

BEYOND THE ADA: HOW CLINICS CAN ASSIST LAW STUDENTS WITH “NON-VISIBLE” DISABILITIES TO BRIDGE THE ACCOMMODATIONS GAP BETWEEN CLASSROOM AND PRACTICE

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Introduction

Much has been written about the need for legal education to prepare students for the practice of law. Twenty years ago, Justice Rosalie Wahl of the Minnesota Supreme Court and Chair of the ABA’s Section of Legal Education challenged legal educators to develop academic programs that prepared their students for entry into practice:

Have we really tried in law school to determine what skills, what attitudes, what character traits, what quality of mind are required for lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation?¹

Traditionally, law school clinics have played a key role in bridging the gap between the study of the law and its practice. Two recent studies, one undertaken by the Clinical Legal Education Association² and another by the Carnegie Foundation for the

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¹ Symposium, *The American Bar Association’s National Conference on Professional Skills and Legal Education*, 19 N.M. L. REV. 1, 7 (1989).

² The first is a report of the Clinical Legal Education Association entitled *Best Practices in Legal Education*, which provides law schools a template for reforming legal education. Clinical education plays a central role in the proposed curriculum. CLINICAL LEGAL EDUC. ASSOC., *BEST PRACTICES IN LEGAL EDUCATION*, at viii (Roy Stuckey, ed. 2007) [hereinafter *BEST PRACTICES*]. As that study acknowledges, it built on the comprehensive work undertaken by a 1989 Commission chaired by Robert MacCrate, “Task Force on Law Schools and the Profession” (known as the “MacCrate Report”). ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION*:

Advancement of Teaching, confirm that legal education needs to balance doctrinal analysis with contextualized teaching of lawyering skills and professional ethics.³

While the leaders of legal education reform have largely been academics and practitioners, the consumers of legal education have also begun to play a role.⁴ Law students bring a range of different learning styles to campus.⁵ Faculties are increasingly seeking to incorporate methodologies other than Socratic dialogue to complement traditional doctrinal teaching. However, for a certain subset of the population, students with disabilities, these changes in legal training are still inadequate.

Over the past three decades, legal educators have felt increased pressure to ensure that law schools respond to the academic needs of disabled students. First, the Rehabilitation Act of 1973,⁶ and then the Americans with Disabilities Act of 1990 (hereinafter the “ADA”),⁷ mandated that law schools make reasonable accommodations in their programs of instruction for qualified law students with disabilities. The faculty and administration’s ability to meet the needs of these students is particularly critical given the mounting evidence that lawyers with disabilities are more likely to face

NARROWING THE GAP (1992); see also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps that We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001).

³ The second major study which also was released this year comes from the Carnegie Foundation for the Advancement of Teaching. It challenges the academy to deliver legal instruction responsive to the demands of practice and to the needs of the public the profession is pledged to serve. EDUCATING LAWYERS 4 (William Sullivan et al., eds.2007).

Even before release of the two studies, the ABA had adopted a new accreditation standard for law schools which required that every student be given substantial instruction in those professional skills “generally regarded as necessary for the effective and responsible participation in the legal profession.” ABA Standards for Accreditation, Standard 3.02 (a) (4), adopted in August, 2004; see also Interpretation 3.02 (2): “Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are amount the areas of instruction in professional skills that fulfill Standard 302 (a) (4).”

⁴ Numerous commentators have questioned the significant reliance by prospective law students on law school rankings. See generally Cass Sunstein, *Ranking Law Schools: A Market Test?* 81 IND. L. J. 25 (2006); Paul L. Caron & Rafael Gely, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L. J. 1 (2006); Ronald Cass, *So, Why Do You Want to Be A Lawyer? What the ABA, the AALS, and the U. S. News Don’t Know That We Do*, 31 U. TOL. L. REV. 573 (2000).

⁵ See generally Eric A DeGroff & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 BYU EDUC. & L.J. 499; Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L.J. 116 (2005); Robin A Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998).

⁶ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797(a) (1994)).

⁷ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 29 U.S.C. § 706, 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 152, 221, 611 (1994)). For purposes of this Article, we have assumed that Title I of the ADA applies to student lawyers practicing in in-house clinics. See Sande Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 185-86 (1999).

unemployment or lower compensation once employed.⁸ Changes have begun to occur: physical barriers have come down and technological tools and adaptive devices have become more accepted throughout the institution.⁹

But students do not present with only physical disabilities. Increasingly, students with “non-visible” disabilities¹⁰ are seeking accommodations for a range of mental health, cognitive, and learning disabilities.¹¹ Again, the academy has tried to be responsive. Building on accommodations developed in public schools, law schools have become more adept at providing qualified students with documented disabilities accommodations in their academic classes. Note-takers, special testing and attendance rules, and access to academic support programs are common features of most law schools’ disability law protocols.

Which brings us to the focus of this piece. At the very time that the importance of experiential learning is being trumpeted as critical to the preparation of all law students for practice, all too little has been written about the role of clinical education in helping students with non-visible disabilities succeed in their chosen careers. In her groundbreaking 1999 article, Sande Buhai alerted the academy to the unique role that

⁸ ABA Comm. on Mental and Physical Disability Law, Goal IX: A Report on the Status of the Participation of Persons with Disabilities in ABA Section, Division and Forum Leadership Positions 2 (2007).

⁹ See generally ABA Standard 213 (setting forth need for accommodations for qualified students); see also *id.* Standard 211 (detailing the non-discrimination policy).

¹⁰ We recognize that various terms for classifications of disabilities have developed in the literature. See *Runnebaum v. NationsBank of Maryland, N.A.*, 95 F. 3d 1285, 1295 (4th Cir. 1996) (“Many disabilities are apparent to a casual observer. An employer can see a wheelchair, a guide dog, or a hearing aid. Other disabilities, however, are invisible to the naked eye.”).

In this article, we use the term “non-visible” disabilities to refer specifically to mental, neurological, and cognitive disabilities, including ADD/ADHD, and not to other types of limitations which might also not be immediately apparent to an employer. See 42 U.S. C. § 12102(2)(A)-(C). While the term “non-visible” disabilities seems not to be common in case law, it has been frequently employed in the academic literature. See Bruce Familant, *The Essential Functions of Being a Lawyer with a Non-Visible Disability: On the Wings of a Kiwi Bird*, 15 COOLEY L. REV. 517, 517 n.1 (1998).

¹¹ See Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 220 (2004); Donald Stone, *The Impact of Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 570 (1996) (citing 1994-95 survey of 80 law schools stating that 54% of students requesting exam accommodations have learning disabilities); see also Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J. L. & EDUC. 217, 217-18 (2003) (noting American Council on Education survey of college freshmen which indicated that the number of students reporting mental health issues and learning disabilities had risen from 16.1% in 1998 to 40.1% in 2001, with dyslexia, anxiety disorders, and ADD/ADHD being the most common impairments).

Several studies have noted that once in practice lawyers experience depression at rates higher than other professions. See, e.g., generally Stephen Terrell, *The Dirty Secret in the Lives of Lawyers*, 49 JUN RES GESTAE 34 (2006) (reporting that attorneys report the highest rate of depression in statistical studies of 104 professions); Bridget A. Maloney, *Distress Among the Legal Profession: What Law Schools Can Do About It*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 307 (2001) (citing 1980s studies); see also *Law and a Disorder*, BOSTON GLOBE, June 27, 2007, at C1 (discussing the dramatic rise in requests for assistance in dealing with depression received by one local lawyer support group, Lawyers Concerned for Lawyers). Others have noted the increase in mental health issues confronted by law students. See Lawrence Krieger, *Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

clinics can play in the legal education of students with disabilities.¹² Buhai demonstrated persuasively that law school clinics offered such students an opportunity to identify and experiment with accommodations which would assist them in practice. To achieve that goal, she proposed that clinicians and students base those accommodations on the employment provisions of the ADA.¹³

This article seeks to build upon these important insights. It presumes the applicability of the ADA to law school clinics and focuses instead on what clinics can offer students with mental health impairments, neurological disorders, and learning disabilities, whether or not they technically qualify for ADA protections, to prepare them most effectively for practice. Given the harsh demands of practice, particularly for lawyers with disabilities, it is incumbent on the academy to maximize the teaching opportunities available in clinics before graduation.

Part I opens with a brief summary of the current law on accommodating lawyers with disabilities in practice.¹⁴ Part II provides an overview of how other professional disciplines (e.g. medicine, education, and social work) are adapting clinical pedagogy to meet the needs of students with disabilities. While educators in other professions attempted to address these questions earlier and more comprehensively than did the law academy, ultimately their contributions leave unanswered many questions about how best to assist students with non-visible disabilities in clinical settings.

Then, in Part III, we offer two case studies, built on our own clinical teaching experiences, of law students with mental health and learning impairments. We then use those histories to discuss one law school's efforts to accommodate the needs of students with learning disabilities and mental illness. In particular, we look to the role of law school administrators (including student services and career placement) in counseling students with disabilities. Then we investigate how clinics can help these students seek assistance and develop tools and strategies for dealing with their disabilities, while preserving ethical and academic standards. We close in Part IV by offering proposals for best practices for maximizing the effectiveness of clinical education in the legal training of lawyers with mental health and learning disabilities.

¹²Buhai, *supra* note 7. Leah Christensen has recently reported on an empirical study she conducted with law students who self-identified as having ADD, analyzing the difficulties they experienced adapting their learning styles to traditional legal education. Leah Christensen, *Law Students Who Learn Differently: A Narrative Case Study of Three Law Students With Attention Deficit Disorder*, 21 J. L. & HEALTH 45 (2008). However, she stopped short of recommending that such students explore clinical education as a bridge to practice.

¹³ Buhai, *supra* note 7, at 185-86; *see also* JENNIFER WATSON & SHANNON HUTCHENS, MEDICAL STUDENTS WITH DISABILITIES: A GENERATION OF PRACTICE (2005) (noting that medical schools are required to comply with Title I of the ADA for medical students and residents who are also employees).

¹⁴ The authors do not intend Part I to substitute for a careful study of the ADA. Much doctrinal analysis already exists that effectively serves that purpose. *See generally* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION (1995); MICHAEL L. PERLIN, ET AL., CASES AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW (2006). Instead, this Article presumes that the ADA applies to law schools generally, and to clinics in particular, and focuses on implementation issues.

I. The View from Practice

One would assume that legal practice has become more open to lawyers with disabilities. Certainly studies have shown a steady increase in the number of law students with disabilities since passage of the ADA.¹⁵ The last two decades have seen a rise in the number of those students seeking accommodations. Institutions have responded by establishing protocols for complying with disability law and established administrative positions to help law schools meet the needs of their diverse student body.

But what is the state of practice for lawyers with disabilities? Despite the promise of the ADA as a tool to end discrimination against individuals with disabilities, the legal profession has been slow to embrace affirmative action plans to hire and retain lawyers with disabilities. In 2006, only .33% of all lawyer-members of the American Bar Association identified themselves as having disabilities.¹⁶ Furthermore, studies suggest that attorneys with disabilities often find limited employment options, with solo practice being the default position.¹⁷

In 2006, the Equal Employment Opportunity Commission (hereinafter “EEOC”) issued a white paper which explored the lack of access to reasonable accommodations experienced by lawyers with disabilities.¹⁸ It notes: “access to the profession is important for people with disabilities for the same reasons it is important to minorities and women.”¹⁹ The EEOC directive presumed that legal employers have misconceptions

¹⁵ Compare Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners and the Law Teacher as a Learner*, 6 NEV. L. J. 116 (2005) (compiling recent studies showing increases in numbers of law students with disabilities); Kevin Smith, *Disabilities, Law Schools and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1 (1999) (noting the difficulties inherent in compiling data on students with disabilities given disclosure concerns); Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); and Leah Lipskar, Comment *Learning Disabilities and the ADA: A Guide for Successful Learning Disabled Students Considering a career in the Law*, 3 U. PA. J. LABOR & EMP. L. 647 (2001); with M. Kay Runyan & Joseph Smith, *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317 (1991) (finding the number of self-identified learning disabled students in law school to be small).

¹⁶ COMM. ON MENTAL AND PHYSICAL DISABILITY LAW, GOAL IX REPORT TO THE ABA (2006) The National Conference on the Employment of Lawyers with Disabilities: A Report from the American Bar Association for the Legal Profession, available at http://www.abanet.org/disability/docs/conf_report_final.pdf (noting the under-representation of persons with disabilities in the legal profession).

¹⁷ Matthew Rafat, Letter to the Editor *What It Is Like to Be a Disabled Attorney*, Cal. Bar J. Oct., 2004 (October 2004); Michael & Penelope Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203-40 (2007).

¹⁸ Equal Employment Opportunity Comm., “Reasonable Accommodations for Attorneys with Disabilities,” (2006) (hereinafter EEOC Reasonable Accommodations), available at <http://eEOC.gov/facts/accommodations-attorneys.html> (last visited on July 10, 2007). In 1999, the EEOC had published an Enforcement Guidance report that outlined standards for interpreting requests for reasonable accommodation and for employer assertions of undue hardship under the ADA. EEOC, *Enforcement Guidance: Reasonable Accommodation and the Undue Hardship under the Americans with Disabilities Act*, 1999 WL 33305876 (March 1, 1999).

