states require students to have completed a certain number of law school credits before being approved under the student practice rules.¹⁵¹ Other student practice rules require specific classes be completed prior to certification.¹⁵² While a cursory review or certification from the school's registrar may be sufficient, a more thorough review of records may meet the goals of constructive prescreening without running afoul of privacy laws.¹⁵³ Nevertheless, prior to implementing any particular prescreening procedure, it would be most prudent for clinicians to consult with their university counsel to consider the range of legal issues implicated by the process contemplated.

2. Disability Rights Laws Protecting Participation in Educational Programs

Constructive prescreening is best used for the purpose of limiting errors and providing a high quality learning experience, rather than rejecting challenging students from clinic participation. Indeed, disability rights laws place limitations on decisions to exclude students from academic programs based upon an actual or perceived disability.¹⁵⁴ Decisions to bar a student from participation in clinic based upon mental health or substance dependence histories are governed by the Americans with Disabilities Act of 1990 (ADA),¹⁵⁵

150. For instance if a prospective student for a litigation clinic received a very low grade in an evidence course, this may be relevant information to the clinical professor. Rather than make this the basis for excluding the student from this particular clinic, use of this information in a constructive prescreening model is for the professor to spend extra time with the student when preparing evidentiary issues for hearings or trials.

151. *See, e.g.*, KAN. SUP. CT. R. 719(b)(2) (requiring sixty credit hours of legal studies); NEV. SUP. CT. R. 49.5(1)(b)(3)(i)–(ii) (requiring between thirty and forty-five credit hours of legal studies); N.D. R. LTD. PRAC. III(B) (requiring four semesters of legal studies); R.I. SUP. CT. ART. II, R. 9(c)(3) (requiring three semesters of legal studies); UTAH JUDICIAL ADMIN. R. 14-807 (c)(1) (as amended in 2011 UT C.O. 0019) (2011) (requiring four semesters of legal studies); WYO. BAR ASS'N R. 12(a)(1)(ii) (requiring four semesters of legal studies).

152. For example, Arkansas requires completion of a course in professional responsibility or its equivalent prior to participating as a student practitioner. ARK. BAR ADMIS. R. XV(C)(2).

153. *See supra* notes 146–148 and accompanying text (noting that certain student records fall outside the scope of privacy laws and are useful tools for constructive prescreening of clinic applicants).

154. 34 C.F.R. § 104.43 (2011) (CODE OF FEDERAL REGULATIONS section dealing with treatment of handicapped persons by parties receiving federal funds).

155. 42 U.S.C. § 12182(a) (2006).

the ADA Amendments Act of 2008 (ADAAA),¹⁵⁶ and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act).¹⁵⁷

Under the ADA, “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities” of an institution falling under the act.¹⁵⁸ The Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”¹⁵⁹ A student making a claim under the ADA and the Rehabilitation Act “must establish that: (1) she has a disability as defined by the acts; (2) she is otherwise qualified for the . . . program at issue; and (3) she was excluded from the . . . program on the basis of her disability.”¹⁶⁰

While one may focus on the “otherwise qualified” language, colleges and universities are required to make “reasonable

156. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Congress enacted the ADAAA to restore its intended definition of disability. “[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled” *Id.* § 2(a)(3), 122 Stat. at 3553. Specifically, in *Sutton v. United Airlines*, 527 U.S. 471 (1999), the Supreme Court eliminated protection under the act for many people whom Congress intended to protect. § 2(a)(4), 122 Stat. at 3553. Moreover, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) the Court “interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.” § 2(a)(7), 122 Stat. at 3553. Congress noted that due to the Supreme Court ruling narrowing the broad protection intended by the ADA, several people with substantially limiting impairments are being found by lower courts to be people without disabilities. *Id.* § 2(a)(4)–(6), 122 Stat. at 3553.

157. 29 U.S.C. § 794 (2006). Applicable provisions of the ADA and the Rehabilitation Act “impose largely the same requirements.” *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69, 78 n.2 (2d Cir. 1998). See also *Betts v. Rector & Visitors of the Univ. of Va.*, 145 F. App’x 7, 10 (4th Cir. 2005); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999). However, there are differences in how these acts apply to academic institutions. The Rehabilitation Act applies to colleges and universities that receive federal funds. Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349, 351 (2008). While the ADA does not share that requirement, Title II of the ADA does apply to public colleges and universities. *Id.* at 351–52. Title III of the ADA applies prohibitions to “undergraduate or postgraduate private schools.” *Id.* at 352.

158. 42 U.S.C. § 12132.

159. 29 U.S.C. § 794(a).

160. *Davis v. Univ. of N.C.*, 263 F.3d 95, 99 (4th Cir. 2001).

accommodations to the known physical or mental limitations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of . . . such covered entity.”¹⁶¹ Thus, under the acts, law clinics must consider accommodations that will permit persons with disabilities to participate in the programs. This may be particularly wise since most claims under the acts allege failure to accommodate.¹⁶²

To qualify as disabled under the ADA, one must have “a physical or mental impairment that substantially limits one or more major life activities”¹⁶³ Major life activities listed in the ADA include “learning, reading, concentrating, thinking, [and] communicating.”¹⁶⁴ While learning disabilities may qualify as a disability under the ADA, not all functions involved in learning are considered integral to the life activity of learning.¹⁶⁵ For example, some specific tasks involved with higher education, such as test taking, have been held not to be a major life activity.¹⁶⁶ Cases prior to the 2008 amendment to the ADA ruled that a person is substantially limited within the meaning of the Act if he or she is “unable to perform a major life activity that the average person in the general population can perform.”¹⁶⁷ Under that standard, a student in a program of higher education will not be compared to other students in that program when determining whether her disability rises to the level of limitation required by the ADA.¹⁶⁸ Rather, she will be compared to the general population in determining whether the disability

161. 42 U.S.C. § 12112(b)(5)(A).

162. Lee & Abbey, *supra* note 157, at 353. Indeed, the failure to accommodate is the only adverse action that is required to be demonstrated. *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1077 n.5 (8th Cir. 2006).

163. 42 U.S.C. § 12102(1)(A) (Supp. II 2009).

164. *Id.* § 12102(2)(A).

165. *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1104 (D.C. Cir. 2007) (explaining that limitations in some elements of learning are not seen as being substantial limitations in a major life activity).

166. *Id.* However, note that *Singh* ruled on a pre-amendment version of the Act. In passing the ADAAA, Congress specifically intended to reject the standard enunciated in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” 534 U.S. 184, 185 (2002), overruled by ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553.

167. *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 626–27 (6th Cir. 2000).

168. *Singh*, 508 F.3d at 1100.

substantially limits major life activities.¹⁶⁹ Whether this standard holds true under the ADAAA, which is intended to construe the definition of disability in favor of broad coverage,¹⁷⁰ has yet to be determined by appellate courts.¹⁷¹

Even if a student possesses a qualifying disability, the duty of a college or university to accommodate is not without limit. If accommodating a student with a disability results in “a fundamental alteration of services or imposes[s] an undue burden,” then the accommodation is not required.¹⁷² If an institution makes a “rationally justifiable conclusion that [an accommodation] would result either in lowering academic standards or requiring substantial program alteration,” then the accommodation is not required.¹⁷³ Similarly, if a student’s disability presents a “direct threat” to the “health and safety of others,” an accommodation is not required.¹⁷⁴ However, the ADA and Rehabilitation Act forbid “discrimination based on stereotypes about a disability.”¹⁷⁵

169. Lee & Abbey, *supra* note 157, at 358–59 (analyzing *Bartlett v. New York State Bd. of Law Exm’rs*, 226 F.3d 69 (2d Cir. 1998)).

170. PL 110–325, 42 U.S.C. § 4(A), 122 Stat. 3553 (amending 42 U.S.C. § 12102(3) (2006)).

171. The United States Supreme Court has not yet issued a ruling involving definitions under the ADAAA. The United States Court of Appeals for the Second Circuit issued one of the few post-ADAAA federal appellate level rulings on a disability issue in *Brief v. Albert Einstein College of Medicine*, 423 F. Appx. 88 (2d Cir. 2011). This case was designated as being not for publication. In its ruling, the Second Circuit’s analysis, consistent with amendments to the ADA, focused the determination of whether the claimant was a “qualified individual” within the meaning of Section 504 of the Rehabilitation Act. 423 F. Appx. at 90–91; *see* PL 110–325 § 2(a)(3), 122 Stat. 3553. The Court of Appeals for the Seventh Circuit in *Winsley v. Cook County*, held that under the ADAAA, driving was not by itself a major life activity, but if it impaired a major life activity such as working, the inability to drive could be a disability under the Act. 563 F.3d 598, 604 (7th Cir. 2009). *But see* *Stephan v. West Irondequoit Central Sch. Dist.*, 769 F. Supp. 2d 104, 107–08, (W.D.N.Y. 2011) (evaluating a school lunch worker’s learning disability in the context of the general population to determine whether she had a disability within the definition of the ADA).

172. Lee & Abbey, *supra* note 157 at 361–62, (quoting *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006)). For example, eliminating a course requirement is not required. *Id.* 28 C.F.R. § 35.150 (2011). *See also* *Powell v. Nat’l Bd. Of Med. Exam’rs*, 364 F.3d 79, 88 (2d Cir. 2004); *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988).

173. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (en banc).

174. Lee & Abbey, *supra* note 157 at 352.

175. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988). The ADA protects not only people with an actual disability, but also those who are subject to prohibited action because of a perceived disability. 42 U.S.C. § 12102(3)(A) (2006).

3. Limitations on the Scope of Prescreening Under Disability Laws

Guidance for what is permissible to ask in a prescreening setting may be gleaned from cases that have ruled upon what character and fitness authorities may ask on bar applications.¹⁷⁶ A federal court in Virginia, while concluding that inquiry into mental health history was permissible, prohibited the question “[h]ave you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?”¹⁷⁷ The court acknowledged that some inquiry about mental health of applicants is important to protect the public,¹⁷⁸ but concluded that this question about past mental health conditions and treatment was too broad for the purpose of screening for current fitness to practice law.¹⁷⁹ Current fitness is the touchstone for permissible inquiries.¹⁸⁰ After passage of the ADA,¹⁸¹ the National Conference of Bar Examiners (NCBE) and the ABA recommended that “in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, [bar examiners] should consider the privacy concerns of bar admission applicants [and] tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law”¹⁸²

Screening a student prior to enrollment in a clinical program might uncover matters that are of concern to a clinical supervisor. If such a reason were the basis for barring a student from clinic participation, the legality of the exclusion would be governed by a long history of court deference to academic assessments.¹⁸³ Courts have

176. Bar authorities and clinicians are both in positions to place young lawyers and soon-to-be lawyers at the entry point of a profession that requires trust and diligence. See Jennifer McPherson Hughes, *Suffering in Silence: Questions Regarding an Applicant's Mental Health on Bar Applications and Their Effect on Law Students Needing Treatment*, 28 J. LEGAL PROF. 187, 191–92 (2004).

177. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 433, 436, 446 (1995).

178. *Id.* at 436.

179. *Id.* at 446.

180. *See id.* at 440–41.

181. 42 U.S.C. § 12101 (Supp. II 2009).

182. *Clark*, 880 F. Supp. at 440–41. Although within the parameters outlined above the ADA precludes universities from excluding participation in an activity based upon a disability, someone with a disability can be excluded from bar membership if the disability currently makes the person unfit for the practice of law. *See id.* at 443. This leads to a quandary for those states that require bar clearance before a student can participate in a student practice program. If students can't be cleared by the bar for a disability, can the law school exclude them from the clinic because the bar has excluded them?

183. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 & n.12 (1985); *see also* *Brief v. Albert Einstein Coll. of Med.*, 423 F. Appx. 88, 91–92 (2d Cir. 2011) (citations omitted).

demonstrated a reluctance to substitute their judgment for that of educators, so long as the academic decisions were reasonable.¹⁸⁴

Subject to some limitations, people with mental health conditions are generally protected under the ADA.¹⁸⁵ However, if the psychological condition constitutes a “significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation,” then ADA protections do not apply.¹⁸⁶ Eligibility for protection contemplates that the person, with or without reasonable accommodation, can perform the essential functions of the position.¹⁸⁷ As such, if prescreening in a clinical setting revealed that a prospective clinic student has a mental health condition,¹⁸⁸ the clinic is required to make accommodations consistent with the above criteria so long as the accommodations do not involve substantial program alteration.¹⁸⁹

4. Accommodations and Enhanced Mentoring for At-Risk Students

Accommodations for a student with mental health issues may involve referral to a mental health counseling center, development of adaptive techniques, and increased levels of supervisory monitoring.¹⁹⁰ For example, a student suffering from short-term memory problems due to traumatic brain injury may benefit from a regimen of enhanced note taking, use of a recording device, creation

184. Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students? 41 AM. U. L. REV. 267, 269 n.10 (1992) (listing numerous cases in which courts deferred to academic decisions when denying relief to claimants).

185. 42 U.S.C. § 12102; 42 U.S.C. § 12182(a) (2006).

186. 42 U.S.C. § 12182(b)(3).

187. 42 U.S.C. § 12111(8), 12112(a).

188. Note that in a pre-employment setting, employers are not permitted to make inquiries “as to whether such applicant is a person with a disability” 42 U.S.C. § 12112(d)(2). The inquiry may explore the ability of the applicant to complete job related duties. *Id.* Thus, if clinicians choose to implement questionnaires seeking information in these areas, the questions must be framed carefully. Inquiries that probe for information about conditions, rather than conduct, may run afoul of the ADA.

