

“INADVERTENT” FAILURE TO DISCLOSE NEGATIVE INFORMATION ON LAW SCHOOL APPLICATIONS: ONE INSTITUTION’S APPROACH TO A CHRONIC PROBLEM

by Robert P. Schuwerk

About 10 years ago, the University of Houston Law Center became concerned that substantial numbers of admitted students (about 15 to 25 percent, depending on the year) had omitted information from their law school applications that, in our judgment, they were clearly required to disclose. Like most schools, the Law Center makes inquiries of students’ criminal records, past involvement in litigation, and the like. Our questions in that regard (set out in the box on this and the following page) are keyed to similar ones appearing on our state bar’s Declaration of Intention to Study Law, a questionnaire required to be filled out by every law student shortly after law school admission if the student wishes to apply for admission to the State Bar of Texas. Like students at most other schools, a lot of our students failed to answer the questions fully and truthfully. This article will explore how we addressed that problem and report on the limited success we have experienced so far in dealing with it.

BACKGROUND: THE QUESTIONS AND THEIR SYSTEMATIC EVASION

The five questions currently appearing on our application, which with only very minor modifications existed in this form throughout that 10-year period,

are as follows. All were to be answered “yes” or “no,” with “yes” answers requiring a further explanation and additional information concerning any incident(s) involved.

6.a. Have you ever been given scholastic suspension or scholastic probation?

6.b. Have you **ever** been disciplined in any way, for any matter by any college, university, law school or other institution of higher learning, or by any professor, administrator, employee or entity representing any college, university, law school or other institution of higher learning, or have you been allowed to withdraw from such an institution to avoid such discipline, whether or not the record of such action was retained in your file?¹

7.a. Have you **ever** been convicted of an offense, placed on probation, or granted deferred adjudication or any type of pretrial diversion? You must report any such offenses involving alcohol or drugs. You must report any failure to appear conviction resulting from any offense. You may exclude only Class C misdemeanor traffic violations.

7.b. Have you, within the last ten (10) years, been **arrested, cited or ticketed for, or charged**

with any violation of the law? You must report any such offenses involving alcohol or drugs. You must report any failure to appear conviction resulting from any such offense. You may exclude only Class C misdemeanor traffic violations.

8. Have you ever been confined by any governmental authority because you were found to be dangerous to yourself or others?²

These straightforward questions apparently managed to perplex a considerable number of our applicants. Questions 6a and 8 have proved to be the least troublesome: such incidents are relatively rare among our applicants, and the clarity of the questions themselves virtually precludes any defense of mistake to a failure to disclose matters covered by them. We have had a few such omissions over the years, but all were clearly deliberate and all were dealt with rather harshly when they arose.³ Question 6b, while initially troublesome, has been beaten into shape over the years to such an extent that it too has stopped being a significant issue for us.

This reduces the number of questions in controversy to two: questions 7a and 7b. The principal omissions in connection with these questions involved underage drinking offenses (“Minor in Possession” or “MIP”), other juvenile offenses, offenses that had supposedly been expunged, and warrants for failure to appear in connection with traffic offenses.

The excuses for not reporting the first three categories of these offenses were numerous. Besides the ubiquitous “I just forgot about it/them,” the principal ones all involved reasons that had no support whatsoever in the questions asked, such as

- “I didn’t know that I had to report juvenile offenses” (even though nothing in the question excluded them and the accompanying Application Instructions and Character and Fitness Examples, both discussed later in this article, specifically stated the requirement to disclose juvenile offenses for each of the questions);
- “I couldn’t find any records” (or “there weren’t any records”) (even though the question didn’t ask about *records* of events, but rather about the *events themselves*);
- “I thought the records were sealed” (even though nothing in the question made that matter);
- “I was told [usually by a lawyer, and for some unspecified reason] that I didn’t have to disclose that matter” (even though the question contained no such exemption);
- “I was told by the judge that I’d never have to talk about that matter” (even though the question did not make that an excuse for nondisclosure); and
- “I was told that the matter would be expunged” (which might have excused nondisclosure had it *actually been* expunged, but students able to produce an actual order of expunction have been few and far between).