¹⁹ EEOC Reasonable Accommodations, *supra* note 18, at 1 (Introduction).

about the ability of disabled lawyers to perform competently or about the efficacy and cost-effectiveness of accommodations.²⁰ However, the report then outlines over ten varieties of accommodations in practice settings, ranging from modified work schedules, to revised supervision structures, to job restructuring.²¹

While the EEOC publication is designed to encourage employers to hire lawyers who seek accommodations, it recognizes as it must that attorneys with disabilities still face significant issues.²² Only those lawyers who can document that they have a disability²³ and who are otherwise qualified, i.e., who can perform the essential functions of the legal job with or without assistance, are entitled to accommodation.²⁴ Furthermore, legal employers are not required to revise their quality and quantity standards,²⁵ or to make accommodations which would work an undue hardship.²⁶

Indeed, a review of recent Supreme Court precedents interpreting the scope of the ADA should cause law students with disabilities to question whether their needs can be addressed in practice. Clearly the range of individuals protected by the ADA has been increasingly limited by the Court as it narrowly defines the standards for determining

²⁰ *Id.* at 2-3 (Section B).

²¹ *Id.* at 9-10 (Section G); *see also* Calero-Cerezon v. United States Dep't of Justice, 355 F.3d 6 (1st Cir. 2004) (summary judgment for employer reversed in employment discrimination suit brought under the ADA and Rehabilitation Act by INS attorney who suffered from depression and tension headaches who had been denied a job transfer; on remand, questions of fact existed as to range of reasonable accommodations, including job restructuring, modified work schedules and reassignment); Lyons v. Legal Aid Soc'y, 68 F.3d 1512 (2d Cir. 1995) (reversal of lower court's dismissal for failure to state a claim; appellate court found that staff attorney who requested an accessible parking space during her recovery from a car accident would be permitted on remand to prove that a particular parking space was a reasonable accommodation); Shaver v. Wolske & Blue, 742 N.E. 2d 164 (Ohio App. 10Dist. 2000) (summary judgment wrongly entered where questions of fact remained as to nature of mentally ill attorney's disability, employer's duty to engage in interactive process, and availability of reasonable accommodations).

²² While the EEOC invokes moral suasion to encourage hiring of employees with disabilities, other countries have adopted legal incentives. *See* Pascale Bloch, *Diversity and Labor Law in France*, 30 VT. L. REV. 717 (2006) (describing France's laws that require employers with at least 20 employees to have 6% of their workforce comprised of employees with disabilities, but noting that the obligation is typically satisfied by an alternative compliance mechanism – financial contributions).

²³ *Sherman v. New York Life Ins. Co.*, 1997 WL 452024 (S. D. N. Y. 1997) (trial court dismissed employment discrimination action brought under the ADA by a former in house counsel who suffered from OCD where the plaintiff could not satisfy his burden that his condition impaired basic life activities).

²⁴ *See* 42 U. S. C. § 12111 (8); *see also* EEOC Reasonable Accommodations, *supra* note 18, at 11-12 (Section H); Buhai, *supra* note 7, at 148-49 (listing reading, ability to comprehend, analyze and apply legal concepts, ability to handle complex issues and develop case theories, together with basic employment protocols such as regular attendance, timely completion of tasks, ability to follow directions, and capacity to handle work stress as essential functions).

²⁵ *See* EEOC Reasonable Accommodations, *supra* note 18, at 11-12 (Section H); *see also* Dziamba v. Warner & Stackpole, 778 N.E. 2d 927 (Mass. App. Ct. 2002) (rejecting claims of employment discrimination brought under the Commonwealth's anti-discrimination law by lawyer suffering from major depression who could bill no more than 1200 hours/year, where the firm norm was 1800 hours/year); EEOC Reasonable Accommodations, *supra* note 18 (re: billable hours).

²⁶ 42 U. S. C. § 12111 (10); 29 C.F.R. § 1630.2 (p)(1) (1998). *See* EEOC Reasonable Accommodations, *supra* note 18 (Section N).

disability status.²⁷ Indeed, in the present legal climate, it will be difficult for graduate students seeking professional training to trigger ADA protection where they have achieved significant academic success prior to graduate school admission.²⁸ Then, once classified as “disabled,” individuals still face the hurdles of proving that they can perform the essential job functions and that a reasonable accommodation can be constructed by the employer to meet their needs.

The ethical demands of the profession impose additional professional duties on lawyers seeking accommodations. It is clear that all lawyers must satisfy basic competency standards and other ethical obligations of the profession.²⁹ The ADA is not a shield to disciplinary action: it does not absolve an attorney suffering from a disability from abiding by all ethical duties.³⁰

²⁷ See *Toyota Motor Mfr. of Ky. v. Williams*, 534 U.S. 184 (2002) (defining “substantially limited” as “to a large degree” or “considerable” in reversing the denial of summary judgment for the employer of an ADA claim brought by an assembly line worker with carpal tunnel syndrome upon a finding that she was limited only in performance of that job, not in the variety of tasks required for successful completion of most jobs); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (indicating the threshold question of whether an individual is disabled under the ADA must be made on the basis of that person’s limitations after any corrective measures are in place). But see *Dahill v. Police Dep’t of Boston*, 748 N. E. 2d 956 (Mass. 2001) (certified question to Massachusetts’ Supreme Judicial Court on analogous issue, concluding that disability classification should be made irrespective of corrective measures for former policeman who was terminated due to hearing loss).

²⁸ See e.g., *Wong v. Regents of Univ. of Calif.*, 379 F. 3d 1097 (9th Cir. 2004), as amended, 410 F. 3d 1052 (9th Cir. 2004) (affirming summary judgment for university in discrimination action brought by former medical student with learning disabilities who was deemed not to be entitled to ADA or Rehabilitation Act protections where his learning was assessed generally and not in the specialized setting of graduate school).

²⁹ See MODEL RULES OF PROF’L CONDUCT R.1.1 (2007) [hereinafter MODEL RULES] (Competence) (requiring any lawyer to provide competent legal representation, including the legal knowledge, skill, thoroughness, and preparation that that undertaking reasonably entails). For provocative articles on the competency issue for law students and practitioners see Familant, *supra* note 10; David Goldstein, *Ethical Implications of the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 111(2000); Scott Lemond, *Identifying and Accommodating the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 69(2000); see also discussion *infra*, at text accompanying note 80 et seq.

Several lawyers with non-visible disabilities have faced disciplinary action when their conduct has been deemed to fall below the minimum professional standards. See *In Re Scibetta*, 502 N.Y.S. 2d 565 (Sup. Ct. 1986) (mishandling of client funds by attorney with ADD); *State ex. rel Oklahoma Bar Ass’n v. Busch*, 919 P. 2d 1114 (Okla. 1996) (neglect of client matters by attorney with ADD warranted disciplinary action; court noted that disability might provide basis for mitigation); see also, *Matter of Hein*, 516 A.2d 1105 (N.J. 1986) (disciplinary action against lawyer suffering from alcoholism who had misappropriated client funds and neglected other client duties); *La Bella v. New York City Admin. for Children’s Services*, 2005 WL 2077192 (E. D. N. Y.) (upholding termination of lawyer with psychotic disorder who had jeopardized confidential client information and been disruptive in the courtroom); *In re Disability Proceeding Against Diamondstone*, 105 P. 3d 1(Wash. 2005) (affirmed removal of attorney with mental disability from active status as she lacked the capacity to practice law); *In re Krouner*, 920 A. 2d 1039 (D.C. 2007) (claim of disability under ADA does not shield lawyer from disciplinary action following his conviction of crime); *In re Marshall*, 762 A.2d 530 (D.C. 2000) (upheld disbarment of attorney suffering from substance abuse over his claim of protection under the ADA); *Oklahoma Bar Assoc. v. Busch*, 976 P. 2d 38 (Okla. 1998) (upheld discipline of attorney with mental illness for neglect of client matters and misrepresentation of status of cases in court, but indicated that disability could be taken into consideration in mitigating factor in sanction imposed).

³⁰ *Diamondstone*, *supra* note 29, 105 P. 3d 1 (Wash. 2005) (upheld disciplinary action against attorney experiencing mental health issues; attorney deemed to lack capacity to practice law and involuntarily

Therefore the ADA is no panacea for budding attorneys.³¹ First, they must decide whether to risk notifying an employer of their disability and requesting accommodations, a major step for those whose disabilities are not readily apparent.³² Then they must convince their employers that they are still able to perform the essential duties of the legal position. Further, they must be knowledgeable about the tools and strategies that would best ensure their successful job performance.

A recent report of the ABA acknowledged how much work lies ahead before individuals with disabilities are afforded the same educational and professional opportunities as other lawyers.³³ That report focused on best practices for legal employers and identified the critical need for changes not just in hiring, but also in promotion and retention practices, to ensure that lawyers with disabilities enjoy a level playing field.³⁴

Given this professional climate, it 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. In law schools across the country, students with disabilities receive academic accommodations in their traditional law school classes on a regular basis. However, often those accommodations do not translate easily from the classroom to law practice. To take but one example, more time on tests does not have any direct analogy to accommodations in practice.³⁵

Here is where law school clinics can play a vital role. The “accommodations gap” between school and practice has already been identified.³⁶ Now it is time to develop specific practices to help students bridge that gap whether or not they have a

transferred to inactive disabled status); Krouner, 930 A. 2d 1039 (ADA does not shield a lawyer from disciplinary action even though his commission of crime may be causally connected to his mental illness); *Marshall*, 762 A. 2d at 535 (upheld disbarment of attorney for ethical violations despite his invocation of the ADA as a defense, concluding that “we cannot and do not believe that Congress intended the ADA to be a shield, much less a sword, to be wielded against appropriate discipline of lawyers who break the disciplinary rules.”).

³¹ See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C. R.-C. L. REV. 99, 100 app. A (1999) (reporting on survey of lawsuits brought under the ADA, estimating that some 93% were decided against employees).

³² See generally PAMELA B. ADELMAN & CAROL T. WREN, *LEARNING DISABILITIES, GRADUATE SCHOOL, AND CAREERS* 15-17, 31 (1993).

³³ ABA Report on the National Conference on the (2006) [hereinafter ABA Report on Employment of Lawyers with Disabilities].

³⁴ *Id.* at 31-33, 41-51.

³⁵ We acknowledge that attorneys who have documented mental illness or learning disabilities that make timely completion of tasks difficult may, on occasion, be able to ask for extensions of deadlines. However, there is no assurance that requests for extensions will be granted, nor are all deadlines susceptible of postponement (e.g., statute of limitations). See generally Patricia Pardo & Debra Tomlinson, *Implementing Academic Accommodations in Field/Practicum Settings*, 46 http://www.ucalgary.ca/drc/files/pub_acad_accom.pdf (last visited July 11, 2007 – reviewed in html form only).

³⁶ Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J. L. & EDUC. 31, 59-62 (1997).

legal right to invoke the ADA. Legal educators are not alone in facing this task; other professions, including medicine and social work, are experimenting with ways to help students with disabilities enter practice successfully. Therefore we turn next to what those professional schools can teach us about the work ahead.

II. The View from Other Professions

When we review the educational programs at various professional schools certain common themes emerge. Whether it be teacher training programs, medical schools, social work departments, or law schools, faculties in all these settings strive to offer their students: a. comprehensive substantive knowledge; b. practical training; and c. ethical grounding.³⁷ Accomplishing these goals for a diverse student body has become a familiar topic in all these schools. What follows is our effort to summarize the studies undertaken by these other professions to determine how best to accommodate students with disabilities in their clinical training programs. The studies confirm the need for professional school educators to implement the ADA for clinic students and offer some general structural and administrative protocols for accomplishing that goal. However, as we will see, there are all too few specific recommendations for how most effectively to supervise students with non-visible disabilities in a clinical setting.

In the wake of passage of the ADA, professional schools began the hard work of implementing its terms. In 1993, the Association of American Medical Colleges (“AAMC”) promulgated standards, entitled “The Americans with Disabilities Act and the Disabled Student in Medical School: Guidelines for Medical Schools.”³⁸ Then in 1994, the American Medical Association’s medical journal published a series of articles which attempted to articulate in more detail specific implementation policies for medical educators.³⁹

The medical school educators identified the following measures relevant to clinical placements:

³⁷ The Carnegie Foundation for the Advancement of Teaching has been studying professional education for nearly a century. Beginning with its 1910 Flexner Report on medical education, it has published frequently on the state of professional school training. Its Preparation for the Professions Program, which has studied education of clergy, engineers, medical professionals and lawyers, is the most recent related initiative. See *Educating Lawyers*, *supra* note 3; *see also* Buhai, *supra* note 7, at 171-77 (acknowledging relevance of other professional school experience with ADA).

