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## Law School Marketing and Legal Ethics

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# School of Law

University of Missouri



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## **LAW SCHOOL MARKETING AND LEGAL ETHICS**

**Ben Trachtenberg**

**91 NEBRASKA LAW REVIEW 866 (2013)**

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# Law School Marketing and Legal Ethics

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“Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be, because he is careless and reckless of justice; the law is not in his heart, is not the standard and rule of his conduct.”

— Daniel Webster<sup>1</sup>

## I. INTRODUCTION

On November 4, 2011, Paul Pless resigned as Assistant Dean for Admissions and Financial Aid at the University of Illinois College of Law. An investigative report issued three days later by the university revealed that during his seven-year tenure as admissions dean, Pless had repeatedly lied about the undergraduate grade point averages (GPA), Law School Admission Test (LSAT) scores, and acceptance rates of applicants to the law school, giving false information to the American Bar Association (ABA), *U.S. News & World Report* (*U.S. News*), and prospective students, among other deceived parties.<sup>2</sup> The investigators concluded Pless “knowingly and intentionally changed and manipulated data in order to inflate GPA and LSAT statistics and decrease acceptance rates.”<sup>3</sup> With respect to data for the class of 2014, investigators found Pless changed the LSAT scores of 109 students and the GPAs of 58, all upward.<sup>4</sup> Pless is a lawyer, having graduated from Illinois Law in 2003 and joined the state bar of Washington in 2004. Although the *Rules of Professional Conduct* governing Washington lawyers provide that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrep-

1. DANIEL WEBSTER & CALLIE L. BONNEY, *THE WISDOM AND ELOQUENCE OF DANIEL WEBSTER* 83 (New York, James B. Alden 1886) (quoting a speech given to the bar of Charleston, South Carolina on May 10, 1847).

2. See OFFICE OF UNIV. COUNSEL ET AL., UNIV. OF ILL., INVESTIGATIVE REPORT: UNIVERSITY OF ILLINOIS COLLEGE OF LAW CLASS PROFILE REPORTING 1 (2011) [hereinafter ILLINOIS REPORT], available at <http://www.uillinois.edu/our/news/2011/law/nov7.uofi.finalreport.pdf> (The Illinois Report was prepared by Jones Day and Duff & Phelps under the direction of the Office of University Counsel and the University Ethics Office.); see also Jodi S. Cohen, *A University of Illinois Law Dean Resigns After Report Details Manipulations of Admissions Data*, CHI. TRIB. (Nov. 8, 2011), [http://articles.chicagotribune.com/2011-11-08/news/ct-met-u-of-i-law-school-1108-20111108\\_1\\_lsatscore-test-scores-data-analysis](http://articles.chicagotribune.com/2011-11-08/news/ct-met-u-of-i-law-school-1108-20111108_1_lsatscore-test-scores-data-analysis) (explaining nature and breadth of the investigation).

3. ILLINOIS REPORT, *supra* note 2, at 1.

4. *Id.* at 3.

resentation,”<sup>5</sup> no public disciplinary action has been taken against Pless.<sup>6</sup>

Under the leadership of Mark Sargent, the Dean of Villanova University School of Law who resigned in 2009,<sup>7</sup> “individuals at the school ‘knowingly reported’ inaccurate admissions data to the American Bar Association for years prior to 2010.”<sup>8</sup> A Villanova spokesperson said the discrepancy between reported data and accurate data amounted to “about 3 points for the average LSAT score and 0.6 percent for the average GPA.”<sup>9</sup> A confidential report prepared for the university by outside counsel was shared with the ABA, which conducted additional investigation. The ABA concluded that Sargent and three other Villanova administrators bore responsibility for the false statements, finding they “acted in secret . . . to prevent other persons . . . from learning that admissions data was being misreported.”<sup>10</sup> Sargent—a scholar of legal ethics<sup>11</sup>—remains an active member of the Massachusetts bar

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5. See WASH. RULES OF PROF'L CONDUCT R. 8.4(c) (2006).

6. The state bar allows internet searches of discipline records. See *Discipline Information Search*, WASH. ST. B. ASS'N, <http://www.mywsba.org/default.aspx?tabid=179> (last visited Jan. 8, 2013).

7. Sargent resigned around the time his name surfaced in a prostitution investigation. See Kathleen Brady Shea, *Ex-Dean Helped Police, Report Says*, PHILA. INQUIRER (July 3, 2009), [http://articles.philly.com/2009-07-03/news/25288787\\_1\\_sargent-prostitution-ring-customer](http://articles.philly.com/2009-07-03/news/25288787_1_sargent-prostitution-ring-customer) (“According to a report by the Pennsylvania State Police, Sargent was a customer at a Kennett Township house suspected as a site for prostitution when police raided it Nov. 25. He was not charged.”).

8. Martha Neil, *Villanova Says Inaccurate LSAT and GPA Data Were “Knowingly Reported” to the ABA in Prior Years*, ABA J. (Feb. 4, 2011, 6:52 PM), [http://www.abajournal.com/news/article/new\\_villanova\\_law\\_dean/](http://www.abajournal.com/news/article/new_villanova_law_dean/).

9. Jeff Blumenthal, *Students, Grads Weigh in on Villanova Law School Scandal*, PHILA. BUS. J. (Feb. 18, 2011), <http://www.bizjournals.com/philadelphia/print-edition/2011/02/18/students-grads-weigh-in-on-villanova.html?page=all>. By “0.6 percent,” the spokesperson seems to have meant 6% of a GPA point, as in the difference between 3.00 and 3.06.

10. COUNCIL OF THE SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, PUBLIC CENSURE OF VILLANOVA UNIVERSITY SCHOOL OF LAW (Aug. 12, 2011) [hereinafter VILLANOVA CENSURE], available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1313428527askewletter\\_villanova\\_081211.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1313428527askewletter_villanova_081211.pdf); see also Chris Mondics, *Law Review: Villanova's Unseemly Silence over Law-School Scandal*, PHILA. INQUIRER (June 12, 2011), [http://articles.philly.com/2011-06-12/business/29650150\\_1\\_law-schools-law-review-averages-and-lsat-scores](http://articles.philly.com/2011-06-12/business/29650150_1_law-schools-law-review-averages-and-lsat-scores).

11. See, e.g., Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867, 871, 885 (2004) (describing lawyers who exhibit “an apparent indifference to the morality of their actions” and arguing, “Perhaps only a more stringent liability regime . . . will make a real difference”); Mark A. Sargent, *Lawyers in the Perfect Storm*, 43 WASHBURN L.J. 1, 1 (2003) (“People steal. People cheat. Then they lie about it.”).

and has not been disciplined.<sup>12</sup> Massachusetts, like Washington, has a rule prohibiting deceit by lawyers.<sup>13</sup>

How do men like Pless and Sargent maintain clean disciplinary records despite years of deceitful stewardship of American law schools? Quite simply, no one has pursued disciplinary action.

Meanwhile, legal education is in crisis. Law professors have slowly begun to acknowledge that our tuition is too high—and the job prospects of our graduates too poor—for the present law school system to endure much longer.<sup>14</sup> Although concern about the plight of lawyers and law students is nothing new,<sup>15</sup> three phenomena have combined to increase the difficulty of convincing students to attend law schools.<sup>16</sup> First, the price has increased,<sup>17</sup> and all things being equal,

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12. Discipline records of Massachusetts lawyers may be searched online. See *Attorney Database Search*, MASS. BOARD B. OVERSEERS, <http://massbbo.org/bbolookup.php> (last visited Jan. 8, 2013).
  13. See MASS. RULES OF PROF'L CONDUCT R. 8.4(c) (2012).
  14. See generally BRIAN Z. TAMANAHA, *FALLING LAW SCHOOLS* (2012); Matt Leichter, *Tough Choices Ahead for Some High-Ranked Law Schools*, AM. LAW. DAILY (July 3, 2012), <http://www.americanlawyer.com/PubArticleALD.jsp?id=1202561764452>; Bill Henderson, *These Data Will Fundamentally Reshape the Legal Education Industry*, LEGAL WHITEBOARD (June 26, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/06/these-data-will-fundamentally-reshape-the-legal-education-industry.html> (“In summary, our ivory tower is crumbling. With the ABA putting the employment data in downloadable format on its website, law schools will have to do something completely new and scary to us—we are going to have to compete to keep our jobs and stay in business.”).
  15. See, e.g., DOUGLAS LITOWITZ, *THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L* (2006); John M. Conley, *How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. REV. 1943 (2004); Marilyn Heins et al., *Perceived Stress in Medical, Law, and Graduate Students*, 59 J. MED. EDUC. 169 (1984); Patrick Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); see also ANTHONY T. KRONMAN, *THE LOST LAWYER* 165–270 (1993) (arguing that certain movements in legal scholarship—such as law and economics—have undermined “the ideal of the lawyer-statesman in our country’s law schools”); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION* 113–38 (1994) (offering various criticisms of legal education).
  16. The difficulty can be measured in statistics collected by the Law School Admission Council (LSAC). Law school applications dropped sharply in the past two years. Seeking admission for the class beginning law school in Fall 2010, 87,500 people submitted law school applications, while for Fall 2011, only 78,800 people submitted law school applications, a decrease of 10%. See *LSAC Volume Summary*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/lscresources/data/lsc-volume-summary.asp> (last visited Jan. 8, 2013). For Fall 2012, 68,000 prospective students applied, a further decrease of 13.7%. *Id.* Matriculation is down too; the number of first-year law students was 52,488 in 2010 to 2011 and 48,697 in 2011 to 2012. See *Enrollment and Degrees Awarded: 1963–2011*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Mar. 20, 2013). As of March 15, 2013, applicants for Fall 2013 were down 17.6% from that time last year. See *Three-Year ABA Volume Comparison*,

selling something at a higher price is more difficult than selling it at a lower price.<sup>18</sup> Second, all things are not equal: The value of legal education—at least its monetary value—has dropped because the legal employment market is terrible for new lawyers and those attempting to enter the profession.<sup>19</sup> Third, prospective buyers—that is, potential law students—have begun to better understand the price and expected value of legal education.<sup>20</sup> Although the recent crisis is not the cause of the deceitful practices catalogued below,<sup>21</sup> the tough legal

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L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/three-year-volume.asp> (last visited Mar. 20, 2013).

17. See Brian Tamanaha, *Information About Law Schools, Circa 1960: The Cost of Attending*, BALKINIZATION (May 22, 2011, 5:06 PM), <http://balkin.blogspot.com/2011/05/information-about-law-schools-circa.html>. “Median annual tuition and fees at private law schools [in the late 1950s] was \$475 (range \$50-\$1050); adjusted for inflation, that’s \$3,419 in 2011 dollars. The median for public law schools was \$204 (range \$50 - \$692), or \$1,550 in 2011 dollars.” *Id.* By 2009, “the private law school median was \$36,000; the public (resident) median was \$16,546.” *Id.*; see also Orin Kerr, *Law School Tuition Over the Last Forty Years*, VOLOKH CONSPIRACY (June 29, 2012, 3:07 PM), <http://www.volokh.com/2012/06/29/law-school-tuition-over-the-last-forty-years/> (demonstrating the rates over the past 100 years adjusted for inflation and put in 2011 dollars).
18. If the law school model depends on legal education becoming a Veblen Good, those rare commodities for which people’s preference for buying them increases as their price increases, the problems are grave indeed.
19. Katherine Mangan, *Unemployment Among Recent Law Graduates Is as Bad as It’s Ever Been*, CHRON. HIGHER EDUC. (June 7, 2012), <http://chronicle.com/article/Unemployment-Among-Recent-Law/132189/>; Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A1 (“Members of the law-school class of 2011 had little better than a 50-50 shot of landing a job as a lawyer within nine months of receiving a degree, according to a Wall Street Journal analysis of new data that provides the most detailed picture yet of the grim market for law jobs.”); Debra Cassens Weiss, *Median Starting Pay for Associates Is No Longer in the Six Figures; Figure Drops 35% in Two Years*, ABA J. (July 12, 2012, 6:56 AM), [http://www.abajournal.com/news/article/median\\_starting\\_pay\\_for\\_associates\\_is\\_no\\_longer\\_in\\_the\\_six\\_figures\\_figure\\_d/](http://www.abajournal.com/news/article/median_starting_pay_for_associates_is_no_longer_in_the_six_figures_figure_d/).
20. The existence of “scamblogs” dedicated to warning students away from law schools marks a significant departure from the situation of just a few years ago, when data concerning employment outcomes (among other things) was presented to prospective students with little opportunity for independent analysis. See, e.g., INSIDE L. SCH. SCAM, <http://insidethelawsschoolscam.blogspot.com/> (last visited Jan. 8, 2013) (scamblog run by Paul Campos, a law professor at the University of Colorado); THIRD TIER REALITY, <http://thirdtierreality.blogspot.com/> (last visited Jan. 8, 2013); see also, e.g., Matt Leichter, *About, L. SCH. TUITION BUBBLE*, <http://lawschooltuitionbubble.wordpress.com/about/> (last visited Feb. 17, 2013) (“The Law School Tuition Bubble is technically not a law school scamblog, but after a few months I found myself allied with them over many substantive issues.”).
21. See, e.g., Dale Whitman, *Doing the Right Thing*, THE NEWSLETTER (Ass’n of Am. L. Schs.), Apr. 2002, at 1 (listing techniques by which law schools “manipulate the data on which rankings are based”); Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J. (Sept. 24, 2007), [http://online.wsj.com/article/SB119040786780835602.html?mod=WSJ\\_article\\_comments#articleTabs%3D](http://online.wsj.com/article/SB119040786780835602.html?mod=WSJ_article_comments#articleTabs%3D) article (noting that “the majority of law-school graduates are suffering from a supply-and-demand imbalance that’s suppressing pay and job growth” and that

employment market and rising tuition may have increased the pain caused to students by these tactics—and perhaps increased the pervasiveness of dishonesty—while concurrently making it more difficult for those of us in the legal academy to ignore the wrongdoing in our midst.<sup>22</sup>

This Article will show that although Pless and Sargent acted with unusual mendacity, misrepresentation in law school marketing is by no means unique to a few bad actors at a handful of law schools. Part II describes many ways in which law school officials have used deceit and misrepresentation, along with misleading statistics, to market legal education. In addition to highlighting examples of particularly egregious marketing, it depicts how the common presentation of employment statistics on law school webpages and elsewhere tends to mislead readers. Part III discusses ethical rules governing lawyers and explains how law school officials have violated these rules, particularly prohibitions on engaging in misrepresentation, dishonesty, and deceit. It also discusses how bar discipline could encourage better behavior by law school officials and why this strategy might be more effective than other tactics that have been proposed, such as class-action litigation and criminal prosecution. Part IV then offers some suggestions for reform, including potential amendments to existing ethical rules and invigorated oversight by entities such as the ABA and the Association of American Law Schools.

## II. LAW SCHOOLS HAVE USED DISHONEST MARKETING

In their efforts to maintain enrollment, law school officials have engaged in deceit and misrepresentation.<sup>23</sup> Beyond the brazen false-

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“debate is intensifying among law-school academics over the integrity of law schools’ marketing campaigns”); see also R. Lawrence Dessem, *U.S. News U.: or, The Fighting Volunteer Hurricanes*, 52 J. LEGAL EDUC. 468, 468 (2002) (stating that law schools have “misrepresented data” and “done other bad and stupid things”).

22. Several *New York Times* articles have painted a highly negative picture of law schools and their treatment of students. See, e.g., David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES (Apr. 30, 2011), [http://www.nytimes.com/2011/05/01/business/law-school-grants.html?\\_r=5&hp=&pagewanted=all&](http://www.nytimes.com/2011/05/01/business/law-school-grants.html?_r=5&hp=&pagewanted=all&). Segal’s articles have drawn sharp criticism from legal academics, including some who have identified important mistakes. Regardless, their very publication serves to discourage matriculation and to draw attention to genuine bad behavior at law schools. E.g., Letter from Charles Grassley, U.S. Senator and Ranking Member of Comm. on the Judiciary, to Stephen N. Zack, President of Am. Bar Ass’n (July 11, 2011), available at <http://www.grassley.senate.gov/about/upload/2011-07-11-Grassley-to-ABA.pdf> (quoting Segal article and expressing concern that “millions of federally guaranteed taxpayer dollars are being borrowed at the great risk that many students may not be able to pay off their loans”).
23. Again, the phenomena described here did not arise with the present recession. See, e.g., *Disturbing Discrepancies*, U.S. NEWS & WORLD REP., Mar. 20, 1995, at



hoods at Illinois and Villanova described above,<sup>24</sup> some law schools have issued highly misleading advertising, communications that are especially objectionable coming from institutions of higher learning. Further, misleading statistics have pervaded the business-as-usual reporting by law schools of their graduates' employment outcomes and salaries, which is among the most important information for prospective applicants deciding whether and where to attend law school.

