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## THE EVAPORATING TRUST IN AMERICAN LEGAL EDUCATION

Kyle McEntee<sup>1</sup>

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I once overheard a non-lawyer tell a popular lawyer joke. *How can you tell that an attorney is about to lie?* Without missing a beat the jokester quipped. *The attorney's lips begin to move.* The group found it funny, while I began to wonder what happened to my sense of humor. I smirked, sure, but more than anything the familiar joke diverted my attention from comedy to comity.

Attitudes about lawyers follow an odd dichotomy. On the one hand, lawyers are esteemed. They play an essential role in a society built on the rule of law. Parents want their kids to grow up to be the next Atticus Finch or Sandra Day O'Connor. On the other hand, lawyers are reviled as opportunistic, morally deficient, and—perhaps worst of all—liars. For a profession predicated on trust, these colorful descriptions undermine, even if subtly, the rule of law.

Lawyers have long had a trust problem (an important topic for another discussion). Now, the legal profession combats a new assault on trust. Law schools have lost much of the trust they've traditionally enjoyed. Through a combination of ever-increasing and unfair costs,<sup>2</sup> disturbing self-dealing,<sup>3</sup> and—most widely publicized—deceptive marketing,<sup>4</sup> law schools now (justly) face historic skepticism about the services they provide and their methods of promoting those services. Persistent doubts about educational quality supplement concerns about law school economics.<sup>5</sup> The result: total LSATs administered, total applicants, and total enrollees are each down for the third year in a row.<sup>6</sup>

Media attitudes are another proxy for changing societal attitudes. Broad coverage of law schools aside, my experience with journalists has completely changed since LST began its public

affairs strategy in April 2010. The journalists providing early coverage understood that law schools went to great lengths to influence the data inputs of the *U.S. News & World Report* rankings, but they knew little of the specifics. Many were shocked to learn that law schools were not upfront with what they knew about post-graduation employment outcomes.

The focus of early conversations, accordingly, was shedding light on how the American Bar Association's Section of Legal Education and Admissions to the Bar ("ABA" or "Section of Legal Education") and law schools published deceptive employment data. Widely distributed employment rates counted any job in the tabulation; salary figures were not accompanied by their often low response rates.<sup>7</sup> Whether intentional or reckless or negligent, these marketing norms fed a widely held belief that law school is a ticket to financial prosperity. In this way, schools promoted attendance with misleading data.

Eventually, I spent almost no time explaining that what schools were doing was wrong—even to journalists writing on law schools for the first time. The conversation, both with journalists and within their stories, shifted to why schools and the ABA were not moving more quickly to better inform prospective students about their expensive investment. United States Senators questioned how well the ABA regulated law school marketing;<sup>8</sup> the Department of Education also publicly shamed the ABA for its inattentiveness.<sup>9</sup> The conversational swing was significant.

It matters that lawyers and law schools be trusted. A society of laws depends in part on the legal profession's credibility: If the society doesn't trust lawyers, it doesn't trust the legal system. In creating that trust, we do not operate in silos. The actions of each of us affect the public's trust of the profession as a whole. For that reason, all lawyers must recognize a duty to build trust through good behavior and continued enforcement of professional rules of conduct.

Law schools harm the whole profession when they breach those duties, especially when they make misrepresentations while recruiting new members to the profession.

This brings me to Ben Trachtenberg's article, *Law School Marketing and Legal Ethics*. Professor Trachtenberg argues that deceptive marketing should open law school administrators to professional liability. He's right, and his conclusion about professional obligations extends quite far. Accountability is essential to building and keeping trust in the legal profession. Exceeding the minimum regulatory standards and voluntarily participating in creating new norms is equally if not more important for healing the law school image.

### **Trust-Building Efforts**

The ABA and law schools have long collected and furnished consumer information. But laudable intentions aside, the questionable quality of that information caused today's need to reclaim the public's trust. Leaders at the ABA and schools all owe a duty to improve the trust in our profession, regardless of each individual's culpability.