³⁸ *See generally* ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *THE AMERICANS WITH DISABILITIES ACT AND THE DISABLED STUDENT IN MEDICAL SCHOOL: GUIDELINES FOR MEDICAL SCHOOLS* (1993). A decade later, the AAMC updated and significantly expanded its guidelines. JENNIFER WATSON & SHANNON HUTCHENS, *MEDICAL STUDENTS WITH DISABILITIES: A GENERATION OF PRACTICE*, (2005).

³⁹ The July, 1994 issue of *Academic Medicine* contained a two part series on the ADA authored by Dr. Diane Essex-Sorlie and a related piece by L. B. Helms and C. Helms. *See* Diane Essex-Sorlie, *The Americans with Disabilities Act: History* 69 ACAD. MED. 501 (1994) (hereinafter ADA I); Diane Essex-Sorlie, *The Americans with Disabilities Act: Implications and Suggestions for Compliance for Medical School* 69 ACAD. MED. 525 (July, 1994) (hereinafter ADA II); L. B. Helms & C. Helms, *Medical Education and Disability Discrimination: The Law and Future Implications*, 69 ACAD. MED. 535 (July, 1994). The latter article followed another by L. B. Helms, which had reviewed these issues for nursing educators. L. B. Helms, *Disability Discrimination in Nursing Education: An Evaluation of Legislation and Litigation*, 9 J. PROF. NURSING 358 (1993).

- a. Need to define the essential requirements and functions of students in the program;
- b. Need to establish a point-person to oversee the program's compliance with the Act;
- c. Need to educate faculty and staff in the program about both the Act and specific individual and institutional duties to accommodate qualified disabled students;
- d. Need to engage faculty and affected students in an interactive process to develop the most appropriate accommodations plan.⁴⁰

These recommendations were made soon after the Act became applicable to universities and on the heels of well-publicized court decisions reviewing certain medical schools' compliance with disability laws.⁴¹

Professional educators in Canada, in conjunction with the Canadian Association of Disability Service-Providers in Post-Secondary Education, developed one of the most extensive proposals for implementing disability mandates in clinical settings. In the wake of a study of educators of students in professional schools conducted in 1999, Patricia Pardo, PhD, and Debra Tomlinson, MSW RSW, prepared a report, entitled "Implementing Academic Accommodations in Field/Practicum Settings," which sought to address the minimal attention that had as yet been paid to applying accommodation plans in clinical settings.⁴² Using data collected from a literature review, interviews, and surveys, they offered the following general suggestions:⁴³

⁴⁰ Essex-Sorlie, ADA II, *supra* note 39 at 533-34; *see also*, 29 C.F.R. §1630.2 (o)(3) (discussing interactive process required by ADA once a qualified disabled employee has sought accommodations). The most recent iteration of the AAMC Guidelines also contain useful practice tips for medical schools which seek to refine their policies and curriculum to comply with the ADA. *See* 2005 AAMC Guidelines, at 7-31. Unfortunately, the section on "Accommodations in Clinical Requirements" provides little detail, other than noting that clinical coursework which is integral to the medical school's curriculum need not be waived for a student with a disability. *Id.* at 22.

⁴¹ *See, e.g.*, Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992) (affirming denial of dyslexic medical student's challenge under the Rehabilitation Act to his dismissal on academic grounds where requested accommodations were not deemed reasonable); Ohio Civil Rights Comm'n v. Case Western Reserve Univ., 666 N.E.2d 1376 (1996) (upholding the state appellate court's order that a blind student's action brought under Ohio's anti-discrimination act seeking admission to medical school should be denied where evidence indicated that she could not perform functions deemed essential to clinical components of the program).

⁴² *See* Pardo & Tomlinson, *supra* note 35. While this research project was undertaken in Canada with its unique anti-discrimination laws, the report's recommendations seem equally applicable to American clinical settings which are directly governed by the ADA. *Id.* at 17. Note that the study included educators from a range of professions, including law, medicine, nursing and education. *Id.* at 32; *see also* Cheruta Wertheim, *Students with Learning Disabilities in Teacher Education Programs*, ANNALS OF DYSLEXIA (1998) (reviewing teacher training programs for students with learning disabilities under the Rehabilitation Act).

⁴³ Note that several of Pardo and Tomlinson's recommendations were geared toward externship placements. We have culled their proposals for those suggestions that are generally applicable to all clinical settings.

- a. Need for realistic appraisal of student's learning needs before commencement of the practicum;
- b. Need for review of all evaluation procedures (including clinical and behavioral standards) with the student in advance of the clinical placement;
- c. Need for discussion and review of all accommodation requests before placement;
- d. Need for clarity regarding disclosure of the student's disability amongst school administration, clinical faculty, and placement staff;
- e. Need for training and guidance for clinical supervisors in working with students with disabilities;
- f. Need for development of institutional protocols for review of students' requests for clinical accommodations.⁴⁴

They concluded by acknowledging the unique role that clinics can play in students' professional development.⁴⁵

Social work educators have long embraced clinical experience as essential to their students' training. Such faculty contemporaneously explored the same topics,⁴⁶ producing scholarship focused on particular types of impairments, such as learning disabilities.⁴⁷ These studies produced action plans aimed at maximizing the likelihood that social work students with disabilities would succeed in their chosen profession.

The literature addressing accommodations for students with disabilities in fieldwork settings includes important contributions from this discipline. Many recommendations focus on removal of physical barriers to fieldwork placements; however, others flagged concerns about perceived negative attitudes of clinical supervisors about students with disabilities.⁴⁸ These studies demonstrated that covert prejudice toward students with disabilities arising out of societal misconceptions risked jeopardizing students' clinical experiences either by denying them admission to programs or by limiting their fieldwork options.⁴⁹

⁴⁴ Pardo & Tomlinson, *supra* note 35, at 52-53; *see also* Cole et al, *supra* note 42 (social work educators should accommodate students with disabilities in practicums regardless of their speculation about the students' employment potential; discounts 1992 survey of social work field directors that showed that they believed that accommodating students sacrificed program quality and standards).

⁴⁵ Pardo & Tomlinson, *supra* note 35, at 53.

⁴⁶ *See* L.C. Reeser, *Students with Disabilities in Practicum: What Is Reasonable Accommodation?* 28 J. SOC. WORK EDUC. 98 (1992); Cole, et al., *Social Work Education and Students with Disabilities: Implications of Section 504 and the ADA*, 31 J. SOC. WORK EDUC. 261 (1995); Cole & Cain, *Social Work Students with Disabilities: A Proactive Approach to Accommodation*, 32 J. SOC. WORK EDUC. 339 (1996).

⁴⁷ *See, e.g.*, Eichhorn, *supra* note 36; Tracey I. Levy, *Legal Obligations and Workplace Implications for Institutions of Higher Education Accommodating Learning Disabled Students*, 30 J. L. & EDUC. 85 (2001).

⁴⁸ *See* Reeser, *supra* note 42 ; Steve Baron et al., *Barriers to Training for Disabled Social Work Students*, 11 DISABILITY & SOC'Y 361, 374 (1996) (citing need for proactive rather than reactive approach for institutions working with students with disabilities).

⁴⁹ *See* Reeser, *supra* note 42, at 102 (noting need for realistic appraisal of students' capabilities in clinic placement selection, but warning that latent biases about disabilities can also skew placement opportunities).

Many of these same themes were echoed in the recommendations of the 2003 Symposium on Students with Disabilities convened by nursing school educators.⁵⁰ Attitudinal barriers led the list of obstacles to successful nursing careers for students with disabilities.⁵¹ One commentator cited the critical role which colleges and universities can play in supporting students entering practice and recommended that clinical pilot programs be established to develop best practices for working with students with disabilities.⁵²

This literature review provides much needed context for our exploration of clinical training for law students with disabilities. Clearly, other professions, where practical training is an integral part of the academic program, have taken important first steps in developing protocols for implementing the ADA in those practice settings. In contrast, the legal profession lagged behind its counterparts in promulgating directives on helping law students and lawyers with disabilities achieve success in practice.⁵³

While the other professions' recommendations on educating students with disabilities provide legal educators with a starting point, they by no means chart a complete course. The action plans described above provide few answers for faculty members who want to maximize the professional training of their students with disabilities. They leave unanswered so many of the hard questions about how best to accommodate students with disabilities without jeopardizing professional and pedagogical standards. Specific procedures and detailed accommodation plans remain to be developed. We now turn to our experience in law school clinics to determine whether the recommendations gleaned from other professions can be adapted to the legal setting and to propose more particularized implementation plans for clinical supervisors.

⁵⁰ Symposium, Students with Disabilities: Nursing Education and Practice (2003), available at <http://www.rushu.rush.edu/nursing/disable/fulldoc.pdf> (last visited July 12, 2007).

⁵¹ Robyn Jones, *Recommendations Nursing Employment and Accommodations*, supra note 50, 149-50. Some case law would suggest that legal barriers may also exist. *See Se. Comty Coll. v. Davis*, 442 U.S. 397 (1979) (upholding denial of hearing impaired nursing student's claim brought under Section 504 of the Rehabilitation Act, where accommodations requested would result in a fundamental change in the clinical component of her education).

⁵² Jones, supra, note 51, at 150 ("[T]he next step should be to develop a demonstration pilot project between a nursing education program and clinical sites (hospital or medical center) to develop a model of recruitment, nursing curricula and clinical relationships associated with the education program.").

⁵³ In 1990, the ABA broadened the mandate of its Commission on the Mentally Disabled to include efforts to promote participation in the legal profession of lawyers with "mental, physical, and sensory disabilities," renaming it the Commission on Mental and Physical Disability Law. However, the Commission appears not to have published guidelines or action plans for the profession. It was not until 2006 that the ABA convened its first national conference on employment of lawyers with disabilities. *See ABA National Conference on the Employment of Lawyers with Disabilities: A Report of the American Bar Association for the Legal Profession*, www.abanet.org/disability (last visited July 17, 2007). The Commission publishes annual Goal IX reports which track the numbers of lawyers with disabilities in the profession. *See supra*, note 16. Also, in 2006, the EEOC released its guidelines designed to encourage legal employers to hire and retain attorneys with disabilities. *See EEOC Reasonable Accommodations*, supra note 18.

III. The View from Law School Clinics

Our interest in pursuing this subject matter stems from our experiences working with law school students with disabilities. We have been disheartened by the relative dearth of information available to law school faculty and to accommodations officers on implementing the ADA in clinical settings.⁵⁴ Building on our administrative and faculty viewpoints, we hope to attract attention to these issues and to help frame the debate about the most troubling challenges we have faced. Our worries include the unwelcome facts that:

- students with disabilities rarely disclose their impairments because of fear of discrimination;
- clinic faculty lack the training to assist students with non-visible impairments even if they do elect to disclose;
- providing accommodations to such students calls into question professional standards and pedagogical goals of the clinical program;
- accommodating such students raises equity issues for other students taking the same clinic;
- students with disabilities may rarely receive appropriate career counseling; and
- such students may infrequently have adequate opportunities to develop tools and strategies while still in law school that will allow them to succeed in practice.

Is our focus limited to those students whose disabilities are so significant as to trigger ADA protection? No. Instead, our study challenges clinical faculty and administrators to attend effectively to the needs of their students, whether or not those students are technically eligible for ADA protections. For some of our students, the ADA may dictate those accommodations. For many more of our students, we should strive to help students with non-visible mental health and learning impairments which may not trigger ADA compliance succeed, as we struggle to define best practices in this discrete area of clinical practice.

We present our thoughts through analysis of two case studies, which are based on our clinical work with students with non-visible disabilities. Each is a composite portrait, rather than a detailed account of any one student's experience with clinic. The first demonstrates how significant the accommodations gap can be for a student with ADHD.⁵⁵ The second, involving a student who developed severe panic attacks while at clinic, demonstrates the uncomfortable fact that there are limits to a program's ability to offer accommodations. For each, we begin with a description of the student and his/her

⁵⁴ One notable exception was the very constructive symposium sponsored by the Office of Student Affairs, American University College of Law on March 8, 2007, which included one panel discussion on clinical programs. Our thanks to those panel members for their useful insights: L. Irene Bowen, Keri Gould, Christine Griffin, Jennifer Gundlach, and Robert Dinerstein (moderator). Their remarks are now contained in *Symposium Assisting Law Students with Disabilities in the 21st Century: Brass Tacks*, 15 AM. U. J. GENDER & L. 769, 772-776 (2007).

⁵⁵ The Diagnostic and Statistical Manual of Mental Disorders IV, TR [hereinafter DSM], published by the American Psychiatric Association, which describes the full range of mental impairments, includes Attention Deficit Hyperactivity Disorder. DSM, § 3.14.9.

work in clinic, followed by an analysis of the administrative and clinical teaching questions raised.

A. Case Study #1: Colleen and her Undisclosed ADHD

An energetic, second year student, Colleen joined the civil legal services clinic eager to learn about practice and to serve clients. She had survived first year, garnering average grades, but her goal of helping people to solve their legal problems remained unrealized.

