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Law, College of

8-19-2013

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REGULATORS, MOUNT UP

Ben Trachtenberg*

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Since I began circulating drafts of an article arguing that certain law school officials have exposed themselves to professional discipline by engaging in dishonest marketing tactics,¹ responses have varied considerably. Everyone seems to agree, however, that law school officials should not lie in their pursuit of students. There also appears to be broad consensus that misleading (albeit not intentionally false) marketing—such as systematically skewed salary statistics—is an unfortunate phenomenon, although disagreement remains on just how serious a problem it is and what level of corrective effort is appropriate. In their recently-published response pieces, Kyle McEntee of Law School Transparency (“LST”) and Professor Jeffrey Stake offer two new avenues for improving the accuracy of law school marketing. Stake explains a theory under which law schools could be held liable for publishing inaccurate information through lawsuits filed by students who—but for the inaccuracies—would have either spent less on their legal education or avoided law school entirely.² If successful, such lawsuits would both provide justice to misled tuition payers and deter future misconduct by law schools. McEntee proposes a certification program under which LST would verify the accuracy of law school marketing materials, allowing schools to advertise that their numbers have been blessed by third-party auditors.³

I will begin my reply with a free suggestion to would-be plaintiffs encouraged by Professor Stake’s legal theory. Hurry. You will certainly feel foolish if your rankings fraud suit

is dismissed because of a statute of limitations.⁴ With respect to the merits of the theory, I am especially intrigued by the idea of plaintiffs who turned down scholarship money offered by a lower-ranked school so they could attend a higher-ranked school.⁵ These potential plaintiffs could avoid one problem facing the actual plaintiffs who have sued various law schools, the highly speculative nature of their alleged damages. For the actual plaintiffs, the complaint boils down to something like the following: (1) I was not sure if I should attend law school, and in the event I decided to attend, I was not sure about what law school to attend. (2) Relying upon certain representations, I matriculated at Defendant Law School (“DLS”). (3) I later learned that these representations were false. The rest is commentary.⁶ A big problem with this theory of liability is that even if one accepts the plaintiff’s claims at face value, one can dispute whether attending DLS actually harmed the plaintiff. Just how terrible is the plaintiff’s post-law school life? Is she malingering, or is she working as hard as possible to find well-paying work? Will her law degree prove valuable one day, or is it worthless? Would her life have turned out differently if she had attended some other law school, or is she so incompetent that even with a Yale Law School degree she would be jobless?⁷ And if she had skipped law school, what would she have tried instead, and how would she have fared? Lawyers for various DLSs have so far mostly avoided reaching this stage of analysis by winning at the motion-to-dismiss stage. Supporters of these suits should realize, however, that if judges allow law school alumni lawsuits to proceed, and if juries then find the defendant law schools liable, the plaintiffs face real challenges at the damages stage.

Not so with Professor Stake’s potential plaintiffs, whose complaints can be summarized as follows: (1) I was admitted both to Truth-Telling Law School (“TTLS”) and to Defendant Law School (“DLS”). (2) I considered attending TTLS because it would have cost me less

money than attending DLS, where I ultimately did matriculate. (3) I chose to pay more at DLS because that school was ranked above TTLS. (4) As it turns out, DLS was ranked above TTLS in part because of its fraudulent publication of false information.⁸ Here, if one accepts a plaintiff's premises, calculating damages is simple. The defendant owes the extra money the plaintiff spent to attend DLS instead of TTLS,⁹ a figure one can calculate after consulting the nominal tuition and fees charged by each school along with the scholarship offers, if any, presented to the plaintiff.¹⁰

Further, compared to the actual plaintiffs law schools have faced so far, Professor Stake's potential plaintiffs should have an easy time proving reliance. The actual plaintiffs have faced the tricky task of convincing courts that they truly read law school employment statistics and that the statistics genuinely affected the plaintiffs' decisions to enroll. Even the most honest plaintiff must overcome the suspicion that his memory is colored by bias; his incentive to recall himself relying on rosy statistics is immense. And even if a court assumes reliance when considering a motion to dismiss, the judge can deem the reliance unreasonable, as some plaintiffs have learned.¹¹ But under the new rankings fraud theory, allegations of reliance become quite credible. Indeed, it would be difficult to overstate the importance of law school rankings to prospective students.