As it pertains to post-graduation employment information, trust-building requires schools to provide excellent substance. It also requires that people believe that schools are open, honest, and fair. Accordingly, schools must find a way to convey their transparency—consumers need reassurance due to the public's declining trust. Compounding that challenge, schools must find ways to help the public understand the new, higher quality information they are providing.

Contemporary consumers are likely to harbor at least two types of skepticism about the quality of law school disclosures. One, some people question data integrity, i.e. the accuracy of the data underlying the statistics. Accuracy refers to not just whether data are true, but also to

whether data collection procedures are likely to produce true results. Two, some people question the presentation of those data. That is, they question whether information is misleading or incomplete.

The Section of Legal Education has attempted to tackle both sources of skepticism. In August 2012, the Section revised Standard 509.<sup>10</sup> Standard 509 forbids law schools from publishing any consumer information that is inaccurate, incomplete, or misleading to a reasonable prospective student.<sup>11</sup> It also requires that law schools disclose certain consumer information on their websites and in scholarship offer letters.<sup>12</sup>

The Section has also begun more closely scrutinizing compliance with Standard 509. As of early 2013, LST reported in the annual Transparency Index that 156 of 199 law schools (78.4%) were non-compliant with Standard 509, despite being ABA-approved.<sup>13</sup> After we worked with law schools to achieve full compliance, 80 schools (40.2%) were non-compliant, an improvement of 76 schools. Following LST's report and the coverage it received in the press,<sup>14</sup> the Section's professional staff reviewed law school materials for violations of Standard 509. Consistent with our report, the Section found many law schools were non-compliant.

The Section's initial compliance check in April found problems at 60 schools (30.2%). By the time the professional staff reported to the Council of the Section of Legal Education in June 2013, just 24 schools (12%) were non-compliant.<sup>15</sup> Despite the troubling reality that there are so many non-compliant ABA-approved schools, the compliance statistics show a marked improvement in data presentation over the six month period.

Finally, the Section has produced a request for proposals ("RFP") to protect employment data integrity.<sup>16</sup> The RFP asks that a third party produce a statement of requirements for collecting, maintaining, and reporting post-graduation employment data to the Section in

compliance with the schools' accreditation responsibilities (the "Statement").<sup>17</sup> The RFP also requires that third party to develop a protocol of policies and procedures for reviewing the integrity of post-graduation employment data reported to the Section (the "Protocol").<sup>18</sup> The Protocol will be written so that a team of volunteers can effectively and efficiently audit whether law schools follow the Statement and whether employment data reflect outcomes.<sup>19</sup>

The hope is that, combined with enforcement of Standard 509, creating, administering, and enforcing data collection procedures will provide the public and other legal education stakeholders with justifiable and documented reasons for having confidence that post-graduation employment information is accurate, complete, and can be relied upon. Indeed, if the ABA enforces Standard 509 and utilizes sound data collection and auditing procedures, the information will be trustworthy. But will the information be trusted?

The Section of Legal Education's efforts are an essential foundation, but it's not apparent that the ABA seal is enough to earn back trust. Four factors indicate that more than ABA-approval is needed to restore trust: timing of the ABA's data integrity program, the complexity of the employment information landscape, execution of the ABA requirements by schools, and the stickiness of ABA-approval.

**Timing.** At best, the ABA's data integrity program will be in effect in two years. The more likely scenario, however, is that data published in March 2016 will be the first batch of data collected and reported under the program.<sup>20</sup> The first full admissions cycle to benefit from the program would therefore be in 2016–2017. The further removed schools are from the time they were trusted, the more challenging it will be to undo that problem.

**Complexity.** Consumers rarely know the best practices for data gathering and publication. Even if they do, it's difficult for them to assess whether the school has followed those best practices. Many law schools today want to provide more information than the standardized charts required by Standard 509, but that's dangerous in the current era of mistrust. Unless a third party assures consumers that schools are following best practices, those consumers may distrust the additional information.

**Execution by Schools.** Schools by and large have not met or exceeded the minimum standards in a timely fashion. Despite the Section's efforts in revising Standard 509, it was not sufficiently effective. With some schools *still* not complying with Standard 509, a minority of schools continues to provide fodder for negative media coverage, while some other schools and the ABA attempt to restore the public's trust. For the schools doing well, their positive efforts may be overlooked because of the harsh reality that negative stories receive traction and imply pervasiveness.

**Stickiness of ABA Approval.** The ABA seal of approval is the only outward signal for law schools—a mark few schools have ever lost for any reason and one that schools will likely never lose for violating Standard 509. Somehow, law schools maintain accredited status despite widely covered and acknowledged violations. This devalues ABA approval and means that trustworthy schools must seek other indicators of their integrity.

Against the backdrop of distrust, affirmative efforts beyond the minimum standards combined with an additional outward signal may prove to be an effective strategy for rebuilding vital trust. Efforts to restore trust need to begin now and require that law schools take an active role outside the scope of the ABA. Indeed, Professor Trachtenberg suggests that state authorities may supplement ABA accreditation with “another organization capable of evaluating law school

advertising for honesty and trustworthiness.”<sup>21</sup> Whether or not state authorities demand one, an additional signal for trustworthiness would help move the trust-building process along.

### **Third-Party Efforts to Improve Trust**

Consider the lawyer joke from earlier. Had a lawyer chimed in to defend himself, he might respond that he’s no liar. But what else would a liar say? His words aren’t persuasive. Instead, he may need time to prove his trustworthiness, or he may rely on a third party to step in and lend credibility. Presentations of good faith aren’t enough when you have several strikes against you, deserved or not.

Now consider LST’s Transparency Index again. The project analyzed school actions on two occasions. First, we analyzed school marketing materials without notice around the first of the year. We measured not only whether law schools met the requirements of Standard 509, but also whether schools met voluntary transparency standards. Second, we re-analyzed schools using the same criteria after sharing our findings with administrators. Every ABA-approved law school dean, career services office, and admissions office received a copy of our report. We invited each school to consult about our findings and informed them that our findings would be published several weeks later. Schools were receptive and appreciative; over 100 schools took the offer, with almost all of those schools improving performance by the end of February.<sup>22</sup>

The Transparency Index delivered dueling messages. On the one hand, more law schools than ever before were open and fair with the information they possessed about post-graduation employment outcomes. This makes those law schools more trustworthy. On the other hand, strikes continue to pile up against law schools with respect to employment information. These strikes make it more difficult for all law schools to be trusted.



For example, it's fair to ask what the responsive schools would have done without the implied threat of negative press. Our reviews occurred many months after schools first had the opportunity to choose to publish relevant data. Only after we raised specific problems did many schools elevate the priority of Standard 509 compliance. Additionally, even though almost all law schools are compliant now, many still withhold pertinent employment information not required by the standard, reducing the ability of prospective students to make informed decisions.

Law school administrators say all of the right things. They value transparency; they value honesty; and they want to enroll informed student bodies. These have become necessary talking points for legal educators. Yet excellent substance is required in addition to recitations. The Transparency Index provided empirical data about public availability of information, and unflattering results for non-transparent schools invade attitudes about the schools that do meet expectations.

The Transparency Index was very effective in nudging non-compliant schools to improve, but it was less successful in recognizing schools that had met the highest levels of transparency. Several schools sought press about good results in local papers; others boasted in tweets and in alumni magazines; and some wrote about their performance on blogs.<sup>23</sup> Schools could positively associate with LST's recognition of their achievement, and they did so, but there was no easy way for them to signal their success.

This gap prompted LST to create a certification program that will label schools that meet our criteria as "LST Certified." LST Certification will increase the quality and consistency of consumer information (employment, financial aid, etc.), and it will allow individual schools to assure prospective students that they are committed to best practices. The certification builds on

the foundation set by the Section of Legal Education to reignite the trust that the legal profession needs law schools to hold.

Critically, the program is a partnership between LST and all law schools that want to participate in rebuilding that trust. Applicant schools will receive free consultation and web services to help them receive certification.<sup>24</sup> Once certified, law schools will be able to use the certification mark unless the school violates the terms of certification. We will monitor LST Certified schools and ensure that their desire to present compelling information remains fair and straightforward so that consumer information will evoke trust from applicants and the public.