Colleen relished the idea of being the front-line lawyer for her clients.⁵⁶ She enthusiastically agreed to accept two cases, one a family law matter nearing settlement; another, an affirmative housing case in the early stages. From the beginning, she seemed to enjoy her work and she quickly forged strong client relationships. It was clear from her strong motivation and her commitment that she set high standards for her work and that she wanted to become a skilled litigator.

But, before long, both she and her clinic supervisor began to flag problems with her work, particularly with planning. As her supervisor wrote in her mid-semester review:

Two critical aspects of your lawyering will need significant attention before you can achieve lawyering independence: case handling and strategic planning. First, let's look at time management. While no deadlines were ever missed, we came all too close too often. We were down to the wire on getting the brief completed on time, even though you had known of that deadline for several weeks. Similarly the Motion to Dismiss was a crunch, which I had to finish without being able to consult with you given the deadline.

Organization is also something which needs to be addressed; I sense that your ability to plan effectively has been complicated by a lack of clear structure for that process. It proved hard for you to prioritize the "to do" list (e.g., research vs. fact investigation). While organization also relates to file maintenance, I raise it as a planning issue since it affects your ability to move a case forward proactively. Breaking tasks down into smaller parts and using the office supervision agenda form to establish internal deadlines for each part of the project are two suggestions I have.

You are a much more effective lawyer when you factor in enough time to prepare. Your court appearance worked well because of the time you took to plan carefully. You have been most effective when you've actually worked out the specific language you want to use and the structure for your presentation (e.g., Motion to Dismiss). I hope that you will continue to plan for discrete events

⁵⁶ Under Massachusetts rules, students in this civil litigation clinic are certified to practice under the state's student practice rule. *Rules of the Supreme Judicial Court, SJC 3:03*.

and role play to ensure a solid product. Let's talk about ways to get you the time you need to undertake those tasks more independently and efficiently. Planning is the best ticket to lawyering independence.

During their mid-term meeting, Colleen shared that her inability to implement her plans in a timely and effective fashion was taking an emotional toll. She told her supervisor that she worried that her goal of becoming a first-rate lawyer was unattainable. Colleen vowed to redouble her efforts to work more efficiently, to be more organized in her case planning and file maintenance, and to bring "more focus" to her work. Still, she did not indicate explicitly that she had any learning impairments; rather she spoke to her supervisor only about her "non-linear" thinking and her "difficulty processing" complex information.

Given the lawyering patterns that had developed and her particularized description of her learning style, Colleen's supervisor considered whether she might have a disability warranting accommodation at clinic. She inquired of her law school's disability officer whether there was any information that could be shared about Colleen, specifically, or students presenting with these symptoms, generally. Since Colleen had never self-identified nor requested accommodations in her academic classes, the administration responded only with general suggestions about dealing with different learning styles.⁵⁷ Rightly or wrongly, the supervisor elected not to ask Colleen point-blank whether she had a learning disability. Instead she hoped to work with her to identify tools which would help her have more success second half, regardless of the cause of her difficulties.

They decided upon a highly structured process aimed at helping Colleen remain focused and efficient. The major tool became Colleen's creation of detailed schedules with internal deadlines each week. They then reviewed those plans twice each week and Colleen revised them accordingly. Quite quickly, Colleen reported that the new systems seemed helpful and, by the end of the term, Colleen's self-confidence and lawyering independence were much improved. As her supervisor noted in her final evaluation:

You clearly took my mid-term suggestions to heart and re-doubled your efforts to become a systematic planner second half. I sense improvement in your ability to channel your significant energy into a carefully constructed game plan. During second half, your cases moved slowly (they had no external deadlines), but there is no question that progress did occur. The next step will be for you to initiate the necessary planning/organizational steps on your own, without supervisory oversight.

⁵⁷See Family Educational Rights and Privacy Rights Act, 20 U.S. C. §1232g [hereinafter FERPA] (providing general protections against disclosure of students' educational records). Perhaps Colleen's faculty supervisor could have asserted a "legitimate educational interest" that would fall within the exceptions to FERPA's privacy standards. See *id.* § 1232 g (b)(1)(A). However, where as here, the student had never disclosed her disability to anyone at the law school, no additional information could be obtained from the administration.

Lest this vignette present an unrealistically optimistic picture, it is important to add information from Colleen's work experience during the summer following clinic in another legal aid office in the same metropolitan area. While the nature of the work was substantively similar to that which she had done in clinic, Colleen again reported significant difficulty managing her cases. Carrying the same caseload expected of other summer interns proved impossible; she had inexplicably abandoned using the planning tools with which she had had some success during clinic. Recognizing that her ADHD issues were recurring, Colleen elected for the first time to disclose her disability to the staff attorneys at her summer position. She asked for extra help from her direct supervisor, who responded positively by helping her prepare weekly to do lists for each case and also to identify the 2-3 key tasks which she needed to accomplish each day.

She later reported to her work colleagues that she had been diagnosed with ADHD between college and law school; she had received on-going treatment for her ADHD as a 1L, though she never disclosed her disability to the institution. Then she decided to wean herself from her medications during her second year. Following her clinic and work difficulties, she elected to return to medical intervention. Once her medication reached therapeutic levels, she asked the staff attorneys to give her their assessment as to whether her lawyering had improved. While not competent to determine causation, the staff did report that they felt her ability to handle her cases improved over the course of the summer.

1. The Administrative Viewpoint

The case study of Colleen, presented above, will be a familiar one to readers in student or disability services. All who work in those areas have known and worked with Colleen (or his brother Colin) many times during their careers. Law school presents a daunting challenge to all students. Few if any are prepared for the level of competition, the overwhelming work load of the first year, the lack of feedback, and the series of high stakes exams as the only evaluative measure, and the application of a rigid grading curve. For students who also face the need to accommodate learning disabilities, the challenges can escalate exponentially.

It is axiomatic that only students who seek assistance and accommodations can receive those services from any educational environment.⁵⁸ In an effort to insure that students who are entitled to accommodations receive them, Colleen's law school sends out a letter to incoming students in the summer before they enter law school reminding students that the school complies with the ADA and describing the process for accessing such services.⁵⁹ Some schools may elect to send such a letter out early in the first semester, but it is fair to say that, by the first few weeks of entering law school, students

⁵⁸ See EEOC Enforcement Guidance, *supra* note 18, Question 1 (request for accommodations is the first step in the interactive process between employer and employee).

⁵⁹ Attached as Appendix # is the form that Boston College Law School sends to all entering first year students in the summer before they matriculate. The form is also posted on the Admitted Students' website.

have received notice and a reminder that reasonable accommodations are available and provided even in the demanding educational environment of law school.

At Colleen's law school, each year a number of students return this form indicating that they have been diagnosed with a learning disability and have received accommodations for all or part of their educational careers. These students will then meet with the Assistant Dean for Student Services and Academic Advising to determine what accommodations are supported by the documentation the student presents and how these accommodations will be provided in the classroom, course and examination context of the first year.⁶⁰

Furthermore, there are more students, like Colleen, in the entering class who might be eligible for accommodations, but who, for a variety of reasons, chose not to disclose their condition. Given the lore and legend of the competitive nature of law school, these students may fear that their classmates may perceive unfairness if one individual is given extra time to complete a writing assignment or the time pressured, high stakes tests.⁶¹ Students also may chose to "tough it out" because they realize they are entering a profession with frequent deadlines and high performance standards, and they reason that they should use law school as a way to prepare themselves for practice.⁶² There is also the "triumph of hope over experience"⁶³ phenomenon some students may feel when entering a new academic environment. They may conclude that, since their past academic or professional successes have enabled them to gain admission to law school, they no longer need to rely on accommodations to perform well. Finally, it is also possible that students fear that their professors may be aware of their need for accommodations and be less than supportive. Students often rely on their professors, and particularly their first year professors, for references and other informal networking entrée into the legal profession. A disabled student might worry about a professor's willingness to vouch for a job candidate who would need an accommodation to perform in a law firm setting. Whether any of these assumptions is wise or well-founded in a particular case can of course be debated in hindsight. The fact remains, however, that in all law schools there will be students who do not disclose their learning disabilities during their first year of law school and so do not come to the attention of student and/or disability service offices.

⁶⁰ While the needs of incoming students are carefully monitored by the disability officers at law schools, the developing accommodations issues of upper level students should also be assessed. Since many students recognize their need for accommodations only when confronted with the demands of law school and/or practice, it is important for administrators and faculty to remain open to new demands for service. Attached as Appendix # is a sample letter developed for distribution to upper level students by the disability officer at Boston College Law School, reminding students of disability services available and career counseling opportunities.

⁶¹ For a sobering review of the adverse impact of the law school education on its students, *see generally* Lawrence Krieger, *Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002) .

⁶² *See supra*, notes 25-26 and accompanying text.

⁶³ OXFORD DICTIONARY OF QUOTATIONS 275 (3d ed. 1979) (quoting Samuel Johnson).

Among students who are willing to disclose the existence of a disability, it is not uncommon for them to express substantial concerns about the confidentiality of their disability and any accommodations they may receive. Students frequently request assurances that professors will not be informed that they have received extra time on their examinations. In Colleen's law school where examinations are centrally administered, such reassurances are easy to give and to implement. The positive aspect of this confidentiality is that students are more comfortable in requesting and accepting accommodations. There is, of course, a downside to limitations on information sharing. Professional staff in student and/or disability services is constrained in sharing accommodation information with professors, career counselors, and other academic advisors without express permission from a student.⁶⁴ As a result, opportunities for exploring additional or different accommodations may well be lost.

Finally, the overall academic environment of law school presents particular challenges for a student with non-visible disabilities. In Colleen's law school, as in many other institutions, the great majority of her first year classes are prescribed.⁶⁵ Colleen arrived for her first day of law school with the academic year pre-determined. Performance in the majority of her first year classes was evaluated using end of the year or end of the semester examinations. As a result, discussions concerning accommodations tended to focus primarily on class and exam modifications, and less on how the demands of upper level experiences might require different accommodations.

Colleen's case presents a perfect example of the challenges that the law school environment presents for a student with a non-visible disability. Although Colleen was notified of her right to accommodations, she chose not to request them during her first or second years. She may or may not have been disappointed with her first year performance, but, even if she were, she may not have connected disappointing grades with the burden imposed by an unaccommodated disability.⁶⁶ Thus when Colleen was choosing her second year classes, it seems unlikely that anyone would have had sufficient information to discuss with her the impact her disability might have on her course load. Furthermore, student services would not have known to review her course selection and, if necessary, suggest proactive measures she might take either in courses or in clinical programs to reduce the challenges she faced in both settings. Finally, Colleen could not have been counseled about if, when and how to raise her disability with her clinical supervisor. The story of Colleen vis a vis her clinical experience fortunately did not end with any major problems. It is, however, a cautionary tale of at best a missed opportunity

⁶⁴ See FERPA, 20 U.S.C. §1232g (establishing general standard of restricted release of educational records); see also "Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities," Department of Education (October 2007).

⁶⁵ See generally Jill Chanen, *Re-Engineering the J.D.*, A.B.A.J. 42 (2007) (contrasting the traditional first year law school curriculum with innovations recently instituted at some law schools).

⁶⁶ Most students come to law school having experienced substantial academic success in college and even graduate programs; indeed, given the increasingly competitive law school admissions process it is unlikely that many students with consistently average or below grades will be admitted to law school at all. As a result, many students are somewhat disappointed with their first year grades and attribute this, not inappropriately, to the academic strengths of their fellow classmates and the rigorous nature of legal education.

and, with a less experienced and diligent clinical supervisor, it could have ended unhappily for Colleen, and worse, for her clients.

2. The Clinic's Viewpoint

While many of the administrative and career counseling issues previously discussed are relevant to all clinical programs, we have chosen to analyze Colleen's clinical experience as it happened – in an in-house litigation clinic where she practiced as a front line lawyer under the state's student practice rule. It may be that some material that we develop is of general relevance to all clinical settings; however, we recognize that externship clinics⁶⁷ have unique attributes which warrant separate exploration. Focusing on in-house clinics puts the supervisory relationship front and center. We begin with Colleen, whose ability to lawyer was compromised by ADHD, starting with her admission to clinic, followed by an analysis of disclosure issues, a discussion of the essential functions of student lawyers, and the ethical issues inherent in practice. Finally, we conclude with the range of accommodations which were offered Colleen, and those that were not, focusing on the impact of providing accommodations on other clinic students and the program.

a. Clinic Selection and Disclosure

As in many states, students are eligible to practice as student lawyers in Colleen's clinic after successful completion of their first year of law school. Colleen entered the clinical lottery and won a slot in the civil, in-house clinic which serves as the local legal services office.⁶⁸ She did not inform the clinical faculty of her disability, nor did they inquire of the students selected by lottery if they had any special needs. After a week-long, intensive skills training program, she was paired with another student and randomly assigned to a clinical supervisor for the balance of the semester.