For the last category, warrants for failure to appear in connection with traffic offenses, most involved a failure to appear in court in connection with a traffic ticket, and the near-universal excuse was “I thought, since the underlying offense was a minor traffic violation [sometimes rather generously interpreted, I might add] that didn’t need to

be reported, that the warrant for failure to appear was a minor traffic violation as well” (conveniently ignoring the fact that such an offense wasn’t a traffic offense *at all*).

REPERCUSSIONS OF NONDISCLOSURE

We found the substantial number of applicants who did not fully disclose the requested information to be rather disconcerting, not only because the situation appeared to reflect a certain cavalier attitude if not an outright lack of candor, but also because of the long-term repercussions in terms of the likely admission of the students involved to the State Bar of Texas.⁴ In Texas, the Board of Law Examiners conducts a thorough investigation of each student’s background, including a full examination of the student’s criminal history, if any. These investigations are conducted by trained former law enforcement officials who have access to all public records databases concerning such matters. Thus any offenses not disclosed to us are apt to be discovered as part of that investigative process.

Additionally, the Board of Law Examiners has access to each student’s entire file at the Law Center, including the application that the student submitted to us as part of the admissions process. Once the investigation referred to above is completed, the bar applicant’s actual criminal record is compared to that disclosed in the law school application, and any discrepancy is called to the attention of any law school attended by that applicant. The board asks the school to review the situation and to ascertain (1) whether the omission(s) involved would have influenced the school’s admission of that student and, if not, (2) whether the school nonetheless believes that some form of discipline is appropriate.⁵ The school’s decisions are then reported back to the board, which takes them into consideration in determining

whether the student possesses the requisite present good moral character and fitness necessary to be admitted to the State Bar of Texas.

REMEDIAL MEASURES TAKEN BY THE LAW CENTER

To confront the problem of nondisclosure, the Law Center decided on a four-pronged approach:

1. Make modifications to our application to emphasize the importance of complete candor in answering our application’s character questions.
2. Prepare detailed instructions to accompany that application that would specifically rule out as illegitimate the most common excuses for not disclosing certain information to us.
3. Institute a process that would eventually become a part of our orientation designed to advise students of the desirability of correcting any errors of omission in their applications at the earliest possible time.
4. Institute an informal administrative process to handle amendments to student applications generated by the above process (or by letters from the Board of Law Examiners to our school), including deciding what sanctions, if any, to impose on the students involved.

1. Modifications to the Application

One concern that we had with our application questions as written was that students would not see past what they perceived as the likely immediate negative consequences of a positive answer (possible adverse effect on their admission prospects) to the far more severe adverse consequences down the road of a negative answer in terms of their admission to the bar. We therefore amended our application

form to set out in bold type just prior to our character questions a warning in that regard. This warning provides in part:

The failure to disclose an act or event such as the ones described [in the questions] below is often more significant and leads to more serious consequences than the act or event itself. Failure to provide truthful answers . . . may result in revocation of admission, disciplinary action by the UH Law Center, or denial of permission to practice law by the state in which you seek admission. Therefore, when in doubt you should always err on the side of FULL DISCLOSURE.⁶ (All caps and underlining in original.)

While this language arguably could be more explicit in explaining why nondisclosure could have more severe negative consequences than disclosure (the reason for this, of course, is that nondisclosure converts a frequently minor and often long-past negative event into a far more serious one—lack of candor, under oath—occurring in the present), as well as why it is very likely that any such nondisclosure eventually will come to light, nonetheless it does point out that the applicant should be thinking of far weightier matters than law school admissions.