### A. Brazen Falsehoods

In a discussion of misleading marketing, it is perhaps easiest to begin with bald-faced lies. Students in the University of Illinois's graduating class of 2014 had a median undergraduate GPA of 3.70 and a median LSAT of 163.<sup>25</sup> After Assistant Dean Paul Pless falsified certain records, the law school reported a median GPA of 3.81 and a median LSAT of 168.<sup>26</sup> Illinois accepted Pless's resignation soon after his deceit came to light.<sup>27</sup> At Villanova, the ABA censured the law school for knowingly falsifying admissions data and concluded that Dean Mark Sargent had directed the misreporting.<sup>28</sup> Sargent had already resigned when his deceit became known; Villanova fired three other employees who had participated in the fraud.<sup>29</sup> Few if any legal academics will defend the actions of Pless and Sargent. Nonetheless, it might be useful for law teachers to acknowledge the simple truth that Pless and Sargent have violated the minimum standards of the legal profession.<sup>30</sup> We might then go one step further, acknowledging that those of us with knowledge of such conduct—particularly those

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82; Elizabeth Amon, *How Many Teachers? Survey by U.S. News at Odds with ABA's*, NAT'L L.J., May 31, 1999, at A12.

24. See *supra* Part I.

25. See ILLINOIS REPORT, *supra* note 2, at 81.

26. See *id.*

27. See *id.* at 1. I take no position on the accuracy of the Illinois Report. Among other things, I cannot know whether anyone else participated in the deceit for which Pless has received nearly all blame.

28. See Jeff Blumenthal, *American Bar Association Censures Villanova Law*, PHILA. BUS. J. (Aug. 15, 2011), <http://www.bizjournals.com/philadelphia/news/2011/08/15/american-bar-association-censures.html?page=all>.

29. See *id.* One of the three other employees was a tenured professor. See Letter from Susan Westerberg Prager, Exec. Director, Assoc. Am. Law Schs., to Rev. Peter M. Donohue, President, Villanova Univ., and John Y. Gotanda, Dean, Villanova Univ. 2 (Nov. 28, 2012), available at <http://www.law.villanova.edu/About%20VLS/AALS%20Executive%20Committee%20Decision.aspx>.

30. The ABA said as much about Sargent and Pless. It described Villanova's conduct as "reprehensible and damaging to prospective law school applicants, law students, law schools and the legal profession. The conduct of the law school undermines confidence in the accreditation process." VILLANOVA CENSURE, *supra* note 10; COUNCIL OF THE SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, UNIVERSITY OF ILLINOIS COLLEGE OF LAW CENSURE 3 (2012) [hereinafter ILLINOIS CENSURE], available at <http://www.americanbar.org/content/dam/aba/>

with first-hand knowledge—should report the malefactors to professional disciplinary bodies for the good of the profession.<sup>31</sup> Perhaps once we accept our duty to report “bad apples” like Pless and Sargent, we will more readily confront the more subtle and widespread phenomenon of misleading marketing.<sup>32</sup> As is true in so many contexts, admitting the existence of a problem is a necessary (but insufficient) condition for solving the problem.

When estimating the scope of the problem, legal academics should realize Villanova and Illinois almost certainly are not the only two American law schools to have intentionally submitted false data. Villanova and Illinois were not caught by the ABA or *U.S. News*; they turned themselves in. What are the odds these two schools are the only ones with deceitful employees? Undergraduate colleges have admitted to lying about the SAT scores of incoming students to boost *U.S. News* rankings.<sup>33</sup> The engineering school at the University of Southern California was caught inflating the number of full-time, tenure-track professors who were members of the National Academy of Engineering.<sup>34</sup> USC was caught not by *U.S. News*, which takes institutions at their word about such matters, but by a graduate student whose message board post on *College Confidential* was read by an enterprising reporter.<sup>35</sup> The University of Florida, whose business

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administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/2012\_june\_u\_illinois\_public\_censure.authcheckdam.pdf.

31. The specific rules violated by dishonest law school marketing are discussed below in Part III.
32. For a discussion of who might already be required to report misconduct under existing rules of professional conduct, see *infra* notes 207–35 and accompanying text.
33. See Richard Pérez-Peña & Daniel E. Slotnik, *Gaming the College Rankings*, N.Y. TIMES, Feb. 1, 2012, at A14 (“In one recent example, Iona College . . . acknowledged last fall that its employees had lied for years not only about test scores, but also about graduation rates, freshman retention, student-faculty ratio, acceptance rates and alumni giving. . . . Claremont McKenna, part of the Claremont Colleges cluster outside Los Angeles, acknowledged . . . that a senior officer had resigned after admitting that he had inflated the average SAT scores given to *U.S. News* since 2005.”). Claremont McKenna President Pamela B. Gann “said the college does not think more than one person was involved.” Larry Gordon, *Claremont McKenna College Inflated Freshman SAT Scores, Probe Finds*, L.A. TIMES (Jan. 30, 2012), <http://articles.latimes.com/2012/jan/30/local/lame-sat-20120131>. Had Gann been involved personally, she might have been subject to professional discipline because she—a former law dean at Duke—is a lawyer licensed to practice in North Carolina. See *Member Information: Ms. Pamela B. Gann*, N.C. ST. B., <http://www.ncbar.gov/gxweb/viewmember.aspx?6262> (last visited Jan. 8, 2013).
34. See Bob Morse, *University of Southern California and the Engineering Rankings*, U.S. NEWS & WORLD REP. (June 11, 2009), <http://www.usnews.com/education/blogs/college-rankings-blog/2009/06/11/university-of-southern-california-and-the-engineering-rankings> (school reported 30 but number was actually 13).
35. See Scott Jaschik, *More Rankings Rigging*, INSIDE HIGHER ED (June 8, 2009, 3:00 AM), <http://www.insidehighered.com/news/2009/06/08/usc>. The *College Confiden-*

school reported false job placement data about graduates, corrected its data after an anonymous tipster called the university's ethics hotline.<sup>36</sup> And school districts across the country have been caught falsifying primary and secondary student test scores.<sup>37</sup> Law schools largely police themselves. Illinois and Villanova cheated for years before admitting their misconduct. Chances are cheating has gone undetected elsewhere.<sup>38</sup>

## B. Highly-Misleading Pitches

Chastened by the knowledge that we indeed have a problem, we can turn from the simple cases of outright lies to the more nuanced problem of misleading communications. In May 2012, the law school at Rutgers-Camden contacted prospective students by e-mail, encouraging them to apply and announcing that the normal application fee

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*tial* post, by Sam Lee, is available online. Sam Lee, Comment to *2010 USNEWS Graduate School Rankings*, COLL. CONFIDENTIAL (Apr. 24, 2009, 11:47 AM), <http://talk.collegeconfidential.com/college-search-selection/701078-2010-usnews-graduate-school-rankings.html>.

36. See ANGEL KWOLEK-FOLLAND, REPORT #114214976 – UNIVERSITY OF FLORIDA (Sept. 21, 2010), available at [http://www.businessweek.com/bschools/blogs/mba\\_admissions/investigation%20report.pdf](http://www.businessweek.com/bschools/blogs/mba_admissions/investigation%20report.pdf); Nathan Crabbe, *UF's MBA Data Given to U.S. News Was Inaccurate*, GAINESVILLE SUN (June 7, 2011, 11:05 PM), <http://www.gainesville.com/article/20110607/ARTICLES/110609584?p=all&tc=pgall>.
37. See Emma Brown, *Probe Finds Test Cheating at Several D.C. Schools*, WASH. POST (June 22, 2012), [http://www.washingtonpost.com/local/education/probe-finds-test-cheating-at-several-dc-schools/2012/06/22/gJQAD4UXvV\\_story.html](http://www.washingtonpost.com/local/education/probe-finds-test-cheating-at-several-dc-schools/2012/06/22/gJQAD4UXvV_story.html) (“D.C. test scores have come under increasing scrutiny since USA Today published a March 2011 investigation showing an unusually high number of erasures from wrong to right answers in more than 100 D.C. public schools between 2006 and 2010.”); Bill Bush & Catherine Candisky, *State Will Look for Signs of Cheating in School District Data*, COLUMBUS DISPATCH (July 26, 2012), [http://www.dispatch.com/content/stories/local/2012/07/26/districts-officials-may-face-criminal-charges.html?utm\\_source=dlvr.it&utm\\_medium=twitter](http://www.dispatch.com/content/stories/local/2012/07/26/districts-officials-may-face-criminal-charges.html?utm_source=dlvr.it&utm_medium=twitter) (“As a third Ohio school district faced allegations of rigging its state report-card numbers, the Ohio schools superintendent said yesterday that he will press for criminal charges against educators who commit fraud.”); John Perry et al., *Cheating Our Children: Suspicious School Test Scores Across the Nation*, ATLANTA JOURNAL-CONSTITUTION (Mar. 25, 2012, 4:54 PM), <http://www.ajc.com/news/news/cheating-our-children-suspicious-school-test-sco-1/nQSTS/> (“Suspicious test scores in roughly 200 school districts resemble those that entangled Atlanta in the biggest cheating scandal in American history . . .”).
38. See Bob Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, U.S. NEWS & WORLD REP. (Mar. 9, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/03/09/us-news-urges-law-school-deans-to-improve-employment-data> (quoting a letter from Brian Kelly to law school deans as saying, “The entire law school sector is perceived to be less than candid. . . . [I]t appears that some schools do not treat the ABA reporting rules with the seriousness one would assume.”). For those faculty members who disagree, I urge the following test. Ask the head of admissions at your school, “Do you think other schools have lied about their admission stats like Illinois and Villanova?”

would be waived.<sup>39</sup> Admitted students could begin law school in just three months.<sup>40</sup> The letter was attacked almost immediately by commentators who accused Rutgers-Camden of disseminating misleading information about the employment outcomes of its graduates.<sup>41</sup> How did an e-mail message advertising a fee waiver draw so much criticism? The answer requires a careful analysis of employment and salary statistics and the ways such data can mislead unless presented in proper context.

One of the statements drawing particular ire stated: “Our average starting salary for a 2011 graduate who enters private practice is in excess of \$74,000, with many top students accepting positions with firms paying in excess of \$130,000.”<sup>42</sup> One problem with the \$74,000 figure is that Rutgers-Camden does not actually know the average salary of its 2011 graduates; instead, it knows the average salary of those graduates who responded to a survey question. As it happens, Rutgers has posted some information about its 2011 class online,<sup>43</sup> allowing a careful comparison of the marketing e-mail and the underlying data. It turns out that Rutgers-Camden graduated 242 students in 2011,<sup>44</sup> and 58 graduates reported being employed in private prac-

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39. See Elie Mystal, *Law School Sales Pitch Doubles Down on the ‘Getting Rich’ Rationale for Law School*, ABOVE L. (May 18, 2002, 4:18 PM), <http://abovethelaw.com/2012/05/law-school-sales-pitch-doubles-down-on-the-getting-rich-rationale-for-law-school/> (reprinting e-mail in its entirety). The solicitation was innovative because instead of contacting LSAT takers or others who had somehow indicated an interest in attending law school, Rutgers-Camden contacted takers of the Graduate Management Admission Test (GMAT), a test commonly taken by business school applicants. See *id.*
40. The message indicated that students with sufficiently good undergraduate GPAs and GMAT performance could be admitted without taking the LSAT. See Paul Campos, *Rutgers-Camden Goes Old School*, INSIDE L. SCH. SCAM (May 18, 2012, 6:15 PM), <http://insidethelawchoolscam.blogspot.com/2012/05/rutgers-camden-goes-old-school.html> (quoting the message as saying, “The program is open to all students who have completed their undergraduate education with a 3.3 GPA or higher and scored in the 70th percentile or higher on any one core section of the GMAT.”).
41. See, e.g., *LST Calls for Dean’s Resignation and ABA Investigation*, L. SCH. TRANSPARENCY (May 20, 2012, 11:27 AM), <http://www.lawschooltransparency.com/2012/05/lst-calls-for-deans-resignation-and-aba-investigation/>; Campos, *supra* note 40; DJM, Comment to *Rutgers-Camden Goes Old School*, INSIDE L. SCH. SCAM (May 19, 2012, 4:58 PM), <http://insidethelawchoolscam.blogspot.com/2012/05/rutgers-camden-goes-old-school.html> (comment by Professor Deborah Jones Merritt of Ohio State speculating that author of marketing e-mail had violated ethical rules).
42. See Campos, *supra* note 40.
43. See *Class of 2011 Employment Data*, RUTGERS SCH. L.—CAMDEN, <http://camlaw.rutgers.edu/sites/camlaw/files/charts.pdf> (last visited Jan. 6, 2013) [hereinafter *2011 Employment Data*, RUTGERS—CAMDEN].
44. See *id.* at 1–2 (reporting a total of 199 students employed nine months after graduation and that “84.32%” of the class was employed at that time). Those numbers yield a class size of 236. Note, however, that six students did not report their

tice nine months after graduation.<sup>45</sup> Of those 58 graduates, 27 reported their salaries.<sup>46</sup> Accordingly, the \$74,000 figure is based on a sample taken from less than half of the graduates in private practice, and only about 11% of the class of 2011.

In addition, the law school's own report indicates that the median salary of those 27 graduates reporting a law firm salary was \$60,000, not \$74,000.<sup>47</sup> While it is possible that the \$74,000 figure is the correct arithmetic mean, the published data do not allow an observer outside the law school to be sure. Further, using the mean instead of the median when reporting salary data can be highly misleading because a small number of outliers can skew results.<sup>48</sup> For example, imagine a law school graduating class of 100, each of whom is hired with a starting salary of \$50,000. The mean and median salary would both be \$50,000.<sup>49</sup> If, however, one of the graduates suddenly has her salary raised to \$1 million, the mean salary for the class becomes \$59,500.<sup>50</sup> The median remains the same. A simpler illustration is

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employment status and seem to have been left out of all calculations. *See id.* at 1. Chances are that the inclusion of those six students would make the employment data appear worse; if they had jobs, Rutgers-Camden may have been able to discover them.

45. *Id.* at 2. The statement “[a]round 29% of 2011 graduates are working in law firms” in the Rutgers-Camden 2011 Data, *id.* at 3, is not accurate. The 58 graduates working at private firms represents about 29% of those graduates who are employed at all, which is about 24% of the graduating class (and 25% of the 236 students counted in the Rutgers-Camden statistics).
46. *Id.* at 2. Because graduates working for larger firms were more likely to report salary data than were small-firm lawyers, the “average” reported by Rutgers-Camden likely overstates the compensation of 2011 graduates in private practice. *See LST Calls for Dean’s Resignation and ABA Investigation, supra* note 41.
47. *See 2011 Employment Data, RUTGERS—CAMDEN, supra* note 43, at 2. The median is the middle value in a list of numbers.
48. I do not intend to suggest that reporting a mean salary is never appropriate. Depending on the data set, it is possible that a median might provide a less accurate picture than the mean in certain circumstances. That said, because of the upward skew of law graduate salary data, schools are much more likely to have a handful of high-salaried outliers in their data set than to have a handful of low-salaried outliers. Accordingly, reporting the mean alone will commonly overstate the expected salary of graduates. Here, it might have been useful for Rutgers-Camden to report both figures. For an example of how an outlier can affect mean salary data, compare Martin J. Katz, “Why Now Is the Time to Apply to Denver Law,” <http://www.law.du.edu/index.php/admissions/learn/choosing-denver-law-myths-v.-facts> (last visited Mar. 20, 2013) (stating that “at Denver Law, our 2011 graduates in the private sector had an average salary of \$81,466”), with *Class of 2011*, U. DENVER STURM COL. L., <http://www.law.du.edu/index.php/career-development-and-opportunities/employment-statistics/class-of-2011> (last visited Mar. 20, 2013) (showing that mean salary figure for private sector lawyers was based on 73 salaries, including one of \$350,000, and that the median reported private sector salary was \$75,000; if one excludes the outlier, the mean of the remaining 72 salaries would be \$77,716).
49. Results like this are beyond the fantasies of most law schools in America.
50. The mean is calculated as follows:  $[(99 * \$50,000) + (\$1,000,000)] / 100 = \$59,500$ .

that when Bill Gates enters a room, the mean net worth of those present goes way up even though no one has become richer.

Someone unfamiliar with the intricacies of law school employment reporting might well believe the “average” 2011 graduate of Rutgers-Camden had a salary of \$74,000, at least for those graduates who chose to enter private practice. The data reveal, however, that this calculation (1) ignores those graduates with no jobs at all, (2) includes only the minority of law firm employees who chose to report a salary, and (3) reports the apparent mean instead of the more useful median. As Professor Campos noted, a more accurate summary of the salary data would report that among Rutgers-Camden’s graduating class of 242 students, only 14 graduates reported a law firm salary equal to or greater than \$60,000.<sup>51</sup>

Further, Rutgers-Camden reported that of the 27 private lawyers reporting a salary, the seventy-fifth percentile was \$111,000.<sup>52</sup> This means that depending on rounding decisions, six or seven graduates reported a salary greater than or equal to \$111,000. But the marketing e-mail stated that “many top students accept[ed] positions with firms paying in excess of \$130,000.”<sup>53</sup> Law School Transparency, after analyzing multiple sources of Rutgers-Camden’s employment data in detail, estimated “just one graduate” earned in excess of \$130,000 and concluded that “Camden knows that at most five graduates reported a salary of \$130,000+, or 2.1% of the entire class.”<sup>54</sup> Reasonable persons can disagree about what number of “top” Rutgers-Camden graduates constitutes “many,” but surely a number countable on one hand cannot justify a claim that “many top students accept[ed] positions with firms paying in excess of \$130,000.”<sup>55</sup>

As will be addressed in the next subsection, the statistics commonly presented by law schools to prospective students have a tendency to mislead by creating a falsely rosy picture of employment outcomes. The marketing e-mail took Rutgers-Camden’s already unduly cheery numbers and used them to create a highly misleading sales pitch, which was then sent to prospective consumers unfamiliar with law school reporting conventions. Would a majority of recipients

51. See Campos, *supra* note 40.

52. See *2011 Employment Data*, RUTGERS—CAMDEN, *supra* note 43, at 2.

53. See Campos, *supra* note 40.

54. *LST Calls for Dean’s Resignation and ABA Investigation*, *supra* note 41. To be fair, these small numbers likely understate the number of Rutgers-Camden graduates who were *offered* such law firm jobs (as opposed to those who held them nine months after graduation) because some top students decline law firm offers to accept judicial clerkships.