With the benefit of hindsight, Colleen's admission to clinic is the first missed opportunity which adversely affected her clinical experience. Had she elected to disclose the critical information about her disability when she enrolled in clinic (or at least by the time she was assigned a faculty supervisor and began representing clients), the clinic might have been under a duty to accommodate her needs.

We use "might" intentionally. Whether the clinic would be mandated to provide accommodations is contingent on several factors. Was the law school, and by inference the clinic, on notice that Colleen had ADHD? Under our scenario, Colleen knew she had a learning disorder for which she received treatment prior to enrolling in clinic; however,

⁶⁷ Externships by definition involve a tri-partite structure: the extern, the fieldwork supervisor, and the faculty instructor. Not only do such clinical experiences produce unique ethical dilemmas, but they also add an additional layer of personnel who would need to be integrated into an effective accommodations plan. See generally Alexis Anderson, et al., *Ethical Issues in Externships*, 10 CLINICAL L. REV. 473 (2004).

⁶⁸ Students founded the Boston College Legal Assistance Bureau in 1968. It continues to be the store-front legal services office for the surrounding community.

she never disclosed her disability to anyone at the law school until after she had completed clinic.

But what if she had? Let's assume for a moment that Colleen had spoken up. Even if she had told her clinic supervisor at the beginning of the semester about her ADHD, it is still not clear that the clinic would have had a duty to accommodate her. Under the ADA, educators and employers must offer reasonable accommodations only to qualified individuals with a documented disability.⁶⁹ Where, as here, Colleen has not used accommodations in the past, yet has performed successfully, it may be difficult for Colleen now to document that she has a disability that affects her basic life functioning.⁷⁰

If technical eligibility for ADA accommodations were the principal focus of this article, then further discussion would be unnecessary. Colleen would likely not qualify for accommodations; end of story. However, our inquiry is much broader: when clinic students struggle, we are invested in trying to identify the reasons and to propose strategies to assist students adapt successfully to practice.

That approach is risky. Over-accommodation of students with disabilities carries its own cost. While a law school or law school clinic might be willing to offer extra support and services to such students, practitioners are often unable or unwilling to respond in kind. Therefore, some commentators have questioned whether providing accommodations not technically required by the ADA may be more harmful than helpful.⁷¹ We share the concern that all students need accurate information about practice expectations. That said, we also believe that clinics offer students with non-visible disabilities a unique bridge between classroom and practice that may warrant use of creative teaching strategies designed to fit the needs of those students. If clinical faculty can be transparent about the need for those tools, then students with disabilities can best determine how, and whether, they can make the transition to practice.

Could Colleen's clinical supervisor have asked whether she had any learning disabilities for which she sought accommodations? Here her supervisor elected not to, even when she described her learning process in terms characteristic of ADHD. Faculty supervisors are often hesitant to inquire lest their questions be viewed as intrusive, or worse, discriminatory. Where a program has made efforts to ensure that students are aware that they can request accommodations at clinic,⁷² clinicians may be able to obtain

⁶⁹ See 42 U.S.C. §§ 12101-12117; EEOC Enforcement Guidance, *supra* note 18, "General Principles."

⁷⁰ Compare *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F. 3d 620 (6th Cir. 2005) (affirming denial of ADA coverage to medical student with learning disability who sought test accommodations), with *Price v. Nat'l Bd. of Med. Exam'rs*, 966 F. Supp. 419 (S. D. W. Va. 1997) (finding that the overall scholastic achievements of three medical students with ADHD indicated that they were not entitled to test accommodations under the ADA). See also, text accompanying note 27, *supra*.

⁷¹ See Suzanne Rowe, *Reasonable Accommodations for Unreasonable Requests: The Americans with Disabilities Act in Legal Writing Courses*, 12 J. LEGAL WRITING INST. 3, 7 (2006) (warning faculty that "provision of *excessive* or *inappropriate* accommodations may harm students with learning disabilities by preventing them from developing the complete set of skills needed to practice law"). Ms. Rowe focuses primarily on legal writing courses, but suggests that teachers of skills courses should also be mindful of any tendency to over-accommodate.

⁷² See text accompanying note 58 *supra*.

the critical information without pressing their students for disclosure. Rather, as here, faculty members could advance the discussion by inquiring whether struggling students have used any special tools or strategies in the past which could be of assistance at clinic. At that point, the student is likely either to disclose or at least to identify special learning techniques which have been helpful in the past in the classroom or work settings. Together they can determine the relevancy of those tools for lawyering.

Few clinicians are trained to teach students with learning disabilities. Therefore, Colleen's supervisor wanted to consult with their law school's accommodations officer to obtain more insight into how best to help Colleen. Had Colleen disclosed her ADHD to her supervisor, relaying that information to the administration would allow its personnel to sort out what additional information, if any, would be needed to determine Colleen's eligibility for accommodations and to report that decision to the clinic staff.

However, here, Colleen chose not to disclose. Since her supervisor still wanted to consult with the administration for general teaching advice, she contacted the school's accommodations officer without even advising Colleen, much less obtaining her consent. Technically, her supervisor did not divulge any confidential information when she contacted the administration since Colleen had been mum about her disability. Still, Colleen might well be concerned that her supervisor took action. Her school's disability officer is also the Dean of Students; that office processes character and fitness documentation for law students seeking bar admission. Therefore Colleen could well have reservations about others being consulted about her performance and needs. To avoid risking Colleen feeling betrayed, her supervisor could well have told Colleen of her interest in consulting. If Colleen agreed, so much the better. If she did not, Colleen's supervisor could still have spoken with the disabilities officer to seek suggestions, but could have protected her anonymity in the process.

Another hurdle remains. Even for those students who have disclosed a disability which triggers ADA compliance, a clinic is obligated to provide accommodations only if the students can perform the range of essential functions of front-line lawyers. As Sandi Buhai recognized long ago, the critical skills needed to operate in the clinic are much more analogous to those required by practicing lawyers than those of classroom students.⁷³ Therefore, we turn next to the need for clinical faculty to define the key job responsibilities of a student lawyer.

b. Essential Functions of In-House Clinic Students

Given that some students will be cautious about disclosing their disabilities, it behooves clinicians to analyze the essential functions of clinical students before being confronted with a request for reasonable accommodations.⁷⁴ By doing so, clinics can

⁷³ Buhai, *supra* note 18.

⁷⁴ See recommendation reported in Pardo & Tomlinson, *supra* note 35 at 49 ("Professional faculty should be required to articulate, document and regularly review which of their requirements and standards are essential"); see also Cole et al., *supra* note 42 ; Buhai, *supra* note 18, at 185-86; Familant, *supra* note 10, at 539-41.

respond more quickly and constructively when such requests do arise. In addition, faculty can more effectively assess the need for interventions to help all clinical students whether or not they have triggered the need for reasonable accommodations.⁷⁵ Perhaps most importantly, dissemination of lists detailing the essential functions required of student lawyers would empower those students who have elected not to disclose. Independently, they could better determine whether they can meet the requirements of the program and make more informed course selections.

The course description of Colleen's clinic available to her before she enrolled did not suffice. Couched in general terms, it included little more than the academic demands of the program (e.g., whether an exam or paper is required, grading procedure) and very general information on the type of clinical experience offered.⁷⁶ Certainly Colleen had insufficient data about what "being the front-line lawyer" entailed.

In 2006, the EEOC recognized the need for employers to specify the essential functions for practicing lawyers.⁷⁷ Those guidelines provide clinics a template for developing their own catalogue of essential duties.⁷⁸ The EEOC expressly recognizes that different types of legal positions require different skill sets. What a litigation clinic may demand of its student lawyers (e.g., ability to present an argument in court) may be distinctly different from the requirements of a transactional clinic (e.g., ability to draft opinion letters). In addition, the recent release of the Best Practices monograph provides clinical faculty with a list of essential attributes for "effective, responsible lawyers."⁷⁹

⁷⁵ Some commentators have noted that schools of higher education have tended to offer accommodations more often than legally required under the disability laws. They question the efficacy of that approach where those same accommodations may not be extended by legal employers and bar examiners, producing serious complications for graduates with disabilities trying to succeed in the workplace. See Levy, *supra* note 43; Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 *Scholar* 219 (2004); Rowe, *supra* note 71, at 6-7.

⁷⁶ The descriptions of the clinical courses offered at Boston College Law School are of this ilk, providing little detail about the type of lawyering skills and level of performance required. See <http://www.bc.edu/schools/law/services/academic/programs/clinical.html> (last visited February 29, 2008).

⁷⁷ EEOC Reasonable Accommodations, *supra* note 18, at 12; see also Calero-Cerezon v. United States Dep't of Justice, 355 F.3d 6 (1st Cir. 2004) (ADA imposes duty on the employee to prove that she can perform the essential functions of the job with the requested accommodation); Dziamba v Warner & Stackpole, 778 N. E.2d 927 (Mass. App. Ct. 2002) (affirming dismissal of employment discrimination case brought by lawyer with major recurrent depression on finding that he was unable to perform the essential functions of generating new clients and handling litigation in a cost effective manner, noting that a lawyer who billed only 1200 hours/year where the firm standard was 1800 hours/year was not fulfilling the job's essential requirements). For a law and economic perspective on the essential functions of a lawyer, see Robert Ashford, *Socio-Economics: What is its Place in the Law?* 1997 WIS. L. REV. 611 (noting that lawyers "are required to determine client objectives, get the facts straight, understand the practical limitations of evidence, know the law, serve clients competently within the bounds of the law, and improve the legal system for clients and society.... Competent lawyers must know the law, understand their clients and their expressed objectives, know the facts, consult with other experts as necessary, provide holistic advice, and provide legal services accordingly.").

⁷⁸ EEOC Reasonable Accommodations, *supra* note 18, Section H. "Actions Not Required as Reasonable Accommodation," at 11.

⁷⁹ See Best Practices, *supra* note 2. That study suggests two complementary measures for student achievement. First, it asserts that at the time of admission to practice, law graduates should exhibit "the

Any list of essential functions of lawyers would include the competent performance of the requisite skills of the trade. Lawyers, like other professionals, must abide by the ethical rules of their vocation. All attorneys must handle client matters with competence and diligence.⁸⁰ Since it is clear that disabilities do not shield a student

attributes of effective, responsible lawyers, which include the following knowledge, understandings, skills, and abilities:

- self-reflection and lifelong learning skills;
- intellectual and analytical skills;
- core knowledge of the law;
- core understanding of the law;
- professional skills;
- professionalism.”

Id. at 65-66. Note that the authors establish these guidelines for graduates. However, because of the ethical requirement that student lawyers comport themselves consistent with all ethical standards, such clinic students must satisfy these basic competency guidelines.

Second, the Best Practices project puts client protection front and center in a clinical program’s objectives. For example, the authors note the key role of in house clinical programs in training students for practice. *Id.*, at 188-93. It ultimately falls on the shoulders of the clinical supervisors to provide an essential safety net to ensure competent representation. *Id.*, at 195-96.

In contrast, Sandi Buhai construes the essential functions of a law student in a hypothetical legal services clinic quite narrowly as being limited to “research and writing, and interacting with clients.” Buhai, *supra* note 18, at 187. Buhai distinguishes between marginal functions which a student with a disability need not perform (eg., handling an administrative hearing which only a few students undertook) and the essential duties listed above which all students performed.

A student Comment proposes a much more comprehensive list of essential lawyer functions based on his review of case law and literature:

- being able to think like a lawyer;
- being organized and being able to perform tasks in a reasonable time period;
- paying attention to detail;
- being able to communicate well, both orally and in writing;
- being punctual;
- having ambition and self-motivation;
- being an advocate for the client and legal system;
- being able to deal with stress;
- being able to maintain the required amount of billable hours;
- being able to perform legal analysis, research, and writing independently.

See Familant, *supra* note 10, at 540-41. While some attributes appear frequently (e.g., research and writing ability), no one list would ever suffice given the host of different types of legal positions which exist. For example, the need to maintain a certain level of billable hours is not a standard applicable in all legal careers.

⁸⁰ See MODEL RULES PROF’L CONDUCT R.1.1, R1.3 (2007). Comment 2 to Rule 1.1 is particularly instructive:

Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

MODEL RULES PROF’L CONDUCT R.1.1, cmt2; *see also* MODEL CODE PROF’L RESPONSIBILITY, EC 1-1, 1-2, 6-1, 6-2, 6-3, 6-4, 6-5; DR 6-101(A) (2007); RESTATEMENT OF THE LAW GOVERNING LAWYERS §16 (2); California Rules Prof’l Conduct R.3-110 () (Competence).

Some commentators have addressed whether lawyers with disabilities are obligated to disclose their impairment to their clients. While Model Rule 7.1 prevents lawyers from making false or misleading statements about themselves or their services to their clients, there appears to be no express disclosure

lawyer, like Colleen, from handling client matters ethically,⁸¹ essential functions of clinical students must include observance of all ethical mandates.⁸²

Colleen's ADHD compromises her abilities to plan strategically, to handle matters in a timely fashion, and to lawyer independently. These skills seem fundamental to effective lawyering. Several commentators have recognized how difficult it is for students with learning disabilities that adversely affect reasoning to succeed in law where the ability to organize materials, put facts in sequence, and generalize from experiences is vital.⁸³ Were we to debrief her after her completion of clinic, she may well have said that she did not appreciate how central these analytical processes were to lawyering.⁸⁴ For someone like Colleen who does not have lawyer relatives and who had not held a law-related position before clinic, it may be difficult to imagine what different demands clinic would make on her in contrast to those made by traditional law school classes. Therefore the absence of that information robbed Colleen of an opportunity to make a truly informed decision at enrollment.⁸⁵ Furthermore, we can only surmise whether Colleen would have decided to disclose her disability earlier had she known in detail what lay ahead.

requirement. See Weiss, *supra* note 11, at 255-56; David Goldstein, *Ethical Implications of the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 111, 112 (2000).

⁸¹ See Lemond, *supra* note 29 (citing case law indicating that lawyers with disabilities will be held to the same professional standards); Goldstein, *supra* note 80 (also arguing that learning disabilities should not shield attorneys from discipline and advocating use of clinical programs to help such students succeed); Familant, *supra* note 10, at (reviewing the debate within the profession about whether the ADA will produce lawyers who are not competent).

While one might question whether student lawyers are subject to professional discipline as they are not yet members of the bar, we believe the better view is that they must conduct themselves consistent with the demands of the ethical rules in the relevant jurisdiction whether or not they could be disciplined. In addition, their clinical supervisors could be disciplined for any ethical missteps. See, e.g., Massachusetts Supreme Judicial Court Order Implementing Supreme Judicial Court Rule 3:03, §5 (obligating student lawyers to comply with the Commonwealth's ethical rules).

⁸² It is less clear whether a lawyer with a disability, or a clinic student like Colin, needs to disclose his disability to his clients. Research has revealed no ethics opinion that requires such affirmative steps. The better view is that no such disclosure is required, assuming the learning disabled lawyer fulfills his professional duties. As David Goldstein has persuasively argued, there should be no more duty for such lawyers to divulge their disabilities than for other lawyers to disclose that they graduated at the bottom of their law school class. Goldstein, *supra* note 80.

⁸³ See Eichorn, *supra* note 36.

⁸⁴ While our attention is principally directed at assisting law students with disabilities succeed in practice, all clinic students would undoubtedly benefit from being apprised at registration what their clinical job responsibilities would entail. For example, a clear articulation of the demands of an in-house clinic would benefit students with family responsibilities, part time work commitments, or other personal issues anticipate the rigor of practice. Therefore, we hope that many of the Best Practices suggestions detailed in Section IV below will benefit the entire law school community.

⁸⁵ Colin did receive more detailed information about the requirements of the job early in the term. The clinical faculty distribute to all students in the program grading and evaluation criteria which detail clinic expectations. As we discuss in Section IV. A below, these types of materials could be adapted by programs to become the list of essential job functions.

At a minimum, we know that by mid-term, she recognized all too well how her disability was compromising her lawyering. A request for reasonable accommodations at that juncture would still have been timely,⁸⁶ and it is to that topic that we now turn.

c. Clinic Accommodations That Were Implemented

We will assume that Colleen elected to disclose her needs at mid-term to her supervisor. No magic language is required;⁸⁷ here Colleen spoke of her “non-linear thinking” and of her “difficulty processing.” In addition, she readily acknowledged her difficulty with planning, organization, and time management. Whether or not these disclosures constituted a legal request for accommodation, they certainly sufficed to put Colleen’s supervisor on notice that additional strategies needed to be developed to enable Colleen to function as an effective student lawyer. ADA compliance aside, good teaching demanded that her needs be addressed.

The next step would be for the program⁸⁸ to engage in an interactive discussion with Colleen to determine what steps should be taken. Some students with ADHD may well be able to propose specific accommodations; others like Colleen may not. Ideally, a report from a psychologist or other medical professional diagnosing Colleen’s disability would have provided concrete suggestions for accommodations, had she elected to disclose her ADHD. More commonly, these suggestions are very generic (e.g. “would benefit from extra time in testing situations”) that will have little practical value to a clinical instructor.⁸⁹ Here, not only had Colleen never worked in a law setting, she had never requested special assistance in any law school class. Therefore, it fell upon her supervisor to identify possible tools which might assist Colleen with her planning and time management issues.⁹⁰ Research about ADHD accommodations provided only

⁸⁶ EEOC Enforcement Guidance, *supra*, note 18, Question 4, at 5.

⁸⁷ *Id.*, Question 1, at 4 (indicating a “plain English” request suffices).

⁸⁸ Upon hearing a request for accommodation, it would behoove the clinical supervisor to clarify her confidentiality duties to Colin. She may well wish to consult the law school’s disability officer or other clinical colleagues. Since Colin had a clinical student partner, she and Colin should also clarify what information would be shared and by whom. Lastly, disability protocols at a law school might well require that a request for accommodation be followed by a request by the school’s disability officer for verification.

⁸⁹ For helpful information for students with disabilities on the issue of finding and understanding diagnostic evaluations, see Adelman and Wren, *supra* note 32, at 9.

⁹⁰ In their article, *Implementing Accommodations in an Academic Setting*, Pardo and Tomlinson describe procedures of providing accommodations as falling on a continuum from “specialized to generic.” Pardo & Tomlinson, *supra* note 35. Under the specialized model, accommodations are “delivered through the institutional unit responsible for the activity in question.” *Id.* The generic model decentralizes the delivery systems in an effort to insure “optimal learning environments for all students, including students with disabilities.” *Id.* In Colin’s case, the model used most closely tracks the generic approach. Under this approach the Dean for Students as disability officer provided information to the supervising clinician and “brainstormed” possible accommodations that might be offered, but the clinician, in dialogue with Colin, structured the actual accommodations. Given the dynamic and fluid nature of the in house clinical setting, the generic approach has clear advantages over a “specialized” service delivery method. However, we recognize that it requires all faculty (and supervising attorneys) to have some familiarity and training in disability law.

limited help; many suggestions about allowing extra time on tests and preferential seating cannot easily be translated to a practice setting.⁹¹

Others can. Here Colleen and her supervisor discussed possible strategies to help her cope. They devised tools to assist her time management and to help her structure tasks sequentially, including “to do” lists and tickler systems for impending deadlines. They increased the amount of supervisory contact so that her tendency to “wheelspin” could be caught quickly and redirected. Colleen’s supervisor began confirming their oral discussions in writing so that Colleen would have both an oral and written version of directions. In addition, they agreed to keep the total number of cases she handled during the term at the minimally acceptable range.

The accommodations Colleen received were minimal and arguably would have been available to any student who presented with similar lawyering difficulties whether or not s/he had a qualifying disability. Therefore, whether or not Colleen elected to disclose her disability and whether or not Colleen’s impairments even if disclosed were deemed to trigger a duty to accommodate, she and his supervisor were committed to finding the best tools to assist her transition to practice.

d. Clinic Accommodations That Were Not Provided

Arguably, it is more important to note what accommodations were not offered to Colleen. She had chosen to take clinic for a grade when she enrolled; she never asked to change that election to pass/fail.⁹² Had she, it seems likely that her request would have been denied by the administration given Colleen had never disclosed her disability and there existed a well-established school policy that such requests can only be made before close of the drop/add period.

It also proved very difficult to find Colleen a truly quiet workspace at clinic. All students worked at carrels in an open work area; only the clinical supervisors had private office space. Had she been permitted to move into a conference room or other isolated workspace, she would have been “outed.” Therefore Colleen continued to work in the

⁹¹ For an example of academic accommodations suggested for students with ADHD, see publication of the United States Department of Education, *Teaching Children with Attention Deficit Hyperactivity Disorder: Instructional Strategies and Practices* (2006). Several commentators have explored these issues in the law school context, including Robin Boyle, *Law Students with Attention Deficit Disorder: How to Reach Them, How to Teach Them*, 39 J. MARSHALL L. REV. 349 (2006). Though Boyle’s recommendations are specifically geared to legal research and writing programs, some of her suggestions have applicability in other classes and potentially even in clinics (e.g. helping ADD students deal with ambiguity). *Id.* at 373-77. See also Eichhorn, *supra* note 36, at 60-63, noting accommodations gap between academic and professional settings for learning disabled law students; Essex-Sorlie, ADA II, *supra* note 39, at 530 (noting that time can be an essential requirement of some professional skills); Familant, *supra* note 10 (noting his experience as a law student with ADD).

⁹² Under the academic standards at Colin’s law school neither he nor his clinical supervisor could have unilaterally changed from a graded course to pass/fail. Approval from the administration, in consultation with the disability officer, would have been required.

common area, surrounded by sights and sounds from her colleagues which continued to cause distraction.⁹³

At first blush, one might be tempted to offer Colleen a much reduced case load and limited types of assignments with extra time to complete them.⁹⁴ However, she continued to work on assignments that exposed her to the full range of litigation skills, rather than having her case responsibilities tailored to areas of strength. Here Colleen chose to enroll in an in-house clinical program where the students serve as the front-line lawyers, rather than another class or clinical program where she might have been required to do only research/writing tasks while observing others undertaking the lead lawyering. To have revamped Colleen's clinical program so drastically would have changed its essential functions and would have robbed Colleen of her chance to represent clients.⁹⁵

Some commentators have proposed a very narrow definition of what constitutes the essential functions of clinical work. Buhai, after describing a hypothetical legal services office, has argued that the essential job functions are minimal; only research and writing and interacting with clients made her final list.⁹⁶ We agree that a program should monitor carefully its core clinic requirements to determine which are truly essential versus which are marginal, and therefore cannot be required of students seeking accommodations. However, it seems implausible that a functioning legal services clinic in which students practice as the front-line lawyers under student practice rules could provide competent representation by attending only to client interaction and research and writing tasks. Instead, case planning, theory development, fact investigation, advocacy, and ethical responsibility seem vital functions of the student lawyers.⁹⁷

For Colleen to lawyer her cases competently as the front-line attorney, she needed to undertake the full range of litigation functions. Clinic students regularly develop case plans, prepare detailed agenda for client meetings and other major events, and personally conduct interviews, counseling sessions, fact investigation, and advocacy. Clinic

⁹³ He eventually spread out his workspace into an empty, neighboring carrel. Other students lucky enough to have a free adjoining space had also taken that step; therefore the reasons for his extra space remained confidential. Colin later indicated that he felt the additional space had improved his organization; he used one carrel for his phone calls and file maintenance; the second for drafting and planning.

⁹⁴ It is important to note the impact that any significant restructuring of the clinical program for one student would have on other participants. At Colin's clinic, students are paired for supervision; therefore it would be likely that Colin's partner would notice had Colin been offered any radical reduction in course requirements. Privacy issues raise additional questions as it is not clear that Colin's partner would fall within any of the exceptions to FERPA. See 20 U.S.C. § 1232 g (b)(1)(A).

⁹⁵ See discussion *supra* at text accompanying notes 26, confirming that accommodations that significantly alter the nature of a program have been deemed not reasonable.

⁹⁶ Buhai, *supra* note 7, at 186-87; see also Familant, *supra* note 10, at 552-53; 561 n.269 (arguing that lawyers with non-visible disabilities will succeed in performing the essential lawyering functions by self-accommodations and coping techniques because learning disabilities do not affect intelligence and that many lawyering tasks which cannot be undertaken by non-lawyers could be transferred to other lawyers in the practice).

⁹⁷ Included in the Appendix to this Article is a memo used in one in-house, civil legal services clinic that outlines the essential functions required of clinic students. See Appendix.

students learn to move a case forward proactively, rather than merely responding defensively to the opposition's tactics or the court's deadlines.

For students with learning disabilities or mental impairments, Buhai proposed that clinics consider a range of modifications to their programs. For example, for a student who has difficulty with research and writing projects, she proposed that they be given extra time or smaller, less time-sensitive projects.⁹⁸ Were a student to have issues with effective interviewing, Buhai suggested that clinicians consider use of client questionnaires in lieu of requiring the students with non-visible disabilities to conduct full-blown interviews.⁹⁹

Such modifications would fatally undercut Colleen's clinical program. She chose a clinical experience in which she would be the front-line lawyer, rather than a legal intern who reported to a lead lawyer. The ADA does not require that a clinic offer Colleen accommodations which would irrevocably change her clinic responsibilities.¹⁰⁰

Furthermore, such modifications would likely adversely affect the clinic experience for other students. In Colleen's clinic, students are paired for supervision. If she were to be spared from undertaking the full lawyering duties, then either her partner or her supervisor would have to shoulder the transferred tasks. The former option seems unworkable: it would undoubtedly lead to disclosure of her disability to at least her partner who might raise equity concerns at being asked to undertake additional assignments.¹⁰¹ Transferring the duties to her supervisor would also render Colleen's limitations patently obvious at least to her partner and would transform the supervisory relationship into one more akin to partner/associate.¹⁰²

In addition, Colleen and her clinic supervisor owe their clients competent and diligent representation.¹⁰³ She and her colleagues are not performing simulated exercises; real cases and real clients are at issue. Deadlines exist which must be met; litigation is essentially interactive and multi-dimensional. Requiring Colleen's supervisor to deconstruct the demands of practice into discrete, linear tasks that are not time sensitive seems an unattainable goal.¹⁰⁴ Therefore, both the pedagogical and professional goals of

⁹⁸ See Buhai, *supra* note 7, at 188.

⁹⁹ It is important to note that Buhai recognizes the limits to these proposals. As she acknowledges, the use of form questionnaires "might not be reasonable or possible" given the unique circumstances of each case and it could "result in insufficient and incomplete statements from the clients" *Id.*

¹⁰⁰ 42 U.S.C. §12111 (8).

¹⁰¹ For a thoughtful review of the morale issues raised by reassignment of lawyering tasks as an accommodation to employees with disabilities, see Lisa Key, *Co-Worker Morale, Confidentiality and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1010 (1997).

¹⁰² Buhai contends that transferring lawyering tasks which the student with a disability cannot handle may be feasible in a clinic with a sufficiently large workforce. Buhai, *supra* note 7, at 188. However, that approach ignores the equity issues it would produce and presumes that client interactions are not essential lawyering functions in a legal services clinic. Our clinical experience calls into question both assumptions.

¹⁰³ See text accompanying note 29, *supra*.

¹⁰⁴ It may be that a different clinical setting might have provided Colin with more structured, less complex lawyering tasks. For example, an externship placement in a firm in which his essential duties were limited

Colleen's clinical program pose limits to what accommodations she can reasonably expect to obtain.

Colleen still has challenges ahead as she develops strategies to help her succeed as a lawyer. The difficulties she experienced in her first paid legal position following clinic demonstrate all too clearly that work remains. Particularly for students like Colleen, it may be unrealistic to expect that any clinical program that is only a semester long can possibly remedy her lawyering deficits. However, Colleen did obtain necessary data about the demands of practice which could help shape her career planning and she began to identify some tools which may be of assistance if she pursues litigation.

B. Case Study #2: Panic Attacks Strike Carlos

By all normal academic measures, Carlos joined the civil, legal services clinic with the promise of being a top-notch lawyer. He had achieved great success in his first two years of law school and had glowing recommendations from his two summer employers. After his first year, he had worked as a legal intern at the local legal services office as an intake worker where his colleagues had praised his interpersonal skills and ability to distill the client's history into a coherent legal package. Then the second summer he had clerked for a state court judge who complimented his proficiency with legal research and writing.

Still he was unsure about his long-term career goals. Therefore, he enrolled in clinic largely to experiment first-hand with practice. He quickly showed great initiative in undertaking research and case planning, even in substantive areas new to him. His clients responded favorably to his warm, caring manner. After conducting extensive fact and legal investigation for one of his clients who was embroiled in a complex Social Security overpayment case, he began to prepare for the administrative hearing.

Subtly at first and then more clearly, his work patterns changed. A bout of the flu kept him away from clinic. Then, when he did return, his demeanor had changed; he no longer exuded enthusiasm. His supervisor and partner checked in with him, but he assured them that he was just feeling the strain of final trial preparation.

He persevered, finishing the brief on time and conducting final witness preparation. At the hearing, he advocated for his client under intense questioning from the administrative judge, explaining the complicated factual situation with great clarity. At the close of the session, his client and supervisor joined in congratulating him on his stellar presentation.

to research and writing (with his field supervisor undertaking the front-line responsibilities) could have offered Colin a different, perhaps more accommodating practice setting.

Then, the week after the hearing, Carlos asked to see his supervisor in private and admitted that he had developed acute panic attacks during clinic, the most recent of which had necessitated an emergency room visit. While they had begun even before the hearing, he reported that the attacks had not subsided even though the event was history. The focus of their work together shifted immediately to his mental well-being and treatment.

His treating mental health providers recommended a medical leave; with Carlos's permission, his supervisor alerted the Dean of Students and disability officer of his needs. Carlos met with the Dean to identify counseling resources. Even though the situation was not clearly a medical emergency, the clinical staff at the university's counseling center was very responsive, and Carlos was seen for a screening visit within a few days. The clinician, with Carlos's permission, notified the Dean for Students that he was in fact experiencing severe anxiety and, in the clinician's opinion, Carlos should be granted an accommodation while arrangements for longer term therapy, and, potentially, for medication were explored. For the next two weeks, Carlos did not attend clinic and entered treatment.

In consultation with Carlos's clinical supervisor, the interested parties began to identify what, if any, longer term clinical accommodations could be offered her. Carlos was the first to recognize the clinic's need to ensure that no harm would befall his clients because of his inability to attend to his clinic work. He and his supervisor discussed whether he could identify any specific trigger for any anxiety. For example, were they causally related to the hearing, and, if so, would elimination of all hearing performances from Carlos's docket allow him to continue in clinic?

Unfortunately, Carlos's anxiety had become so severe and pervasive that he experienced disabling symptoms when he crossed the threshold of the clinic's door. Tasks which he had handled very effectively earlier in the semester (and in prior work settings), such as interviewing clients, threatened his health.

The timing of the onset of Carlos's panic attacks complicated the situation. Students receive 7 academic credits for their work in the clinic in which Carlos was enrolled, 4 for the clinical work and 3 for the co-requisite weekly seminar. Full time students are required to take a minimum of 12 credits, so withdrawing from the clinic entirely would inevitably mean an additional semester's work for Carlos to be able to obtain a sufficient number of credits for graduation. Clearly, requiring Carlos to withdraw and incur the cost of an additional semester's tuition was a last resort. Ultimately, the Dean, in consultation with Carlos and his clinical supervisor, found a middle course. The administration allowed Carlos to withdraw from clinic. However, given that these events occurred at mid-term and that he had completed all clinical requirements to that point, the Dean approved him receiving partial credit proportionate to the work he had completed and converted his credits from graded to pass/fail. The Dean also worked with Carlos to determine a way to make up the course credits he lost as a result of the withdrawal.

At clinic, Carlos's supervisor reassigned his cases. In addition, she worked with Carlos to develop a plan for informing fellow clinic students and Carlos's clients about his withdrawal. Ultimately, Carlos advised his clients of the substitution of counsel by letter and elected to tell his peers himself. While entering the clinic office remained too stressful, Carlos was able to continue to attend and contribute to the clinic seminars which were held in a law school classroom.

Carlos's clinical experience prompted a permanent change in his career path. He graduated the following semester, cum laude, but with no job. That summer Carlos passed the bar exam with ease. However, instead of looking for a traditional legal job, Carlos chose to explore alternative careers which might better match his needs.

1. The Administrative Viewpoint

While Colleen's case may be one of a missed opportunity, Carlos's case presents an even more complex challenge. It is possible that Carlos had experienced similar crises in the past, and had not fully appreciated their effect. This, however, is more a matter for Carlos and his treating medical professionals to determine. The major dilemma that Carlos's case presents for law school administrators is how to help a student salvage not only a semester, but also quite possibly a professional career.

Although it is beyond the scope of this article, it does bear noting that many students come to law school with only a vague notion of what practicing law entails and what the profession may demand. For students without a disability, this may result in a rude awakening at some point between matriculation and graduation. For those who enter with disabilities, or experience a worsening of or, like Carlos, the onset of a disability in law school, coming to terms with the demands of the profession can be overwhelming.

Carlos's case raises several issues of how best to counsel a student who, well into his law school career, exhibits signs of a disability that may well have a serious impact on his ability to function in practice. Given the amount of debt that law students now incur, the idea of abandoning law school half or two thirds of the way through is not a very palatable one.¹⁰⁵ Yet, as illustrated by Carlos's ultimate career decision, a "take away" message from the clinical experience that one is not cut out to be a lawyer need not be an entirely bleak one. Many of the skills that law school teaches—critical analysis, effective oral and written communication, creative problem solving—are highly prized in other professions and careers. While it is safe to say that the vast majority of students enter law

¹⁰⁵ See generally Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 LSINQ 677 (2006) (study indicating that average law student debt was \$60,588).

school with the intention of actually practicing law, for the few who determine that the legal profession is not the highest and best use of their talents, a law degree can still be an important entrée into other careers. Most clinicians, and Deans for Students, would hope that the clinical experience is a means for students with disabilities to develop a set of effective strategies to use in practice. But, if the final determination is that a disability cannot be accommodated in traditional legal work, law schools have an obligation to provide these students with support and assistance in identifying career alternatives.¹⁰⁶

It should be noted here that some of the accommodations that were offered Carlos might well raise equity issues with fellow students.¹⁰⁷ For example, if the Dean's decision to allow Carlos retroactively to change from a grade to pass/fail became known, this administrative action could very well frustrate another student, who had performed poorly and who wished to be afforded a pass/fail option after grades were assigned. Similarly, if the reduction of credits became known, other students might also want to petition for a change of credits (e.g., increase in the number of credits if they had worked longer hours on a particularly troublesome case). Administrators and clinicians need to be aware of the potential for tension between students when one is perceived as receiving "unequal treatment." On a more positive note, however, the need to accommodate one student within a clinic can provide an opportunity for other students to become aware of disability law, the concept of "reasonable accommodations," and the complexity of determining what such accommodations might entail.

2. The Clinic's Viewpoint

It is difficult to recapture the angst connected with Carlos's clinical experience. To see anyone suffering so acutely and to recognize that he had tried quietly to soldier on for so long brings back painful memories. However, we offer this case study to invite exploration of how student lawyers with mental health concerns can use clinics to assist their preparation for practice. While Carlos developed one type of mental impairment, law students with depression, obsessive-compulsive disorder, substance abuse, and other psychological disabilities may also seek out clinical experiences as a preview of practice.

¹⁰⁶ See generally Weiss, *supra* note 11 (proposing affirmative duty for law school administrators to counsel learning disabled students on demands of practice); Levy, *supra* note 43 (advocating career counseling); Eichhorn, *supra* note 36 (concluding that law schools do not adequately prepare students with disabilities for the accommodations gap they will experience in practice); see also Adelman & Wren, *supra* note 32, at 23 (emphasizing the need for students with disabilities to be very self-reflective when choosing careers).

In some extreme cases, the clinical experience may indicate that a student is unable to meet the character and fitness requirements of the profession. Discussion of the consequences of such a finding is beyond the scope of this article, but raises complex and troubling issues for law school administrators and the affected students.

¹⁰⁷ A school's ability to deal effectively with these equity concerns would be impacted by confidentiality constraints which could bar an administrator or clinician from sharing with other students the reasons for the accommodations. If a disabled student insisted that his or her supervisor keep confidential the existence of a disability and the reasons for granting accommodations, arguably such a request would have to be honored. It is unlikely that the "need to know" exception would apply to fellow students having access to this information. See, note 64, *supra*.

Can clinics accommodate the needs of student lawyers with mental health issues, whether or not they technically qualify for accommodations, and, if so, how?

a. Clinic Selection and Disclosure

Unlike Colleen, Carlos had no advance knowledge of a disability. Therefore, the classic disclosure issue did not present itself. However, his interest in enrolling in clinic still provides a useful starting point. Carlos joined clinic in his third year of law school with no clear career direction. He had eschewed traditional law firm positions his second summer, electing instead to clerk for a local judge. As he described his quandary to his supervisor at their first meeting, “I love law school; I’m just not sure I’m cut out to be a lawyer. I haven’t seen any legal job yet that I could see myself enjoying.”

Those words presaged the difficulties he would experience in clinic. Coming from a student who had no history of educational accommodations, they certainly were too cryptic for the clinical supervisor to treat them as triggering ADA compliance. However, upon hearing his warnings, his supervisor knew that one of Carlos’s goals at clinic was to experiment with practice. Therefore his clinical objective became a desire to obtain as broad an exposure to types of legal skills and substantive fields as possible to allow him to weigh career options.

b. Essential Functions of In-House Clinic Students

Carlos’s situation is distinct from Colleen’s in another way: he performed all the essential functions of a student litigator until he developed disabling anxiety. Then he could perform none of them. At that point, Carlos’s anxiety symptoms became so profound as to render him unqualified. He could not walk into the office, much less undertake any legal work, competently. However, if, after the two week hiatus when he began treatment, his medical providers had cleared him for practice, then his supervisor and he could have discussed whether he could have continued in clinic assuming appropriate accommodations could be made which would have allowed him to represent clients with competence and diligence while he regained his mental health.

c. Clinic Accommodations That Were Implemented

In this section, we explore two sets of accommodations relevant to Carlos’s case. The first, involves those accommodations he received; the second, those that Carlos might have received had the severity of his mental illness abated sufficiently as to allow him to continue at clinic. As outlined above in Section III.B.1, the administration offered Carlos important accommodations: a. the school allowed him to withdraw from clinic without penalty; b. Carlos received academic credit for half of the term; and c. the school allowed him to change clinic from a graded experience to pass/fail. Each proved critical to Carlos’s ability to recover and graduate.

What if Carlos had been medically able to return to clinic? Assuming he became able to resume at least some of his functions as a student lawyer, what types of

accommodations should be considered? We have data from his prior legal jobs that suggest that Carlos could perform many significant lawyering tasks without risk. Researching, drafting, and interviewing are all key practice skills with which he had had success. Therefore, in consultation with his medical team, Carlos and his supervisor could construct a specialized clinical experience that would build on his positive experiences and attempt to avoid the most stress-producing activities. Such a redefinition of course expectations would need to maintain the essential program requirements.¹⁰⁸ Here, if Carlos could have returned to clinic, and performed all the essential functions, but not the marginal ones (ex. conducting hearings), then Carlos's needs might well have been successfully accommodated in clinic. Whether that accommodation program would have been successful for Carlos is not clear.¹⁰⁹

Continuation of clinic for someone like Carlos would be a high-stakes endeavor. Whether it would be advisable for a particular student involves individualized decision-making on a case by case basis. In Carlos's clinic, there is no guarantee that every student will handle a hearing every term due to the vagaries of court schedules. Therefore handling court hearings could be considered a marginal function, rather than an essential duty of that clinic's student attorneys.¹¹⁰ If a clinic narrowly defines its essential functions and continually revises that list to reflect current experiences of all of its students, then students like Carlos may well be able to be accommodated.

d. Clinic Accommodations That Were Not Provided

For a high-achiever like Carlos, it would be tempting to try to revamp the clinical program to accommodate his needs. Assuming for purposes of this discussion that his treating mental health providers had cleared him to return to clinic, there would still be limits to the modifications that a legal services clinic could offer without undermining the program's standards. For students with mental health issues, one might consider proposing he work at home in lieu of regular clinic attendance.¹¹¹ In Carlos's clinic, however, clients' access to their student lawyers is a significant feature of the office. Furthermore, frequent interaction between Carlos and his partner, as well as his

¹⁰⁸ See text accompanying note 24, *supra*. Carlos's situation seems distinguishable from that of Colleen. We have argued that dropping her case load below program minimums or redefining her work to include only certain lawyering tasks and not the full range required of other clinic students exceeds the scope of reasonable accommodations.

¹⁰⁹ Pardo & Tomlinson, *supra* note 35, at 36, surveyed one legal educator who expressed concern that lawyering is an inherently stressful occupation: "From a mental health perspective, panic anxiety, for example, would be enough to keep that person out of the profession or school – it is so stressful." *Id.*

¹¹⁰ See Buhai, *supra* note 7, at 187 (concluding that conducting judicial or administrative hearings in a free legal clinic would be marginal functions). Educators from other professional training programs have questioned whether their students should be permitted to specialize, thereby narrowing the range of essential functions they are required to perform. Within the medical profession, for example, commentators have questioned whether someone who wishes a career in psychiatry must pass all clinical rotations, including those in surgery. See Pardo & Tomlinson, *supra* note 35, at 22; see also *Ohio Civil Rights Comm'n v. Case Western Reserve Univ.*, 666 N. E. 2d 1376 (Ohio 1996) (affirming denial of admission to medical school of a blind applicant who sought to specialize in psychiatry because of inability to perform surgery rotation and other medical procedures).

¹¹¹ See Buhai, *supra* note 7, at 190-91 (describing hypothetical clinic student with OCD).

supervisor, is another critical component of that program. Perhaps his partner and supervisor could arrange their meetings with Carlos at non-clinic venues; however, requiring his clients to contact him only by phone rather than in person risks irreparably undercutting an effective lawyer-client relationship.

As we saw in Colleen's case, questions involving disclosure of Carlos's disability to others in the program would become an additional consideration. Here, Carlos's withdrawal from clinic prompted his disclosure to his peers and clients. However, had he been able to return to clinic, he and her supervisor would have had to identify what disability information was to remain confidential and what could be shared.

These disclosure questions are complex. First, take his clients. Surely they might be curious as to why Carlos had an extended absence. If he elected to tell them the reason, he risks an adverse reaction. As one commentator acknowledged, if a client has a choice between two lawyers, one who has admitted his disability and one who is not impaired, the client would likely choose the non-disabled attorney.¹¹² If he elected not to be forthcoming, he would still need to assure his clients that he was once again able to provide competent, diligent representation as ethically required.

Then, consider his clinic colleagues. When Carlos told his peers of his anxiety, they proved very supportive; his partner offered to assume some of his case responsibilities. Such a sympathetic climate is just what one would hope in any work environment. Still Carlos's supervisor would face a tough issue: were the supervisor to allow Carlos to do less and his partner to do more, equity concerns would surface. Furthermore, if Carlos received preferential treatment to which he was legally entitled, what impact would those accommodations have on other students without diagnosed or disclosed disabilities who might also be struggling in clinic?

Allowing all students to take clinic pass/fail might seem an easy fix. However, Carlos's clinical staff, in consultation with students and administration, had previously reviewed the grade v. pass/fail issue and concluded that the program's pedagogical goals could best be served through grading students' performances. Requiring the clinic to make such a major shift in its evaluative process mid-stream falls outside the demands of the ADA. However, as in Carlos's case, the law school could permit one student with such a documented disability to take the program pass/fail as an accommodation.

Carlos's case graphically demonstrates the barriers to, and limits of, accommodations even for a student with an acknowledged disability known to the faculty and administration. While his experience with front-line lawyering proved overwhelming in the short-run, we trust that it provided significant data for reformulating his career planning.

¹¹² Jeffrey Gallant, *The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning-Disabilities*, 37 BUFF. L. REV. 739, 743 (1988-89).

IV. Best Practices for Law School Administrators and for Clinics

While perhaps interesting history, the two case studies presented are most useful if they help highlight standards to which legal educators and clinicians should aspire when working with student lawyers with mental health, neurological, or learning disabilities. Our work with clinic students with these and other disabilities suggests some approaches which may help those students succeed both in clinic and upon graduation. We invite others to share their experiences and to join this debate.¹¹³

Overcoming Barriers to Disclosure

A threshold issue involves increasing the likelihood that students with disabilities will disclose their impairments. Only then are schools required to comply with the ADA, and only then can the institutions begin to work with such students to prepare them for the demands of practice. The following proposals are designed to help overcome disclosure barriers at the institution and the clinic:

1. The disability officer of the law school should oversee dissemination of information about access to accommodations, protocols for triggering disability services, and range of accommodations available. The school's confidentiality guidelines should be included in that information. Attached as Appendix 1 are examples of such outreach to incoming law students and upper level students.
2. The disability officer should coordinate with any formal or informal academic support services to ensure that any students who do not initially disclose their disabilities have access to services should they elect to disclose during the course of their educational program.
3. Clinical faculty should disseminate information about access to accommodation and protocols for triggering disability services for student lawyers. Procedures for handling confidential information received from students with disabilities should be included. We have appended a sample communication to incoming clinic students.¹¹⁴
4. Clinical faculty should publicize the essential functions required of student lawyers in the clinic. That catalogue of responsibilities should be updated regularly to ensure that it represents clinic students' current required duties, and not marginal functions. This compilation should be more comprehensive than a general course description. Included in the Appendix is an example of this type of material prepared for a civil litigation clinic in which students serve as front-line lawyers.¹¹⁵

¹¹³ Several of the recommendations for best practices proposed in Section IV are modeled after those proposed in the ABA Report on Employment of Lawyers with Disabilities, *supra* note 16.

¹¹⁴ Attached as Appendix 2 is a copy of an email sent to incoming clinic students at BCLS's civil litigation clinic.

¹¹⁵ Attached as Appendix 3 is a list of essential functions of student attorneys derived from the criteria for grading and evaluation at the BCLS clinic.

5. The Dean for Students and/or disability services staff should review course selections for students who are receiving accommodations prior to their entry into clinics in order to discuss with the students whether they will disclose to the clinicians, and, if so, whether an accommodation will be necessary or possible.¹¹⁶

Post-Disclosure Protocols

Once a student has triggered a law school's duty to comply with the ADA by disclosing a disability, the institution can bring to bear the full range of its resources to fine-tune that student's education to fit specific needs. We offer the following recommendations for both administrative staff and clinics:

6. The disability officer should coordinate with career services staff to ensure that students with disabilities receive guided, career counseling appropriate to their needs. All law students will benefit from access to complete and accurate information on the demands of particular practice settings. In addition, the career service office should provide information on non traditional career paths. Finally, the career service office should maintain information relevant to the issues facing disabled lawyers (e.g. bar association reports and bulletins on career opportunities for lawyers with disabilities, EEOC guidelines on accommodations for attorneys with disabilities, etc.).¹¹⁷

7. The disability officer should coordinate with academic advisors to ensure that students with disabilities are counseled about the various clinical opportunities available at that law school and how particular clinical settings could assist such students make the bridge to practice successfully.

8. The disability officer should help coordinate training programs for faculty on teaching students with disabilities. Particularly for law schools with university resources available, interdisciplinary programs which build on the insights learned from medical, social work, and teacher training would be very beneficial.

9. The disability officer should review the law school's academic standards to ensure that they comply with the ADA and make recommendations for any revisions that are necessary. The officer should attempt to balance the rights of students with disabilities with the equity considerations inherent in specialized treatment.

¹¹⁶ We recognize that this may be a controversial recommendation, because it could be easily construed as "vetting" which students should be admitted into clinics. That is not the intention of this suggestion. Instead, such a proactive review by staff in student services or disability services could result in conversations with the student about whether to disclose a disability early on to a clinical supervisor and how to structure a request for accommodation.

¹¹⁷ The extent to which law school administrators have any duty to notify state bar examiners that students with disclosed disabilities have received accommodations in clinic practice settings (or in any other law school course) is beyond the scope of this article. Indeed the role of administrative staff as "gate-keepers" of the profession needs to be debated within the academy and the profession. *See also*, discussion *supra*, note 29, regarding no ethical duty to disclose disability to clients assuming lawyer is otherwise competent.

10. Clinical faculty should convene regional workshops to discuss their experiences with helping students with disabilities transition from academia to practice. These conferences can provide opportunities for sharing practice accommodations developed for different disabilities.

Specific accommodations for students with mental health or learning disabilities

Once disclosure occurs, the student can engage in an interactive process with faculty and administration to develop appropriate accommodations. The case studies offered in this Article involve only two types of disabilities. Not only are there a range of non-visible disabilities, but also each person's experience with a particular impairment will differ, requiring a unique accommodation plan.¹¹⁸ Therefore we offer the following suggestions as a first installment of what we hope will become a protocol for accommodations which law school administrators, clinical faculty and legal employers can consult when working with (student) attorneys with disabilities.

11. Clinical faculty, the school's disability officer, and the student who seeks accommodations should develop an appropriate accommodation plan in concert. Topics to be included are: a. specific workplace accommodations; b. impact, if any, on the evaluation/grading of the student's clinical experience; and c. confidentiality expectations, including protocols for what, if any information about the student's disability will be shared with other clinical supervisors, student partners, seminar colleagues, and clients.¹¹⁹

12. With permission of the student lawyer, clinical faculty should consult with the student's treating medical providers about reasonable accommodations appropriate to the particular practice setting.

13. Clinical faculty and the student lawyer seeking accommodation should review the proposed accommodation plan in light of the ethical standards in the relevant jurisdiction, to ensure compliance with all professional duties.

14. At mid-term, the accommodations development team should be reconvened to review progress and revise the accommodation plan as needed. Then, at the conclusion of clinic, the team should meet for a final debriefing of the experience and for career counseling.

¹¹⁸ It is beyond the scope of this Article to attempt to outline specific accommodations best suited to help each clinic student who presents with a non-visible disability. In addition to working with the student's medical professionals and the law school's disability officer, we hope that clinical faculty will begin to develop a menu of accommodations. Thankfully, some trained professionals have already begun to compile compensatory techniques and accommodations designed to assist graduate students with non-visible disabilities. See, in particular, Adelman & Wren, *supra* note 32, at 11-13, 27; see also Christensen, *supra* note 12, at 26-28 (compiling list of study aids and learning accommodations which her subjects identified as helpful); Familant, *supra* note 10, at 552-58.

¹¹⁹ Attached as Appendix > is a template for such a clinic accommodation plan.

15. Clinical faculty should compile and make public a list of accommodations which have been successfully employed by student lawyers.

Conclusion

There is much work still to be done before the legal profession successfully accommodates lawyers with disabilities. By focusing attention on the role that clinical education can play in assisting aspiring lawyers with special needs experiment with the demands of practice, we hope that a lively discussion within the academy will ensue. There are many angles left unexamined, including how the ADA can best be implemented in clinics other than in house, litigation-based settings where the students are the front-line lawyers, and how disabilities other than ADHD and anxiety can best be accommodated in clinics. The role of career counselors, including pre-law advisors and post-graduate vocational counselors, is also ripe for further study.¹²⁰ We invite others to join us in that exploration.

¹²⁰ For suggestions on practice protocols for employers of lawyers with disabilities, see Stein & Stein, *supra* note 17.