2. Amendments to the Application Instructions

In addition to adding this warning, we felt that it was necessary to amend the instructions accompanying our application in three respects. The first was to highlight, once again, the magnitude and severity of the risks of nondisclosure as compared to disclosure. Thus the instructions point out that “[w]hile an answer of ‘yes’ to any of these questions will not

result in rejection of your application, a false answer of ‘no,’ once discovered, can have very serious repercussions, . . . including revocation of admission to, or expulsion from, the UH Law Center or denial of admission to the bar.”⁷

The second was to specifically address and eliminate any reasonable basis for unjustifiably relying on our application or its accompanying instructions as reasons for failing to disclose information clearly called for by our various character questions, and to rein in those excuses that were valid

in some circumstances to their proper compass. For example, the instructions for questions 7a and 7b acknowledge that actual expunged offenses do not have to be disclosed, but then cautions that nondisclosure on that basis is improper “unless, at the time you are filling out the application, you have in your

possession either a written order of [expunction] or a written statement from an attorney or a responsible and knowledgeable official of the jurisdiction involved that the offense has been expunged. It is the responsibility of the applicant to make sure that the incident has in fact been expunged or sealed.”⁸ See the sidebar on page 29 for the specific instructions pertaining to the five character and fitness questions.

The third was to direct applicants to examples on the Law Center’s website of the type of information that has to be disclosed, and to further caution them that the Law Center “expects you to be familiar with these examples and will not be sympathetic to students who fail to disclose matters that clearly had to be revealed.”⁹ These Character and Fitness Examples are presented in a “Frequently Asked Questions” format for each of the questions.

The instructions below pertain to the five character and fitness questions on the University of Houston Law Center's Full-Time Program Application. The questions, listed on pages 25 and 26 of this article, have been repeated in brackets in this sidebar for ease of reference.

UNIVERSITY OF HOUSTON LAW CENTER APPLICATION INSTRUCTIONS

Character and Fitness

You should take care to respond fully and carefully to every question on this application, but you should use extra care with regard to questions 6.a., 6.b., 7.a., 7.b., and 8. While an answer of "yes" to any of these questions will not result in rejection of your application, a false answer of "no," once discovered, can have very serious repercussions. Both the UH Law Center and any state bar association to which you apply will consider any substantial discrepancy between your application and the facts as grounds for adverse action, including revocation of admission to, or expulsion from, the UH Law Center or denial of admission to the bar.

Good moral character is part of being a worthwhile lawyer. Providing truthful and complete answers to these questions is your chance to exhibit that character.

[6.a. Have you ever been given scholastic suspension or scholastic probation?]

[6.b. Have you **ever** been disciplined in any way, for any matter by any college, university, law school or other institution of higher learning, or by any professor, administrator, employee or entity representing any college, university, law school or other institution of higher learning, or have you been allowed to withdraw from such an institution to avoid such discipline, whether or not the record of such action was retained in your file?]

Question 6.b. You must disclose all incidents of suspension, probation, or other disciplinary action even if it happened when you were a juvenile, and even if your school did not include it in your records. If you do not remember the details and do not have any records, you must fully disclose all you can remember, make a diligent search for all additional information, and supplement your responses as necessary.

[7.a. Have you **ever** been convicted of an offense, placed on probation, or granted deferred adjudication or any type of pretrial diversion? You must report any such offenses involving alcohol or drugs. You must report any failure to appear conviction resulting from any offense. You may exclude only Class C misdemeanor traffic violations.]

Question 7.a. You must disclose any incident where you were convicted (or pleaded guilty or no contest), placed on probation, or granted deferred adjudication, even if it happened when you were a juvenile, and even if an attorney has told you differently. If you do not remember the details and do not have any records, you must fully disclose all you can remember, make a diligent search for all additional information, and supplement your responses as necessary.

[7.b. Have you, within the last ten (10) years, been **arrested, cited or ticketed for, or charged with** any violation of the law? You must report any such offenses involving alcohol or drugs. You must report any failure to appear conviction resulting from any such offense. You may exclude only Class C misdemeanor traffic violations.]

Question 7.b. You must disclose any offense, even if it happened when you were a juvenile, and even if you were acquitted or the charges were dismissed. If you do not remember the details and do not have any records, you must fully disclose all you can remember, make a diligent search for all additional information, and supplement your responses as necessary.