With the next set of Professor Stake's potential plaintiffs, those who would not have attended law school at all but for misleading employment statistics,¹² the difficulty of calculating damages returns with full force. Like the actual law graduate plaintiffs, this class of hypothetical litigants must somehow prove that their law school educations were not worth their price.¹³ The value of a law school degree is the subject of some controversy. I have read serious suggestions that for some alumni, law degrees have negative economic value; they not only failed to provide

legal jobs but also hinder the search for non-legal employment. On the other hand, two scholars suggest in a forthcoming paper that the median value of a law degree is around \$1 million.¹⁴ For now at least, I will stay out of the law degree valuation debate, other than to note the tremendous uncertainty surrounding any projection about the economic value of a course of study, particularly decades into the future.¹⁵ In addition, even if economists can offer a fair estimate of the median value of a law degree (that is, the median lifetime earning premium obtained by attending law school, compared to a similarly situated college graduate who does not), real lawsuits require the calculation of damages suffered by a specific person, whose life outcomes may not resemble projected medians.¹⁶

In any event, I am pleased to have Prof. Stake on board the anti-dishonesty bandwagon, and I appreciate his plain statement that “the lying in which law schools have engaged is plainly deplorable behavior deserving severe punishment.”¹⁷ Further, while he raises a few concerns about potential problems associated with subjecting law school officials to professional discipline for dishonest marketing (for example, someone who participated in dishonesty might be discouraged from blowing the whistle by fears of personal punishment),¹⁸ he does not dispute my conclusion that dishonest law school marketing—if committed by lawyers—can violate existing regulations governing lawyers and can accordingly justify professional sanctions.¹⁹ McEntee agrees that professional discipline is appropriate.²⁰

So far, I have yet to see anyone respond to my article by arguing something to the effect of: “Under current law governing lawyers, a law school dean may brazenly lie to prospective students about matters material to their choice of where (and whether) to matriculate without fear of professional sanctions.” The closest I have seen might be this comment of Prof. Andrew Perlman:

I'm also a little bit concerned about interpreting Rule 8.4(c) as expansively as [Trachtenberg] suggests. If a lawyer could be disciplined for making misleading statements on matters of public import, I wonder how many politicians (many of whom are lawyers) would be subject to disciplinary proceedings under this understanding of Rule 8.4(c)?²¹

I think, however, that important distinctions can be made between dishonest law school marketing and dishonest political speech. First, the very term “political speech” signals the important First Amendment concerns that would be presented should bar counsel seek to punish a politician who, say, falsely accused an opponent of cutting Medicare benefits. Second, even I would not recommend applying Rule 8.4(c) to the kind of nonfalsifiable puffery common in educational marketing. Claims like “students receive useful hands-on practice experience in our clinics” ought to be beyond the scope of “dishonesty” charges—unless, of course, such statements were uttered concerning a school with no clinics at all. The misrepresentation and deceit that I believe worthy of bar counsel’s attention is quite different from statements like “we have a collegial environment.”²²

Recall that my article begins with stories of two American law schools whose officials engaged in knowing deceit—for years—about the credentials of their incoming students (their standardized test scores and undergraduate grade point averages).²³ They intentionally sent this false information to the American Bar Association, to prospective students, and to *U.S. News & World Report*, which used the bogus data to give the schools inflated rankings. As Prof. Stake has documented (and as is understood intuitively by those who pay attention to law school admissions), these rankings significantly affected matriculation decisions and likely caused at least some students to pay tens of thousands of extra tuition dollars to attend the offending

schools. Will anyone state directly that the deans responsible for those falsifications cannot properly be punished by the bar? Would such punishment really start us down the path to sanctions against United States Senators who break campaign promises?

If we can accept that brazen falsehoods in the service of “rankings fraud” are properly punishable, then deciding what other misleading law school marketing can justify bar discipline becomes an exercise in line drawing. Reasonable minds may differ about just how sloppy a school’s alumni salary statistics may be before a lawyer responsible for their publication should be accused of “dishonesty, fraud, deceit or misrepresentation.” For those who disapprove of suddenly punishing law school officials for conduct common in legal education, advisory bar opinions can provide fair notice that certain forms of marketing will no longer be tolerated.