55. When confronted with criticism, the law school administration said the marketing material was accurate. See *Group Seeks Resignation of Rutgers-Camden Law Official*, INSIDE HIGHER ED (May 22, 2012, 3:00 AM), <http://www.insidehighered.com/quicktakes/2012/05/22/group-seeks-resignation-rutgers-camden-law-official>.

be misled by such a message? Perhaps not. Nonetheless, law professors should agree that the number of readers likely to be misled is unacceptably high.

An “Employment FAQ” published on the New York Law School (NYLS) website provides another example of how technically accurate statistics can prove highly misleading.<sup>56</sup> The document contains statements like “Reports of salaries in business for recent graduates have ranged from \$50,000 to \$150,000.”<sup>57</sup> Those numbers track salaries reported in another NYLS document, “New York Law School 2010 Employment Stats” (also available on the school’s website, and linked to on the Employment FAQ), which reports the minimum and maximum salaries for graduates employed in “corporate/business” as \$50,000 and \$150,000.<sup>58</sup> Someone reading the Employment FAQ could learn, if she clicked on a link to the NYLS website and found the 2010 Employment Stats, that the salary range reported for recent graduates in “business” is based upon 10 survey respondents (out of about 111 students working in “business” from a graduating class of 481).<sup>59</sup> This statistic is especially misleading because law schools count non-legal employment in the “corporate/business” category (sometimes referred to as “business and industry”), meaning that graduates unable to find legal jobs who work in retail, childcare, or food service are counted as being employed in “business.” One can only imagine law graduates employed at Target and Starbucks—in the sort of jobs they might have taken had they not attended law school—are those least likely to report their salaries to career services surveyors.<sup>60</sup> Chances are the overwhelming majority of graduates in the “corporate/business” category earn less than \$50,000.

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56. See *Employment FAQ*, N.Y.L. SCH., [http://www.nyls.edu/user\\_files/1/3/4/794/ADMSEmploymentFAQ2011.pdf](http://www.nyls.edu/user_files/1/3/4/794/ADMSEmploymentFAQ2011.pdf) (last visited Aug. 5, 2012) [hereinafter *Employment FAQ*, N.Y.L. SCH.] (cached copy on file with author). Professors Campos and Merritt were the first to publically analyze this document. See Paul Campos, *Mistaken Beliefs About the Crisis of the American Law School: If You Sue a Law School, It Will Stop Publishing Fraudulent Employment Data*, INSIDE L. SCH. SCAM (Apr. 25, 2012, 7:29 AM), [http://insidethelawschoolscam.blogspot.com/2012/04/mistaken-beliefs-about-crisis-of\\_25.html](http://insidethelawschoolscam.blogspot.com/2012/04/mistaken-beliefs-about-crisis-of_25.html).

57. *Employment FAQ*, N.Y.L. SCH., *supra* note 56, at 1.

58. *New York Law School 2010 Employment Stats*, N.Y.L. SCH., [http://www.nyls.edu/user\\_files/1/3/4/167/CSRS%20Employment%20Stats%20for%20Web%20Classof200511%20v1-rev.pdf](http://www.nyls.edu/user_files/1/3/4/167/CSRS%20Employment%20Stats%20for%20Web%20Classof200511%20v1-rev.pdf) (last visited Jan. 8, 2013) [hereinafter *NYLS 2010 Stats*].

59. See *id.* at 1. The figure of 111 students comes from the 27.3% of employed graduates listed in “Corporate/Business” (out of 407 employed graduates).

60. See NAT’L ASS’N FOR LAW PLACEMENT, JOBS & JDs 2010, at 15–18, 112–13 (2011) [hereinafter NALP, JOBS & JDs] (discussing how national salary data is upwardly skewed by non-random sample); NAT’L ASS’N FOR LAW PLACEMENT, CLASS OF 2011 NATIONAL SUMMARY REPORT (2012) [hereinafter NALP, 2011 SUMMARY REPORT], available at [http://www.nalp.org/uploads/NatlSummChart\\_Classof2011.pdf](http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf) (including salary data from 2,661 out of 2,865 graduates at firms employing 500+ lawyers, but only 3,081 out of 7,570 graduates at firms with 2-to-10 law-

Similarly, the Employment FAQ discussed NYLS graduates working at “smaller firms” and reports: “Based on the data we do have, we estimate that the salary range is \$40,000 to \$80,000.”<sup>61</sup> Firms of two-to-ten lawyers employed 57.6% of all 2010 NYLS graduates working for private law firms (with 42.5% of employed graduates working for a firm of any size), making the salary of small firm lawyers particularly important in evaluating the expected return of a NYLS degree.<sup>62</sup> The 2010 Employment Stats reveal, however, that this important datum is based on the reported salaries of 16 small-firm lawyers (of the 98 graduates working at such firms).<sup>63</sup> In addition, the highest salary reported by a graduate working at a firm of ten lawyers or fewer was \$75,000.<sup>64</sup> The \$80,000 figure likely comes from someone employed at a slightly larger “smaller firm.”<sup>65</sup> Even the bottom figure, \$40,000, probably substantially overstates the salaries of many graduates working in firms of two-to-ten lawyers.<sup>66</sup> The category counts part-time and temporary positions (and part-time, temporary positions), as well as “eat-what-you-kill” arrangements in which a firm allows a re-

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yers); TAMANAHA, *supra* note 14, at 146–54 (providing further evidence of skew). The skew upward is further exacerbated because schools can enter salaries for non-reporting grads when publically known, and such data are known far more often for large firms, which happen to have the highest salaries. See NAT’L ASS’N FOR LAW PLACEMENT, NALP BEST PRACTICES GUIDE FOR MANAGING LAW SCHOOL EMPLOYMENT OUTCOMES 3 (2012), available at [http://www.nalp.org/uploads/lse\\_otf\\_guide\\_final.pdf](http://www.nalp.org/uploads/lse_otf_guide_final.pdf) (listing sources of “third-party provided” information for employment and salary data, including internet searches). Although the “Employment FAQ” page does advise that the “salary range for law graduates varies greatly,” *Employment FAQ*, N.Y.L. SCH., *supra* note 56, at 1, it does not disclose that the data collected by law schools tend to substantially oversample higher salaries among graduates with full-time positions, nor does it mention the complete exclusion of salaries from part-time workers.

61. *Employment FAQ*, N.Y.L. SCH., *supra* note 56, at 1. Although the document states that it is “difficult to report definitive information on starting salaries in smaller firms because the information is not public,” *see id.*, there is no mention of the skewed sample or the exclusion of part-time lawyers.
62. See *NYLS 2010 Stats*, *supra* note 58, at 1–2. The combination of these numbers reveals that about 24% of all employed 2010 NYLS graduates were at firms with 2–10 lawyers. That represents 98 members of the class of 481; recall that the NYLS stats count only the 407 graduates who are employed at all.
63. *See id.* at 2.
64. *Id.*
65. Firms with between 11 and 500 lawyers are divided into five categories in the *NYLS 2010 Stats*. *See id.* at 2. All such firms combined to employ about 24.5% of the 2010 NYLS graduates working at private firms (that is, less than half of the number of graduates at firms with two-to-ten lawyers). *See id.*
66. The *NYLS 2010 Stats* note that the lowest reported small-firm (two to ten lawyers) full-time salary was \$35,000, *see id.*, which is below the \$40,000 figure reported in the *Employment FAQ* as the bottom of the “salary range” for smaller firms.



cent graduate to associate with established lawyers without providing a salary.<sup>67</sup>

The Employment FAQ then discusses how many graduates change jobs frequently during their first years of practice and presents the results of a “recent study” of NYLS graduates two-to-four years out of law school:

A recent study of New York Law School alumni who graduated between two and four years ago showed their salary increases in their second and third jobs. First salaries in the \$40,000 to \$60,000 range were the most common (46 percent), but that shifted with the graduates’ second and third jobs to the least common (20 percent). At the same time, salaries in the \$60,000 to \$90,000 range grew from 22.5 percent to 35.5 percent. Salaries in the range above \$90,000 grew from 26 percent to 40 percent. All of these job changes occurred within four years of graduation.<sup>68</sup>

A reader of the above paragraph and its accompanying graph might reasonably draw the following inferences: First, about 95% of NYLS graduates earn at least \$40,000 per year in their first job.<sup>69</sup> Second, more than one-fourth of NYLS graduates begin work with a starting salary above \$90,000.<sup>70</sup> Third, the percentage of NYLS graduates earning above \$90,000 annually increases in just a few years to 40%.<sup>71</sup>

Those assumptions are likely false. We know from the 2010 Employment Stats that NYLS has salary data for only 26% of employed graduates (105 salaries), or 22% of the graduating class.<sup>72</sup> Even if we exclude the unemployed, it is difficult to see how 95% of the 407 graduates NYLS counted as “employed” in its 2010 statistics could have had an annual salary of at least \$40,000. These 407 graduates include 111 in “Corporate/Business” (of whom 10 reported a salary) and 98 graduates in firms with between two and ten lawyers (of whom 16 reported a salary). If even 21 of these students (including those not

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67. See *Graduate Survey Form—Class of 2010 NALP Employment Report and Salary Survey*, NAT’L ASS’N L. PLACEMENT (2011), [https://www.nalp.org/uploads/ERSS/Gradsurvey\\_and\\_FAQs\\_2012.pdf](https://www.nalp.org/uploads/ERSS/Gradsurvey_and_FAQs_2012.pdf) (asking graduates to count themselves as employed if they have “a position for which [they] receive a salary or a stipend or are being paid on a contract or retainer basis”); NALP, *JOBS & JDs*, *supra* note 60, at 29, 81 (reporting that 51.6% of graduates nationwide reporting *full-time* salaries from firms with two-to-ten lawyers reported salaries of \$50,000 or less and that the median reported salary for graduates employed *full-time* at such firms in New York was \$50,000). Like the Employment FAQ, the *NYLS 2010 Stats* present salary data with no mention of the skewed sample or the exclusion of part-time lawyers. *NYLS 2010 Stats*, *supra* note 58, at 1–2.

68. See *Employment FAQ*, N.Y.L. SCH., *supra* note 56, at 2.

69. The graph shows starting salaries of “\$40,000 to \$60,000” for 46%, of “\$60,001 to \$90,000” for 23%, and “Over \$90,000” for 26%. *Id.* This yields a total of 95% earning \$40,000 or more.

70. The graph shows 26% earning above \$90,000. *Id.*

71. The graph shows that in the “3rd Job,” the “Over \$90,000” includes 40% of alumni. *Id.*

72. See *NYLS 2010 Stats*, *supra* note 58, at 1.

reporting salaries) earned below \$40,000, then the 95% figure is false.<sup>73</sup> As for the second assumption, if we again exclude the unemployed, NYLS must nonetheless produce more than 100 members of the class of 2010 with salaries above \$90,000 nine months after graduation; otherwise, it cannot justify a claim that 26% of alumni earned “Over \$90,000” in their first job.<sup>74</sup> The 2010 Stats show that of all graduates working in “Corporate/Business” or at law firms with more than 100 lawyers, the total number who reported salaries was 37 or fewer, and not all of these salaries exceeded \$90,000.<sup>75</sup> It is nearly impossible to believe that more than 60 additional alumni from the NYLS class of 2010 were earning above \$90,000 nine months after graduation without the school knowing.<sup>76</sup> Finally, with respect to the third assumption, if 40% of NYLS alumni have changed jobs and earn more than \$90,000 a few years after graduation, the legal employment market must be vastly better than has been reported.<sup>77</sup>

The NYLS “study” is likely not the result of outright fabrication like the statistics reported by Villanova and Illinois. Instead, the school hired a market research firm to conduct a survey of some of its alumni, a survey whose validity cannot be assessed based on the information presented in the Employment FAQ.<sup>78</sup> The small number of graduates who had changed jobs and reported salary data presented a highly misleading picture of the employment prospects of most NYLS

73. Twenty-one graduates would be 5.2% of the 407 employed 2010 graduates.

74. To be precise, 26% of 407 employed graduates is 105.8 alumni.

75. The number includes 10 from “Corporate/Business,” 19 from firms with more than 500 lawyers, and “<5” each from firms with 101–250 lawyers and 251–500 lawyers. See *NYLS 2010 Stats*, *supra* note 58, at 1–2.

76. NALP best practices allow schools to determine graduates’ employment status (i.e., where they work) with internet searches and to use publically available salary data (if any) when employed graduates do not report salaries. At firms paying more than \$90,000 to new lawyers, associate salaries are generally publicly known. In other words, few graduates earn such salaries without their law schools “knowing” for purposes of salary data collection. See *supra* note 60.

77. See, e.g., Christopher Danzig, *DOJ Wants You, Experienced Attorneys—To Work for Free*, ABOVE L. (Jan. 26, 2012, 12:20 PM), <http://abovethelaw.com/2012/01/the-doj-wants-you-experienced-attorneys-to-work-for-free/> (reporting that U.S. Attorney’s Office in Pennsylvania seeks “candidates [who] should possess at least five years of post-J.D. legal experience” for unpaid, year-long position); see also *supra* note 19 (noting the faltering market for attorneys entering the workforce).

78. Reasonable prospective applicants might well believe that when an academic institution touts a “study,” the work is reliable. In response to an earlier draft of this article, NYLS informed me that Hanover Research conducted the “study” described in the Employment FAQ. The school declined to provide a copy of the Hanover report. Hanover Research is a company that provides “strategy and market research services” for clients. See *About Us*, HANOVER RES., <http://www.hanoverresearch.com/outsourced-research/> (last visited Feb. 17, 2013) (“By delivering timely, authoritative reports, our research professionals help clients leverage insights to stay abreast of trends, make informed decisions and increase their return on investment.”).

graduates. After all, graduates with higher salaries are far more likely to report them.<sup>79</sup> This misleading picture was presented on a graph and summarized in way that could lead prospective students to wildly overestimate the expected compensation of NYLS alumni.<sup>80</sup>

### C. Systematically-Bad Statistics

The previous section concerned marketing materials prepared by law schools that tend to mislead readers about the employment prospects of law graduates; careful analysis of underlying statistics provided context that undermined the optimistic marketing messages. But a prospective law student who avoided all e-mail pitches and rosy FAQ documents would not be safe in assuming the basic statistics collected and presented by law schools are accurate. Indeed, the misleading nature of common legal employment statistics is perhaps a bigger danger to prospective students than is the selective quotation of those statistics in advertisements. While a wary consumer may suspect trickery in a glossy brochure or an unsolicited message offering a fee waiver, the dry statistics reported by academic institutions to the ABA, the National Association for Law Placement (NALP), and *U.S. News* possess an aura of credibility. That credibility is undeserved.

For years, law schools have reported statistics using an overbroad definition of “employed” (causing prospective students to overestimate the percentage of law graduates with the sort of jobs prospective students hope to attain); masked the number of “employed” graduates working for their own law schools in temporary jobs; released salary data based on self-selected samples of the best-paid graduates; and enticed students with opaque scholarship offers, causing prospective students to overestimate the benefits being offered. Misleading statistics, which nearly always tend to improve the apparent value of legal education, have been spread via third parties—such as the ABA, NALP, and *U.S. News*—and directly by the law schools in websites, brochures, and other advertising media.

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79. See *supra* note 60 and accompanying text.

80. Professor Merritt contacted NYLS in April seeking information about how the study was conducted; NYLS never provided that information. See E-mail from Deborah Merritt, Professor of Law, Moritz College of Law, to author (July 30, 2012, 10:27 PM) (on file with author); Campos, *supra* note 56. As of August 5, 2012, the “Employment FAQ” page was linked from the “Consumer Information” page of the NYLS webpage, located at [http://www.nyls.edu/prospective\\_students/consumer\\_information](http://www.nyls.edu/prospective_students/consumer_information). As of December 21, 2012, it was no longer linked from that page.

### 1. *The Broad Definition of “Employed”*

The obfuscation of employment statistics begins with the question of who counts as “employed.” In general, law school statistics count as “employed” graduates whose employment outcomes are far from what most law students would consider successful. For example, schools for years commonly reported the percentage of students who were “employed” with no qualifications concerning (a) whether a job is part-time or full-time, (b) whether a job is temporary or permanent, or (c) whether a job is legal or non-legal (that is, whether the graduate has a job requiring bar admission).<sup>81</sup> Accordingly, a student could count as “employed” while holding a part-time, non-legal temporary job (such as a twenty-hour-per-week, temporary, secretarial position).<sup>82</sup> This phenomenon continues today. The Rutgers-Camden statistics discussed above are representative of what law schools have disseminated for years.<sup>83</sup> An eight-page document on the law school website titled “Class of 2011 Employment Data” begins by stating that 84.32% of the Rutgers-Camden class of 2011 was employed nine months after graduation.<sup>84</sup> There is a chart titled “Level of Education Required” showing which jobs count as “Bar Admission Required,” “JD Advantage,” “Other professional degree,” and “Professional degree not required.”<sup>85</sup> Another two charts divide jobs between “Part-time” and “Full-time,” and between “Short-term” and “Long-term.”<sup>86</sup>

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81. The statistics generally measure employment at graduation and, more importantly, nine months afterward. *See, e.g.*, Admissions Bulletin, U. S.C. SCH. L. 6, <http://law.sc.edu/admissions/bulletin/> (last visited Aug. 15, 2012) (cached copy on file with author) (stating, in bulletin aimed at prospective students, “Approximately 95 percent of graduates are employed within nine months of graduation.”); *2011–2012 Admission Statistics*, SMU DEDMAN SCH. L., <http://www.law.smu.edu/getattachment/e3f30e9e-0cff-4c8a-a94a-cbf33e7e095b/quickfacts.pdf.aspx?chset=d2f1c79e-498e-4f5c-84d5-495e2099922f> (last visited Jan. 8, 2013) (“Approximately 95.06% of the class of 2010 was employed 6 to 9 months after graduation.”); *see also NYLS 2010 Stats*, *supra* note 58. The statistics presented for the NYLS class of 2011 are substantially more comprehensive. *See New York Law School 2011 Employment Statistics*, N.Y.L. SCH., [http://www.nyls.edu/user\\_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf](http://www.nyls.edu/user_files/1/3/4/21/CSRS%20Employment%20Stats%20for%20Web%200511%20v1-rev.pdf) (last visited Feb. 17, 2013) [hereinafter *NYLS 2011 Stats*] (showing which jobs are part-time, which are full-time, which are temporary, and which are permanent, and also listing how many graduates are in jobs that require a law degree, among other data).

82. *See Methodology for Calculating Graduate Employment Rate*, NAT’L ASS’N L. PLACEMENT, [http://www.nalp.org/uploads/Employment\\_Rate\\_Calc.pdf](http://www.nalp.org/uploads/Employment_Rate_Calc.pdf) (last visited Feb. 17, 2013) (“A graduate who has a job as of February 15 is employed. The job may be full-time, part-time, permanent, law-related or not.”).

83. *See 2011 Employment Data*, RUTGERS—CAMDEN, *supra* note 43 (discussing employment statistics which were sent by e-mail to GMAT takers).

84. *Id.* at 1.

85. *Id.* at 5. “JD Advantage” is not defined.

86. *Id.*

These three charts are misleading because, on each of them, the numbers sum to 100%, meaning unemployed graduates are omitted from the calculations. Accordingly, it is not true (as a graph implies) that 90.45% of Rutgers-Camden 2011 graduates have full-time jobs; in truth it is 90.45% of *employed* students (only 84.32% of the class was employed) with full-time jobs—about 76% of the overall class. Similarly, it is not true (as a graph implies) that 91.46% of Rutgers-Camden 2011 graduates have long-term jobs; more correctly, 91.46% of the 84.32% of graduates with *any* jobs had long-term jobs—about 77% of the overall class. In addition, nowhere in the document can one find the percentage of graduates working full-time in long-term jobs for which bar admission is required.<sup>87</sup> Further, it is not true (as a graph implies) that 77.39% of Rutgers-Camden 2011 graduates have jobs of *some kind* that require bar admission (some of which are likely temporary jobs in the document review mines, others of which are part-time, and some of which are both temporary and part-time). Instead, the correct figure is 77.39% of the 84.32% of the class employed at all—about 65%—has some kind of job requiring bar admission. When one excludes part-time and short-term workers, the percentage drops to 58.3.<sup>88</sup> These statistics are far less encouraging than the 84% employment figure touted at the top of the document.

I should stress that Rutgers-Camden is no outlier. Law schools across the United States have released misleadingly rosy statistics for years. For example, on Santa Clara Law's webpage, the "Legal Employment Statistics" page begins with a discussion headed, "Employment Status for the Class of 2010."<sup>89</sup> The bar graph in that section reports that of 306 total graduates, 78% were employed nine months after graduation.<sup>90</sup> Near the bottom of the page, under "Other Employment Information," one can find three charts showing the kinds of jobs obtained by Santa Clara graduates.<sup>91</sup> One distinguishes part-time jobs from full-time jobs, a second separates permanent and temporary jobs, and the third displays the "Education Required for Position."<sup>92</sup> All three ignore unemployed students entirely.<sup>93</sup> No chart shows the percentage of graduates in full-time, permanent jobs for

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87. Although the number is not presented by the law school in its summary, Rutgers-Camden did submit it to the ABA. According to ABA data, 141 graduates (out of the class of 242) had full-time, long-term, "bar passage required" jobs. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, EMPLOYMENT SUMMARY FOR 2011 GRADUATES: RUTGERS UNIVERSITY-CAMDEN (2012), available at <http://employmentsummary.abaquestionnaire.org/>.

88. *See id.*

89. *Legal Employment Statistics*, SANTA CLARA L., <http://law.scu.edu/careers/employment-data-2010.cfm> (last visited Feb. 17, 2013) [hereinafter *Legal Employment Statistics*, SANTA CLARA L.].

90. *Id.*

91. *Id.*

92. *Id.*

which legal training is required. Also, even though 239 of the Santa Clara class of 2010 graduates are reported as employed,<sup>94</sup> these three charts are based on far smaller data sets. While 200 graduates reported the level of education required for their jobs, only 65 reported whether their jobs were temporary or permanent, and only 62 reported whether they had part-time or full-time work.<sup>95</sup> Without accounting for sample bias, these statistics show that about 63% of Santa Clara's 2010 graduates reported being employed as lawyers.<sup>96</sup> Because students with better employment outcomes are far more likely to provide detailed reports of their employment status,<sup>97</sup> the figures on these charts are both highly unreliable and almost certainly overly optimistic.<sup>98</sup> Santa Clara deserves credit for providing the sample size for its graphs, allowing a careful reader to realize the results presented are of such little value. Nonetheless, the low value of the statistics is problematic despite the ability of statisticians to discern flaws.

At Gonzaga University School of Law, a "Prospective Students" page had a pie chart titled, "Where Our Graduates Work: Class of 2009."<sup>99</sup> The chart divided graduates into categories such as "private practice," "business," and "government."<sup>100</sup> It took no account of unemployed students—the totals summed to 99%, presumably because of rounding—nor did it explain that certain jobs are likely part-time, temporary, and non-legal. There was also no explanation for the use of class of 2009 statistics in autumn 2012.<sup>101</sup>

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93. Two sum to 100%. The other, presumably because of rounding, sums to 101%. *See id.*

94. That is, 78% of 306 is 238.7.

95. *See Legal Employment Statistics*, SANTA CLARA L., *supra* note 89.

96. *See id.* (showing 78% of all graduates are employed, with 81% of those jobs being "JD required").

97. *See infra* subsection II.C.3 (discussing the tendency of high-salaried graduates to respond to the surveys at higher rates than low-salaried graduates).

98. The overly rosy figures are: 82% of employed graduates are in permanent positions, 89% of employed graduates have full-time jobs, and 81% of employed graduates have jobs requiring a J.D. *Legal Employment Statistics*, SANTA CLARA L., *supra* note 89.

99. *Prospective Students*, GONZ. U. SCH. L., [http://www.law.gonzaga.edu/Career+Services/prospective\\_students.asp](http://www.law.gonzaga.edu/Career+Services/prospective_students.asp) (last visited Oct. 5, 2012) (cached copy on file with author).

100. *Id.*

101. *See id.* Under the newly revised ABA Standard 509, fresher data will now be required. *See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2012–2013*, Approval Standard No. 509(a) (2012) [hereinafter *ABA STANDARDS FOR APPROVAL 2012–2013*]. After reviewing an earlier draft of this article, the law school informed me that the "Prospective Students" page described above "was an archived web page that remained available only for historical purposes and accessible only via a search results page, rather than through our official website navigation." E-mail from John D. Sklut, Assistant Dean of Students, Gonzaga Univ. Sch. of Law to author (Nov. 9, 2012, 11:17 AM) (on file

At Atlanta's John Marshall Law School, a "Quick Facts" webpage reports "Placement Rates for 2011 Graduates" as 84.1%.<sup>102</sup> It then states that of 132 graduates, 111 were "known to be employed."<sup>103</sup> No information is provided concerning how many jobs are long-term or short-term, how many are full-time or part-time, or how many require bar admission. From data submitted to the ABA, one can learn that only 54 of the 132 graduates in Atlanta's John Marshall's class of 2011 (40.9%) had full-time, long-term jobs for which bar passage was required.<sup>104</sup>

The data reported by Thomas M. Cooley School of Law reveal another potential flaw in the ABA's data collection. Cooley states in its online employment statistics, "The ABA advised schools to determine and report every graduate's full-time/long- or short-term and part-time/long- or short-term employment status, even if a graduate did not voluntarily supply complete information."<sup>105</sup> Because Cooley lacked information about whether certain employed graduates were in short-term or long-term jobs, as well as about whether they held part-time or full-time jobs, Cooley proposed to the ABA that the school would report these statuses as "unknown."<sup>106</sup> The ABA form allowed schools to report a graduate's employment status as entirely unknown (if a school had no idea whether someone was working at all), but it did not provide an "unknown" option for the short-term/long-term or full-time/part-time statuses of graduates with jobs.<sup>107</sup> The ABA declined to create the new "unknown" options for employed graduates, instructing Cooley, "Do everything you can to contact [the graduates] and confirm the status."<sup>108</sup> For those graduates whose statuses re-

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with author). Further, more current data were available on the career services webpage during autumn 2012, and as of Nov. 5, 2012, the archived page was removed from the Gonzaga website. *Id.*

102. *Quick Facts*, ATLANTA'S J. MARSHALL L. SCH., <http://www.johnmarshall.edu/futurestudent/admissions-aid/quick-facts/> (last visited Feb. 17, 2013).
103. *Id.*
104. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR. ASS'N, EMPLOYMENT SUMMARY FOR 2011 GRADUATES: ATLANTA'S JOHN MARSHALL LAW SCHOOL (2012), available at <http://employmentsummary.abaquestionnaire.org/>.
105. *Class of 2011 Employment Statistics*, T.M. COOLEY SCH. L. (Mar. 30, 2012), [http://www.cooley.edu/consumerinformation/\\_docs/2011\\_Graduate\\_Employment\\_Report.pdf](http://www.cooley.edu/consumerinformation/_docs/2011_Graduate_Employment_Report.pdf) [hereinafter *2011 Employment Stats*, T.M. COOLEY SCH. L.].
106. See E-mail from Laura E. LeDuc, Assistant Dean of Planning, Programs, & Assessment, Thomas M. Cooley Law Sch., to Kenneth Williams, Data Specialist, Am. Bar Ass'n (Mar. 6, 2012, 11:21 AM) (on file with author).
107. *Id.*
108. See E-mail from Kenneth Williams, Data Specialist, Am. Bar Ass'n, to Laura E. LeDuc, Assistant Dean of Planning, Programs, & Assessment, Thomas M. Cooley Law Sch. (Mar. 6, 2012, 12:24 PM) (on file with author). Williams added, "Use secondary sources as much as possible to confirm the status. Finally, make a decision based on your best judgment. Document your reasoning for that judgment as related to the particular graduate." *Id.*

mained unknown after further investigation by the school, Cooley stated that “the default classification for those lacking complete data was full-time/long-term unless Cooley had evidence to contradict that classification.”<sup>109</sup> In other words, if a potential Cooley student reviews the law school’s placement statistics as reported to the ABA (whether on the ABA website or as part of rankings based on the ABA data), the number of reported full-time, long-term jobs may include some number of part-time, short-term jobs.<sup>110</sup>

## 2. *Statistics-Enhancing Jobs at Law Schools*

In addition to masking the prevalence of underemployed graduates—those who are working but lack full-time, long-term, legal jobs—the definition of “employed” conceals the common practice of law schools employing their own graduates. With names like “Entry Into Practice”<sup>111</sup> and “Postgraduate Fellowship Program,”<sup>112</sup> programs at many law schools pay recent graduates to provide free work for approved employers, often in public interest jobs.<sup>113</sup> Graduates in such

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109. *2011 Employment Stats*, T.M. COOLEY SCH. L., *supra* note 105. Cooley adopted this “default classification” even though some of the students who did report their employment status in detail did not report full-time/long-term employment. *See id.*
110. The number is not likely to be large. Cooley stated that after “exhaustive research,” the school was “able to determine with reasonable certainty the full-/part-time and long-/short-term status of all but perhaps a dozen of our 583 employed graduates.” *See* Letter from James B. Thelen, Assoc. Dean for Legal Affairs and General Counsel, Thomas M. Cooley Law Sch. to author 2 (Nov. 7, 2012) (on file with author). For a description of Cooley’s research, see *Consumer Information*, T.M. COOLEY SCH. L., <http://www.cooley.edu/consumerinformation/#employment> (last visited Feb. 17, 2013) (“For graduates who did not respond to the NALP survey, Cooley determined and confirmed a graduate’s employment status from publicly available sources such as state bar records, social media (e.g., LinkedIn, Facebook), law firm or business web sites, and other internet resources. Cooley also obtained employment information about some graduates from faculty members and classmates.”).
111. *Employment Data for 2011 Graduates*, GEO. L. 3, <http://www.law.georgetown.edu/careers/career-planning/upload/class-of-2011-graduate-statistics.pdf> (last visited Feb. 17, 2013).
112. *2010 Employment Report*, EMORY L., <http://www.law.emory.edu/career-services/for-prospective-students/employment-statistics/2010-employment-statistics.html> (last visited Feb. 17, 2013).
113. *See* Karen Sloan, *Data Trove Reveals Scope of Law Schools’ Hiring of Their Own Graduates*, NAT’L L.J. (Apr. 16, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202549157393&Data\\_trove\\_reveals\\_scope\\_of\\_law\\_schools\\_hiring\\_of\\_their\\_own\\_graduates\\_](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202549157393&Data_trove_reveals_scope_of_law_schools_hiring_of_their_own_graduates_) [hereinafter Sloan, *Data Trove*] (subscription required). Not all school-funded jobs are in public interest positions. *See, e.g.*, Karen Sloan, *Paying the Price for Law Firm Employment*, NAT’L L.J., Feb. 28, 2011, at 11 (“SMU unveiled its Test Drive program, in which the school pays employers \$3,500 to take in recent graduates for one or two months.”).



programs are then counted as “employed” in employment statistics.<sup>114</sup> For example, the University of Virginia School of Law reported that 98% of the class of 2010 was employed nine months after graduation, Vanderbilt University Law School reported 92%, and Washington & Lee University School of Law reported 90%.<sup>115</sup> At all three schools, however, 11% of graduates from 2010 were employed by the schools themselves.<sup>116</sup> These percentages are high but not unique; 9% of ABA-accredited law schools reported that they hired between 11% and 15% of their 2010 graduates.<sup>117</sup>

The 2011 statistics from UCLA School of Law illustrate the effects of school-funded employment on statistics already obfuscated by a loose definition of “employed.” UCLA’s “Employment Data” webpage reports that the class of 2011 had 344 graduates, and 91.6% of the class was “employed at nine months out.”<sup>118</sup> Of the employed graduates, 92.4% have jobs for which bar admission is anticipated or required, meaning 84.6% of UCLA graduates had jobs as lawyers.<sup>119</sup> Further down the page, however, one learns that 64 graduates (22% of the entire class) were in positions funded by UCLA itself.<sup>120</sup> If all of

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114. Counting such graduates as “employed” can be particularly misleading because (1) school-funded jobs often disappear soon after the nine-month reporting period, and (2) some schools have recently extended the length of their program to one year, just enough to count as “long-term” employment.

115. *See Sloan, Data Trove, supra* note 113.

116. *See id.* The graduates employed by the schools are counted as employed; otherwise, the total employment rate at all three of these schools would exceed 100% for the class of 2010. I do not mean to suggest that any of the three schools concealed programs through which they funded employment of their own graduates. Indeed, schools advertised these programs to prospective students, *see, e.g., On-Campus Interviews, Employment and Judicial Clerkships: 2012 Edition*, VAND. U. L. SCH. 20, <http://law.vanderbilt.edu/employers-cs/download.aspx?id=7765> (last visited Jan. 7, 2013) (“To assist new graduates during the downturn, VLS launched the Public Service Initiative (PSI) in 2009, providing stipends to new graduates who secure legal internships in public service or with non-profit advocacy organizations.”), and the number of graduates participating was reported to the ABA. Nonetheless, the headline “employed” figures are widely reported, often without context.

117. *See Sloan, Data Trove, supra* note 113. Additionally, 11% of schools reported hiring 6-to-10% of their graduates, 48% reported hiring 1-to-5%, and 27% reported hiring none. *Id.*

118. *Employment Data*, UCLA SCH. L., <http://www.law.ucla.edu/career-services/Pages/employment-statistics.aspx> (last visited Aug. 5, 2012) (cached copy on file with author).

119. *See id.* Another 5.1% were listed under “JD Advantage.” *Id.* Of the 291 graduates employed in jobs requiring bar passage, only 211 had full-time, long-term employment. *See* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR. ASS’N, EMPLOYMENT SUMMARY FOR 2011 GRADUATES: UNIVERSITY OF CALIFORNIA—LOS ANGELES (2012), available at <http://employmentsummary.abaquestionnaire.org/> [hereinafter UCLA 2011 EMPLOYMENT SUMMARY] (allowing users to generate reports of data by school for classes of 2010 and 2011).

120. *See Employment Data*, UCLA SCH. L., *supra* note 118.

those 64 graduates are among those counted as working as lawyers,<sup>121</sup> the percentage of UCLA's 2011 graduating class working in legal jobs not funded by the school drops to 66%. Suddenly, what seemed like a 92% employment rate appears much different.

Similarly, at Boston University School of Law (BU), 238 of the 273 members of the class of 2011 (87.2% of graduates) were reported as employed nine months after graduation.<sup>122</sup> However, one-fourth of all employed BU graduates (22% of all graduates) were in jobs funded by the university.<sup>123</sup> In other words, only about 65% of the graduating class held jobs of any kind—including part-time gigs, temporary jobs, and non-legal positions—that BU was not funding.

Until recently, one could not even calculate the effect of school-funded jobs on law school employment statistics because the schools did not disclose such employment. The availability of these figures is therefore an improvement. Many prospective students, however, will continue to be misled by the headline “employed” figure disseminated by schools (that is, the high number of total employed graduates that includes school-funded positions). First, some who read law school websites will not think to delve into the statistics to uncover the percentage of graduates who have found actual legal employment without a school fellowship. Second, prospective students consult secondary sources that often reprint the headline figures without providing any additional context.<sup>124</sup> To avoid issuing misleading statistics, schools should report a headline “total employed” figure that does not include

121. Based on the placement data UCLA submitted to the ABA, at least 62 of the 64 graduates in university-funded positions were among the graduates counted as “Employed - Bar Passage Required.” See UCLA 2011 EMPLOYMENT SUMMARY, *supra* note 119.
122. See *Class of 2011 Employment*, B.U. SCH. L., <http://www.bu.edu/law/prospective/careers/jd/employmentstats2011.html> (last updated Dec. 3, 2012). An update reports that BU's employment numbers have improved substantially from the original February 15 reporting cut-off date. See *id.*
123. See *id.* (showing total of 59 graduates in BU-funded positions); see also SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR. ASS'N, EMPLOYMENT SUMMARY FOR 2011 GRADUATES: BOSTON UNIVERSITY (2012), available at <http://employmentsummary.abaquestionnaire.org/> (reporting 60 such graduates). Of the 197 law schools for which the ABA released 2011 data, only Notre Dame reported a higher fraction of its graduates holding positions funded by the university (22.6%). See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, COMPLETE EMPLOYMENT DATA FOR 2011 GRADUATES (2012), available at <http://employmentsummary.abaquestionnaire.org/> (to reproduce these results, one may compare—for each school—the number of total graduates and the number of graduates in school-funded jobs).
124. See, e.g., BCG ATT'Y SEARCH, THE 2012 BCG ATTORNEY SEARCH GUIDE TO AMERICA'S TOP 50 LAW SCHOOLS 144, 147 (2012), available at [http://www.bcgsearch.com/pdf/BCG\\_Law\\_School\\_Guide\\_2012.pdf](http://www.bcgsearch.com/pdf/BCG_Law_School_Guide_2012.pdf) (reporting, based on U.S. News data, that 96% of Georgetown's 2010 graduates were “known to be employed nine months after graduation”); Yale University, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/>

graduates with school-funded jobs. At minimum, such a figure should be prominently displayed next to the headline figure of schools that insist on leading with statistics that fail to account for the effects of school-funded employment.

As far as honest marketing goes, I see no problem with the mere existence of law school-funded jobs for law graduates. The problem arises when a perfectly reasonable—indeed, perhaps commendable—program obscures the true employment prospects of law students. Schools would perform a valuable service if they collected and shared data about the jobs taken by graduates after their school-funded positions end.<sup>125</sup>

### 3. *Salary Surveys of the Rich and Satisfied*

In addition, schools commonly report salary statistics based on unrepresentative samples, samples that skew high because of the tendency of high-salaried graduates to respond to the surveys at higher rates than low-salaried (and exclude unemployed graduates entirely from the pool).<sup>126</sup> This phenomenon continues today. Therefore, prospective students can be misled not just about the percentage of graduates with real legal jobs, but also by salary statistics that substantially overestimate the likely compensation of employed graduates.

For example, Georgetown University Law Center presented salary data on a webpage titled “Employment Statistics” with no disclaimer concerning the tendency of higher-paid graduates to report salaries.<sup>127</sup> In the section for 2010 graduates in private practice, the 25th percentile, the median, and the 75th percentile were all reported as \$160,000. The “response rate” of 77.2% (down from 86.3% for private lawyers in the class of 2009 surveyed nine months after their graduation, and 89.6% from the class of 2008) was the only clue that Georgetown graduates might not be earning quite as much as the across-

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top-law-schools/law-school-03027 (last visited Feb. 17, 2013) (providing a figure for “Graduates known to be employed at graduation” with no explanation).

125. For an example of a law school webpage presenting some data concerning the subsequent outcomes of graduates taking school-funded positions, see *Employment Data 9 Months After Graduation*, WASH. & LEE SCH. L., <http://law.wlu.edu/admissions/ninemonthdata.asp> (last visited Feb. 17, 2013) (“For the Class of 2011, 64 students were enrolled in the program at graduation and 12 remained in the program after nine months.”).

126. See *supra* note 60 (collecting evidence of upward skew); see also *infra* note 138 and accompanying text.

127. See *Employment Statistics*, GEO. L., <http://www.law.georgetown.edu/career/EmploymentStatistics.htm> (last visited July 3, 2012). Note that as of August 5, 2012, this page is no longer available online. For sources linking to the original page, see, for example, Twistedwrister, Comment to *Detailed Employment Stats*, TOP-LAW-SCHOOLS.COM (Feb. 18, 2012, 11:28 PM), <http://www.top-law-schools.com/forums/viewtopic.php?f=1&t=174447&start=100>.

the-board “\$160,000” implies. Indeed, a separate page titled “Employment Data for 2011 Graduates” reveals that the response rate for private sector salaries has dropped further to 60.8%.<sup>128</sup> Georgetown again reported a 25th percentile, median, and 75th percentile of \$160,000.<sup>129</sup> Under NALP reporting guidelines, schools can enter salaries for non-reporting graduates when such data are available to the public.<sup>130</sup> Entry-level salaries are known far more often for large firms, which happen to have the highest salaries.<sup>131</sup> It is therefore fair to conclude that of the 39.2% of 2011 Georgetown graduates working in private practice whose compensation numbers were not part of the law school’s salary survey data, few if any of them earned \$160,000. If so, the 25th percentile for 2011 graduates’ private sector salaries (that is, for all 2011 graduates working in private practice, as opposed to those whose salaries Georgetown used to calculate its statistics) cannot have been close to \$160,000, and the median may also have been well below the advertised number.

At Wayne State University, the law school’s career services office reports: “2010 Career Stats: 85.9% of our 2010 graduates seeking employment were successful in obtaining a job within nine months after graduation with an average starting salary of \$72,471.”<sup>132</sup> The page provides no disclaimer concerning the tendency of higher-paid graduates to report salaries.<sup>133</sup> When one scrolls down the page, one learns the “average” is the arithmetic mean; the median salary is \$60,000.<sup>134</sup> Further, of Wayne Law’s 145 graduates (122 of whom reported being employed), only 51 reported a salary.<sup>135</sup> A more accurate summary of the data collected by Wayne Law would be: “Last year we graduated 145 students, and no more than 25 of them (17%) reported salaries above \$60,000.”

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128. *Employment Data for 2011 Graduates*, GEO. L., *supra* note 111.

129. *See id.*

130. *See* authorities cited *supra* note 60.

131. *See* NALP, 2011 SUMMARY REPORT, *supra* note 60, at 2.

132. *Wayne Law: Class of 2010 Career Statistics*, WAYNE ST. U., <http://law.wayne.edu/career-services/2010stats.php> (last visited Feb. 17, 2013).

133. A prospective Wayne Law student might have questioned the salary numbers more carefully upon reading a January 2011 *National Jurist* article by the school’s dean. *See* Robert Ackerman, *Is Law School Worth It? A Dean Looks Behind the Numbers*, NAT’L JURIST (Jan. 31, 2011, 8:36 AM), <http://www.nationaljurist.com/content/critical-issues/law-school-worth-it-dean-looks-behind-numbers> (“I suspect that those with higher salaries are more likely to report this data than their lower salaried peers, so I do not put too much stock in our \$100,000 median salary figure for those employed in the private sector.”). The Ackerman article was also posted on the Wayne Law website. Robert Ackerman, *Is Law School Worth It? A Dean Looks Behind the Numbers*, DEAN BOB L. BLOG, (Jan. 31, 2011) <http://blogs.wayne.edu/lawdean/2011/01/31/is-law-school-worth-it-a-dean-looks-behind-the-numbers/>.

134. *Wayne Law: Class of 2010 Career Statistics*, WAYNE ST. U., *supra* note 132.

135. *Id.*

On the “Out of State FAQ” webpage provided by the University of Alabama School of Law, prospective students can read, “The starting average salary for a 2009 Alabama Law graduate was \$67,128. That figure would be even higher, but many graduates choose to work for less salary as judicial clerks or in public interest positions (salary figures are also impacted by geography).”<sup>136</sup> No context is provided for the statistic.<sup>137</sup>

Some law schools have begun releasing more forthright employment information. For example, on the “Employment Data” page of the University of Wisconsin Law School’s webpage, prospective students are informed: “Because we receive starting salary data from fewer than half of our most recent graduates, and because the data we do receive tends to be disproportionately from graduates who join larger law firms which pay the highest salaries, the Law School is not in a position to provide complete and accurate salary information about what our most recent graduates earn.”<sup>138</sup> Loyola Law School (Los Angeles) took a middle course, choosing to present the misleading statistics along with a warning: “Salary figures were not reported by all respondents. Data reflects full-time, long-term positions only and excludes comparatively high or low anomalous figures. Salary figures are not reported for self-employed. For national salary statistics, please consult the National Association for Law Placement, Inc. . . .”<sup>139</sup> Loyola’s choice is perhaps reasonable.<sup>140</sup> A prospective applicant might prefer incomplete (and upwardly skewed) salary data to no data at all. The presence of a warning similar to, or more robust than, Loyola’s should be considered a minimum standard for a law school that wishes to present alumni salary data without being accused of misrepresentation.<sup>141</sup>

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136. *Out of State FAQ*, U. ALA. SCH. L., <http://www.law.ua.edu/career-services/prospective-students/out-of-state-faq/> (last visited Jan. 8, 2013).

137. On the “Prospective Students” page, there is a link to the “Placement Summary” forms submitted by Alabama to the ABA for the classes of 2011 and 2010. *Prospective Students*, U. ALA. SCH. L., <http://www.law.ua.edu/career-services/prospective-students/> (last visited Jan. 8, 2013). Those forms do not, however, have any salary data.

138. *Employment Data*, U. WIS. L. SCH., <http://law.wisc.edu/career/employmentdata/index.html> (last visited Feb. 17, 2013).

139. *Employment Report for the Class of 2011*, LOY. L. SCH. (February 15, 2012), <http://intranet.lls.edu/careerservices/stats/employmentstats.pdf>.

140. The reasonableness will depend, in part, on the accuracy of the disclaimer. A reader cannot know, for example, how many “comparatively high” salaries Loyola excluded from its calculations.

141. For an example of an inadequately robust disclaimer of misleading salary data, see *NYLS 2011 Stats*, *supra* note 81 (stating, in small type, “Salary information on this chart does not include compensation reported by those employed part time. For employment settings for which five or fewer graduates reported salaries, salary information is intentionally left blank to protect the privacy of the graduates.”).

Although a new ABA regulation enacted during summer 2012 requires some disclosures concerning salary data,<sup>142</sup> it leaves substantial room for interpretation and does not explicitly require that schools explain why the data as currently collected is so unreliable. In particular, one could argue about what it means to “clearly identify” the “number of salaries and the percentage of graduates included in” salary data calculations.<sup>143</sup> Because prospective students may not understand the significance of small sample sizes—especially if the skewed nature of the sample is not explained—merely stating the raw numbers will not suffice to avoid misrepresentation.

#### 4. *Scholarships with Terms Written in Fine Print*

While unduly rosy employment statistics serve to increase the apparent worth of a law degree, law schools further boost the apparent value of legal education by offering merit-based scholarships to especially desirable applicants. Unfortunately, as Professor Jerry Organ has documented, many scholarship offers come with fine print not comprehended by the offerees, causing entering students to misunderstand the terms of their merit awards.<sup>144</sup> Organ notes:

[A]t the present moment, there is a profound information asymmetry between law schools and prospective law students when it comes to scholarship offers. At many Competitive Law Schools, the law schools are keenly aware of the impact of a forced curve on first-year grades and know that they have offered scholarships to significantly more first-year students than can possibly renew their scholarships under the renewal conditions attached to the scholarships. Prospective law students, by contrast, have generally performed very well academically, frequently have not experienced how a forced grading curve functions and well may perceive that by being granted a scholarship, they are among the “best students” and should be able to remain among the “best students” and retain a GPA or class rank that allows them to renew their scholarship. They are not aware that the law school has given out more scholarships than possibly can be renewed and are not informed by the law school of the likelihood of non-renewal.<sup>145</sup>

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142. See ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 509 Interpretation 509-3 (“Any information, beyond that required by the Council, regarding graduates’ salaries that a law school reports, publicizes or distributes must clearly identify the number of salaries and the percentage of graduates included in that information.”).

143. *Id.* Must this information appear on the same page as the salary numbers? In the same type size?

144. See Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. LEGAL EDUC. 173, 190 (2011). For more on law school scholarships (and recent criticism of certain practices), see Paul L. Caron, *Merit Scholarships, Grading Curves & US News as Law School Bait and Switch*, TAXPROF BLOG (May 2, 2011), [http://taxprof.typepad.com/taxprof\\_blog/2011/05/more-on-.html](http://taxprof.typepad.com/taxprof_blog/2011/05/more-on-.html) (collecting links to several articles).

145. Organ, *supra* note 144, at 190. A “competitive” law school is defined as one at “which students receiving scholarship assistance as first-year students will re-

For those unfamiliar with contingent merit scholarships—that is, scholarships renewable for the second and third year of law school only if the recipient performs well (beyond mere good academic standing) during the first year—Organ’s conclusions may require some unpacking. Let’s start from the bottom and work upward. First, it is often literally impossible for all scholarship recipients to retain their awards after the first year. Schools have been documented giving more merit awards than can be renewed (e.g., granting scholarships to over half of the entering class, while reserving renewal to those ranking in the top third in first-year grades).<sup>146</sup> Because law school is often graded on a “forced curve,” scholarship renewal for all recipients can be impossible even if schools set a GPA benchmark (e.g., 3.2 or 3.3) instead of using class rank.<sup>147</sup> Second, prospective law students do not know how many of their future classmates have been awarded scholarships, meaning that even if they know, for example, that they must finish in the top third of the class to retain their money, they do not know that half the class has the same deal. Third, because prospective law students overestimate their own abilities (as does pretty much everyone),<sup>148</sup> they do not realistically assess their own likely performance in law school. Fourth, this optimism bias is exacerbated by the different grading schemes used by law schools and by the undergraduate programs from which most law students come. For many law students, it is not easy to imagine themselves ending up with a GPA below 3.0—every good student they knew in college performed

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tain their scholarships only if they perform to a certain level, e.g., in the top one-quarter or top one-third of the first-year class.” *Id.* at 173.