189. A factor to consider in determining whether an accommodation constitutes an undue hardship is the impact the accommodation has on the operation of the program. 42 U.S.C. § 12111(10) (2009).

190. See *supra* Part IV for further discussion of enhanced supervisory methods.

of task lists, and frequent reporting to a supervisor on progress of intermediate tasks.¹⁹¹

With respect to substance addiction, while the condition may be covered under the ADA, a person who currently uses illegal drugs, or who currently abuses substances is not protected.¹⁹² Conduct or misconduct that is the product of a disability is not immune from sanctions.¹⁹³ However, if prescreening reveals an alcohol or substance history for a student who is not currently using illegal drugs or abusing substances, subject to the above conditions, a clinical program should accommodate that student.¹⁹⁴ Appropriate accommodations under these circumstances may include participation in a lawyer assistance program or other substance support program to maintain the student's ongoing recovery.¹⁹⁵ Some form of accountability to the supervisor for compliance with these steps may be appropriate.

Preparing students for practice is a professionally and academically desirable goal. Accommodating students with disabilities so they can productively and responsibly participate in clinical programs helps achieve that goal. Some students with disabilities may have difficulty developing, on their own, methods to cope in professional environments with their disabilities.¹⁹⁶ The opportunity to adapt to a disability in a law clinic may provide that student with a road map of how to succeed in the legal profession.¹⁹⁷

191. See Anderson & Wylie, *supra* note 122, at 4 (noting that note-taking and other accommodations are commonly provided by law schools to students with documented disabilities).

192. Rothstein, *supra* note 128, at 561.

193. *Id.* at 555. In discussing sanctions for law students who engage in misconduct related to a disability, Rothstein notes "[l]aw schools that have clinical programs where students have direct client contact may need to focus particular attention on the issue of discipline and sanctions where student misconduct occurs." *Id.* at 555–56.

194. See 42 U.S.C. § 12114 (2006).

195. See Rothstein, *supra* note 128, at 546. Due to anxiety about questions about character and fitness for bar admission, students may have concerns about participating in treatment programs. *Id.* at 547–48 (discussing concerns that law student may have about reporting to bar authorities participation in substance programs). Also note that one associate dean interviewed for this article interprets the ADA to permit requiring a student to be evaluated for substance problems but does not permit requiring that student to attend treatment. See Telephone Interview with Dean 13, *supra* note 18.

196. See Anderson & Wylie, *supra* note 122, at 10 ("[I]t is critical that law students grappling with mental health and learning disabilities be able to use law school to help prepare them for the reality of practice.").

197. Development of coping mechanisms may be key to the success of a student later in her legal career. A study of the medical profession concluded that behavior of medical students related to irresponsibility, diminished capacity for self-improvement

D. Constructive Prescreening in Practice

1. What Clinics Look for when Prescreening

Most clinicians responding to the survey for this article report they do not engage in any prescreening methods prior to students entering their clinical programs.¹⁹⁸ While statistical projections cannot reliably be made from this data due to the sample size and the voluntary participation involved in responding to the survey, the significant majority of responders who do not prescreen may be an indication that most clinics do not engage in any kind of prescreening procedure. Indeed, 87.5% of those responding to the survey indicated they do not engage in prescreening of their clinic students.¹⁹⁹ Of the other 12.5% who report prescreening their clinic students, most report looking for information about criminal history and disciplinary history.²⁰⁰ These are logical subjects about which to inquire. The nature of a criminal conviction may raise issues affecting representation of clients.²⁰¹ A conviction involving a crime of moral turpitude may bear on issues of trust involved in client representation.²⁰² Crimes of violence may call into question safety

and poor initiative were predictive of unprofessional conduct later in the career. Rothstein, *supra* note 128, at 565–66, (citing Maxine A. Papadakis et al., *Disciplinary Action by Medical Boards and Prior Behavior in Medical School*, 353 NEW ENG. J. MED. 2673 (2005)). Helping law students overcome potential causes of misconduct while they are still students may help avoid misconduct later in their careers.

198. *Infra* App. Question B.1.

199. The first question of the survey asked: “Does the admissions process in your clinical program include questioning students or reviewing their records to identify mental health issues, substance abuse issues, or criminal/disciplinary histories that might raise concerns about the student’s ability to carry out his or her clinical responsibilities?” Seventeen people answered “yes.” One hundred nineteen people answered “no.” Eleven people skipped the question. *Infra* App. Question B.1.

200. *Infra* App. Questions B.1–2. Of those who indicated they prescreen, 93.8% reported they screen for information about possible criminal histories of prospective clinic students. 81.3% report they screen for disciplinary histories. *Infra* App. Question B.2. The survey question asked: “If your answer to Question 1 is yes, what issues do you look for?” *Infra* App. Question B.2. One hundred thirty respondents skipped this question. Presumably, the people who skipped the question were the one hundred nineteen who answered “no” to the previous question and the eleven people who skipped the previous question. *Id.*

201. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 350–51 (1998).

202. See *id.* at 350.

for clinic clients and others who work in the clinic.²⁰³ Convictions indicating an underlying substance problem may cause a supervisor to be vigilant for signs of current substance abuse that might affect an array of representational issues.²⁰⁴ From a logistical perspective, students with a criminal history may have difficulty visiting clients in correctional institutions.²⁰⁵

To a lesser extent, survey respondents report prescreening specifically for mental health issues and alcohol or substance abuse problems.²⁰⁶ While clinicians should be mindful of the legal limits of inquiring about conditions protected under the ADA and Rehabilitation Act, students with a history of substance abuse may nevertheless give rise to concerns involving representation of clients. These concerns may cause a supervisor to be vigilant against relapse and to employ methods to help the student remain sober.²⁰⁷

Whether or not they prescreen students, very few clinicians report having denied students admission to their clinics. Of 114 people who

203. Incidents of campus violence, such as the shootings at Virginia Tech in 2007, have raised concerns among university administrators about how to maintain safe environments on campus. See generally Oren R. Griffin, *Constructing a Legal and Managerial Paradigm Applicable to the Modern-Day Safety and Security Challenge at Colleges and Universities*, 54 ST. LOUIS U. L.J. 241 (2009) (discussing methods and strategies to increase campus safety); Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2009) (discussing the potential liability for disability discrimination campuses face for responding to misconduct of students with mental health problems); Susan P. Stuart, *Participatory Lawyering & the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech*, 35 J.C. & U.L. 323 (2009) (discussing the Virginia Tech shooting and procedures to reduce the harm and costs of campus violence). One of the deans interviewed for this article specifically mentioned concern for the safety of clinic personnel and clients when considering whether a student with a documented violent history should participate in clinic. Those interviewed for this article were assured that information from interview/survey responses would be presented in a way that does not identify institutions. See Telephone Interview with Dean 4, *supra* note 18.

204. See *supra* notes 58–66 and accompanying text.

205. For example, a county jail informed one of the authors that a particular student, due to a criminal conviction, would not be granted entry to the jail for a counsel visit in the event that student had a client incarcerated at the facility. While this may be an issue that can be negotiated with the jail, this is certainly a matter that affects the administration of the clinic.

206. See *infra* App. Question B.2. Of clinicians who reported they prescreen clinic students, 56.3% look for mental health issues. 56.3% also reported looking for alcohol/substance abuse issues. *Infra* App. Question B.2.

207. See *infra* App. Question C.2.

answered the applicable question, only 11 (9.6%) denied students admission to their clinics.²⁰⁸

2. Methods of Prescreening

Screening students prior to clinic participation can take many forms. Some survey respondents reported seeking information about prospective clinic students from law school deans or administrators.²⁰⁹ Others report reviewing students' law school records or transcripts.²¹⁰ Still others directly ask prospective students to reveal issues of concern.²¹¹ Yet others simply rely on a law school certification of good standing under an applicable student practice rule.²¹²

Considering these reported methods, reviewing academic records maintained by a law school will yield information pertaining to conduct code or academic code violations.²¹³ These student records should also contain a copy of the student's law school application, which will typically have information provided by the student about prior criminal charges and convictions.²¹⁴ If the school requires

208. The question asked: "To the best of your knowledge, has your clinical program ever denied admission to a student on the basis of such screening?" Eleven people (9.6%) answered "yes." One-hundred-and-three people (90.4%) answered "no." Thirty-three people skipped the question. The eleven "yes" responses came from clinicians in ten different states. *Infra* App. Question B.3.

209. *Infra* App. Question B.2.

210. *Infra* App. Question B.2.

211. *Infra* App. Question B.2.

212. *Infra* App. Question B.2.

213. See discussion *supra* Part III.C.1 (discussing legal implications for reviewing student academic records).

214. Under-reporting of criminal records on law school applications is something that should be considered when relying on review of law school applications to determine whether a student has been previously charged with a crime. See McGuire, *supra* note 117, at 710–19. At the school of one of the authors, there have been incidents in which students have come forward after admission to law school to reveal they have not fully disclosed their criminal history on the law school application. When this occurs, the information is sent to the law school admissions committee. If the committee determines that the information would have been material to the admissions decision, even if it would not have precluded admission, then an honor code proceeding is commenced. During interviews with deans for this article, several deans mentioned that it is not uncommon for students to come forward after admission to the law school to disclose criminal conduct that was not reported on the law school application. This disclosure often occurs after a student attends a presentation by bar authorities or after there is a class in a Professional Responsibility course addressing the topic. See Telephone Interview with Dean 4, *supra* note 18; Telephone Interview with Dean 10, *supra* note 18.

students to inform the administration about criminal incidents that occur while in law school, viewing the academic records will provide information about recent criminal conduct as well. Meanwhile, inquiries about a prospective clinic student made to a dean's office may yield similar information depending on the specificity of the inquiry and the scope of information the dean's office discloses. Directly asking clinic applicants to reveal issues of concern to clinic practice has the benefit of yielding recent information. However, there is a risk that students may withhold information out of concern that it could prevent clinic admission.²¹⁵ Since such disclosures are likely to be sought by character and fitness authorities later when applying for admission to the bar, and bar authorities have resources to verify information provided, withholding information at this stage could endanger a future bar application.²¹⁶ Students should be informed that failure to disclose important information, on bar applications or while in law school, is likely to be a much greater impediment to admission than an act that is the subject of disclosure. The last method reported on the Serious Errors Survey, a certificate of good standing, will usually signify that the student is in good academic standing.²¹⁷ Additional information in such a certificate will vary from school to school.

Beyond methods listed in survey responses, other options for prescreening include requiring prospective students to complete a questionnaire developed by the clinic, conducting interviews with students applying to clinic, and having students undergo a legally required student licensing procedure conducted by state bar authorities.²¹⁸ Considering a prescreening questionnaire, one can be tailored by the clinician to address issues of concern to the practice of a particular clinic.²¹⁹ The questionnaire can be administered as part of the clinic enrollment process and be geared towards seeking information that will constructively assist a clinic supervisor to provide the best learning environment for students and the highest

215. *But see* Telephone Interview with Dean 4, *supra* note 18 (noting that a student was denied admission to a clinic for failing to disclose a prior offense).

216. *See* Bar Official 5, Conference Presentation (Jan. 6, 2011).

217. *See infra* App. Question B.2.

218. *See supra* Part III.A.

219. However, such questionnaires should refrain from seeking information about conditions that are protected against discriminatory conduct under the law. *See supra* Part III.C.1. (discussing legal limitations of information sought and its permissible use).

quality professional service to clients.²²⁰ Such information may provide insight on whether a student wishes to implement adaptive techniques such as increased note taking or use of recording devices to improve clinic performance. Information gained may also reveal whether there is a need for enhanced supervision and a heightened focus on teaching professionalism. Used in the constructive manner advocated by the authors, such a questionnaire can tailor the clinic experience to the individual student's educational needs.

Conducting clinic pre-enrollment interviews can yield the same type of information and similar benefits. Although very time consuming, in-person interviews provide the additional benefit of assessing prospective students in a way that written answers do not permit. Face-to-face meetings can uncover more information than questionnaires by themselves.²²¹ If there are more applicants than available clinic positions, the interview process can be used to identify the students best suited to a particular clinic as well as identify issues raised by other prescreening methods.²²²

Another means of prescreening involves students submitting to character and fitness evaluations conducted by state authorities. Some states require students to submit an application to state bar authorities in order to obtain a student practice license.²²³ For

220. See *supra* Part III.B (discussing issues that allow supervisors to custom tailor learning methods for individual clinic participants, thus providing better assistance to clients).

221. Face-to-face meetings provide the opportunity for immediate follow up on information in a way that cannot be accomplished with questionnaire responses on paper. The benefits (and detriments) are analogous to comparisons made of depositions and interrogatories.

222. Criteria for such a determination are likely specific to each clinical program. No particular criteria for clinic selection are advocated by the authors of this article. A clinic in which one of the authors formerly worked in employed an interview process for prospective students. The clinic typically had more applicants than available positions. The interview process was used to gather information to select students for clinic enrollment. The interview also created an opportunity to have an early discussion about professionalism, convey the magnitude of the responsibility that the student was about to take on, and try to assess the level of commitment the student had to living up to clinical responsibilities. A specialty clinic at the current school of one of the authors also conducts interviews. Again, in that clinic there are usually more applicants than there are available positions. The interview seeks information from students about their professional aspirations and provides the clinic opportunity to students for whom this particular clinic experience will have the most career benefit.