Although much of the response to my article has concerned the propriety of punishment, McEntee helpfully directs his attention to how we might avoid misleading marketing in the first place. Yes, punishing wrongdoing deters future misconduct. And formally announcing the disapproval of the community has its own value.²⁴ But as I mentioned near the end of the article, constructive solutions will largely help law schools do the right thing instead of reacting to those that do wrong.²⁵ One’s heart must be truly hardened to prefer that colleagues stray and be chastised rather than reform and prosper.²⁶

McEntee essentially argues that existing regulatory bodies cannot repair the damage law schools have inflicted upon their own reputations.²⁷ In particular, he deems the American Bar Association (“ABA”) slow moving and lacking in credibility. (As an aside, I will note that if McEntee is correct, then he has severely weakened one of the more plausible arguments against using bar discipline to curb misleading law school marketing. Prof. Stake, for example, writes

that “tailoring and clarification of the ABA standards will be more important than increasing the personal punishment lawyers face for being involved in misreporting.”²⁸ Prof. Perlman predicts “that the solution is better ABA/AALS standards rather than lawyer discipline.”²⁹ These responses lose force if the ABA cannot handle its responsibilities.) McEntee raises fair criticisms. While the ABA has made recent statements indicating that it takes seriously its role in the fight against deceptive law school marketing,³⁰ the organization spent years doing little-to-nothing about the chicanery now widely understood (at least by those who care about such things) to have been common practice among American law schools. For example, salary statistics touted by law schools misstate the economic reality of recent law graduates because of their tendency to oversample the best paid alumni,³¹ and ABA action has been anemic.³² Even if the ABA Section of Legal Education and Admissions to the Bar becomes a dynamic force for accurate marketing of legal education, at least some potential law students may discount the value of ABA approval, if only because reputations once tarnished are slow to repair.

To supplement the accreditation work of the ABA, McEntee offers the services of Law School Transparency, of which he is the executive director and a co-founder. Although I cannot speculate about the value of LST’s inspection program,³³ I am pleased to see LST offer some form of constructive services. It is easy, in a sense, for someone like me to criticize law school administrators and regulators. After all, I neither run a law school nor regulate those who do, and I accordingly will not face the challenge of meeting my own proposed standards. In addition, a prospective law student who reads my article might acquire some appropriate skepticism concerning statistics presented in law school websites and viewbooks. That skepticism, however, does not easily translate into the ability to discern which law schools are more and less trustworthy. If prospective law students know which schools disseminate shady

statistics, then those schools should (if my introductory economics instructors told me the truth) be slapped by the invisible hand. If the wrongdoers can evade detection in a sea of “everyone does it” cynicism, market discipline will arrive more slowly, if at all.

To help honest schools earn the credit they deserve, LST proposes to review law school marketing materials and certify their trustworthiness. Perhaps LST would also help law schools produce accurate marketing materials if hired to do so. While the devil remains in the details, I commend LST for offering what could be a valuable service, and I wish McEntee and his colleagues all success. If other organizations can offer competing third-party certification—ideally without creating so much confusion as to undermine their purpose—so much the better. Efforts like the proposed LST program will be useful regardless of how the ABA performs. If the ABA response to misleading marketing remains inadequate, then outside auditors can concurrently provide well-behaved law schools with a credible seal of approval while also arming the ABA’s critics with important data. If the ABA performs well, then additional third-party certification can offer incentives to schools who wish to attain accuracy above the regulatory-mandated minimum.

In the end, however, school-selected third-party number crunchers are no substitute for effective accreditation. Profs. Stake and Perlman are correct that whatever one’s opinion of using bar discipline to discourage malfeasance by law school officials, an active ABA possesses tools far better calibrated for quickly influencing the behavior of law schools. When the ABA tells law schools to jump, they may not ask “how high,” but they eventually get their feet off of the ground. Even Prof. Brian Tamanaha, by no means an unquestioning fan of ABA accreditation standards,³⁴ recognizes their power to effect changes desired by those who draft the regulations. Any law school dean will tell you that if an ABA site visit report identifies some

apparent shortcoming, a law school is usually better off addressing the problem than arguing.³⁵ As far as I know, however, site visit teams do not include an assessment of law school marketing in their reports.³⁶ In a world without any intentional falsification in law school marketing, it would still be useful for ABA reports to advise law schools on how they might better comply with Standard 509.³⁷ (As a point of comparison, I will note that in one recent ABA report I have had the chance to review, the site visit team found space to address the rigor with which teachers enforce attendance requirements, the level of administrative support for the externship program, the number of academic credits awarded to various journal editors, the number of linear feet of library shelving, and the square footage of co-curricular activity space. While the report did mention some areas related to Standard 509, it did not assess the accuracy of the school's published employment statistics.)

As it happens, we do not live in a world in which intentionally deceptive law school marketing is some “scamblog” fantasy. Further, while only a few examples of brazen deceit have thus far come to light, misleading statistics pervade law school publications. For the ABA to combat misleading law school marketing with any chance of success, it must envisage itself more like the Securities and Exchange Commission and less like the Chamber of Commerce. Both organizations have a place in American economic and political life, but only one is a regulator.