Certification is a simple, efficient way for schools to build individual reputation while helping rebuild public trust in the profession. Especially if some schools continue to shirk the requirements of Standard 509—or, worse, engage in the sort of fraudulent actions that Professor Trachtenberg documents—other schools will need a proactive way to signal their integrity. Certification can help individual schools accomplish that end, promote greater trust in the profession, and attract a new generation of lawyers inspired by the commitment to fairness and accuracy displayed by the law schools recruiting them.

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<sup>1</sup> Law School Transparency (“LST”) is a nonprofit legal education policy organization. LST seeks to hold law schools and the ABA accountable, make access to the legal profession more affordable and fair, and provide quality and consistent information to prospective students and the public. I would like to thank Patrick J. Lynch and Deborah Jones Merritt for their valuable feedback on this essay. I would also like to thank a number of anonymous law school deans for their candor about the moral dilemmas they face in their leadership roles. Their insights have affected LST’s general direction over the years for the better.

<sup>2</sup> Law schools are abusing both their position as professional gatekeepers and as federal student loan beneficiaries. Since 1985, inflation has been a factor in rising law school prices. According to the Bureau of Labor Statistics, inflation has been 103.2% over this period. CPI Inflation Calculator, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm). But legal education inflation far exceeds the inflation rate. In 1985, the average private school tuition was \$7,526 (1985 dollars), which would now cost a student \$15,733 (2011 dollars). Instead, the average tuition is \$39,184 (2011 dollars), so tuition grew about 2.5 times the inflation rate. For public school resident tuition, the average grew 5.27 times the inflation rate. Tuition Tracker, LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com/reform/projects/Tuition-Tracker>.

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<sup>3</sup> See Mathew D. Staver & Anita L. Stayer, *Lifting the Veil: An Expose on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1 (2003); Reeve Hamilton, *UT Law's Forgivable Loans to Faculty "Not Appropriate"*, TEXAS TRIBUNE (Nov. 13, 2012), [www.texastribune.org/texas-education/higher-education/ut-law-forgivable-loan-program-deemed-not-appropri/](http://www.texastribune.org/texas-education/higher-education/ut-law-forgivable-loan-program-deemed-not-appropri/); Joe Patrice, *NYU Law's Secret Slush Funds*, ABOVE THE LAW (June 10, 2013), <http://abovethelaw.com/2013/06/nyu-laws-secret-slush-funds/>; Michael Rezendes and Christina Pazzanese, *New England Law head draws scrutiny for his pay*, BOSTON GLOBE (Jan. 13, 2013), <http://www.bostonglobe.com/metro/2013/01/13/law-school-dean-salary-may-nation-highest/r59QMPRZANUkeJOKxhne1K/story.html>.

<sup>4</sup> For an extensive discussion of some tools prospective law students use, see Kyle P. McEntee and Patrick J. Lynch, *A Way Forward: Improving Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012) (originally published in May 2010). Also see Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 81 NEB. L. REV. 866 (2013).

<sup>5</sup> The problems pushed ABA leadership to create a task force on the future of legal education. Press Release, American Bar Association, ABA President Names Task Force on the Future of Legal Education (July 31, 2012), available at <http://www.abanow.org/2012/07/aba-president-names-task-force-on-the-future-of-legal-education/>.

<sup>6</sup> LSATs Administered, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/lisats-administered.asp>; LSAC Volume Summary, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/lisac-volume-summary.asp>.

<sup>7</sup> McEntee, *supra* note 4.

<sup>8</sup> Senators Barbara Boxer (Minnesota), Chuck Grassley (Iowa), and Tom Coburn (Oklahoma) have publicly criticized the ABA and law schools.

<sup>9</sup> Victoria Szymczak, *An Intervention: ABA Violates 17 Department of Education Accreditation Regulations*, LAW LIBRARIAN BLOG (June 13, 2011), [http://www.lawprofessors.typepad.com/law\\_librarian\\_blog/2011/06/an-intervention.html](http://www.lawprofessors.typepad.com/law_librarian_blog/2011/06/an-intervention.html).