223. See, e.g., FLA. STAT. ANN., BAR R. 11-1.3(a) (West 2011) (stating that all students must receive a letter of clearance from the Florida Board of Bar Examiners before being permitted to practice).

example, Washington State has an application for a student practice license that seeks information about citations, arrests, charges, or convictions for any law including minor traffic violations.²²⁴ The form also requires applicants to disclose whether they have “ever been charged with fraud, deceit, misrepresentation or forgery in any civil, criminal, administrative or other proceeding.”²²⁵ This process raises two concerns. First, it may prevent participation in clinic for students who will have difficulty getting admitted to the bar after graduation. Some may argue that excluding students from practice at this early stage prevents the opportunity to work with students who are in the greatest need of guidance with their professional development.²²⁶ A clinical experience may provide a means of getting a student with a history of problems that could derail a successful career back on track. The second concern with a bar administered character and fitness process for clinic students is that, unless the clinician has access to bar investigation data, the process will not help the clinician tailor the clinic environment to maximize the learning and professional development of students who do get licensed but nevertheless merit special supervisory consideration.²²⁷

Some type of prescreening can provide valuable insight to clinic professors to help them forge a strategy to prevent mistakes by clinic students. It can alert them to students who may be at risk to make errors, struggle with learning disabilities, succumb to bouts with substance abuse, or fall short of professional standards in some other way. Armed with this information, clinicians can work with students

224. Wash. State Bar Ass'n, Application for License for Limited Practice as a Legal Intern Under APR 9 in the State of Washington 3 (Mar. 2009), *available at* http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Limited-Licenses-and-Special-Programs/Non-Lawyers-and-Students/~media/Files/Licensing_Lawyer%20Conduct/Admissions/Special%20Admissions/Legal%20Intern%20Application.ashx.

225. *Id.* The application also seeks disclosure on whether the applicant has any lawsuits or unsatisfied judgment and whether the applicant has “been dropped, suspended or expelled from any university or college.” *Id.*

226. See Chavkin, *supra* note 113, at 266–67.

227. If students who reported issues of concern are granted student practice licenses, clinical supervisors of those students may have reason to be alerted to the conditions. However, there is nothing inherent in bar-run student practice applications that will convey critical information to clinical professors so that conditions of the clinical experience can be tailored to maximize the student's professional development. Yet at least one state does currently employ a practice in which supervisors review disclosures made to bar authorities. Although Florida's student practice Rule does not explicitly require this, the forms issued by the Florida Supreme Court require the student to disclose misconduct and the supervising attorney to certify: “I have read the disclosure form of the certified legal intern candidate named above and am aware that there is something in his/her background that may reflect adversely on his/her character.” Forms on file with Professor Glynn at Barry University.

to develop strategies that help them uphold professional standards, provide high quality representation of clients, and facilitate a transformative learning experience for the clinic student. However, as mentioned earlier, prior to implementing any particular procedure, university counsel should be consulted to explore the legal limits and consequences of various prescreening methods.

IV. SUPERVISION AND TEACHABLE MOMENTS

A. *Guidance and Supervision as the Core Clinical Pedagogy*

As discussed, most students come to a law school clinical course with few skills to adequately handle a complex legal matter.²²⁸ Clinical professors recognize these weaknesses and design clinical programs with a substantial amount of guidance and supervision built in.²²⁹

The first step is to provide the students with substantive guidance. In most programs, this guidance occurs in many forums. First, there is a classroom component to most clinical courses.²³⁰ Some of this classroom work can be handled through pre-requisite courses, but there is frequently a seminar concurrent with students' casework. These classes or prerequisites may cover substantive law but also have simulated skills components to assist the students in the legal steps anticipated by the clinical experience.²³¹ The professors in these courses provide feedback on the students' substantive knowledge or skills performance to prepare them for the legal matters to be addressed in the clinical course²³² or address ethical issues that may arise in the clinical course.²³³

In addition to these large group preparatory steps, most clinics also involve small group or one-on-one case reviews before students participate in major steps in their clinical legal matter.²³⁴ To many

228. See *supra* notes 41–42 and accompanying text.

229. Schrag, *supra* note 98, at 213–17.

230. *Id.* at 236.

231. See *id.* at 236–37.

232. *Id.* at 236–41; see Jennifer A. Gundlach, “*This Is a Courtroom, Not a Classroom*”: *So What Is the Role of the Clinical Supervisor?*, 13 CLINICAL L. REV. 279, 307–18 (2006) (explaining how the classroom can be used for more than trial skills: it can be used to prepare the student for the more complicated decision-making that occurs in the midst of a court hearing).

233. Joy & Kuehn, *supra* note 7, at 840.

234. See Gundlach, *supra* note 232, at 294 (highlighting the importance of preparation before court appearances).

clinical professors, these individual case meetings are the best opportunity to provide individual education.²³⁵ Through the case experience, students are permitted to struggle with legal matters, seek guidance, and receive feedback on proposed plans.²³⁶ These meetings may include mock client interviews or mock hearings prior to a real experience. It is through these experiences that clinical professors can assess the skills and educational needs of individual students. If there are problems that need to be addressed, professors will identify teachable moments in these meetings. The meetings also allow a professor to individualize the education to the needs of a particular student.

For example, there may be two students who have a very good understanding of the law. Both are preparing for an upcoming hearing. One needs help in preparing questions in simple non-legalese language for the witness. Another needs help understanding the hearsay rule and how to ask questions necessary to lay the foundation for a hearsay exception. Through these case meetings, the professor can identify the individual educational needs of the student, develop an appropriate educational plan, and evaluate whether the student is ready to overcome the problem to avoid issues for the client.²³⁷

Clinical professors expect students to make errors. Clinical professors often allow students to make errors and use those errors as teachable moments.²³⁸ When a student makes an error in a client interview by giving a client incorrect advice, the professor can review the interview, allow the student to learn from that mistake, and remedy the error with the client in the next conversation. When the error occurs during a court hearing, a clinical professor has to make a decision about whether to intervene during the hearing or allow the error to occur without correction.²³⁹ Whether the errors occur in a

235. See Schrag, *supra* note 98, at 214–17 (describing a “case team method” for preparing students in which clinical supervisors are teamed with student pairs).

236. See *id.*

237. George Critchlow has suggested that a professor is better able to make this judgment if they have had the time to assess the student’s various legal competencies. Critchlow, *supra* note 46 at 433–34.

238. How to respond to a student’s error and when to intervene is one of the most difficult tasks of a clinical professor. See Justine A. Dulap & Peter A. Joy, *Reflection-In-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 87–90 (2004).

239. See generally Critchlow, *supra* note 46, at 433–34; Gundlach, *supra* note 232 (noting the complicated role a clinical professor plays in supervising a student in the midst of a court hearing).

courtroom or a classroom, professors can use the post-error debriefing session as an opportunity for substantial education.²⁴⁰

When there are errors, especially major errors, it is important for professors to consider the manner in which these critiques or debriefs occur. Although great teaching opportunities that can be helpful to an entire class, they can be demoralizing experiences for a law student. A professor should consider how to handle each error based on the individual vulnerability more than the educational opportunity for the entire class.²⁴¹

B. Extra Supervision Due to Constructive Prescreening or Initial Errors

Even without an error or systemic issues identified through constructive prescreening, professors may take extra supervisory steps due to a student's individual needs. For example, early in the semester in a student's first court appearance, there may be too much to do in preparing for a hearing. Based on an individual student's stress level and lack of familiarity with evidentiary objections, a professor may offer to handle all evidentiary objections regarding an opposing counsel's questioning of a witness. This decision may be made based on the level of comfort or nervousness the student has in the individual case meetings.²⁴²

As suggested earlier, constructive prescreening can give clinical professors information that can help plan appropriately to maximize the educational benefit to meet each student's needs. Even without constructive prescreening, professors can and do take extra steps to address errors of the students. According to the Serious Errors Survey, nearly half of clinical professors (62 respondents, or 47.3%) reported that they or their programs had set up special supervisory procedures for individual students who had exhibited poor

240. See Ass'n of Am. Law Schs., *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 552 (1992) ("Good supervision is the hallmark of any high-quality clinical program."); Gundlach, *supra* note 232, at 318–20 (listing broad categories of options professors can discuss in a debriefing session with a student).

241. Some disclosure to other students may be unavoidable. For instance circumstances may necessitate discussing details of the error with the student's partner. It may also be necessary to address some details with other students who take over the case. FERPA may limit disclosure of non-essential information to third parties. See *supra* Part III.C.1.

242. Some have argued that a clinical professor's relationship with a student changes throughout the semester. As the student learns and the professor becomes more comfortable, the roles change from an educator to an evaluator. See generally Hoffman, *supra* note 42, at 302–12.

performance or who were perceived to be at risk of poor performance.²⁴³ The primary techniques for enhanced supervision included, in descending order of frequency more frequent supervisory meetings; reduced or modified case responsibilities; additional intermediate deadlines or more elaborate procedures for accomplishing tasks; involvement of student services staff or deans; recommendation that the student obtain outside counseling or treatment; and requiring that the student submit additional written reports on case work.²⁴⁴

When a student has committed an error, the most logical response is for a professor to increase supervision or meetings to review the student's work. If the usual practice of a professor is to meet with each student every week, a student who has committed an error or has a history of problems may need to meet with the professor two or more times a week to ensure that all issues are covered. Forty-four survey respondents indicated they have implemented more frequent or more vigilant supervision of students about whom they have concerns.²⁴⁵

Professors have also implemented more detailed deadlines with more specific instructions. Where many clinical professors desire to be non-directive in their instruction,²⁴⁶ when a student has demonstrated an inability to follow through without more specific guidance, the professor may have to adopt a more directive model.²⁴⁷ Thus, eight survey respondents indicated that they have implemented more specific deadlines.²⁴⁸

243. *Infra* App. Question C.1.

244. *Infra* App. Question C.2. Although the survey suggested some procedures, other appropriate responses to student errors are discussed throughout this article.

245. *Infra* App. Question C.2. One respondent explained, their program addresses problems by "scheduling more supervision, parsing out assignments in smaller parts, giving less weighty and important assignments and more carefully monitoring work product." See *infra* App. Question C.2. Another reports, "I write specific expectations - what has to happen, by when, in order for the student to succeed in the Clinic." See *infra* App. Question C.2. One went so far as to have daily monitoring. "Student had to give a list of the work he intended to do each day to the clinic director at the beginning of his shift, then check in with director at the end of the day to confirm that he had done what he planned, or explain why he couldn't." See *infra* App. Question C.2.

246. See generally, Schrag, *supra* note 98, at 213-14. But see Brook Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1 (1999) (arguing that a more directive model is a better pedagogy).

247. Dunlap & Joy, *supra* note 238, at 85.

248. See *infra* App. Question C.2. For example, one respondent wrote "where it was clear a student lacked focus (possible attention deficit) or was under stress for some

Although many clinical professors require all students to provide regular written reports, when a student needs additional guidance the frequency and quantity of written reports may increase. For example, a professor may require students only to provide journals assessing broadly what their experience in the clinic has been.²⁴⁹ However, once a student has failed to follow through on tasks, the professor might require a more detailed list of activities completed and list of activities to be done with deadlines. Six survey respondents have indicated that they have implemented additional reports.²⁵⁰ One survey respondent indicated that a student with an error in ethical judgment was required to write an essay about a particular rule of professional conduct.²⁵¹

Another response to address potential concerns may be to reduce a student's case assignments. Fifteen survey respondents indicated that they have done this to address a student's needs.²⁵² As one survey respondent explained:

The goal was twofold: to protect clients from misfeasance, and to try to give the student an educational experience in which he or she could be successful. This was always very much a trial and error sort of thing: giving students small responsibilities, increasing those responsibilities where earlier tasks were carried out successfully.²⁵³

C. Adaptive Measures Due to More Serious Errors

At some point in the experience of supervising a student with the more serious types of issues addressed in this article, additional steps may be necessary. To meet the educational objective of the students, all steps should be taken to treat the errors as teachable moments. Even if additional steps of reporting the errors to some other

identifiable reason, supervision would become highly directive, including, but not limited to, written task by task instructions and deadlines to keep the student on track." See *infra* App. Question C.2.

249. Journals are used by many clinicians to improve the educational experience and guide the professor on designing the individual student experience. See J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 61–63 (1996).

250. *Infra* App. Question C.2.

251. See *infra* App. Question C.2.

252. *Infra* App. Question C.2.

253. See *infra* App. Question C.2.

authority are necessary,²⁵⁴ clinical professors can take steps to work with students to help them overcome their problems and provide remedial education in the hopes that they will become successful and ethical attorneys.²⁵⁵

As indicated in other parts of this article, professors may need additional assistance addressing more serious mental health issues with students. Six survey respondents indicated that they have referred or required students to seek counseling to remain in the clinical course.²⁵⁶

The most egregious errors can become teachable moments. When a student has engaged in the unauthorized practice by using their student practice licenses to represent clients outside of the clinic, a professor may have to report this to the bar and even pursue withdrawal of the student license. However, the professor can explore why the student made such an error and help the student develop an understanding of why the error was so egregious and will lead to such harsh sanctions.²⁵⁷ Through the guidance and education provided by the professor, the student might be better equipped to respond to the likely bar inquiry.

V. REPORTING OBLIGATIONS TO THE LAW SCHOOL AND THE BAR

Responding to problematic student behavior is complicated by the competing duties imposed upon law schools generally and upon clinical professors in particular. In the preceding sections, this article describes a student-centered approach to prevent and respond to serious breaches of professional standards of conduct. That approach, grounded in clinical professors' primary roles as educators and mentors, is designed to ensure that clinic students have every opportunity to develop as professionals and to overcome their mistakes.²⁵⁸ This article would be incomplete, however, if it did not consider the additional duties of law schools and clinical professors as officers of the court, including their role as gatekeepers for the

254. See discussion *infra* Part V.

255. See McCaffrey, *supra* note 11, at 28–29.

256. See *infra* App. Question C.2. As one clinician details, “If a student appears to be at risk, I may reach out to the Dean of Students for background, assistance, etc. I also have had frank discussions with some students, referred them for mental health care.” See *infra* App. Question C.2.

257. See Joy & Kuehn, *supra* note 7, at 840.

258. See discussion *supra* Part IV.

bar.²⁵⁹ Bar examiners routinely ask law school deans and clinical professors for character and fitness information.²⁶⁰ One unavoidable dimension of dealing with student misconduct in clinical practice is determining whether misconduct should be reported to law school administrators or even directly to bar examiners.

In addition to the harm that may be caused to a client, a serious consequence of student misconduct in a clinic may be delaying or jeopardizing the student's bar admission.²⁶¹ No clinical professor or dean wishes to contemplate the painful prospect of reporting a student's misconduct to bar examiners, fearing that such an action might reduce the student's chances of admission to the bar. Nonetheless, there are circumstances in which both law schools and clinical professors are obligated to make such reports.

There are four ways that bar examiners may learn of student misconduct in a clinical program:

259. Law schools are considered gatekeepers, of course, in the sense that aspiring lawyers must obtain a law degree on their way to bar admission. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe Our Students*, 45 S. TEX. L. REV. 753, 759 (2004). Legal educators disagree, however, about the extent to which they should be viewed as gatekeepers for the bar with respect to character and fitness. See, e.g., McGuire, *supra* note 117, at 729–30.

260. See discussion *supra* Part IV.B.i, ii.

261. See Joy & Kuehn, *supra* note 7, at 503–04 (“[P]rofessional misconduct as a clinic student is likely to raise the red flag of faulty moral character. . . . What better indication of a bar applicant's fitness to practice law is there than the applicant's actual practice of law as a law clinic student under a student practice rule?”). Three other potential, but apparently uncommon, consequences of clinical student misconduct are revocation of the student's practice certification, discipline by attorney disciplinary authorities, and malpractice claims. See Joy, *supra* note 8, at 827–28, 831. Reported cases involving malpractice claims against a law school clinic are virtually non-existent. See Joy & Kuehn, *supra* note 7, at 505 n.45. Formal disciplinary proceedings are unlikely because only a few states consider clinic students formally subject to the Rules of Professional Conduct. *Id.* at 501; see Joy, *supra* note 8, at 827–28. In some states, however, supreme courts have imposed discipline on licensed attorneys for acts that occurred prior to their admission to the bar. See Joy & Kuehn, *supra* note 7, at 504 n.42.

Formal revocations of a student practice certification appear to be rare. Withdrawal of a student practice certification “can take place without any hearing and without the showing of any cause.” *Id.* at 501–02; see, e.g., FLA. STAT. ANN., BAR R. 11-1.4(b) (2011). Nonetheless, among the sixty-eight survey respondents who reported serious student misconduct to law school administrators, only seven took steps to terminate the student's practice certification. See *infra* App. Questions E.1, F.1. The reason may be that a clinical professor who removes a student from case work due to serious misconduct assumes that the student will not continue to practice, and that terminating the student's practice certification is therefore an unnecessary formality.

- Self-report. A student may self-report misconduct on the bar application in response to specific questions about disciplinary proceedings, mental health problems, or other matters.²⁶²
- Bar examiner inquiry. Bar examiners may prompt a student to disclose misconduct by asking the student to explain “red flags” in the student’s record that are related to misconduct, such as failing or withdrawing from a clinical course, or interrupting law school studies for a period of time.²⁶³

262. See, e.g., *Bar Exam Application: Character and Fitness Questionnaire*, ILL. BD OF ADMISSIONS, Question 28, <https://www.ilbaradmissions.org/browseform.action?applicationId=1> (last visited May 31, 2012) (“In a paid or volunteer employment setting, have you ever been accused of misconduct, disciplined, permitted to resign in lieu of discipline or discharge, discharged or permitted or requested, formally or informally, to resign from or terminate employment?”); *Connecticut Bar Examining Committee: Admission by Examination July 2012*, ST. OF CONN. JUD. BRANCH, Question 34, <http://www.jud.ct.gov/cbec/instadmisap.htm> (last visited May 31, 2012) (“Do you currently have any condition or impairment (including but not limited to substance abuse, alcohol abuse or a mental, emotional or nervous disorder or condition) which in a material way affects your ability to practice law in a competent and professional manner?”); *Standard NCBE Character and Fitness Application: Request for Preparation of a Character Report*, NAT’L CONF. OF B. EXAMINERS, 14 (last revised Aug. 9, 2011), <http://www.ncbex.org/character-and-fitness/character-and-fitness-electronic-application/> (“Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?”).

263. In our interviews, some law school administrators expressed the view that in cases of serious misconduct that may not constitute an honor code violation (such as egregious neglect of clinic duties) and would therefore not normally be reported to bar examiners by the law school, it would be appropriate for a clinical professor to effectively plant a “red flag” in the student’s transcript by failing or removing the student from the clinic, thereby encouraging bar examiners to inquire further into the circumstances. In instances where a student may take time off from law school in the wake of clinic misconduct to obtain treatment for a mental health problem, including substance abuse, the deans expressed the belief that bar examiners would normally inquire into the circumstances prompting such interruptions in studies. Interview with Dean 1, *supra* note 18; Telephone Interview with Dean 5, *supra* note 18.

The assumption that bar examiners will see such red flags is not always well grounded, however. Bar examiners do not always request a student’s transcript; some states rely solely on the dean’s certification that a student has successfully completed his or her course of studies. Based on a review of bar applications and instructions on various states’ websites, it appears that some states, including at a minimum, Illinois, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, Tennessee, Texas, Utah, and Virginia, do not require that law schools provide transcripts. See *Bar Exam*

- Law school report. The law school may disclose misconduct as part of its routine response to inquiries from bar examiners.²⁶⁴
- Clinical professor report. A clinical professor may report student misconduct directly to bar examiners in response to a character and fitness questionnaire sent to that professor.²⁶⁵

Clinical professors who responded to our survey indicated they reported student misconduct more often to law school administrators than to bar examiners.²⁶⁶ That may be attributable to a variety of factors, including (1) a hope that law school administrators would provide intervention and support to address a student's problem;²⁶⁷

Application: Bar Exam Instructions, ILL. BOARD OF ADMISSIONS, <https://www.ilbaradmissions.org/browseform.action?applicationId=1&formId=1> (last visited May 31, 2012); *Step 3: Record Requests*, ST. BAR MICH. <http://www.michbar.org/professional/step3.cfm> (last visited May 31, 2012); *supra* note 260; *Instructions for February 2012 Exam Applicants*, MINN. ST. BOARD OF L. EXAMINERS, [http://www.ble.state.mn.us/file/Bar%20Application%202011%20Current%20w%20ACCOM%20Fill-In\(2\).pdf](http://www.ble.state.mn.us/file/Bar%20Application%202011%20Current%20w%20ACCOM%20Fill-In(2).pdf) (last visited May 31, 2012); *Petition and Questionnaire for Admission to the New Hampshire Bar*, N.H. JUD. BRANCH (last revised Dec. 2011) <http://www.courts.state.nh.us/nhbar/petition.pdf>; *February 2012 Bar Exam Application*, N.J. CTS., http://www.judiciary.state.nj.us/supreme_doc/njbarexams/apps/application.pdf (last visited May 31, 2012); *Admissions: Instructions for Filing an Application to Sit for the Oregon Bar Exam*, OR. ST. B., http://www.osbar.org/_docs/admissions/ExamApplication.pdf (last visited May 31, 2012); *Instructions for Application by Exam*, TENN. BOARD OF L. EXAMINERS, <http://www.state.tn.us/lawexaminers/HowToApply.htm> (last visited May 31, 2012); *General Application for Admission to the Bar of Texas*, TEX. BOARD OF L. EXAMINERS (last modified Apr. 14, 2011), http://www.ble.state.tx.us/applications/GenApp/ble-57_11-2010_Instructions_Only.pdf; *Utah State Bar Application for Admission*, OFF. OF B. ADMISSIONS, http://www.utahbar.org/admissions/index_admissions.html (last visited May 31, 2012); *Educational Verification Documents*, VA. BOARD OF B. EXAMINERS, <http://www.vbbe.state.va.us/bar/baredu.html> (last visited May 31, 2012). New York and South Carolina give applicants the choice of providing either a dean's certificate or a transcript. *New York State Bar Exam Handbook*, N.Y. ST. BOARD OF L. EXAMINERS, 5 (last revised Oct. 2011), <http://www.nybarexam.org/Docs/hbook.pdf>; *Bar Admissions: Bar Application*, S.C. SUP. CT., 5, <http://www.sccourts.org/bar/> (last visited May 31, 2012).

264. See *infra* Part V.B.i.

265. See *infra* Part V.B.ii.

266. Whereas sixty-eight survey respondents reported student misconduct to law school administrators, only nineteen reported misconduct to bar examiners. *Infra* App. Questions D.2, E.1.

267. Some survey respondents reported that they would consult with administrators before reporting misconduct to the bar or would turn the matter over to the dean to determine whether the misconduct should be reported to the bar. *Infra* App. Question D.6.

(2) the fact that many clinical professors do not receive character and fitness questionnaires from bar examiners;²⁶⁸ (3) the fact that some clinical professors believe it is never appropriate to report student misconduct to bar examiners;²⁶⁹ (4) an understanding at some schools that law school administrators reserve the right to judge whether student misconduct is reportable to the bar;²⁷⁰ or (5) perhaps simply a desire to “punt” the reporting decision to someone else. Some information that is reported solely to a law school administrator may ultimately be passed on to bar examiners as part of a student’s “file.”²⁷¹

This section will examine the differing obligations, practices, and attitudes of law school deans and clinical professors with respect to disclosure of student misconduct to bar examiners. This section will also address the consequences of reporting misconduct to bar examiners, which may generally be less severe than many suspect.

A. Informing Law School Administrators

Under some circumstances, a clinical professor may be required to disclose student misconduct to the dean or another university official. For example, the professor may have an affirmative duty, imposed by the school’s honor code, to report violations of that code to the dean or a designee.²⁷² Indeed, honor code violations appear to be the

268. Half of the survey respondents reported that the state in which they are located does not routinely send character and fitness questionnaires to clinical professors or ask them to complete a character and fitness affidavit. *Infra* App. Question D.1.

269. Five survey respondents stated that “[n]o student misconduct in a clinical course would merit a report to a character and fitness panel.” *Infra* App. Question D.6. One respondent commented that “[i]n my experience student misconduct almost always involves some responsibility or oversight on the part of the instructor.” *See infra* App. Question D.6. Another commented that “I would consider most of this a failure of supervision rather than an incident of student misfeasance.” *See infra* App. Question D.6.

270. One survey respondent reported, for example, that “I reported [an instance of student misconduct] but my academic dean said it didn’t rise to the level of something she would reporter [to the bar].” *See infra* App. Question E.3.

271. *See infra* Part V.B.i for a discussion of which information law school administrators pass on to bar examiners. Interviews with law school administrators and bar examiners reveal there is no common understanding of what constitutes a student’s “file.” Different states ask for different materials—some ask for a transcript and others do not, for example—and law schools have different practices concerning when incidents of student misconduct should be reported to bar examiners. *See infra* Part V.B.i.

272. *See, e.g.*, Notre Dame Law School Honor Code § 2.1, available at <http://www.nd.edu/~ndlaw/currentstudents/hoyne/honorcode.pdf> (“All law students and law faculty have the duty to report promptly either to the dean or to the president of the Student

primary—and in some cases the only—clinic-related misconduct of which deans expect to be informed.²⁷³ In addition, where a student's conduct may potentially expose the law school to liability, the professor may have a responsibility to notify the dean, an associate dean, or the school's general counsel.²⁷⁴ Certain academic responses to a student error, such as removing a student from the clinic or assigning a failing grade, might require the involvement of an associate dean or another law school administrator.

Regardless of any such obligation, a clinical professor may wish to involve law school administrators in order to secure support for the student.²⁷⁵ A serious problem in the clinic may be part of a larger pattern of conduct. An associate dean may know of other issues with

Bar Association all circumstances that they believe to constitute a clear violation of the code. Intentional breach of this duty shall be a violation of the Honor Code.”); Washburn U. Sch. of L. § IV.C.1, *available at* <http://www.washburnlaw.edu/policies/honorcode.php> (“Any person having direct knowledge or information concerning a possible violation of this Honor Code shall report the matter within a reasonable time to the Associate Dean of the Law School, or on matters related to course work, to the faculty member responsible for the course, or on matters related to use of library facilities and property, to the Director of the Law Library.”).

273. When asked which clinic-related misconduct should be reported to them, deans most commonly responded they should know about honor code violations. *See* Telephone Interview with Dean 3, *supra* note 18; Telephone Interview with Dean 4, *supra* note 18; Telephone Interview with Dean 10, *supra* note 18; Telephone Interview with Dean 11 & Dean 12, *supra* note 18.

274. Insurance carriers routinely require that they be notified of events that have the potential to result in liability. For example, the National Legal Aid & Defender Association (NLADA), which provides professional liability coverage to many law school clinics, instructs its members on the NLADA Web site that they should provide notice “as soon as possible” whenever “a professional liability claim is made against your organization, or if you become aware of circumstances that could lead to a claim.” *Claim Procedures*, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/Insurance/Insurance_Claim (last visited May 31, 2012). Whether law school administrators should be involved in such a notification may vary among law schools. Any notification of persons outside the clinic, whether the law school administrators, university administrators, or malpractice carriers, must of course be accomplished in a manner consistent with the clinic’s client confidentiality obligations under applicable rules of professional conduct. There are ethical ramifications anytime a clinical professor communicates about a client outside the confines of the clinic. *See* Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1115 (2007).