American legal education enjoys tremendous privilege. The federal government lends our customers whatever it takes to pay our tuition, along with living expenses, all while asking pretty much no questions. If the student later cannot pay back the money, that is a problem for the borrower and the lender; the law school has no skin in the game. Concurrently, many law schools receive state funding through public university systems, and even nominally private law

schools benefit from tax law provisions designed to promote education, such as the income tax deduction for charitable donations and the exemption of schools from local real property taxes. These legal benefits are not enshrined in the Constitution of the United States. Federal and state governments have given them to us, largely in the form of legislation, and those governments can take them away if we exhibit sufficiently bad behavior.

Lawsuits against deceitful law schools may be useful. The same is true of third-party certification of honest law schools. And bar discipline may too have something to offer, if only a chance for the legal profession to condemn injustice perpetrated by its own members. Yet without a good regulator, law schools will continue to mislead consumers, and eventually the public that so generously funds legal education may run out of patience.

* Associate Professor, University of Missouri School of Law. I thank Kyle McEntee and Jeff Stake for their thoughtful responses to my article, as well as the *Nebraska Law Review* for soliciting and editing their commentary and my own reply. I also thank Scott Norberg, Andrew Perlman, and others who have taken time to discuss legal education with me over the past year.

¹ Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866 (2013).

² See Jeffrey Evans Stake, *Improving Law School “Transparency,”* 5 NEB. L. REV. BULL.9 (2013). For some discussion of lawsuits already filed by disappointed law school alumni, see Trachtenberg, *supra* note 1, at 912–13.

³ See Kyle P. McEntee, *The Evaporating Trust in American Legal Education*, 5 NEB. L. REV. BULL. 1 (2013). For some other ideas concerning third-party verification of law school marketing materials, see Trachtenberg, *supra* note 1, at 917–18, 921–22.

⁴ While this should go without saying, as a teacher of professional responsibility, I feel compelled to add the following disclaimer: Nothing herein should be construed as legal advice. This is legal scholarship addressed to the general public, not an attorney-client communication.

⁵ See Stake, *supra* note 2, at 13. To be precise, potential plaintiffs need not have turned down a scholarship offer, so long as the price of the lesser-ranked school would have been lower. For example, imagine a who student attended the #30 ranked Private U. Law School (at \$40,000 tuition per year) instead of the #35 ranked State U. (at \$20,000 in-state).

⁶ Like Hillel, I will note that the rest, despite being commentary, is important and worthy of study. Complications include, among others, proving reliance, deciding what level of scienter is necessary before liability may attach (*e.g.*, are negligent statements sufficient, or must plaintiffs prove knowing falsification), whether *caveat emptor* can serve as a defense (*e.g.*, should reasonable would-be law students have known better than to trust the notorious exaggerators who promote law schools, as New York courts have concluded).

⁷ Cf. Eugene S. McCartney, *Themistocles and the Seriphian*, 4 CLASSICAL J. 225 (1922) (recalling that when provincials informed Themistocles that certain of his honors would not have been won were he not from Athens, he would reply that his critics would be obscure even if born Athenians).

⁸ Many plaintiffs could also add a fifth point: Now that the truth has been revealed, DLS is ranked below TTLS.

⁹ In theory, the damages might be even higher, if the plaintiffs can win the equitable remedy of rescission, in which case they ought to be able to unwind the contract completely—by returning their law degree in exchange for every tuition and fee dollar paid. While the concept of returning an academic degree (not to mention returning the education provided) may seem odd, readers of law school “scamblogs” will be familiar with the expressed desire of certain law school alumni to return to the *status quo ante* of their pre-law school days. I will leave to contract law experts the question of whether rankings fraud (*i.e.*, false statements leading to inflated rankings) is the sort of thing that allows an innocent party to void a contract, as well as what limitations to the remedy might exist.

¹⁰ The calculation is not without some uncertainty. If a scholarship offer was limited to the first year, with renewal conditioned on certain academic performance, a court might need to assess the odds that the plaintiff would have maintained the foregone award at TTLS. The plaintiff’s performance at DLS would be probative.

¹¹ See, e.g., *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 856–57 (N.Y. Sup. Ct. 2012), *aff’d*, 956 N.Y.S.2d 54 (N.Y. App. Div. 2012); *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 794–97 (W.D. Mich. 2012), *aff’d*, No. 12-2066, --- F.3d ---- (6th Cir. Jul. 30, 2013).

¹² See Stake, *supra* note 2, at 16.

¹³ At least if they plead the more traditional causes of action. Certain modern statutes, such as consumer protection laws, may allow recovery on the basis of false statements absent proof of monetary damages.