For questions 7.a. and 7.b., you do not have to disclose Class C misdemeanor traffic violations such as citations for speeding, running a stop sign, or changing lanes improperly. Citations given for violations that show a disregard for the law or for one's financial responsibilities, such as failure to provide proof of insurance or driving on a suspended license, MUST be disclosed. In addition, a warrant issued for failure to appear must be reported, even if the underlying offense was a Class C misdemeanor traffic violation. Please note that the exception for Class C misdemeanor traffic violations is very limited in scope and should not be cited to excuse non-disclosure of offenses outside of the few listed above. If you have any questions about whether a particular offense should be disclosed, please contact the Office of Admissions at 713-743-2280.

For questions 7.a. and 7.b., if the record has been expunged or sealed, you do not have to disclose the incident. You should not fail to disclose an offense based on its having been expunged or sealed unless, at the time you are filling out the application, you have in your possession either a written order of expunction or a written statement from an attorney or a responsible and knowledgeable official of the jurisdiction involved that the offense has been expunged or sealed.

[8. Have you ever been confined by any governmental authority because you were found to be dangerous to yourself or others?]

Question 8. You must disclose any involuntary confinement by a governmental authority where it was determined that you were dangerous to yourself or others, even if the incident occurred while you were a juvenile. You do not have to disclose if you voluntarily committed yourself.

Source: University of Houston Law Center Application Instructions, <http://www.law.uh.edu/admissions/application-instructions.html> (last visited June 20, 2011).

3. Early Warning in Law School of the Consequences of Nondisclosure

The third step in our campaign to deal with nondisclosure, like the fourth discussed immediately below, was remedial rather than preventive: to stress the importance of correcting any omission errors sooner rather than later. At our orientation, we always have a representative of our state Board of Law Examiners present who makes it clear to students what the consequences of nondisclosure can be, how likely such nondisclosures are to be discovered, and how any such discoveries will be compared to the student's law school application and reported to the Law Center.

This presentation is followed by one from our Office of Student Services explaining what students should do if they wish to correct any omissions, how any such supplemental disclosures will be processed, and, perhaps most importantly, that any sanctions the school might choose to impose on the student for failure to disclose a matter initially will be more severe if the student does not self-report to the Law Center before the Board of Law Examiners discovers the omission.

Typically, most students with nondisclosure issues self-report to the Law Center shortly after this presentation occurs. How those matters are processed is discussed below.

4. Administrative Review Process

To handle the anticipated cases of students belatedly disclosing various matters called for on our application, the Law Center established an informal administrative process for reviewing the reasons given by students for their initial nondisclosures. The process was also set up to determine whether sanctions should be imposed by the Law Center for the

students' failure to disclose initially.⁹ This process, which continues to operate very much as initially established, is administered by the dean of students and the chair of our Admissions Committee or their respective designates, acting as the Application Disclosure Subcommittee (ADS).

These two officials were seen as particularly suitable for that role for three reasons. The first was their familiarity with whether an undisclosed violation likely would have had an effect on the admission decision for the student involved. The second was that they were best able to determine whether a particular nondisclosure was likely due to an actual lack of clarity in the Law Center's application or supplemental instructions that merited a change in those documents and, if they so concluded, to implement any necessary modifications. The third was that they were especially heavily invested in the integrity of the Law Center's admissions process and so most likely to police that process with the vigor that the faculty believed appropriate.

Under the ADS Procedures, self-reporting students are required to submit formal amendments to their applications, together with explanations of why disclosure of the events in question did not occur earlier. Students whose nondisclosures are first reported to the Law Center by the Board of Law Examiners are contacted and required to make such submissions. All such submissions are subjected to review by the ADS to determine either whether additional information is required or, if that is not the case, whether the ADS might be inclined to impose sanctions on the students involved.

When No Further Action Is Required

At this stage, most—about two-thirds to three-fourths—of the matters are resolved with a decision

that no further action is required, and the student is so notified, all without any hearing being held. There can be a number of reasons for such a decision, such as a belief on the part of the ADS that

- the student was misled by the Law Center’s application or supplemental instructions into not making a disclosure (in such cases, we seek to prevent such incidents from occurring in the future by amending whichever document needs it);
- the matter involved in the supplemental disclosure is not in fact one that our application requires to be revealed; or
- while disclosure was required, factors in mitigation clearly outweigh those in aggravation for some other reason (typically that the violation was extremely minor and did not involve any interaction with law enforcement authorities, thus making it more likely that the student would overlook it).¹¹

The formal communication closing such matters in this latter category advises the student of the need to use extreme care in connection with any future disclosure obligations (such as to the Texas Board of Law Examiners or its counterpart in another jurisdiction) but has no adverse consequences.¹²

When a Hearing Is Required

In those instances where a hearing is deemed necessary, the process involved is very informal. By the time of any such hearing, the student will have sub-

mitted any additional information requested by the ADS, and the ADS will have reviewed it. Thus, these hearings are not evidentiary in nature but rather are held to permit the ADS members to ask any questions left open by the student’s submission(s) and to determine whether certain factors in mitigation and aggravation exist.¹³ In addition, a fair amount of the time, the hearings are used to lecture the students involved about their lapses and the dangers such slipshod practices pose to them in the future.

In our experience, it is rare for any such hearing to take more than 20 minutes. Counsel are seldom if ever present. In short, the burden of holding a hearing is minimal, although the amount of time devoted by staff to processing student amendments and preparing correspondence to various interested parties outside the hearing itself is not.

CONCLUSION

A great deal of work has gone into the efforts documented in this article. We would love to say that we have seen a substantial decrease in the number of post-admission supplemental disclosures that our students have made as our application questions and accompanying instructions have been refined. However, that is not the case. Instead, we continue to see a substantial number of students—roughly 15 percent of those matriculating—omit matters from their applications whose disclosure seems to us to have been clearly called for.

We think it is important for our students to come to an understanding early in their law school careers that the ethical standards of the legal

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profession require more of them than they perhaps have been used to in their lives up to their joining us. A rigorous but fair process of policing ethical lapses in students' law school applications provides one opportunity both to make that point and to demonstrate the importance that our institution attaches to personal and professional integrity. We think our process is fair, but I question whether it is sufficiently stringent.

Speaking only for myself, I feel that we have reached the point where the nondisclosure problem that the Law Center continues to face can no longer be attributed to a lack of clarity in its application questions or their accompanying instructions. Rather, what appears to be the most likely explanation for that phenomenon is the one we hypothesized years ago: a substantial number of applicants who are willing to deliberately misrepresent aspects of their backgrounds that they believe we would hold against them were we aware of the incidents being concealed. If that is correct, we will not teach those students the lessons concerning the importance of character and integrity that we want them to learn unless we impose a disciplinary sanction on them with potential consequences for their future—such as probation¹⁴ or perhaps even academic suspension—far more frequently than is done now. It now seems clear that at least some of our admitted students were prepared to compromise their integrity to improve their chances for admission to law school.¹⁵ If we don't show them that we care about that—not just *say* that we do, but *show* that we do—when such behavior comes to light, they will leave here feeling the same way about such matters as they did when they arrived. The world will be the worse for it if that happens.

It would be nice to end this account of our experiences on a more hopeful note, but the data to this

point unfortunately do not support such a happy ending. We hope nonetheless that some of our efforts will help other law schools struggling with similar problems and that their results will turn out better than ours. ■