275. Most of the deans who were interviewed noted that associate deans commonly help secure treatment for students with substance abuse issues and other mental health problems. *See* Interview with Dean 2, *supra* note 18; Interview with Dean 7, *supra* note 18; Telephone Interview with Dean 8, *supra* note 18; Interview with Dean 9, *supra* note 18; Interview with Dean 10, *supra* note 18.

the student or may be able to inquire of other professors in order to identify broader issues that should be addressed.²⁷⁶ In extreme cases, such as a student who has simply disappeared from the clinic, an associate dean may be able to call upon campus resources to initiate a wellness check of the student.²⁷⁷ In any case, an associate dean may be best positioned to make a judgment about any therapeutic assistance the student may need and how best to access that assistance.²⁷⁸ In the case of serious misconduct, informing law school administrators outside of the clinic may also be an essential “wake up call” to force a student to confront the seriousness of the conduct.²⁷⁹

B. Reporting Student Misconduct to Bar Examiners

1. Law Schools’ Reporting Obligations and Practices

According to a 2010 survey of state bar examiners’ inquiries to law schools,²⁸⁰ forty-six states and the District of Columbia asked law schools to provide character and fitness information in addition to evidence that a bar applicant had completed degree requirements.²⁸¹ The questions that states posed to law schools varied greatly. Seven states used the character and fitness questions developed by the National Council of Bar Examiners (NCBE).²⁸² Twenty-two other jurisdictions used the NCBE questions, supplemented with additional

276. See Telephone Interview with Dean 10, *supra* note 18; Telephone Interview with Dean 13, *supra* note 18.

277. One of the authors called upon an associate dean to initiate a wellness check of a student who disappeared from the clinic and who failed to respond to calls, texts, and email messages from professors and fellow students. The wellness check “surfaced” the student, allowing the author and the Dean of Students to begin addressing the incident.

278. One law school has created a structure in which the Dean of Students is “walled off” from the school’s disciplinary process so that students who seek help with mental health conditions have an assurance of confidentiality. Telephone Interview with Dean 10, *supra* note 18.

279. One dean explained that his school had a policy of initiating disciplinary proceedings in the face of any significant misconduct in order to “get the student’s attention.” The school then emphasizes a therapeutic approach to working through the problem. See Telephone Interview with Dean 8, *supra* note 18.

280. See Patricia A. Halstead, *Survey of State Bar Form Questions to Law Deans Regarding Student Character* (Oct. 6, 2010) [hereinafter Halstead Survey].

281. The four jurisdictions that do not ask law schools to provide character and fitness information are Alaska, Delaware, Idaho, and Montana. See *id.*

282. The seven states that relied exclusively on the NCBE questions in 2010 are Alabama, Kansas, North Dakota, Oklahoma, South Carolina, Vermont, and West Virginia. *Id.*

character and fitness questions.²⁸³ The remaining eighteen jurisdictions did not rely on the NCBE questions at all but instead have developed their own questions.²⁸⁴

Bar examiners' questions tend to cast a wide net, fishing for any unfavorable information about bar applicants.²⁸⁵ The NCBE's 2010 questions were particularly broad, seeking information that might "raise questions" about an applicant's fitness or that "might" impact bar examiners' decision, whether or not the information is contained in a student's record:

Does the applicant's record raise questions regarding applicant's character or indicate a lack of integrity or trustworthiness?

Has the applicant engaged in any behavior, whether or not it was made a part of the applicant's record, that reflects unfavorably on his or her character or fitness to practice law?

Is there any additional information of which you are aware that might impact the Board's determination of this person's character and fitness.²⁸⁶

Most individual states have crafted equally broad questions.²⁸⁷ To cite just a few examples:

283. The twenty-two jurisdictions that used the NCBE questions, supplemented with additional questions, include Arizona, the District of Columbia, Florida, Hawaii, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, Washington, and Wyoming. *Id.*

284. The eighteen jurisdictions that do not use the NCBE questions, but instead craft their own character and fitness inquiries, include Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Kentucky, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, Texas, Utah, and Wisconsin. *Id.*

285. See Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternative Means*, 8 GEO J. LEGAL ETHICS 401, 416 (1995).

286. Halstead Survey, *supra* note 280, at 1.

287. Some states have made efforts to craft their questions more narrowly. See Carol A. Needham, *The Professional Responsibilities of Law Professors: The Scope of the Duty of Confidentiality, Character, and Fitness Questionnaires, and Engagement in Governance*, 56 J. LEGAL EDUC. 106, 111–13 (2006). For example, Iowa changed its questionnaire in the early 2000s to "move from generalized questions, such as 'do you have any reason to doubt the fitness of the candidate,' to more particularized questions

Is your institution aware of, or do your records reflect, anything that would impair the applicant's ability to exercise professional judgment, deal with stress, handle funds, or complete work in a timely manner? (Arizona)²⁸⁸

Do you have any reason to question the applicant's fitness for admission to the practice of law? (California)²⁸⁹

Is the applicant honest? (Florida)²⁹⁰

Does [t]he applicant's record contain[] information that reflects unfavorably on the applicant's Character or fitness to practice law? (Hawaii)²⁹¹

Do your records or other information show anything adverse as to his/her honesty, integrity, general conduct? (Illinois)²⁹²

Such questions are so broad and vague that they might be read as requirements to report any type of substandard performance or conduct in a clinical course, or even any complaint or accusation of misconduct, whether or not it was substantiated.

In order to understand how law schools respond to such bar inquiries, the authors conducted anonymous interviews with twelve deans and administrators from a variety of law schools, both public and private, from different states and different ranking tiers.²⁹³ The

that cause the law school to report factual observations and records of behavior, not opinions." McGuire, *supra* note 117, at 732 n.59. Nonetheless, Iowa, like nearly every other state that has crafted more specific questions, continues to ask a "catch all" question. See Halstead Survey, *supra* note 280, at 4 (reporting that Iowa continues to ask law schools "[d]o you have any other information that would reflect on the character and fitness of the applicant?").

288. Halstead Survey, *supra* note 280, at 1.

289. *Id.*

290. *Id.* at 3.

291. *Id.*

292. *Id.* at 4.

293. The persons whom the authors interviewed have served as dean (five persons), associate dean (seven persons) or a university administrator with responsibility for bar reporting (one person) at fourteen separate law schools in eleven states and jurisdictions: Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Kansas, New Jersey, New Mexico, Washington, and Washington, D.C.. Seven of the law schools are public; seven are private. In the 2011 US News rankings, three of the schools were ranked in the top 25, nine others were ranked in the top 100, and two were ranked in the third tier. See generally Best Law Schools, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 31, 2012). All interviews with law school administrators

purpose of those interviews was not to develop rigorous data for statistical analysis, but rather to determine whether there were informative themes in the attitudes and procedures described by the deans.²⁹⁴ Indeed, those interviews, together with presentations on

were conducted under an assurance of anonymity. Interview notes are on file with Robert Jones. With respect to the types of questions propounded by bar examiners in the jurisdictions where the schools are located, one state relies on the NCBE questions only (Kansas), five jurisdictions use the NCBE questions supplemented with other questions developed by the state (Indiana, New Jersey, New Mexico, Washington, and Washington, D.C.), and five states use questions they have crafted entirely themselves (Arkansas, California, Colorado, Connecticut, and Illinois). See Halstead Survey, *supra* note 280. The schools receive inquiries, of course, from other states as well, since their graduates may apply for bar admission in other states.

294. Law school administrators were asked the following questions:

(A) General Questions about Character and Fitness for Bar Purposes:

What information do you report to character and fitness committees?

Under what circumstances would you/have you reported to a character & fitness committee on a student's misconduct? Mental health condition? Substance abuse? Criminal history? Misconduct or dereliction in a clinical course? Other?

What criteria would you/do you use to make such decisions?

What information regarding character and fitness do you expect professors to report to law school administrators? Do you think there is a different expectation for clinical professors versus doctrinal professors?

What information reported by professors is included in a student's permanent file? Passed on to bar examiners?

Have you ever had a professor report students to you or another dean for: Coming to class drunk? Incoherent? Plagiarism? Misconduct or dereliction in a clinical course?

(B) Questions Regarding Certification of Students as Clinic Interns:

What process do you use to verify student fitness for purposes of student practice certificates?

(C) Questions Regarding Certification of Law Graduates for Admission to the Bar:

What process/standards do you use to verify fitness for certification of students for bar admission?

Does your school ask faculty to vote to certify students for eligibility for the bar? If so, does that certification encompass character and fitness?

Has your school ever declined to certify a student on grounds other than academic achievement? If so, on what grounds?

In answering the above questions, do you distinguish between a student's conduct and a student's condition (such as a mental health problem)? If so, how?

this subject by two other deans at the 2011 AALS Annual Meeting,²⁹⁵ revealed fairly consistent approaches to bar examiner inquiries.

Despite the broad invitation by many bar examiners to share unfavorable information, it appears that law school deans²⁹⁶ tend to interpret bar questionnaires narrowly. Several deans expressed what one described as a “basic, instinctive reluctance to do anything that would harm a student,” resulting in a “minimalist” approach to information sharing with bar examiners.²⁹⁷ Such reticence may be attributable to a variety of factors, including loyalty to a law school’s students and alumni, a “desire to protect the trust and privacy essential for mentoring interactions between students, staff, and faculty[,]”²⁹⁸ concerns about confidentiality under federal laws,²⁹⁹ and fear of lawsuits,³⁰⁰ among other reasons.

The deans expressed general agreement about certain principles. They were consistently opposed to reporting a mental health or substance abuse condition, for example, unless that condition had resulted in unprofessional conduct that merited reporting on its own.³⁰¹ The deans were equally consistent in expressing a concern

295. See Susan Fortney, David Baum & Margaret Corneille, Character and Fitness: To Disclose or Not to Disclose, That is the Question, AALS Annual Meeting (Jan. 6, 2011).

296. The term “deans” is used in this article as an inclusive term to include both deans and associate deans with responsibilities related to reporting character and fitness information to bar examiners.

297. See Telephone Interview with Dean 6, *supra* note 18; Telephone Interview with Dean 10, *supra* note 18; McGuire, *supra* note 117, at 710–11 (explaining that many law school administrators allow students to amend inaccurate law school applications after they have graduated in order to avoid having to report that an application contained false information or omissions).

298. Needham, *supra* note 287, at 114.

299. See Telephone Interview with Dean 4, *supra* note 18 (mentioning the need to balance “the needs of student privacy” against the duty to the bar); Telephone Interview with Dean 6, *supra* note 18 (stating that public institutions may be particularly conservative about releasing information to bar examiners because any disputes or litigation arising from those releases is more likely to find its way into the public domain through freedom of information laws); Interview with Dean 7, *supra* note 18 (commenting that associate deans are well-schooled in the requirements of federal privacy laws such as the Family Education Rights and Privacy Act of 1974).

300. See Needham, *supra* note 287, at 114 (reporting cases in which law schools have been sued for negative information sent to bar examiners and observing that “[i]t is one thing to know that courts have held that those providing information to the Bar Admissions Committees are protected by immunity; it is quite another to muster the courage to reveal information that might expose the institution to a lawsuit by an aggrieved former student”).

301. Nine deans (Deans 1, 2, 3, 5, 8, 9, 10, 11, and 12) expressly stated they would not report a mental health condition in the absence of corresponding problematic

about due process. None would be willing to report a rumor, accusation, or complaint about a student without some form of additional fact finding and process.³⁰² For most, that process would have to take the form of an honor code proceeding or a formal student admission of misconduct.³⁰³ Even then, at some law schools,

behavior. Dean 4 stated that her law school had never reported a mental health condition to the bar, although her school once reported to bar examiners that a student with a substance abuse problem would not be fit to practice without help. Deans 1, 11, and 12 commented that they were not psychologists and would therefore not presume to diagnose mental health conditions. The remaining two deans did not address this issue explicitly, although Dean 7 stated that the “instinct” of associate deans is to send students for help rather than reporting them to the bar. See Interview with Dean 1, *supra* note 18; Interview with Dean 2, *supra* note 18; Telephone Interview with Dean 3, *supra* note 18; Telephone Interview with Dean 4, *supra* note 18; Telephone Interview with Dean 5, *supra* note 18; Interview with Dean 7, *supra* note 18; Telephone Interview with Dean 8, *supra* note 18; Interview with Dean 9, *supra* note 18; Telephone Interview with Dean 10, *supra* note 18; Telephone Interview with Dean 11 & Dean 12, *supra* note 18.

The deans’ focus on conduct, rather than a mere mental health condition, may be supported by empirical studies and judicial decisions. See Stephanie Denzel, *Second Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 CONN. L. REV. 889, 905–06 (2011) (contending that empirical studies and courts have generally concluded that the mere existence of mental health conditions or prior treatment, without problematic behaviors, is a poor predictor of unprofessional behavior after admission to the bar).

302. See Interview with Dean 1, *supra* note 18 (stating that the dean would report only an honor code proceeding); Interview with Dean 2, *supra* note 18 (stating impression that bar examiners care primarily about honor code convictions); Telephone Interview with Dean 3, *supra* note 18 (stating that the honor code “is 99% of the process,” and that despite the broad wording of some questions from bar examiners, the school’s approach is that unless there is evidence to the contrary, the school presumes the student is fit); see also Needham, *supra* note 287, at 114 (“Information within the personal knowledge of the responding administrator can be included in the answers. On the other hand, unconfirmed rumors of malfeasance cannot be the basis for a negative response.”).

303. See Interview with Dean 1, *supra* note 18 (stating that a law school should report only what is on a student’s transcript; and the only thing that should go on a transcript is an honor code proceeding); Interview with Dean 2, *supra* note 18 (stating impression that bar examiners care primarily about honor code convictions); Interview with Dean 3, *supra* note 18 (stating that a school should only report something that has gone through a formal process, including a chance for the student to respond); Interview with Dean 4, *supra* note 18 (stating that a law school should only report a committee finding of an honor code violation or a formal student admission of misconduct); Telephone Interview with Dean 5, *supra* note 18 (stating that a school should report honor code proceedings where there is a finding of probable cause that leads to a hearing, but not honor code proceedings that are dismissed for lack of probable cause); Telephone Interview with Dean 6, *supra* note 18 (stating that a mere report about student misconduct would not be placed into the student’s file; such a report is

either the dean or the honor code committee retains the discretion to decide that an honor code violation or other finding of student misconduct should not be reported to bar examiners.³⁰⁴ On the other hand, a few deans would consider reporting serious misconduct that was not the subject of an honor code proceeding.³⁰⁵

2. Clinical Professors' Reporting Obligations and Practices

In addition to requesting character and fitness information from law schools, bar examiners often request such information directly from clinical professors.³⁰⁶ Bar applicants are always required to

merely an invitation to do further investigation); Interview with Dean 7, *supra* note 18 (stating that nothing should be in a student's file unless the student has an opportunity to review, comment, and contest an accusation through some sort of hearing or process); Interview with Dean 8, *supra* note 18 (stating that his school will not report anything that lacks process behind it, which could include a disciplinary adjudication or a student admission of failing to disclose things on the law school application); Interview with Dean 9, *supra* note 18 (stating that there must be an actual finding of wrongdoing after a hearing in order to report misconduct to bar examiners); Interview with Dean 10, *supra* note 18 (stating that before anything adverse goes into a student's file, the student must at a minimum be allowed to meet with the dean and present a case); Interview with Dean 11 & Dean 12, *supra* note 18 (stating that there does not necessarily have to be formal due process before something adverse is reported to bar examiners, but the misconduct must be serious).

304. See Needham, *supra* note 287, at 113 ("The process used at each school to arrive at its responses to the Dean Certification letter, along with the content of each response, is entirely within the ambit of decanal responsibility and prerogative."); Telephone Interview with Dean 4, *supra* note 18 (stating that honor code violations are reported to bar examiners "if that is the decision of the honor code committee"); Telephone Interview with Dean 5, *supra* note 18 (stating that any letters of concern about a student are put in the student's file; when it comes time for certification of graduates to the state bar, the associate dean reviews the file and makes a determination, in conjunction with other administrators, whether any of the letters bear reporting to bar examiners); Interview with Dean 9, *supra* note 18 (stating that he reviews violations of the student conduct code to decide whether they are serious enough to report to bar examiners).

305. See Telephone Interview with Dean 5, *supra* note 18 (stating that the dean would report serious neglect in a clinic that injured a client even in the absence of an honor code proceeding); Telephone Interview with Dean 6, *supra* note 18 (stating that the dean would report egregious client neglect, fraud on a court, or serious dishonesty); Telephone Interview with Dean 10, *supra* note 18 (stating that the dean would report failure to report criminal history on a law school application, student performance that was impaired by alcohol use, or incidents of abusive conduct toward other law students).

306. See *infra* App. Question D.1 (stating that 50% of the clinical professors surveyed reported that bar examiners in the state in which their law school is located routinely send clinical supervisors a character and fitness questionnaire or ask for an affidavit of character and fitness as part of the bar application process).

provide a list of former employers.³⁰⁷ Bar examiners then send character and fitness questionnaires to all former employers listed on the application.³⁰⁸ Numerous states, but not all, specifically inform applicants to treat clinical courses as past employment.³⁰⁹ Whether clinical professors receive character and fitness inquiries, then, turns on how bar examiners define past employment.³¹⁰

How do clinical professors respond to those inquiries? What reporting obligations are imposed by the Rules of Professional Conduct or other law? And how do reports of student misconduct impact the students' chances of bar admission?

a. The unique role of clinical professors

Clinical professors stand in a different position from law school administrators with respect to character and fitness inquiries. While deans speak for their institutions and only "know" what has been

307. See, e.g., NAT'L CONF. OF B. EXAMINERS, *supra* note 262, Question 7; OR. ST. B., *supra* note 299, Question 19; VA. BOARD OF B. EXAMINERS, *supra* note 263, Question 9(a).

308. See, e.g., ILL. BD. ADMISSIONS TO BAR R. 5, available at <https://www.ilbaradmissions.org/getpdfform.action?id=1100> (stating that a character investigation and report will include pertinent information acquired from employers); CAL. STATE BAR, MORAL CHARACTER DETERMINATION INSTRUCTIONS, available at http://www.calbarxap.com/applications/CalBar/info/moral_character.html#attachment (noting that contacting employers is part of the administrative screening process required of all applicants); NAT'L CONF. OF B. EXAMINERS, *supra* note 262 (advising applicants to advise former employers that agency may be contacting them).

309. Some states clearly define clinical professors as former employers. See, e.g., 2011 *Character and Fitness Questionnaire*, ILL. BD. OF ADMISSIONS, Question 24 <https://www.ilbaradmissions.org> (last visited May 31, 2012) ("List all legal or law-related employment you have ever had . . . including without limitation temporary, part time, full time, and self employment, paid or unpaid, as a lawyer, law clerk, intern, research assistant, paralegal, legal secretary, or any other clerk or assistant, at or for any individual, lawyer, law firm, legal services office, legal clinic, partnership, corporation, or other business entity, judge, court, government office, armed services, and law school."). Other states seem just as clearly to exclude law school clinics from the category of employers to whom they send character and fitness questionnaires. See, e.g., *Massachusetts Bar Application*, Question 7 (2012), available at <http://www.sjccountyclerk.com/pdf/FEB2012FIRSTTIMEAPP.pdf> ("List employment you have held since your 18th birthday or any business or profession engaged in on your own account."); *South Carolina Bar Application*, Question 11 (Feb. 2012), available at <http://www.sccourts.org/bar/> ("I have pursued the following gainful occupations, including summer employment and self-employment, for the ten-year period prior to the filing of this application.").

310. Only half of the respondents to our survey indicated that their home state routinely request that clinical supervisors fill out such forms. *Infra* App. Question D.1.

established in a student's formal record, clinical professors have worked closely with their students on an individual basis in the practice of law.³¹¹ When clinical professors are sent character and fitness questionnaires, it is in their capacity as former legal employers, not as educators.³¹²

Clinical professors are therefore in a position to know things about their students that a law school administrator could not.³¹³ Moreover, clinical professors may observe serious misconduct that would not constitute an honor code violation and would thus not be the subject of an honor code proceeding.³¹⁴ For example, egregious neglect of casework—the most common type of serious misconduct reported by survey respondents—would not run afoul of the typical honor code that is focused on dishonesty. Such conduct may therefore not be brought to the attention of bar examiners unless it is reported by a clinical supervisor.³¹⁵

At least seventy-five respondents to our survey stated they would consider informing bar examiners of serious misconduct during a clinical course, in particular if it involved a pattern of behavior suggesting that misconduct may recur.³¹⁶ Nineteen respondents

311. See Interview with Dean 1, *supra* note 18 (stating that the dean is an educator who reports on a student's performance as a student, whereas a clinical professor is in a position akin to an employer who has worked closely with a student and has seen the student actually practice law, and that it may therefore be appropriate for the clinical professor to report things that a dean could not or should not report).

312. See *id.*

313. See Telephone Interview with Dean 4, *supra* note 18 (stating that clinicians have more personal contact with students and see more of their behavior, have personal knowledge and their decisions are made more as individuals, and that when a dean reports someone, by contrast, it is the result of an institutional decision).

314. See Telephone Interview with Dean 8, *supra* note 18 (stating that honor code convictions almost always involve dishonesty; he cannot remember a conviction with anything involving an impairment).

315. See Telephone Interview with Dean 3, *supra* note 18 (stating that it could be appropriate for a clinical professor to report something to bar examiners that does not rise to the level of an honor code violation); Telephone Interview with Dean 5, *supra* note 18 (stating that a serious failure to perform in a clinic would not be reported to bar examiners by the school unless the failure resulted in harm to the client or involved dishonesty such as lying to the clinical professor about the work the student performed on the case).

316. *Infra* App. Question D.6. The actual number of respondents who stated they would consider informing bar examiners of serious misconduct is probably significantly higher than seventy-five and may be as high as 142. Only five respondents out of 147 stated they would never report a student's misconduct in a clinic. The survey question was structured in a manner that makes it impossible to determine the precise number of potential reporters, because the question allowed respondents to choose up to ten types of situations in which they would consider reporting student misconduct. For

stated they have actually reported an incident of student misconduct to bar examiners.³¹⁷ The most common type of misconduct they reported is egregious neglect of case responsibilities.³¹⁸ Multiple respondents have also reported conduct involving dishonesty or abuse of a student practice license.³¹⁹

Other clinical professors believe their sole responsibility is to their students. Five respondents to our survey endorsed that view, agreeing with the statement that “[n]o student misconduct in a clinical course would merit a report to a character and fitness panel.”³²⁰ The clinic should be a “safe zone,” some believe, where students can fail without facing career-threatening consequences. The clinical method is based in part on helping students learn from their mistakes through trial and error. Better to have students make mistakes under the watchful eye of a clinical instructor, so the thinking goes, when those mistakes can be quickly corrected and can be used as pedagogical fodder. Reporting a student’s misconduct may seem, at some level, like a betrayal of the student, who, after all, enrolled precisely so that the law school could help the student prepare for bar admission. Submitting unfavorable information is doubly painful because it seems to be a tacit admission of failure in supervising and training a student for appropriate professional conduct. Sharing such information is at times an obligation, however, as discussed below.

example, seventy-five persons stated they would consider reporting a student for “appearing in court or otherwise engaging in case work while impaired.” Sixty-nine respondents stated they would consider reporting a student for “misrepresenting himself or herself to a third party by pretending to be someone other than a legal intern.” *Infra* App. Question D.6. It is possible that all sixty-nine respondents to the second question were among the seventy-five who responded affirmatively to the first question. It is also possible that all sixty-nine respondents to the second question were *different* from those who responded affirmatively to the first question. The total number of persons who responded positively to those two questions may fall anywhere between seventy-five and 144. The precise number is not critical, in any event, because the survey was not constructed in a manner that allows a statistically significant extrapolation to the broader clinical community. The responses are significant not because they reveal the precise proportion of clinical professors who would consider reporting student misconduct to bar examiners, but rather because they suggest that the number is more than negligible.

317. *Infra* App. Question D.2.

318. *Infra* App. Question D.3.

319. *Infra* App. Question D.3.

320. *Infra* App. Question D.6.

b Reporting obligations under the rules

There is generally no affirmative obligation to report student misconduct to bar authorities in the absence of a specific inquiry from bar officials. No state disciplinary rule expressly requires attorneys to report a student's violation of the Rules of Professional Conduct to a disciplinary body.³²¹ Nor do states otherwise—with a single exception—impose an affirmative duty on attorneys to report student misconduct to bar examiners in the absence of a specific request.³²²

On the other hand, Rule 8.1 of the Model Rules of Professional Conduct requires lawyers to “respond to a lawful demand for information from an admissions or disciplinary authority,” and prohibits lawyers from “knowingly making a false statement of material fact” in connection with a bar admission application, including the bar application of another person.³²³ A clinical professor who receives a character and fitness questionnaire,

321. In the “vast majority” of states, law students with student practice certifications are not subject to attorney disciplinary proceedings. See *id.* In the five states where students are formally subject to disciplinary proceedings (Texas, Mississippi, South Carolina, Nevada, and Washington), the rules of professional conduct require members of the bar to report misconduct only by “lawyers”; there is no explicit requirement to report misconduct by law students. See TEXAS RULES OF PROF’L CONDUCT R. 8.03 (1994); MISSISSIPPI RULES OF PROF’L CONDUCT R. 8.3 (1994); SOUTH CAROLINA RULES OF PROF’L CONDUCT R. 8.3 (2010); NEVADA RULES OF PROF’L CONDUCT R. 8.3 (2006); WASHINGTON RULES OF PROF’L CONDUCT R. 8.3 (2006).

322. Michigan Informal Ethics Opinion RI-29 states that even though the disciplinary rules do not impose an explicit duty on attorneys to report serious student misconduct, lawyers must nonetheless do so because “[t]he responsibility to report . . . is consistent with the spirit and intent of those rules and the purpose behind them.” State Bar of Michigan Informal Ethics Opinion RI-29 (1989). The authors have not been able to find another judicial or ethics opinion endorsing that reasoning.