¹⁴ See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* (forthcoming) (formerly titled “The Million-Dollar Law Degree”), *draft available at* <http://ssrn.com/abstract=2250585>.

¹⁵ See NASSIM NICHOLAS TALEB, *THE BLACK SWAN* 136 (2d ed. 2010) (quoting Yogi Berra, “It is tough to make predictions, especially about the future”); see also Ben Trachtenberg, *Health Inflation, Wealth Inflation, and the Discounting of Human Life*, 89 OR. L. REV. 1313, 1351–52 (discussing how cost-benefit analysis figures used by federal agencies “resemble random guesses”).

¹⁶ The idiosyncratic experiences of law graduates also complicate the efforts of counsel to bring suits against law schools as class actions. See FED. R. CIV. P. 23(a); *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). The principles of *res judicata*, however, might well allow many alumni of the same school to benefit from a single plaintiff’s court victory against a law school.

¹⁷ See Stake, *supra* note 2, at 9.

¹⁸ See *id.* at 11.

¹⁹ See generally Trachtenberg, *supra* note 1, at 900–07 (describing liability under state equivalents of Model Rule of Professional Conduct 8.4(c)).

²⁰ See MeEntee, *supra* note 3, at 3.

²¹ Andrew Perlman, Comment to *Ben Trachtenberg’s Article on Deceptive Law School Marketing*, LEGAL ETHICS FORUM (Dec. 27, 2012, 6:00 PM), <http://www.legalethicsforum.com/blog/2012/12/ben-trachtenbergs-article-on-deceptivelaw-school-marketing.html>

²² My focus on true dishonesty—as opposed to mere boasting—explains the article’s focus on Rule 8.4(c) over Rule 7.1, which regulates lawyer advertising. I devote a long footnote to a comparison of lawyer advertising rules (which, at least on paper, are quite strict) with the lax attitude toward law school marketing. *See* Trachtenberg, *supra* note 1, at 906 n.206.

²³ *See* Trachtenberg, *supra* note 1, at 867–69.

²⁴ *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958).

²⁵ *See* Trachtenberg, *supra* note 1, at 920–22.

²⁶ *See, e.g., Deuteronomy* 30:11–20.

²⁷ *See* McEntee, *supra* note 3, at 5–7.

²⁸ *See* Stake, *supra* note 2, at 11.

²⁹ *See* Perlman, *supra* note 21. “AALS” refers to the Association of American Law Schools.

³⁰ *See, e.g.,* Martha Neil, “ABA looking for ways to better monitor employment stats for law graduates,” A.B.A. J. (Feb. 22, 2013), at http://www.abajournal.com/news/article/aba_to_mull_audit_procedures_for_employment_data_re_new_law_graduates (“[T]he American Bar Association is seeking bids for what the *National Law Journal* calls a law school data cop.”). The Feb. 1, 2013 request for proposal covered in the article, titled “Development of a Protocol for Reviewing Law School Graduate Employment Data,” is available here: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march_2013_council_meeting/2013_rfp_employment_data_protocol.authcheckdam.pdf

³¹ *See* Trachtenberg, *supra* note 1, at 890–92.

³² *See id.* at 893.

³³ Much will of course depend on the precise suite of services eventually offered, as well as on the price.

³⁴ *See* BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 11–36. (2012) (cataloging various changes to American legal education wrought by ABA regulations).

³⁵ Neophytes unfamiliar with ABA and AALS site visit reports (which are prepared separately after a joint visit to a school by representatives of the ABA and AALS) may not realize the level of detail with which the ABA sees fit to write its recommendations. For example, it turns out the ABA has an opinion on how many power outlets belong in lecture halls of various sizes. Once a “shortage” has been identified, a law school might as well install the outlets instead of debating the merits of laptops in the classroom.

³⁶ To be fair to the ABA, I should note that in its guidance for site visit teams, it mentions Standard 509 and encourages site visit reports to “[d]escribe any areas in which consumer information published by the law school is incomplete, inaccurate or misleading,” along with other more specific items related to consumer information. *See* ABA Office of the Consultant of Legal Education, “The Format for an ABA Site Team Report” 24 (Fall 2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governance/documents/2012_2013_format_memo.pdf. Unless a school’s posted employment statistics or salary data are false on their face, however, a site visit team is unlikely to uncover chicanery. The “data cop” mentioned above, *see supra* note 30, may help site visit teams become more effective in this area.

³⁷ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2012–2013, Approval Standard No. 509 (2012) (requiring publication of accurate “consumer information”), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf