The Character and Fitness Inquiry: Can We Predict “Problem” Lawyers?

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Every U.S. jurisdiction requires bar applicants to demonstrate that they have the requisite character and fitness to become a lawyer. The character inquiry seeks to determine “whether the present character and fitness of an applicant qualifies the applicant for admission.” In most states, bar examining authorities seek extensive information about the applicant’s personal history, and past misconduct typically creates a rebuttable presumption that an applicant lacks the requisite character to practice law. Bar examining authorities look at a variety of factors when considering any past misconduct including, *inter alia*, the seriousness and recency of the misconduct, the cumulative effect of the conduct, and evidence of rehabilitation. As a practical matter, few applicants are denied admission to the bar on character and fitness grounds.

The character inquiry has been criticized on a variety of grounds, including the absence of evidence that the inquiry succeeds in weeding out those individuals who are likely to do harm.

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2 See, e.g., Keith Swisher, *The Troubling Rise of the Legal Profession’s Good Moral Character*, 82 ST. JOHN’S L. REV. 1037, 1045 (2008). In some states, certain misconduct, such as a serious felony, is automatically disqualifying, at least for a period of time. COMPREHENSIVE GUIDE, supra note 2, at 4-5.


4 A study in the early 1980s found that only 0.2% of all applicants were denied admission on this basis. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 516 (1985). Recent denial rates based on character and fitness grounds are not easy to obtain. Denial rates in Connecticut on character and fitness ground are roughly 1-2 people (0.14%) per year. In Missouri, denials during 2002-2008 ranged from .18% to .477%. Missouri Board of Law Examiners, *Frequently Asked Questions* (FAQs) (2011), https://www.mble.org/faq#360. Applicants who are denied bar admission on character and fitness grounds are often given leave to reapply.
if they become lawyers. Of course, it is very difficult to prove that someone who was denied bar admission would have become a problem lawyer. But we do know that attempts to predict future conduct, even by trained clinicians, have met with only mixed success. Moreover, predictions based on human judgments by a variety of actors (e.g., psychiatrists, college counselors, judges, etc.) are often less reliable than predictions based on algorithmic models. This evidence suggests that intuitive judgments by bar examining authorities about who might become a problem lawyer may not be especially reliable.

Commentators have also argued that the character and fitness inquiry cannot reasonably be expected to prevent admission of “problem” lawyers because the inquiry comes too early to predict which applicants might become problems. This argument finds support in the research showing that lawyers’ ethical orientation and decision making are significantly affected by the context in which they work. This argument also finds support in the discipline statistics. The most common subjects of lawyer discipline are disproportionately middle-aged males who

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8 Rhode, *supra* note 4, at 515.

practice in solo or small law firms.\textsuperscript{10} Bar examining authorities often do not know who will be practicing in these settings until \textit{after} applicants are admitted to the bar.\textsuperscript{11} Likewise, disciplined lawyers often report some depression related to work or life circumstances, alcohol abuse, or family or financial crises.\textsuperscript{12} These problems often arise several years after the character and fitness inquiry occurs.\textsuperscript{13}

Nevertheless, it is possible that certain behaviors displayed by bar applicants predict which ones are more likely to become problematic lawyers. Research in other fields may be useful in this regard. For instance, psychologists and other researchers have found a relationship between academic dishonesty and unethical behavior at work (\textit{e.g.}, theft from employers, violations of workplace policies, etc.).\textsuperscript{14} Academic dishonesty also correlates with measures of risky driving behavior, unethical behaviors in clinical settings, illegal behaviors and personal unreliability.\textsuperscript{15} Most of the studies have been limited to undergraduate students, although a few


\textsuperscript{11}Of course, some predictions about an applicant’s likely practice setting can be at the time of admission, based on the tier of law school attended and law school performance, but it seems unlikely that an applicant would be denied admission based on those measures.


\textsuperscript{15} Kevin L. Blankenship & Bernard E. Whitley, Jr., \textit{Relation of General Deviance to Academic Dishonesty}, 10 ETHICS & BEHAV. 1, 6 (2000); Trevor S. Harding et al., \textit{Does Academic Dishonesty Relate to Unethical Behavior in Professional Practice? An Exploratory Study}, 10 SCI. & ENGINEERING ETHICS 311, 323 (2004); Gail A. Hilbert, \textit{Involvement of Nursing Students in Unethical
have looked at graduate business students. Nevertheless, the studies are of interest because they suggest that academic misconduct may be correlated with other reckless or dishonest behaviors that can be a problem in professional practice.