NOTES

1. This question goes on to define what it means by "discipline" to include "without limitation, a letter or other written notice of reprimand or warning, suspension, expulsion, adjustment of grade, assignment of community service, any form of probation, or any other adverse action." It also defines "entity" to include "without limitation, residential facilities or other facilities owned or managed by a college or university, law school or other institution of higher learning."
These two definitions, which are of relatively recent origin, have apparently largely put to rest the two most common categories of omissions in answers to this question—namely (1) extremely narrow constructions of disciplinary actions by applicants to exclude incidents not resulting in the reduction of a grade in a course and/or incidents where the student was allowed to withdraw in lieu of discipline, and (2) the omission of forms of discipline not related to academic dishonesty.
Even before these definitions were prepared, the question itself had had to be amended to make it clear that a *record* of discipline was not a prerequisite to a reportable *incident* of discipline. However, even before these changes, this particular category of omission was not a major component of the troublesome incidents noted at the Law Center.
2. 2011 Full-Time Program Application—University of Houston Law Center.
3. While I am not aware of all such cases that have arisen in recent years, I am aware of several that occurred when I played a role in the process of administratively addressing instances of nondisclosure that first came to light post-admission. I can recall one where a student was suspended for a semester, one where a student was suspended for a year, and one where a student's admission to the Law Center was revoked altogether and the student expelled.
4. Most of our students end up seeking to practice law in Texas, and this article will therefore focus on the admissions process in Texas. However, I believe that similar problems would arise in most if not all other states in which our graduates might seek to be licensed.
5. Because in Texas the Declaration of Intention to Study Law is typically completed by students early in their first year at the Law Center, it is fairly common for the Board of Law Examiners to have completed its investigation and notified the school of any disclosure discrepancies before the student has graduated, thus permitting the school to impose a sanction on a student while he or she is still attending the institution. However, the Law Center also possesses the power to discipline such a student even when he or she has completed all coursework at the Law Center, either by withholding or revoking the certification of completion in good standing or, in very serious cases, by retroactively revoking admission to

the school. Occasionally the school has found it appropriate to exercise those powers.

6. 2011 Full-Time Program Application—University of Houston Law Center.
7. University of Houston Law Center Application Instructions, <http://www.law.uh.edu/admissions/application-instructions.html> (last visited June 17, 2011).
8. *Id.*
9. *Id.*
10. This process is summarized in a document titled Procedures of the Application Disclosure Subcommittee of the Admissions Committee (hereinafter ADS Procedures), <http://www.law.uh.edu/oss/disclosure.html> (last visited June 17, 2011).
11. The factors in mitigation and aggravation of any sanction imposed are set out as Appendix 1 to the ADS Procedures, <http://www.law.uh.edu/oss/appendix.html> (last visited June 17, 2011).
12. For the 2009–2010 academic year, at least 32 of 45 matters were resolved with a “no further action” letter, with 3 additional matters listed as closed but without indication of what action, if any, was taken. Some of these required the submission of additional documentation before that decision was reached, but the majority did not. For the 2010–2011 academic year, 20 of 24 closed matters were resolved with a “no further action” letter, while 12 more matters remain pending.
13. For example, among such factors are whether or not the student involved (1) takes responsibility for an unexcused failure to disclose, (2) appears to recognize the serious nature of the lapse involved, and (3) is genuinely remorseful for the failure to disclose. *See* ADS Procedures, Appendix 1, *supra* note 10. Frequently, one can get a better idea of such matters in a face-to-face meeting than from reviewing a paper record.
14. Academic probation could be accompanied by conditions, such as restrictions on a student’s right to hold a position as an officer of a student organization or the like, that could affect the student’s extracurricular educational experience. Regardless of whether such conditions are imposed, however, placing a student on probation is an act of academic

discipline that must be reported as such to every bar to which the student applies for admission, as well as to any other school to which the student applies for transfer, admission, or enrollment. The letter informing a student of that sanction explicitly informs the student of that fact, thus making any future failure to disclose it clearly inexcusable. Such a sanction would be taken, as it should be, as a judgment by the Law Center that the student in question was unjustifiably less than forthright.

15. I certainly don’t mean to suggest by this that our students are any more culpable than those enrolled at other institutions. To the contrary, I am fairly confident based on visits with colleagues that the problems we uncover are typical of those other schools face—or would face if they took the problems we address as seriously as we do.



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