146. See Steven Harper, *Law School Deception, Part 3*, AM. LAW. DAILY (May 22, 2011, 5:31 PM), <http://amlawdaily.typepad.com/amlawdaily/2011/05/harper052011.html> (describing program at Golden Gate University School of Law). According to a study by Organ of 160 law schools, “it appears that 122—over 75%—have some type of ‘competitive’ scholarship program while only thirty-one—fewer than 20%—have a ‘non-competitive’ scholarship program.” Organ, *supra* note 144, at 183. A “non-competitive” scholarship program is one “in which students receiving scholarship assistance as first-year students will retain their scholarships provided they remain in good academic standing.” *Id.* at 173–74.
147. See Jeffrey Evans Stake, *Making the Grade: Some Principles of Comparative Grading*, 52 J. LEGAL EDUC. 583, 599–600 (2002). The details of law school grading curves are often confidential, meaning students cannot easily translate a GPA benchmark into class rank.
148. See TAMANAHA, *supra* note 14, at 142; James A. Shepperd et al., *Exploring the Causes of Comparative Optimism*, 42 PSYCHOLOGICA BELGICA 65, 65 (2002) (“Comparative optimism refers to the tendency for people to believe that they are less likely to experience negative events and more likely to experience positive events than are other people.”).

far better<sup>149</sup>—yet half or even two-thirds of the first-year class falls below this standard under merciless law school grading curves.<sup>150</sup>

Both Organ and Law School Transparency have called for more robust disclosure of scholarship details, proposing that law schools should release sufficient data to allow prospective students to calculate the expected value of their merit-aid offers.<sup>151</sup> The ABA adopted rules during the summer of 2012 that require schools to release some additional scholarship data.<sup>152</sup> It will take some time, however, to see how law schools respond to the new rules. One new requirement, that

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149. See Catherine Rampell, *A History of College Grade Inflation*, N.Y. TIMES (July 14, 2011, 10:00 AM) <http://economix.blogs.nytimes.com/2011/07/14/the-history-of-college-grade-inflation/> (“Most recently, about 43 percent of all letter grades given were A’s, an increase of 28 percentage points since 1960 and 12 percentage points since 1988.”).
150. See, e.g., GOLDEN GATE UNIV. SCH. OF LAW, STUDENT HANDBOOK 2011–2012, at 88–89 (2011) (noting that the maximum portion of students allowed to receive grades of “B- and above” in first-year courses is 70%, and the minimum is 45%). A grade of B- translates to a 2.67 for GPA calculations. *Id.* at 87; see also SOUTH TEX. COLL. OF LAW, STUDENT HANDBOOK 2011–2012, at 84 (2011) (“The class average shall be 2.85–3.15.”); *Grades, GPAs, Class Standing, and Honors*, U. WIS. L. SCH., <http://law.wisc.edu/current/rtf/09.0.html> (last visited Jan. 8, 2013) (“The Law School’s guidelines for faculty to use in assigning grades provides that for all first-year courses, and for advanced classes with an enrollment exceeding 30, the mean grade (i.e., the class average) should fall between 2.85 and 3.1 on the 4.3 scale.”). Not all schools have such tough curves. See, e.g., *Grading Policy*, U. TEX. SCH. L., <http://www.utexas.edu/law/sao/academics/gradingpolicy.html> (last visited Feb. 17, 2013) (“The expected mean grade in all courses other than seminars shall be 3.30.”). Note that the inclusion of a law school’s grading policy in this footnote is not meant to imply that the school awards contingent merit scholarships. Texas, for example, requires only that a student remain in good academic standing. Cf. *Scholarships*, UNIV. TEX. SCH. L., <https://www.utexas.edu/law/finaid/scholarships/> (last visited Jan. 7, 2013) (showing 99% retention rate).
151. See Organ, *supra* note 144, at 190, 194 (“[T]here is a profound need for greater clarity and transparency with respect to scholarship awards and renewal rates.”); *Proposing a New Standard to Require Scholarship Retention Information*, L. SCH. TRANSPARENCY (Apr. 30, 2011, 9:27 PM), <http://www.lawschooltransparency.com/2011/04/proposing-a-new-standard-to-require-scholarship-retention-information/>.
152. See Debra Cassens Weiss, *No Fudging: Revised Standard Bars Law Schools from Publishing Misleading Consumer Info*, ABA J. (Aug. 6, 2012, 11:46 AM), [http://www.abajournal.com/news/article/no\\_fudging\\_revised\\_standard\\_bars\\_law\\_schools\\_from\\_publishing\\_misleadin/](http://www.abajournal.com/news/article/no_fudging_revised_standard_bars_law_schools_from_publishing_misleadin/); Karen Sloan, *ABA Backs off Making Law Schools Report Graduates’ Salaries*, NAT’L L.J. (Mar. 19, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&ABA\\_backs\\_off\\_making\\_law\\_schools\\_report\\_graduates\\_salaries\\_](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&ABA_backs_off_making_law_schools_report_graduates_salaries_) (“The ABA’s Council of the Section of Legal Education and Admission to the Bar on March 17 gave preliminary approval to a new accreditation standard that would require law schools to report additional details about their scholarship retention rates . . .”). The revision adds “conditional scholarships” to the list of subjects about which law schools must publish consumer information, and it mandates the posting of consumer information online. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 103 (2012), available at <http://>



a law school “shall publicly disclose on its website consumer information [about] . . . conditional scholarships,”<sup>153</sup> leaves substantial room for interpretation. Perhaps more promising is the new rule providing: “A law school shall publicly disclose on its website, in the form designated by the Council, its conditional scholarship retention data. A law school shall also distribute this data to all applicants being offered conditional scholarships at the time the scholarship offer is extended.”<sup>154</sup> Depending on what specific disclosures the Council requires—and the form in which it is displayed to offerees—this information could be helpful.

Regardless of what is required by the ABA, NALP, *U.S. News*, or other entities collecting data from law schools, law schools should immediately begin disclosing material information to scholarship offerees. Such information includes the percentage (disaggregated for the first-year, second-year, and third-year classes) of students receiving merit aid, the raw number of such students in each class, the mean and median of the awards for each class, and the percent of students (in the second- and third-year classes) receiving merit aid during the previous year whose scholarships were renewed.<sup>155</sup> This information should be prominently displayed on law school websites, and it should be included with all scholarship offers. In addition, when making new offers, schools should disclose the approximate percentage of students in the entering class likely to hold similar scholarships. While exact data will not be available at the time admissions and scholarship offers are made, a useful disclosure might read something like, “In the most recent first-year class, [40] percent of the class held a merit scholarship contingent on maintaining a GPA of [3.2], and we expect [a similar number] of next year’s entering students will have similar awards. In recent years, about [20] percent of the first-year class has maintained a GPA at or above [3.2], causing [half] of the scholarship recipients to forfeit their awards.”<sup>156</sup> Without such a disclosure, a statement like “we hereby offer you a merit scholarship of \$10,000 per year, renewable upon the maintenance of a 3.2 GPA” is materially misleading.

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[www.abanow.org/2012/06/2012am103/](http://www.abanow.org/2012/06/2012am103/) (follow “Proposed Resolution and Report” link) (providing blackline showing changes to ABA Standard 509).

153. ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 509(b)(2).

154. *Id.* Approval Standard No. 509(e). The “Council” mentioned is the Council of the ABA’s Section of Legal Education and Admissions to the Bar.

155. *See* Organ, *supra* note 144, at 194.

156. The information in brackets would of course vary from one school to another.

### 5. *Underreported Law School Debt and Other Matters*

In addition to the marketing strategies discussed above, a few other matters deserve some attention here even though space constraints preclude a thorough exploration. First, law schools have long understated the amount of educational debt incurred by their students, with some schools recently admitting they have underreported their graduates' indebtedness by as much as two-thirds. Second, loan repayment assistance programs—often described as a way for students to pursue public interest law without servicing large debts<sup>157</sup>—contain complex eligibility rules that preclude many graduates from participating. Third, the focus on employment statistics concerning recent graduates—NALP and ABA data collection from law schools concerns current students and recent graduates almost exclusively—prevents prospective students from evaluating the longer-term economic value of legal education.

*Underreported Debt.* Each year, law schools report to the ABA on their students' educational loans. News media then review the data and report on matters like the “average education debt for law grads” and the schools with the highest and lowest per capita debt loads.<sup>158</sup> Prospective students might reasonably believe the numbers reported in such stories represent the “average education debt” (or at least the average amount borrowed for law school) of law graduates. Because it can be difficult to estimate the cost of housing, books, and other costs, the amount borrowed by recent graduates could be helpful in predicting the real cost of legal education. Unfortunately, the numbers reported systematically understate the actual indebtedness of graduates. The ABA requests schools to report “[t]he average amount borrowed in law school by . . . J.D. graduates who borrowed at least one education loan in law school.”<sup>159</sup> In the instructions for that question, the ABA states that schools should “only include information for . . . law school debt (e.g. not including undergraduate debt)” and that schools should report the “[t]otal loans for law school processed through the university or law school financial aid office,” a number that should “not include post J.D. loans (i.e. bar loans) even if distributed prior to graduation.”<sup>160</sup> If schools follow these instructions, the

157. See *infra* note 164 and accompanying text.

158. E.g., Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, ABA J. (Mar. 28, 2012, 5:29 AM), [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m/](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/).

159. AM. BAR ASS'N, 2010 ANNUAL QUESTIONNAIRE pt. 4, at 6 (2010), available at [http://lawschooltransparency.com/documents/Annual\\_ABA\\_Questionnaires/2010/2010%20AQ%20Part%204%20-%20Financial%20Aid.pdf](http://lawschooltransparency.com/documents/Annual_ABA_Questionnaires/2010/2010%20AQ%20Part%204%20-%20Financial%20Aid.pdf).

160. *Id.* at 1. For a more recent (and substantially similar) version of the instructions, see AM. BAR ASS'N, 2012 ANNUAL QUESTIONNAIRE INSTRUCTIONS pt. IV, at 5 (2012), available at <http://www.americanbar.org/content/dam/aba/administrative/>

numbers reported as “average education debt” in *U.S. News* and other sources<sup>161</sup> will not account for debt accrued during law school, will not account for the common practice of bar loans, and will ignore any loans not processed by university financial aid offices.<sup>162</sup> All this combines to substantially understate the debt burden facing law school graduates, simply because the ABA questionnaire asks the wrong question. In addition, some schools failed to follow the forms’ instructions and vastly understated their numbers even further, erasing two-thirds of their students’ debts.<sup>163</sup>

*Confusing Loan Repayment Assistance Programs.* To encourage attendance by students interested in practicing public interest law, several law schools operate loan repayment assistance programs (LRAP), which provide some financial assistance to certain graduates.<sup>164</sup> The programs are advertised in law school marketing materials as a way to make public service affordable.<sup>165</sup> Space limitations in brochures prevent the presentation of details such as eligibility rules (what debt is covered, how much debt is covered, what jobs qualify), income caps (amount you may earn and still qualify, whether your spouse’s well-paid job counts toward the cap), and the effect of unemployment on eligibility (is there an application deadline soon after graduation, is someone unable to find a public interest job by then

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legal\_education\_and\_admissions\_to\_the\_bar/governancedocuments/2012\_part\_4\_financial\_aid.authcheckdam.pdf.

161. See, e.g., Ben Trachtenberg, Op-Ed., *Rethinking Pro Bono*, N.Y. TIMES, May 14, 2012, at A23 (repeating lowball debt figures based on submissions to ABA). I teach law for a living and write about legal education, yet it did not occur to me when writing the op-ed just cited that the debt figures were understated across the board. I think it is fair to assume that prospective law students are also misled by the figures currently collected and reported.
162. The numbers reported would also appear to ignore loan origination fees.
163. See *infra* at notes 280–83 and accompanying text.
164. See generally Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583, 587–89 (2011) (describing development of LRAPs); COMM’N ON LOAN REPAYMENT & FORGIVENESS, AM. BAR ASS’N, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE (2003) (analyzing the impact of the educational debt problem on the legal profession and society, and recommending a comprehensive package of programs, including LRAPs, to provide relief for and incentives to lawyers who want to pursue public service careers).
165. See, e.g., CORNELL LAW SCH., J.D. VIEWBOOK 2013, at 32 (2012), available at <http://www.lawschool.cornell.edu/admissions/apply/JD-Viewbook-2013.cfm> (“Through one of the nation’s most generous loan repayment programs, the Public Interest Low Income Protection Plan (PILIPP) provides sizable grants to help with the payment of student loans.”); VANDERBILT UNIV. LAW SCH., VIEWBOOK 2013, at 14 (2012), available at <http://law.vanderbilt.edu/prospective-students/admissions/request-a-viewbook/download.aspx?id=8388> (statement of a recent graduate) (“I wanted to be able to do policy work supporting the education and welfare of children, and Vanderbilt’s Loan Repayment Assistance Program makes it possible for me to do this work.”).

forever disqualified). In addition, the relationship between LRAPs and the federal income-based repayment (IBR) program is often murky.<sup>166</sup> Such information, sometimes but not always available on a law school website,<sup>167</sup> should be posted in prominent locations online, and marketing materials promoting LRAP should direct prospective students to the fine print, which varies importantly from one school to another.<sup>168</sup>

*Sparse Data on Long-term Employment Prospects.* NALP and ABA employment data, as well as that collected by *U.S. News*, concern law students and very recent graduates, largely ignoring the situations of graduates more than one year out of law school. Without such data, one cannot estimate the long-term economic value of a law degree, even if one somehow corrected all of the existing flaws with current employment statistics. For example, even if we somehow could learn the real median salary data for law school graduates—instead of seeing inflated numbers like those collected today<sup>169</sup>—that information would shed no light on how salaries change over time. Do students get better, higher-paying jobs, or do they wash out of the best paying jobs after a few years and settle for less remunerative work? A law school (or anyone else, for that matter) that collected accurate employment data for, say, the class of 2003 or 2008 would provide a valuable service.<sup>170</sup>

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166. See, e.g., TAMANAHA, *supra* note 14, at 119–25 (explaining effects of IBR on hypothetical law graduates); Dan, *Untangling the Tangled Web of LRAP and IBR*, NUTS & BOALTS (Oct. 8, 2010, 10:55 AM), <http://boaltalk.blogspot.com/2010/10/untangling-tangled-web-of-lrap-and-ibr.html>. But see Philip G. Schrag, *Failing Law Schools — Brian Tamanaha’s Misguided Missile*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013) (reviewing Tamanaha and arguing that the new Pay As You Earn (PAYE) plan provides better options than were previously available under IBR). Among other unsettled issues is the potential tax liability of graduates participating in IBR/PAYE. See Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later*, N.Y. TIMES, Dec. 14, 2012, at B1 (“For many people, especially those who finished graduate or professional school with six figures of debt, the tax bill could be well into the five figures. And when it comes, you are supposed to pay in full, immediately.”).
167. See, e.g., *Loan Assistance Repayment Program FAQs*, N.Y.U. SCH. L., <http://www.law.nyu.edu/financialaid/lrap/lrapfaq/index.htm> (last visited Jan. 8, 2013).
168. See Schrag & Pruett, *supra* note 164, at 588–89 (describing differences among programs). Someone who collected and reviewed all the fine print and then made the details available in a format accessible to prospective applicants, especially one allowing comparisons among law schools, would provide a valuable service.
169. See *supra* subsection II.C.3.
170. For an example of the limited research in this area, see Jeffrey Evans Stake et al., *Income and Career Satisfaction in the Legal Profession: Survey Data from Indiana Law School Graduates*, 4 J. EMPIRICAL LEGAL STUD. 939 (2007).

### III. LEGAL ETHICS RULES PROHIBIT DISHONEST LAW SCHOOL MARKETING

In addition to violating moral norms against lying, dishonest law school marketing, when committed by lawyers, violates rules of professional conduct enacted to regulate the legal profession. This Part reviews professional conduct rules that law school officials have violated with misleading statements about legal education. Specifically, Rule 8.4(c) of the *Model Rules of Professional Conduct* prohibits lawyers from engaging in “dishonesty, fraud, deceit, and misrepresentation.”<sup>171</sup> Courts and disciplinary bodies have interpreted state rules modeled on this provision to cover dishonest conduct beyond the practice of law. Further, Rule 8.3(a) requires that lawyers report certain misconduct of other lawyers.<sup>172</sup> Although the precise application of the Model Rules—or, to be more precise, the rules of professional conduct of the several states—to dishonest law school marketing is debatable, two things are clear: First, at least some dishonest law school marketing has violated at least some ethical rules. Second, little if any disciplinary action has resulted from these violations.

#### A. Rule 8.4(c): No Dishonesty, Fraud, Deceit or Misrepresentation

Model Rule 8.4 lists various kinds of lawyer misconduct. Rule 8.4(c) provides, “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>173</sup> When interpreting provisions based on this model rule,<sup>174</sup> state courts and disciplinary bodies have made clear that lawyers are subject to discipline for dishonest conduct even when that conduct does not directly involve the practice of law, so long as the

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171. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2012), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html). Although the ABA's *Model Rules of Professional Conduct* do not have the force of law, they serve as the basis of the majority of state legal ethics codes. See LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 27, 40 (2d ed. 2008). When this Article refers to a provision as “Rule” or “Model Rule” without citing a specific state code, the ABA's *Model Rules of Professional Conduct* are the intended referent. For an edition of the Model Rules that includes state variations from each Rule, see STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2012).

172. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2012). Brief attention is also given below to Rule 7.1, which prohibits false and misleading communications about lawyers and their services, and to Rule 5.1, which requires that supervisory lawyers make reasonable efforts to ensure ethical conduct by their subordinates.

173. *Id.* at R. 8.4(c).