Psychometric testing and other information have also been used to predict problem behavior in the work place. Researchers have focused closely on the construct known as “Conscientiousness,” which is one of the “Big Five” factors in personality theory. Lower scores on measures of Conscientiousness (e.g., Responsibility, Socialization and Self Control) have been found to be predictors of counterproductive work behaviors such as theft and rule violations. Certain personality measures on the California Psychological Inventory and the Minnesota Multiphasic Personality Inventory correlate with unprofessional behavior by law enforcement personnel and by medical students. Discrepancies, inconsistencies or omissions by individuals when supplying life history information (e.g., criminal activity, drug use, etc.) prior to being hired significantly differentiated disciplined and never disciplined law enforcement personnel.


16 Donald L. McCabe et al., Academic Dishonesty in Graduate Business Programs: Prevalence, Causes and Proposed Action, 5 ACAD. MGMT. LEARNING & EDUC. 294 (2006); Nonis & Swift, supra note 14, at 71; Sims, supra note 14.


18 Sarchione et al., supra note 17, at 909; Sellbom et al., Identifying MMPI-2 Predictors of Police Officer Integrity and Misconduct, 34 CRIM. JUST. & BEHAV. 985, 998-99 (2007).


20 Michael J. Cuttler & Paul M. Muchinsky, Prediction of Law Enforcement Training Performance and Dysfunctional Job Performance with General Mental Ability, Personality, and Life History Variables, 33 CRIM. JUST. & BEHAV. 3, 18 (2006); Sarchione, supra note 17, at 906, 909.
Using a different approach, Maxine Papadakis et al. looked at the medical school records of 235 graduates disciplined by state medical boards and compared those records to a control group.\textsuperscript{21} They found that disciplinary action by a medical board was strongly associated with prior unprofessional behavior reported in supervisors’ narratives during medical school and somewhat less strongly associated with low MCAT scores and poor grades during the first two years of medical school. A different retrospective study of internal medicine residents found that residents with either low professionalism ratings on their Resident’s Evaluation summaries or a low score on the internal medicine certification exam had nearly twice the chance of being subsequently disciplined by a state licensing board.\textsuperscript{22} Disciplined diplomates also had more unsuccessful attempts to pass the internal medicine certification examination than those in the control group.\textsuperscript{23}

Only one previous study has sought to explore whether there is, in fact, a relationship between applicants who disclose “problem” histories during the bar admissions process and those lawyers who are later disciplined. Based upon a review of 52 disciplined attorneys’ records and their bar admissions files, and a comparison to the general population of all Minnesota applicants for bar admission, Carl Baer and Margaret Corneille found that disciplined lawyers were more likely to reveal evidence of certain types of conduct in their admissions files (e.g., arrests, possible substance abuse, involuntary employment terminations, financial problems, etc.) than other bar applicants.\textsuperscript{24} Lawyers who were disciplined were also more likely than other lawyers to fail the Minnesota bar examination at least once before they successfully

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\textsuperscript{21} Maxine A. Papadakis, et al., Disciplinary Action by Medical Boards and Prior Behavior in Medical School, NEW ENG. J. MED., Dec. 2005, at 2673.
\textsuperscript{22} Maxine A. Papadakis. et al., Performance during Internal Medicine Residency Training and Subsequent Disciplinary Action by State Licensing Boards, ANNALS INTERNAL MED., June 2008, at 869, 873-74.
\textsuperscript{23} Id. at 872.
\textsuperscript{24} Carl Baer & Peg Corneille, BAR EXAMINER, Nov., 5, 6-7 (1992).
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passed it. But as Corneille later noted, “the study was not conducted scientifically and involved a very small sample.”  

One topic of discussion at the ABA’s National Conference on Professional Responsibility will be a recent study of Connecticut lawyers which suggests that some of the measures of past conduct traditionally relied upon to evaluate the character and fitness of bar applicants to practice law do not predict who will later be disciplined. And it appears that other measures traditionally believed to reflect adversely on an applicant’s character and fitness to practice only weakly predict those applicants who will later be subject to discipline. If these findings are replicated in other jurisdictions, they raise obvious questions about whether the character and fitness inquiry should be continued in its current form.

Of course, even if the character and fitness inquiry relies on information that does not strongly predict future discipline, this does not mean that the inquiry is entirely without value. Perhaps the small number of applicants who are denied admission to the bar based on the character inquiry would have done some very bad things if allowed to practice law. The character and fitness requirement may also deter an additional number of individuals whose backgrounds suggest that they would have been problematic lawyers from ever seeking bar admission. The good character requirement might also have symbolic importance. It may signal to the public that lawyers can be trusted. For the legal profession, the good character requirement may express shared assumptions and values about what it means to be a member of

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the bar. These and other topics will be discussed when we explore whether it is possible to predict “problem” lawyers.

27 Rhode, supra note 4, at 509. More generally, see Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021 (1996) (suggesting that law serves not only to deter or compensate, but to signal disapproval of disfavored conduct).