323. Model Rule of Professional Conduct 8.1 provides:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

MODEL RULES OF PROF’L CONDUCT R. 8.1 (2003). The Comment to MODEL RULE 8.1 makes clear that the prohibition applies not merely to a lawyer’s own bar admission application, but also to “that of others.” *Id.* at cmt. 1.

therefore, must respond to it and must do so honestly.³²⁴ As noted above, however, many clinical professors never receive such a questionnaire for their former students.³²⁵

Clinical professors may have reasons apart from the requirements of Rule 8.1 for reporting serious student misconduct. Clinical professors are members of the bar, and every member of the bar has a duty “to seek improvement of the law, . . . the administration of justice, and the quality of service rendered by the legal profession.”³²⁶ If a clinical professor has serious doubts about a student’s fitness to represent clients, it is difficult to justify allowing that student to enter practice without further scrutiny, knowing that clients may be harmed. Moreover, if a student has real character and fitness issues, it may be a disservice to the student to give the student a “pass” to practice, only to have the student fail and face later disciplinary proceedings.

c. *What should clinical professors report?*

Nineteen survey respondents indicated they had reported to bar examiners either “an incident of student misconduct or dereliction” in a clinical course, or “a concern about the student’s fitness to practice law that arose during a clinical course.”³²⁷ Eight of those reports involved an egregious neglect of case responsibilities, including students completely disappearing from the clinic at a critical juncture in a case.³²⁸ Three reports involved dishonesty, including, forging a document, falsifying client income on a pleading, and misrepresenting information on a resume.³²⁹ Two involved abuse of a student practice license, including one student who represented an outside client and another who filed pleadings and appeared in court in a clinic matter without the supervisor’s knowledge or

324. Rule 8.1’s requirement to respond to a lawful demand for information has been enforced in connection with lawyer disciplinary cases, see *Attorney Grievance Comm’n v. Oswinkle*, 364 Md. 182, 772 A.2d 267 (2001), but it is not clear that the rule has ever been enforced in connection with a request for information related to another person’s application for bar admission. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 857 (1986) (“[Rule 8.1 is] among the least enforced in the lawyer codes. Lawyers are very rarely called upon to play any role in the bar admission process, and then they act mainly as volunteers.”).

325. See *supra* note 268 and accompanying text.

326. MODEL RULES OF PROF’L CONDUCT, Pmb1 (2006).

327. *Infra* App. Question D.2.

328. *Infra* App. Question D.3.

329. *Infra* App. Question D.3.

permission.³³⁰ The other reports involved an honor code violation, a threat of violence, substance dependence, and mental illness.³³¹

Among the seventy-five or more survey respondents who stated they would *consider* reporting a clinical student's misconduct to a bar examiner, the types of misconduct that would most likely prompt such a report included "appearing in court or otherwise engaging in case work while impaired," "misrepresenting himself or herself to a third party by pretending to be someone other than a legal intern," and "abandoning a case at a critical juncture, such as disappearing in the days leading up to an evidentiary hearing."³³² Over half of respondents indicated they were not likely to report a single incident of misconduct, but would consider reporting it if there was a pattern or "circumstances suggesting a problem may recur."³³³ Over ninety respondents indicated that, depending on the circumstances, they would consider reporting a "serious alcohol or other substance abuse problem" even in the absence of an incident of misconduct, or a "serious mental illness" that affects a student's performance.³³⁴

In narrative responses, some emphasized the importance of context, including particularly the student's response to the problem.³³⁵ That response would help the clinical professor judge whether the student understood the seriousness of the problem and whether the student was addressing it responsibly. Clinical professors seem to be willing to overlook minor mistakes and one-time mistakes as learning opportunities. Their decision whether to report misconduct seems to turn on whether they believe a serious problem that would harm clients is likely to recur in practice.

There is an understandable tension between what clinical professors may be willing to report and what bar examiners would like to know. Clinical professors appear loath to report misconduct or fitness concerns unless they know enough to have made their own judgment as to the likelihood the student will commit misconduct, and potentially harm a client, in practice.³³⁶ Bar examiners, on the

330. *Infra* App. Question D.3.

331. *Infra* App. Question D.3.

332. *Infra* App. Question D.6.

333. *Infra* App. Question D.6.

334. *Infra* App. Questions D.7, D.8.

335. *See infra* App. Question D.6.

336. Telephone Interview with Bar Examiner 2, *supra* note 18. Clinical professors need not, and are generally not asked to, express an opinion about the ultimate question of an applicant's fitness. Bar examiners generally seek *facts* from which they can form their own opinions, and clinical professors should generally limit themselves to reporting facts. Telephone Interview with Bar Examiner 1, *supra* note 18.

other hand, have a lower threshold. They seek information about problems that *might* suggest fitness concerns because they want to be able to form their *own* judgment about the likelihood of future misconduct based on information they have gathered from a variety of sources, including information that may not be known to the clinical professor.³³⁷

d. *What are the consequences of reporting?*

Clinical professors' (and law school administrators') reluctance to report adverse information may be driven in part by a fear that the information could lead to a denial of bar admission.³³⁸ Bar officials with whom the authors spoke, however, indicated that adverse information is far more likely to be resolved by further inquiry than to result in ultimate denial.³³⁹ The bar officials uniformly acknowledged that students make mistakes, that bar examiners are willing to look beyond students' mistakes,³⁴⁰ and that bar examiners' concern is whether an applicant has a character flaw³⁴¹ or an ongoing

337. See discussion *supra* Part V.B.i.

338. Interviews with Dean 7, *supra* note 18; Interview with Dean 8, *supra* note 18 (stating their impressions that many professors and law school administrators erroneously fear that reports of student misconduct will lead to denials of admission).

339. Telephone Interview with Bar Examiner 1, *supra* note 18; Telephone Interview with Bar Examiner 2, *supra* note 18; Telephone Interview with Bar Examiner 3, *supra* note 18; Telephone Interview with Bar Examiner 4, *supra* note 18. The authors conducted anonymous interviews with five state bar officials from four different states. Three of the officials were bar examiners. Two were state bar disciplinary officials. As with the authors' other interviews, the sample was too small to draw statistically significant conclusions. Nonetheless, the interviewees expressed consistent themes concerning bar examiners' willingness to look beyond student errors.

340. The bar examiners interviewed by the authors indicated that bar examiners are not looking to exclude applicants and that few applicants are ultimately denied bar admission. See Telephone Interview with Bar Examiner 3, *supra* note 18 (acknowledging that "students make mistakes all the time"; that many mistakes "may be attributable to poor supervision"; and that if there is a single incident of misconduct but no other "red flag[s]" in a student's application the mistake will not affect admission—as long as the student admits the mistake and pledges it won't happen again). See Telephone Interview with Bar Examiner 1, *supra* note 18 (stating that "[m]ost bar regulators are concerned with character flaw problems," not "mistakes" or "things that can be treated," and that it is "very hard to be kept out altogether" if you own up to past mistakes or if you admit you have a problem and are being treated); Telephone Interview with Bar Examiner 4, *supra* note 18 (would not likely exclude a student guilty of client neglect as long as the "student understood [the] neglect was wrong, took responsibility for it, and was committed to not repeating the incident).

341. The bar examiners seemed particularly concerned with dishonesty. See Telephone Interview with Bar Examiner 1, *supra* note 18 (stating that "[m]ost bar regulators are

problem that is so serious that it indicates a *current* lack of fitness to practice law.³⁴² While it is difficult to obtain reliable national statistics, all indications are that ultimate denials of bar admission are rare, even in cases where a file contains adverse information that merits extra investigation.³⁴³

concerned with character flaw problems” such as dishonesty; he would be inclined to further investigate instances of “knowing falsity” or “outright abandonment” of a client to ensure there was not an underlying fitness problem); Telephone Interview with Bar Examiner 3, *supra* note 18 (stating that lying and dishonesty can “kill” an application, but an applicant can overcome a plagiarism problem or a serious error in a clinical course as long as the student owns up to the unprofessionalism of the behavior and demonstrates it is not likely to recur); Interview with Dean 9, *supra* note 18 (reporting that bar admissions officials have told him “[t]he biggest problem they have is when students fail to report something [adverse] that the school has reported to the bar”).

342. See Interview with Bar Official 5, *supra* note 216 (The standard for admission is “current’ good character and fitness.” If an applicant can show she is past her bad conduct, that she has dealt with it, and that she has “a plan for going forward,” it would be “tough” for a board of law examiners to “keep [her] out.”); Pa. Bd. of Law Exam’rs, *Character & Fitness FAQ’s*, PABAREXAM.ORG, http://www.pabarexam.org/c_and_f/cffaqs/7.htm (last updated Oct. 22, 2011) (“Evidence of rehabilitation is the most critical factor the Board uses to determine whether past problems should lead to denial of admission. The Board’s standard for admission is current good character and fitness. Generally, the Board will assess whether the problems continue and, if they do not, whether the applicant’s life has changed in ways that suggest they are unlikely to recur.”).
343. In 1985, Deborah Rhode reported, in an often-cited article, on the low rate of character and fitness-based bar admission denials. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 516 (1985) (discussing the historically low rate of admission denials on character and fitness grounds, estimated at .2% in 1982). Information from various states suggests that trend has continued. See BAR ADMISSIONS COMM. OF THE ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, A MODEL FOR DIALOGUE: A MEETING MANUAL ON CHARACTER AND FITNESS ISSUES FOR BAR EXAMINERS AND LAW SCHOOLS, 41–43 (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/model_dialogue.authcheckdam.pdf (reporting that in Ohio, Georgia, and Minnesota, most applicants who went to hearing were ultimately admitted, and that each state rejected an average of fewer than four bar applications per year on character and fitness grounds during the previous decade); John T. Berry, *The Character and Fitness Process*, MICH. B. J., July 2003 at 14, 14 (reporting that of the 1,350 bar applications reviewed in Michigan each year, 60–70% present issues meriting further investigation by the Character and Fitness Department, but the vast majority are resolved without hearing; only 3% are ultimately taken to an evidentiary hearing); Mo. Bd. of Law Exam’rs, *Frequently Asked Questions*, MBLE.ORG, <https://www.mble.org/faq#360> (last visited May 31, 2012) (discussing how out of an average 1500+ bar applications each year from 2002 to 2008, an average of thirty-one went to a character and fitness hearing, and fewer than six per year were ultimately denied); Kathryn L. Allen & Jerome Braun, *Admission to the Bar—Character and Fitness Considerations*, SUPREME COURT OF GEORGIA OFFICE OF BAR ADMISSIONS,

One recent development that lessens the likelihood of an adverse report leading to denial of admission is the rise of conditional admissions.³⁴⁴ Twenty-one states have now instituted a “conditional admission” process that allows applicants with recent histories of substance abuse, mental disability, debt problems and sometimes other issues to join the bar subject to a limited period of probation that may include treatment, monitoring, and other procedures to ensure that their problems are being addressed.³⁴⁵

<http://www.gabaradmissions.org/pages/braun/php> (last visited May 31, 2012) (reporting that of 11,000 bar applications reviewed by the Georgia Fitness Board since 1977, the vast majority of issues have been resolved through informal proceedings and only thirty-one applications have been denied on character and fitness grounds). Many of the law school administrators interviewed by the authors endorsed the view that bar examiners tend to overlook student misconduct and that denials of bar admission are rare. See Interview with Dean 5, *supra* note 18 (reporting to character and fitness bodies does not usually result in denial; Dean 5 is aware of only one graduate from School 8, a convicted felon, who was ever denied admission); Interview with Dean 6, *supra* note 18 (discussing how a report to bar examiners does not mean the applicant will be denied admission and that most such reports that are reviewed end up in admission; only a rare case results in denial); Interview with Dean 7, *supra* note 18 (discussing how reports to bar examiners are unlikely to result in exclusion from the bar); Interview with Dean 8, *supra* note 18 (describing the character and fitness climate in his state as a “warm environment” in which bar examiners work with applicants to overcome problems and accomplish admission); Interview with Dean 9, *supra* note 18 (reporting that bar admission officials have told him they do not want to exclude applicants from the bar; they want to find a way to admit applicants).

344. See Stephanie Lyerly, Note, *Conditional Admission: A Step in the Right Direction*, 22 GEO. J. LEGAL ETHICS 299, 300 (2009).

345. See NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2011 4–5 (2011), available at http://www.ncbex.org/assets/media_files/Comp-Guide/2011CompGuide.pdf (reporting that the following states now allow conditional admission: Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Texas, and West Virginia); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans With Disabilities Act*, 49 UCLA L. REV. 93, 156 (2001) (“Typically, these programs establish a probationary period during which the applicant must comply with conditions such as avoiding disciplinary problems, providing periodic reports from a treatment provider confirming compliance with treatment recommendations, or abstaining from alcohol and drug use. The conditions are generally confidential, so that the attorney appears fully licensed in the eyes of clients and colleagues.”); Denzel, *supra* note 301, at 912–13 (“The programs are used most frequently for applicants with substance abuse or mental health histories, but may also be employed for those with histories of financial difficulties or, in some states, in any situation that the board feels a period of

Conditional admissions programs are controversial. Proponents argue, as one bar examiner observed, that the conditional admission process “changes the conversation” between law schools and bar examiners by making them partners in a rehabilitative enterprise rather than adversaries.³⁴⁶ Others contend that conditional admissions programs create “second class citizenship” for attorneys with mental health problems³⁴⁷ and may violate the ADA.³⁴⁸

The observations in this section are not meant to suggest that reporting student misconduct is without consequences for the student, or that a clinical professor should make a report to bar examiners without careful thought. Additional inquiries by bar examiners can lead to delays in admission. Conditional admission certainly has its costs.³⁴⁹ Finally, student misconduct can in extreme cases lead to denial of admission. Thus, while a clinical professor must respond honestly to character and fitness inquiries from bar examiners, and may at times be required to report student misconduct to them, the professor must inevitably exercise discretion and judgment as to whether any particular instance of student misconduct rises to the level of reportability. The authors endorse the instincts of the majority of respondents to the Serious Errors Survey who indicated they would consider reporting student misconduct only when it is part of a pattern of misconduct, or when an individual instance of misconduct is particularly egregious, such that the clinical professor has a genuine concern that the conduct would reoccur in practice.

monitoring would be appropriate. Conditions attached to admission may include close supervision by an admitted attorney; continued sobriety; drug tests; substance abuse, psychiatric, or psychological treatment; or other forms of monitoring.”).

346. Interview with Bar Official 5, *supra* note 216; see also Lyerly, *supra* note 344, at 315–16 (discussing the benefits of conditional admissions programs).

347. See Denzel, *supra* note 301, at 913 (“[C]onditional licenses may be revoked for a failure to adhere to conditions that are not directly related to the attorney’s ability to practice law. Additionally, conditionally admitted attorneys may be repeatedly required to turn over medical records to the bar, reveal their or their sponsor’s participation in otherwise ‘anonymous’ support programs, expend thousands of dollars to enroll in monitoring programs or to obtain professional evaluations, or be continually supervised by another attorney in order to maintain their license. A conditional license is an official statement that an attorney is less capable, and therefore less trustworthy, reliable, or simply ‘less than’ a fully licensed attorney. Conditional status is stigmatizing and, if known, may damage an attorney’s reputation and ability to build a practice.”).

348. *Id.* at 923–25.

349. See Bauer, *supra* note 345, at 156 (“Conditional admission is not without its problems. It places significant burdens on lawyers with disabilities. When conditions are imposed without sufficient basis, or for an unreasonably long time period, conditional admission is degrading and discriminatory.”).

When considering whether to report misconduct, however, clinical professors should keep in mind that such reporting is not always fatal to bar admission; that in some cases it can be part of a rehabilitative process that is ultimately in the student's best interests; and that in extreme cases, where a student's conduct demonstrates that the student is truly unfit for practice, reporting may be necessary for the protection of clients and the legal system.

CONCLUSION

Student errors and misconduct will occur in a law school clinic. Minor student errors should be part of the regular educational process. Law school clinics should expect minor errors and use them as teaching opportunities. However, clinical faculty have an obligation to minimize the potential for major misconduct that negatively affects clients rights or subjects the school to liability. Even with appropriate constructive prescreening and quality supervision, some misconduct will occur. When this happens, the clinic and school should have policies and procedures to intervene and respond in a constructive and appropriate manner.

APPENDIX

Serious Errors in Clinical Practice—Survey Summary and Responses

METHODOLOGY

- Survey administered online through SurveyMonkeyTM.
- All responses were anonymous.
- Survey distributed to clinical law professors through the LawClinic listserv administered by Washburn University School of Law. The listserv has approximately 1500 members.

RESPONDENTS

- 147 respondents from 38 states and the District of Columbia.
- All clinical law professors teaching in either live client clinics or externships.
- More than half of respondents have 11+ years of experience in clinical teaching.

RESPONSES

Admission to Clinics

- The vast majority of respondents (87.5%) report their clinics do not pre-screen their students.
- Those that pre-screen look primarily for criminal/disciplinary history, and secondarily for mental health/substance abuse issues.
- Very few students are denied admission to a clinic.
- The primary reason for denying admission is pending criminal charges.

Monitoring of Students Deemed to Pose a Greater Risk of Poor Performance

- Nearly half of respondents (62 respondents/47.3%) reported that they or their programs had set up special supervisory procedures for individual students who had exhibited poor

performance or who were perceived to be at risk of poor performance.

- The primary techniques for enhanced supervision included, in descending order of frequency: more frequent supervisory meetings; reduced or modified case responsibilities; additional intermediate deadlines or more elaborate procedures for accomplishing tasks; involvement of student services staff or deans; recommendation that student obtain outside counseling or treatment; and requirement that student submit additional written reports on case work.

Reporting Misconduct

- More than half of respondents stated that one or more of their clinical students had engaged in sufficiently serious misconduct or poor performance that the respondent reported it to a law school administrator.
- The primary types of misconduct or poor performance that led to such reports, in descending order, are: egregious neglect of case responsibilities (27), dishonesty (12), and mental health issues leading to a serious performance problem (6).
- A substantial majority of respondents stated that they would consider reporting serious misconduct during a clinical course to a bar examiner. Most respondents would be unlikely to report misconduct unless it involved a pattern of behavior suggesting that misconduct may recur.
- Five respondents (4%) stated that they would never report student misconduct to a bar examiner, no matter how serious.
- Only a small minority of respondents (19 respondents, or 14.5%, of total) have actually reported an incident of student misconduct to a bar examiner.
- Among those who have reported student misconduct to bar examiners, the most common type of misconduct reported is egregious neglect of case responsibilities. Multiple respondents have reported conduct involving dishonesty or abuse of a student practice license.
- Only a small number of respondents (7 respondents, or 5.5%) reported that they have ever taken steps to terminate a student practice license.

DETAILED SURVEY RESPONSES³⁵⁰

A. General Information

1. In what state is your law school located?

Alabama (1), Arkansas (1), California (12), Colorado (1), Connecticut (3), District of Columbia (8), Florida (7), Georgia (2), Hawaii (1), Idaho (1), Illinois (6), Indiana (5), Iowa (3), Kansas (1), Louisiana (1), Maryland (5), Massachusetts (7), Michigan (8), Minnesota (3), Mississippi (1), Missouri (5), Montana (1), Nebraska (1), New Jersey (5), New York (19), North Carolina (3), Ohio (4), Oklahoma (1), Oregon (3), Pennsylvania (9), Rhode Island (1), South Carolina (1), Tennessee (2), Texas (7), Vermont (1), Virginia (1), Washington (2), West Virginia (1), Wisconsin (1).

2. Is participation in a clinical program mandatory at your law school?

Yes8

No..... 137

3. How many years have you been a clinical instructor?

YEARS	NUMBER	PERCENTAGE
1-5	43	29.5
6-10	23	15.8
11-15	24	16.4
15+	56	38.4

B. Admission to Clinical Program

1. Does the admissions process in your clinical program include questioning students or reviewing their records to identify mental health issues, substance abuse issues, or criminal/disciplinary histories that might raise concerns about the student's ability to carry out his or her clinical responsibilities?

350. Not all respondents answered every question. Answer totals therefore do not always add up to 147.

Yes	17 (12.5%)
No.....	119 (87.5%)

2. If your answer to Question 1 is yes, what issues do you look for?

Criminal history	15 (93.8%)
Disciplinary history	13 (81.3%)
Mental health issues.....	9 (56.3%)
Alcohol/substance abuse	9 (56.3%)
Other ³⁵¹ :	

Inquire of student services dean/administrators3

Rely on law school certification of good standing under student practice rule4

Review student records/transcripts.....2

Ask prospective clinic students to reveal issues.....2

3. To the best of your knowledge, has your clinical program ever denied admission to a student on the basis of such screening?

Yes (responses from 10 different states)	11 (9.6%) ³⁵²
No.....	103 (90.4%)

4. If so, briefly describe the reason.³⁵³

Pending criminal charge	5
Mental health issue	2
Academic issues.....	1
Falsified admissions application	1
Bad record of absences	1

351. "Other" responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here.

352. In order to ensure respondent anonymity, respondents were asked to identify themselves by state, not by school.

353. Responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here.

C. Monitoring

1. Have you or your program ever set up a special supervisory or monitoring procedure for a student whom you believed might be at a heightened risk for performance problems?

Yes 62 (47.3%)

No..... 69 (57.7%)

2. If yes, briefly describe the special procedures.³⁵⁴

Increase frequency of supervisory meetings with student ..24

Increase supervisory vigilance (unspecified)20

Reduce or modify case responsibilities15

Set more intermediate deadlines or procedures for accomplishing tasks8

Get student services dean/administrators involved.....7

Require or recommend that student obtain professional counseling.....6

Require student to submit additional reports on case work ..6

Hold a special meeting with student to discuss concerns.....5

Advise student to withdraw from clinic4

Write special memos to student2

Increase consultation about student with other clinical faculty2

Assign student to work solo so that partner won't mask deficiencies.....2

Add a partner to assure that client will be adequately served1

Make sure student is placed with an experienced/trusted externship supervisor1

354. Responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here. Because some respondents listed multiple monitoring procedures, the total number of responses to this question exceeds the number of respondents to the survey.

Videotape client meetings so that supervisor can ensure proper performance.....1

D. Character and Fitness Process

- 1. Does the state in which your law school is located routinely send clinical supervisors a character and fitness questionnaire or ask for an affidavit of character and fitness as part of the bar application process?**

Yes 65 (50%)

No..... 65 (50%)

Answers broken down by state:

Jurisdictions in which all respondents answered yes.....7

Jurisdictions in which all respondents answered no15

Jurisdictions in which responses were mixed15

- 2. Have you ever directly informed bar examiners about an incident of student misconduct or dereliction during a student's participation in a clinical law course, or of a concern about the student's fitness to practice law that arose during a clinical course?**

Yes 19 (14.5%)

No..... 112 (85.5%)

- 3. If so, briefly describe the nature of the misconduct, dereliction, or concern.³⁵⁵**

Egregious neglect of case responsibilities.....8

Dishonesty – (Forging document, falsifying client income on a pleading, misrepresenting info on resume)3

355. Responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here.

- Abuse of student practice license – (Representing outside client, filing documents/appearing without supervisor permission)2
- Honor code violation1
- Threat of violence1
- Substance dependence1
- Mental illness1
- 4. Have you ever been asked to provide written or oral testimony to a character and fitness panel concerning a student’s performance in a clinical law course?**
- Yes23 (17.6%)
- No.....108 (82.4%)
- 5. If so, briefly describe the circumstances, including whether you considered your testimony to be supportive or adversarial to the applicant.**
- Supportive7
- Adversarial1
- 6. Which of the following instances of student misconduct would you consider serious enough that you would at least consider reporting it to a character and fitness committee?**
- Appearing in court or otherwise engaging in case work while impaired.....75 (60%)
- Misrepresenting himself or herself to a third party by pretending to be someone other than a legal intern69 (55%)
- Abandoning a case at a critical juncture, such as disappearing in the days leading up to an evidentiary hearing66 (52.8%)
- Failing to disclose a conflict of interest.....48 (38.4%)
- Misrepresenting a fact to an opposing party48 (38.4%)
- Appearing in court or another forum in violation of a student practice rule – without a supervisor48 (38.4%)

Failing to appear at a scheduled hearing after oversleeping or for another reason	29 (23.2%)
Missing a filing deadline	23 (18.4%)
Taking a case file out of the office and losing it.....	15 (12%)
Failing to prepare adequately for a hearing or deposition.....	14 (11.2%)
Would consider reporting a single incident of misconduct if it was serious enough	70 (56%)
Not likely to report a single incident or condition, but might report if there's a pattern of problems such as those listed above or if there are circumstances suggesting a problem may recur	68 (54.4%)
It depends on whether the client was harmed; would report an above incident only if it resulted in harm to the client	16 (12.8%)
None. No student misconduct in a clinical course would merit a report to a character and fitness panel	5 (4%)

Summary of Respondents' Free-Form Comments on when They Would Report Misconduct to Bar Examiners³⁵⁶

1. Would need additional "bad facts" or evidence of improper intention before considering reporting the conduct; the student might have a satisfactory explanation5
2. The student's self-awareness, response to the incident, and subsequent corrective actions would weigh heavily in any decision whether to report.....4
3. Issues bearing on integrity are the most critical. Fraud, deceit or criminal activity relating to clinical work (such as stealing from a client or clinic) would merit reporting.....3
4. Much of the described student misconduct represents a failure of supervision.....3

356. Responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here.

5. Students should be given latitude to make mistakes that may stem from lack of experience or failure to understand the rules; the clinic should be a learning ground1
 6. Misconduct should be reported to the dean. The dean can then decide whether to report to the bar1
 7. The standard for reporting student misconduct should be the same as the standard for reporting attorney misconduct1
 8. The standard should be whether there is a serious problem that would likely recur in the student's professional life1
 9. Would consult with colleagues and administrators before considering reporting student misconduct.....1
- 7. Would you ever inform a character and fitness panel if you knew that a clinical student was struggling with a serious alcohol or other substance abuse problem, in the absence of an incident of misconduct?**
- Yes 14 (10.9%)
- No..... 23 (18%)
- Depends on the circumstances91 (71.1%)
- 8. Would you ever inform a character and fitness panel that a clinical student suffers from a serious mental illness such as major depression or PTSD that affects the student's performance?**
- Yes 10 (7.8%)
- No..... 22 (17.2%)
- Depends on the circumstances 96 (75%)

E. Law School Process

- 1. Have you ever reported student misconduct or dereliction during a clinical course to a law school administrator?**
- Yes 68 (53.1%)
- No..... 60 (46.9%)

2. If so, was that information included in the student's permanent record?

Yes	19 (25.3%)
No.....	18 (24%)
Unsure.....	38 (50.7%)

3. Briefly describe the nature of the misconduct or dereliction.³⁵⁷

1. Egregious neglect – failure to prepare, to perform tasks, to meet deadlines	7
2. Dishonesty – Deliberate misrepresentation, stealing, encouraging witness to lie, falsifying records related to course.....	12
3. Mental health issue led to serious performance problem	6
4. Extremely poor performance (even when trying).....	3
5. Insubordination	2
6. Student misrepresented self as attorney	1
7. Alcohol abuse led to missed mediation.....	1
8. Breached client confidentiality	1
9. Failed to show for externship placement – no advance notice	1

357. Responses to this question were in narrative form. The survey administrators used their editorial judgment to create the grouping and labeling reported here.

F. Student Certification**1. Have you ever taken steps to terminate a student's practice license?³⁵⁸**

Yes 7 (5.5%)

No..... 121 (94.5%)

358. Some respondents indicated in narrative notes that they had removed students from cases or from the clinic for misconduct without informing state bar officials or taking formal steps to terminate the student practice certification.