<sup>10</sup> See the American Bar Association House of Delegates Resolution on Standard 509 (Aug. 6, 2012), available at <http://www.abanow.org/2012/06/2012am103/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In particular, Standard 509 requires that law schools publish employment information in a certain form.

<sup>13</sup> Transparency Index Statistics, LAW SCHOOL TRANSPARENCY, <http://goo.gl/yNRO6>.

<sup>14</sup> Winter 2013 Transparency Index Report, LAW SCHOOL TRANSPARENCY, available at <http://ssrn.com/abstract=2227508>. A representative story can be read in the National Law Journal. Karen Sloan, *Problems persist with law school jobs data, watchdog says*, NATIONAL LAW JOURNAL (March 4, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202590850252>. For additional details on the methodology, see Transparency Index Statistics, *infra* note 13 (click on “methodology” section).

<sup>15</sup> Memo from Barry Currier to the Council of the ABA Section on Legal Ed. & Admission to the Bar (May 29, 2013), <http://goo.gl/tgjHR>.

<sup>16</sup> Request for Proposal, American Bar Ass’n, Development of a Protocol for Reviewing Law School Graduate Employment Data (Feb. 1, 2013), <http://goo.gl/RYrjE>.

<sup>17</sup> *Id.*

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The most aggressive timeline puts the data integrity program in effect for the class of 2014, which would have its employment outcomes measured as of February 15, 2015 and published by the end of March 2015. But the class of 2014 includes graduates from September 1, 2013 – August 31, 2014. As of the end of June 2013, the ABA has not contracted with RFP's winning bidder. So, the most likely scenario is that the program goes into effect for the class of 2015.

<sup>21</sup> Trachtenberg, *supra* note 4, at 918.

<sup>22</sup> Index Statistics, *supra* note 13.

<sup>23</sup> See Highlights, FLORIDA STATE UNIVERSITY COLLEGE OF LAW, *available at* <http://www.docstoc.com/docs/148953276/Highlights---Florida-State-University-College-of-Law> (excerpt from an Florida State alumni magazine); *Texas Tech law school named one of nation's most transparent*, LUBBOCK AVALANCE-JOURNAL (March 6, 2013, 1:33 AM), <http://lubbockonline.com/education/2013-03-06/texas-tech-law-school-named-one-nations-most-transparent> (newspaper article on Texas Tech); Spring 2013, University of Baltimore School of Law Accolades (March 29, 2013), <http://ublawaccolades.wordpress.com/2013/03/29/spring-2013/> (blog of University of Baltimore); University of Baltimore College of Law, Twitter (March 5, 2013, 10:55 AM), <https://twitter.com/ubaltlaw/status/309014365821095936> (Twitter account of University of Baltimore); University of Colorado (press release), Press Release, University of Colorado, Class of 2012 Employment Numbers Released (April 13, 2013), <http://www.colorado.edu/law/2013/04/01/class-2012-employment-numbers-released> (University of Colorado); University of Memphis (Twitter), Memphis Law School, Twitter (Mar. 6, 2013, 9:14 AM), <https://twitter.com/memlawschool/status/309351321864118272> (Twitter account of University of Memphis Law School); Boyd Identified as "Fully Transparent" in Reporting Employment Information, UNLV Law Blog (Mar. 6, 2013) (blog of University of Nevada--Las Vegas), <http://unlvlawblog.blogspot.com/2013/03/boyd-identified-as-fully-transparent-in.html>; Wayne State (CBS Detroit), Matt Rousch, *Awards And Certifications From March 18*, CBS DETROIT (Mar. 18, 2013), <http://detroit.cbslocal.com/2013/03/18/awards-and-certifications-from-march-18/> (media report on Wayne State University Law School).

<sup>24</sup> Note, however, that we will charge a licensing fee for the certification mark. There are administrative costs involved in monitoring law schools. The fee also enables a necessary layer of accountability and ensures real participation in the certification process.