174. For state provisions with text identical or materially identical to the Model Rule, see ALA. RULES OF PROF'L CONDUCT R. 8.4(c) (2012); ALASKA RULES OF PROF'L CONDUCT R. 8.4(c) (2009); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(3) (2012).

conduct calls into question whether the lawyer possesses the honest character necessary for the practice of law.<sup>175</sup> Accordingly, a lawyer-parent who knowingly lies to a child about the presence of ice cream in the freezer has not violated Rule 8.4(c).<sup>176</sup> But a lawyer-landlord who files a false police report to harass a tenant would be subject to discipline.<sup>177</sup>

The story of Oregon lawyer Jim Carpenter illustrates the sort of dishonest conduct unrelated to legal practice that can result in professional discipline of a lawyer. Engaging in what he later described as a “practical joke,” Carpenter created a *Classmates.com* profile in the name of a high school contemporary.<sup>178</sup> The impersonated acquaintance was a high school teacher, and Carpenter wrote in the fake profile, “Hey all! How is it going. I am married to an incredibly beautiful woman, AND I get to hang out with high school chicks all day (and some evenings too). I have even been lucky with a few. It just doesn’t get better than this.”<sup>179</sup> After a third party alerted the impersonated teacher’s employer about the posting, which the teacher denied having written, a police investigation eventually revealed Carpenter’s deceit.<sup>180</sup> Carpenter admitted his wrongdoing but argued that it did not violate the professional conduct rules governing Oregon lawyers.<sup>181</sup>

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175. *See, e.g., In re Serritella*, 125 N.E.2d 531, 534 (Ill. 1955) (“[W]e are interested in their private conduct only in so far as such relates to their professional competence or affects the dignity of the legal profession.”); *see* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 04-433 (2004) (“Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law”); *see also* Josh Gerstein, *Clinton Eligible, Once Again, to Practice Law*, N.Y. SUN (Jan. 17, 2006), <http://www.nysun.com/national/clinton-eligible-once-again-to-practice-law/25965/> (mentioning “the law license [President Bill Clinton] gave up as a consequence of the inaccurate responses he gave under oath to questions about his relationship with a White House intern”).

176. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 65.5, at 65-15 (3d ed. 2012) (“[C]ourts and disciplinary authorities applying Rule 8.4(c) . . . commonly have given it a sensible reading that forgives truly trivial deceptions and misrepresentations . . .”).

177. *See In re Schaeffer*, 45 A.3d 149 (Del. 2012) (imposing public reprimand on lawyer who falsely reported a “hostage situation” during 911 call); *In re Grossman*, 211 N.W.2d 21 (Mich. 1973) (false police report); *In re Asbell*, 640 A.2d 837 (N.J. 1994) (false police report); *see also In re Siegel*, 627 A.2d 156 (N.J. 1993) (holding that lawyer who steals from partners violates Rule 8.4(c) even if no client is defrauded).

178. *In re Carpenter*, 95 P.3d 203, 206 (Or. 2004).

179. *Id.*

180. *Id.* at 206–07.

181. The *Oregon Code of Professional Responsibility* provision at issue was Disciplinary Rule 1-102(a)(3), which provided, “It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.” As of January 1, 2005, the *Oregon Rules of Professional Conduct* (which are based on the ABA Model Rules) replaced the *Oregon Code* (which had been based on the older ABA *Model Code of Professional Responsibility*) in its entirety. For the current provision, *see* OR. RULES OF PROF’L CONDUCT R. 8.4(a)(3) (2012).

The initial trial panel dismissed the complaint against Carpenter, finding that the rule prohibiting dishonesty does not “does not extend to the kind of non-professional, unregulated conduct found in this case.”<sup>182</sup>

A divided Supreme Court of Oregon disagreed and imposed a public reprimand.<sup>183</sup> The court began by noting that the prohibition on lawyer dishonesty “contains no requirement that, to violate that rule, the lawyer’s conduct must be subject to criminal or administrative sanctions” and that while the rule “does refer to ‘professional misconduct,’ this court has held that the rule does not require that the lawyer be acting in his or her capacity as a lawyer.”<sup>184</sup> The court then explained how it distinguished punishable dishonesty from those lies unrelated to law practice that sit beyond the scope of the rules of professional conduct:

[T]his court examines lawyer conduct that occurs outside the scope of professional relationships, such as that of attorney and client, to determine whether the conduct jeopardizes the public’s interest in the integrity and trustworthiness of lawyers. Not every lawyer misstatement poses that risk: telling the story of Santa Claus to children is an example. Instead, there must be a rational connection between the conduct that gives rise to an allegation of a rule violation and the purpose of the lawyer discipline system. That is, the accused lawyer’s conduct must demonstrate that the lawyer lacks those characteristics that are essential to the practice of law.<sup>185</sup>

In this case, the court found that Carpenter exhibited “dishonesty” when he impersonated the teacher, that the dishonesty wasted the time of public officials and subjected the teacher to hassle and embarrassment, and that the conduct “reflects adversely on the accused’s fitness to practice law, because it causes us to question whether the accused possesses the requisite trustworthiness and integrity to handle important matters involving legal rights that clients commonly entrust to lawyers.”<sup>186</sup>

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182. *Carpenter*, 95 P.3d at 207.

183. *Compare id.* at 214 (“The accused is publicly reprimanded.”), *with id.* (Balmer, J., dissenting) (agreeing that prohibited misconduct can “include conduct by a lawyer involving ‘dishonesty, fraud, deceit, or misrepresentation,’ even if that conduct does not violate the criminal law or occur in the course of the practice of law” but rejecting “the majority’s conclusion that the accused’s conduct in this instance violated” the rule).

184. *Id.* at 207 (citing *In re Coe*, 731 P.2d 1028 (Or. 1987)); *see also In re Germundson*, 724 P.2d 793 (Or. 1986) (holding that a lawyer violated the prohibition on dishonesty by enrolling as a student in a class he was teaching in order to avoid a reduction in government benefits when the lawyer knew he could not receive credit as a student); *In re Houchin*, 622 P.2d 723 (Or. 1981) (holding that a lawyer violated this rule by executing a promissory note as a representative of a corporation when the lawyer knew he had no authority to act as such a representative).

185. *Carpenter*, 95 P.3d at 208.

186. *Id.* at 210. The court noted that the existence of rumors in the community concerning a sexual relationship between the teacher and a high school student did not remove the taint of dishonesty from Carpenter’s impersonation of the

Other, less salacious cases illustrate that lawyers can face discipline for lying, even if no clients or courts are involved. The District of Columbia Court of Appeals imposed a thirty-day suspension on a lawyer who “falsified his resume and altered his law school transcripts in an attempt to obtain legal employment in California.”<sup>187</sup> The Supreme Court of Washington suspended a lawyer for ninety days for similar—but more extensive—conduct.<sup>188</sup> The Supreme Court of Louisiana imposed a six-month suspension, with all but sixty days deferred, upon a lawyer who made false statements about his domicile in the context of running for public office.<sup>189</sup> The Supreme Court of Illinois censured a lawyer (with dissenting justices calling for more punishment) who plagiarized portions of academic work submitted toward an LL.M. degree.<sup>190</sup>

In light of the common application of Rule 8.4(c) to lawyers who engage in dishonesty unconnected with the practice of law, there is little doubt that dishonest law school marketing conducted by members of the bar justifies professional discipline. Paul Pless lied repeatedly, over a period of years, about the quality of incoming students at the University of Illinois College of Law, deceiving the ABA and *U.S. News*, along with prospective students and others who relied on statistics they compiled.<sup>191</sup> Mark Sargent conspired with colleagues to engage in similar conduct at Villanova.<sup>192</sup> Can anyone dispute that these men engaged in “conduct involving dishonesty, fraud, deceit or misrepresentation”? Surely serial dishonesty—committed with the purpose of gaming the rankings used by prospective students deciding whether and where to spend tens (if not hundreds) of thousands of dollars—is at least as serious a violation as falsifying a resume and transcript.<sup>193</sup> Pless is admitted to practice in Washington and committed his wrongdoing while employed in Illinois. Precedent in both

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teacher’s identity. Indeed, the teacher’s fragile reputation increased the damage caused by the fake profile. *Id.* at 209–10.

187. *In re Hawn*, 917 A.2d 693 (D.C. 2007).

188. *See In re Lavery*, 587 P.2d 157 (Wash. 1978). “He falsified his law school transcript to show a grade point average of 3.79 and wrote bogus and extremely favorable letters of recommendation over the photocopied signatures of several of his law school professors. These falsified documents were sent to prospective employers, both public and private, with letters of application for a job.” *Id.* at 157.

189. *See In re Richmond*, 996 So. 2d 282 (La. 2008).

190. *In re Lamberis*, 443 N.E.2d 549, 552–53 (1982); *id.* at 553 (Underwood, J., dissenting) (“Although I agree with the majority’s conclusion that respondent’s conduct warrants discipline, the censure imposed seems to me an inadequate response to the deliberate and deceitful nature of respondent’s conduct.”).

191. *See supra* notes 2–6 and accompanying text.

192. *See supra* notes 7–13 and accompanying text.

193. The ABA’s *Standards for Imposing Lawyer Sanctions* provide, “Absent aggravating or mitigating circumstances, . . . Disbarment is generally appropriate when . . . a lawyer engages in . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fit-



states compels a finding that Pless deserves professional discipline.<sup>194</sup> The same is true for Sargent, who is admitted in Massachusetts and lied in Pennsylvania.<sup>195</sup> As discussed below, lawyers with personal knowledge of the deceit practiced by Pless and Sargent likely have a professional duty to report their misconduct, and others—lawyers and nonlawyers alike—may refer the matter to disciplinary authorities upon a good faith belief that misconduct occurred.<sup>196</sup>

The same is also likely true for some of the other dishonesty catalogued above. Sargent and Pless present easy cases because their deceit was so brazen; closer questions are presented when law school officials approve advertisements and spread statistics that are merely misleading, rather than completely false. There has been some debate recently about whether Rule 8.4(c) covers such statements.<sup>197</sup> The

ness to practice.” ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard No. 5.11(b) (1992).

194. See *Lamberis*, 443 N.E.2d at 553 (censure for lawyer who submitted plagiarized thesis in course of obtaining master’s degree in law); *In re Lavery*, 587 P.2d 157 (Wash. 1978) (ninety-day suspension for lawyer who falsified law school transcript and forged letters of recommendation).
195. See *In re Barrett*, 852 N.E.2d 660, 667 (Mass. 2006) (misappropriation of corporate funds unrelated to law practice justifies discipline as “conduct that is dishonest or deceitful, or that adversely reflects on an attorney’s fitness to practice”); *In re Greenberg*, 280 A.2d 370, 373 (Pa. 1971) (stating that prohibition on “conduct involving dishonesty, fraud, deceit or misrepresentation’ . . . is not limited to conduct in the practice of law, but reaches to general activities”). Also, Sargent knew his lies would spread beyond Pennsylvania; he intentionally disseminated falsehoods nationwide. Sargent’s behavior is especially outrageous when one considers his position as leader of a religious law school, who described his duties as a “servant leader” as including helping his school serve as an antidote to “the detachment of professionalization from a commitment to justice, the triumph of business values, and the alienation of so many lawyers from their vocations.” Mark A. Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. Tol. L. Rev. 171, 173 (2001).
196. See *infra* sections III.B and III.C.
197. See *People v. Perez*, 946 N.Y.S.2d 835, 844–45 (N.Y. App. Div. 2012) (discussing memoranda prepared by professors of legal ethics and by retired judge of New York Court of Appeals); Memorandum of Prof. Marc O. DeGirolami at 6, *People v. Perez*, 946 N.Y.S.2d 835 (N.Y. App. Div. 2012) (Indictment No. 1202/09) (opining that Rule 8.4 does not cover “misleading” conduct but instead, “by the terms of the rule itself, it targets dishonest, fraudulent, and deceitful conduct, as well as conduct in which a lawyer openly misrepresents material facts or law”); Prof. Yaroshefsky’s April 14, 2010 Report (as Corrected April 27, 2010) with Cover Letters at 4, *People v. Perez*, 946 N.Y.S.2d 835 (N.Y. App. Div. 2012) (Indictment No. 1202/09) (“Rule 8.4(c) prohibits misleading conduct as well as affirmatively deceptive conduct irrespective of intent or knowledge of the lawyer.”). This case has attracted substantial attention in New York because it involves a finding by a state trial judge that the office of the Queens District Attorney has behaved unethically. See Daniel Wise, *D.A. Seeks to Bar Enforcement of Ruling Finding Office Unethical*, N.Y. L.J. (Apr. 30, 2012), [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202550601057&DA\\_Seeks\\_to\\_Bar\\_Enforcement\\_of\\_Ruling\\_Finding\\_Office\\_Unethical&slreturn=20120830144035](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202550601057&DA_Seeks_to_Bar_Enforcement_of_Ruling_Finding_Office_Unethical&slreturn=20120830144035).

District of Columbia Court of Appeals, considering a precursor to Rule 8.4(c), noted that the “most general term in DR 1-102(A)(4) is ‘dishonesty,’ which encompasses fraudulent, deceitful, or misrepresentative behavior.”<sup>198</sup> It continued, “In addition to these, however, it encompasses conduct evincing ‘a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . .’ Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.”<sup>199</sup> The court then concluded:

Given the “technically true” nature of respondent’s answers to questions posed by revenue agents, and his abstinence from actual false statements or affirmative acts of concealment, we decline to describe his financial arrangements and his parsimonious dissemination of information as either fraudulent, deceitful, or misrepresentative, which all describe degrees or kinds of active deception or positive falsehood. . . . We deem this issue a close one, however, and thus experience no difficulty in characterizing these arrangements as evincing a lack of integrity and straightforwardness, and therefore dishonest.<sup>200</sup>

Mere negligence, however, should not lead to findings of “dishonesty,” much less “fraud, deceit or misrepresentation.”<sup>201</sup> For example, the Supreme Court of Louisiana held that a lawyer whose billing practices were “sloppy” but did not involve “an intent to deceive” did not violate Rule 8.4(c).<sup>202</sup> Similarly, the Presiding Disciplinary Judge of the Supreme Court of Colorado found no violation resulting from a voicemail that “might have been poorly articulated, extemporaneous and made in haste, but [fell] short of clear and convincing evidence of

198. *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990). The District now uses rules based on the ABA *Model Rules of Professional Conduct*. Under the former disciplinary rules at issue in *Shorter*, DR 1-102(A)(4) provided that a “lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” D.C. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) (Repealed 1990). Model Rule 8.4(c) is materially identical. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2012).
199. *Shorter*, 570 A.2d at 767–68 (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)).
200. *Id.* at 768; see also *In re Estate of Corriea*, 719 A.2d 1234, 1242 (D.C. 1998) (“We take as a given that, for disciplinary purposes, dishonesty does not always depend on a finding of intent to defraud or deceive.”); *Att’y Grievance Comm’n v. Sheridan*, 741 A.2d 1143, 1156–57 (Md. 1999) (quoting *Shorter* with approval). *But see In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (“In the absence of affirmative proof of a fraudulent intent or state of mind, we hold that Hutchinson’s misdemeanor conviction did not establish a violation of DR 1-102(A)(4).”).
201. *E.g., In re Varriano*, 755 N.W.2d 282, 290 (Minn. 2008) (“The referee thus appears to have made a credibility determination that, despite what he should have known or suspected, Varriano did not in fact know or suspect the endorsement on the check was forged. We conclude that the referee’s finding that Varriano did not act dishonestly, and his conclusion that Varriano’s action in cashing the check did not violate Rule 8.4(c), are not clearly erroneous.”). *But see In re Quinn*, 184 P.3d 235, 313–14 (Kan. 2008) (holding that Rule 8.4(c) has no “requirement of wrongful intent in misrepresentation cases” as opposed to cases in which dishonesty, fraud, or deceit is charged).
202. *In re Lawrence*, 954 So. 2d 113, 117 (La. 2007).

an intent to deceive.”<sup>203</sup> Recklessness—a mental state more culpable than negligence but less culpable than intent—may be sufficient to support a Rule 8.4(c) violation, depending on the state.<sup>204</sup> Several states have no authority setting forth what mental state applies.<sup>205</sup>

In cases of technically accurate yet misleading law school marketing, the question is whether the lawyers involved exhibited either an intent to mislead or, in certain states, recklessness such that discipline is appropriate.<sup>206</sup> As knowledge of the highly misleading nature

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203. *People v. Chambers*, 154 P.3d 419, 426 (Colo. 2006).

204. *Compare In re Dodge*, 108 P.3d 362, 366 (Idaho 2005) (“[C]lear and convincing evidence both of misrepresentation and the intent or purpose to deceive is needed to demonstrate a violation of the rule.”), and *State ex rel. Okla. Bar Ass’n v. Besly*, 136 P.3d 590, 605 (Okla. 2006) (“Rule 8.4(c) has an intent requirement and to prove a violation the OBA must adequately show the attorney had a purpose to deceive.”), with *In re Ukwu*, 926 A.2d 1106, 1113–14 (D.C. 2007) (“[E]ven if Respondent’s conduct was in reckless disregard of the truth rather than specifically intended to deceive . . . he would have violated Rule 8.4(c).”), *In re Cleaver–Bascombe*, 892 A.2d 396, 404 (D.C. 2006) (“[A]n attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client . . . engages in dishonesty within the meaning of Rule 8.4(c).”), and *In re Fisher*, 202 P.3d 1186, 1203 (Colo. 2009) (“[A] mental state of at least recklessness is required for an 8.4(c) violation.”). See also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1982) (stating that reckless falsehoods should be covered by precursor to Rule 8.4(c)).

205. See *infra* notes 254–60 and accompanying text (discussing what standard is appropriate). *Compare In re Surrick*, 338 F.3d 224, 233–34 (3d Cir. 2003) (discussing Pennsylvania’s adoption of recklessness standard), with *id.* at 239 (Cowen, J., dissenting) (noting many states have not decided whether reckless statements are covered).

206. Although mere negligence is not sufficient for discipline under Rule 8.4(c), it is instructive to recall that misleading lawyer advertising is punishable under Rule 7.1 regardless of the intent behind a misleading communication. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2012); see also GILLERS ET AL., *supra* note 171, at 420–25 (collecting state variations). In lawyer advertising, “[t]ruthful statements that are misleading are prohibited.” MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 2 (2012). And Rule 7.1 treats as false or misleading any communication that “omits a fact necessary to make the statement considered as a whole not materially misleading.” *Id.* at R. 7.1. If a reasonable person might be misled by a piece of lawyer advertising, the communication is likely prohibited. See, e.g., *In re Anonymous*, 775 N.E.2d 1094 (Ind. 2002) (ordering a private reprimand where a lawyer placed ad in newspaper stating “Bankruptcy, but keep house & car” but failed to state that obligations to secured lenders must be reaffirmed in bankruptcy for debtor to keep house and car). To be fair, most misleading lawyer advertising goes unpunished, and the legal profession does a far from perfect job in policing lawyer misconduct. See Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 974 (2011) (“[A]dvertising regulation is simply one of many underenforced aspects of legal ethics codes.”). Nonetheless, true-but-misleading lawyer advertising is prohibited and sometimes results in professional discipline. The contrast with law school marketing could hardly be more stark. Whereas a lawyer using the phrase “specializing in matrimonial law” in an advertisement can be subject to discipline for implying

of commonly used statistics becomes more widely known in the legal academy, findings of intent and recklessness should become increasingly easy to reach.

### B. Rule 8.3(a): Duty to Report Significant Misconduct of Other Lawyers

Model Rule 8.3, titled “Reporting Professional Misconduct,” states that a “lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”<sup>207</sup> Analogous rules have been adopted by most states with some variations.<sup>208</sup> The mandatory reporting requirement has taken some criticism,<sup>209</sup> and few cases report the discipline of lawyers under Rule 8.3(a) absent some misconduct beyond the failure to report another lawyer’s violation.<sup>210</sup> Nonetheless, reporting the serious misconduct of other lawyers is a genuine professional duty, and lawyers have indeed been punished for failing to obey.<sup>211</sup>

As the language of the rule makes clear, not all rule violations create a reporting duty for other lawyers. Before one lawyer can be required to report the misconduct of another, the first lawyer must “know” of the violation. No definition of knowledge is provided in Rule 8.3 or its comments.<sup>212</sup> Most courts construing the rule have held that

certification as a specialist, *e.g.*, *In re Peperone*, 615 N.Y.S.2d 212 (N.Y. 1994), law schools commonly advertise the percentage of their graduates who are employed nine months after graduation without a prominent disclaimer concerning graduates employed by the university, graduates working part-time or temporary jobs, or graduates working outside the legal profession.

207. MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2012).

208. *See* GILLERS ET AL., *supra* note 171, at 489–93 (collecting state variations); *see, e.g.*, ILL. RULES OF PROF’L CONDUCT R. 8.3(a) (2010) (imposing narrower reporting requirement); IOWA RULES OF PROF’L CONDUCT R. 32:8.3(a) (2005) (requiring reporting of violations without “substantial question” qualifier); W. VA. RULES OF PROF’L CONDUCT R. 8.3(a) (1989) (adopting Model Rule). *But see* GA. RULES OF PROF’L CONDUCT R. 8.3(a) (2001) (making reporting permissive rather than mandatory); GILLERS ET AL., *supra* note 171, at 490 (“The California Rules of Professional Conduct have no comparable provision.”).

209. *See, e.g.*, Arthur Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003).

210. *See* 2 HAZARD & HODES, *supra* note 176, § 64.

211. *See In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988) (imposing one-year suspension); *In re Condit*, No. SB-94-0021-D (Ariz. Mar. 14, 1995) (en banc); *see also* Skolnick v. Alzheimer & Gray, 730 N.E.2d 4, 13 (Ill. 2000) (stating that “the duty to report misconduct is absolute” and mentioning “the certain discipline that flows from a breach of that duty”); Ronald Rotunda, *The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 985–91 (1988) (discussing when whistleblowing is required).

212. There is a definition of “knowingly,” “known,” and “knows” in the “Terminology” section of the Model Rules. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2012).

reporting is required only when a lawyer has a “substantial basis” for believing that a violation occurred, which has been interpreted as requiring more than mere probable cause; knowledge of a violation is analogized to a “clear belief . . . based on pertinent facts.”<sup>213</sup> Assuming a lawyer “knows” of another lawyer’s violation of the *Rules of Professional Conduct*, the next inquiry is whether the misconduct “raises a substantial question as to [the offending] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>214</sup> Not every rule violation raises such a substantial question; Rule 8.3(a) was intentionally drafted to cover only especially serious misconduct, unlike the prior Model Code provision.<sup>215</sup> A comment to the rule explains, “This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.”<sup>216</sup> While this standard is somewhat vague,<sup>217</sup> some patterns have emerged from various states’ interpretation of the rule. First, criminal acts deemed misconduct by Rule 8.4(b) normally must be reported.<sup>218</sup> Second, violations of Rule 8.4(c)—the rule prohibiting “dishonesty, fraud, deceit, and misrepresentation”<sup>219</sup>—can trigger the reporting requirement.<sup>220</sup>

If any conduct by a lawyer “raises a substantial question as to that lawyer’s honesty,” surely a years-long pattern of intentional deceit, like those committed by Paul Pless and Mark Sargent, qualifies.<sup>221</sup>

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Yet courts have stated that there is no definition when discussing Rule 8.3. *See, e.g., Attorney U v. Miss. Bar*, 678 So. 2d 963, 970 (Miss. 1996) (“Proper determination of this issue is hampered by Rule 8.3(a)’s failure to define ‘knowledge.’ The Official Comment adds nothing at all.”).

213. *Attorney U*, 678 So. 2d at 970–71 (quoting D.C. Bar Legal Ethics Comm., Ethics Op. 246 (1994)); *see also* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 185–86 (1999) (collecting cases and bar counsel opinions on the knowledge requirement).
214. MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2012).
215. *See* Richmond, *supra* note 213, at 177–79; *see also* MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 3 (2012) (“If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable.”).
216. MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 3 (2012).
217. *See* Greenbaum, *supra* note 209, at 285 & n.44.
218. *See* MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2012) (“It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”); Richmond, *supra* note 213, at 190–91.
219. *See supra* notes 173–96 and accompanying text.
220. *See* Richmond, *supra* note 213, at 191–93.
221. *See supra* notes 2–13 and accompanying text. The lengthy period of misconduct also evokes a comparison to Model Rule 5.1, which concerns “Responsibilities of Supervisors for Maintenance of Ethical Compliance” at law firms and other organizations practicing law. The rule provides:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm,

Who will vouch for the “trustworthiness” of these former law school administrators? As for their “fitness as a lawyer,” who would hire them? The question then becomes whether any lawyer “knows” of their misconduct and has a duty to report them to disciplinary authorities.<sup>222</sup> With respect to Pless, he committed his misconduct in Illinois, the state whose supreme court decided the most famous case imposing discipline on a lawyer for failing to report the misconduct of a fellow lawyer.<sup>223</sup> Surely there are lawyers at the University of Illinois who know of Pless’s misconduct with sufficient certainty that reporting is mandatory.<sup>224</sup> Sargent told his lies in Pennsylvania, which

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shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2012). In addition, “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” *Id.* at R. 5.1(b). Law schools are not law firms, and Rule 5.1 does not apply to deans and other “supervisors” in law school administrations. Nonetheless, the example of Rule 5.1(a), along with the theory behind its enactment, should be instructive to law school deans. Rule 5.1(a) “prevents the most influential lawyers in a firm—partners—from ignoring the behavior of other lawyers in their firms.” Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 Ky. L.J. 231, 238 (2007). Law schools are now aware that (1) at least some schools have brazenly lied about statistics to the ABA, *U.S. News*, and prospective students, (2) other schools have disseminated advertisements that use the schools’ data in a manner likely to mislead reasonable readers, (3) the unadorned data presented on law school websites and elsewhere is itself often misleading, and (4) law school scholarship offers often omit material information necessary to a fair evaluation of awards. Like partners at a firm, law school deans are the most influential members of their organizations, possessing the greatest ability to set expectations for ethical conduct and to ensure that employees live up to those expectations. Deans should make clear to their subordinates that misleading marketing is not to be tolerated, and they should establish practices and procedures for ensuring honest communications. Reasonable practices and procedures will not ensure perfection, especially if a rogue employee is willing to deceive superiors. Nevertheless, a good system would set a proper “tone at the top” and should catch most misleading communications before they are made.

222. See LERMAN & SCHRAG, *supra* note 171, at 99 n.74 (“[L]aw professors occasionally engage in misconduct that would be reportable under Rule 8.3 or its equivalent. If their colleagues are aware of such conduct but do not report it, those colleagues are violating the rule.”).
223. See *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988) (imposing one-year suspension); Richmond, *supra* note 213, at 182 (“*Himmel* clearly sent a message to the Illinois bar. In the first year after *Himmel* was decided, Illinois attorneys’ reports of professional misconduct increased by 500%.”).
224. See ILLINOIS REPORT, *supra* note 2 (presenting detailed report of outside investigators hired by the university). One odd wrinkle is presented because Pless is licensed in Washington, not Illinois. See Greenbaum, *supra* note 209, at 295–97 (discussing questions that “arise if the reporting lawyer and the lawyer potentially to be reported are licensed in different states”). As it happens, an Illinois advisory ethics opinion specifically addresses the issue. See Ill. State Bar Ass’n, Advisory Op. 94-23 (1995) (“Illinois Rules of Professional Conduct require a law-

also has a mandatory reporting rule.<sup>225</sup> Villanova officials possess a report prepared by outside counsel concerning Sargent's misconduct.<sup>226</sup> While the outside lawyers need not report information they learned while representing the university,<sup>227</sup> lawyers at Villanova "know" Sargent engaged in serious misconduct. For example, the law school's dean is a lawyer,<sup>228</sup> and it seems highly unlikely that he is ignorant of the conduct of his predecessor.

Some readers may wonder, having delved this far into an article that (1) accuses law school officials of serious ethical rule violations and (2) argues that lawyers with knowledge of such violations must report them, whether the author of such an article is required to report the violators identified in the article to appropriate disciplinary authorities. My answer is that I do not believe I am obliged to file any bar complaints. First, I am licensed to practice in New York,<sup>229</sup> and neither of the most egregious violations—that is, those of Pless and Sargent—involve New York lawyers.<sup>230</sup> (Then again, if a New York lawyer has a duty to report the misconduct of lawyers licensed in other jurisdictions,<sup>231</sup> this argument will not help me.) Second, nearly all my knowledge of the misconduct discussed above comes from pub-

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yer admitted to practice in Illinois to report misconduct of lawyers who are not admitted to practice in Illinois.”).

225. See PENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); Penn. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2002-11 (2002) (lawyer must report former partner who, despite lacking license to practice law in California, assisted a client with pro se appearance in that state). Because Sargent is licensed in Massachusetts, the issue of out-of-state lawyers is again presented. See *supra* note 224.
226. The other Villanova professor fired for involvement in the deceit, see *supra* note 29, is likely also a lawyer. Villanova officials with knowledge of that person's role likely have reporting obligations similar to those related to Sargent's misconduct.
227. See MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2012) (“This Rule does not require disclosure of information otherwise protected by Rule 1.6 . . .”); *id.* at R. 1.6 (providing broad rule of confidentiality for “information relating to the representation of a client”); Richmond, *supra* note 213, at 195–200 (noting that Rule 1.6 covers far more than is protected by the attorney-client privilege).
228. See Curriculum Vitae of John Yukio Gotanda 5, available at <http://works.bepress.com/gotanda/cv.pdf> (listing memberships in multiple bars).
229. I live in Missouri but am not licensed here. As far as I know, no Missouri-licensed lawyers are discussed anywhere in the article.
230. The New York Law School marketing, see *supra* notes 56–80, is a closer case. Without more information about the NYLS “study” and the mental state (and identities) of any lawyers who produced the marketing materials at issue, I believe that I do not have knowledge of serious professional misconduct.
231. There is not much authority on whether a lawyer licensed in one jurisdiction must report the misconduct of lawyers licensed elsewhere. See Greenbaum, *supra* note 209, at 296–97 (collecting a few advisory ethics opinions with divergent conclusions).

lic information available to every reader of this article,<sup>232</sup> implying that if I have a duty to report, so does anyone who has read from the start of the article to this sentence, at least if they trust my citations.<sup>233</sup> The reporting requirement is more sensibly limited to lawyers with first-hand knowledge of misconduct or, at a minimum, some access to information not widely available to the public.<sup>234</sup> The contrary interpretation, requiring anyone who reads reliable reports about misconduct to file a discipline complaint, would create an unenforceable rule and would undermine the purpose of Rule 8.3, which is to bring hidden misconduct to light.<sup>235</sup>

### C. How and Why to Use Bar Discipline to Curb Dishonest Law School Marketing

We have seen that lawyers have violated professional conduct rules by engaging in misleading law school marketing, and the worst offenders have thus far avoided professional discipline. Perhaps some bar complaints are in order. Anyone possessing good information that a lawyer has engaged in professional misconduct may file a bar complaint.<sup>236</sup> Further, in at least some states, disciplinary authorities have a practice of informing complainants of their responses to complaints, including when a complaint is deemed to be without merit.<sup>237</sup> If, for example, a complainant concerned about the good name of the University of Illinois College of Law were to report Paul Pless to the

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232. My non-public information is limited to what I have learned in response to earlier drafts, including some explanatory comments from law schools named in this article.

233. Indeed, a duty might similarly be imposed on anyone who read about Pless's and Sargent's conduct in a reputable newspaper.

234. For example, while news media have reported on the data manipulation committed by Pless at the University of Illinois, neither I nor the general public has access to the spreadsheets he altered, much less to the underlying student data.

235. See MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2012) ("Reporting a violation is especially important where the victim is unlikely to discover the offense."); see *also id.* at R. 8.3 cmt. 3 (noting that rule was written to avoid being "unenforceable," in contrast to predecessor rule that required too much reporting to be respected).

236. The complainant need not be a lawyer, much less a lawyer obligated to report under Rule 8.3.

237. See, e.g., *Filing a Complaint*, ST. B. CAL., <http://www.calbar.ca.gov/Attorneys/LawyerRegulation/FilingaComplaint.aspx> (last visited Feb. 17, 2013) ("At the end of the investigation you will be informed in writing if your complaint will proceed to prosecution in the State Bar Court or if it will be closed."); *How to Submit a Request for Investigation*, ATT'Y REGISTRATION & DISC. COMM'N SUP. CT. ILL., [https://www.iardc.org/htr\\_filingarequest.html](https://www.iardc.org/htr_filingarequest.html) (last visited Feb. 17, 2013) ("We will notify you in writing of our decision whether to investigate about two weeks after we received your request. If we determine that there is not a sufficient basis for us to investigate, our letter to you will explain the reasons for our decision.").



Washington State Bar Association, someone would inform the complainant whether Pless's conduct is considered serious enough to warrant a disciplinary proceeding.<sup>238</sup> If the complaint is dismissed, the complainant can request further consideration by a review committee of the disciplinary board.<sup>239</sup>

Some recent law graduates have filed lawsuits against their law schools, alleging all sorts of misconduct, including misrepresentation and deceit.<sup>240</sup> While it would of course be improper for these alumni to file bar complaints in an effort to gain advantage in a civil matter,<sup>241</sup> the existence of these suits implies that the plaintiffs sincerely believe that some law school officials have engaged in professional misconduct. A bar complaint will not yield the financial benefits sought in class-action litigation,<sup>242</sup> but it might provide some measure of justice and could encourage schools to improve their conduct. Also, law students and recent graduates are well placed to serve as private attorneys general.<sup>243</sup> They know the sorts of statistics collected by their law schools, such as salary data. They know the precise wording of scholarship offers. They have convenient access to marketing materials such as brochures, websites for admitted students not made available to the broader public, and statements of school officials sent in response to inquiries by prospective students.<sup>244</sup> Their willingness to expose misleading law school marketing would help to improve le-

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238. See *The Grievance Process*, WASH. ST. B. ASS'N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Discipline/File-a-Complaint-Against-a-Lawyer/The-Grievance-Process> (last visited Feb. 17, 2013).

239. See *id.*

240. See *infra* notes 242 and 247.

241. See *Futrell v. Kentucky Bar Ass'n*, 189 S.W.3d 541, 547 (Ky. 2006); Va. State Bar Disciplinary Bd., Order No. 08-052-071266 (2011).

242. The success of these suits is by no means certain. See, e.g., *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 856–57 (N.Y. Sup. Ct. 2012) (dismissing suit against law school and holding that “plaintiffs could not have reasonably relied on NYLS’s alleged misrepresentations . . . because they had ample information from additional sources and thus the opportunity to discover the then-existing employment prospects”), *aff'd*, 956 N.Y.S.2d 54 (N.Y. App. Div. 2012). The trial judge ruled, in essence, that no reasonable consumer would have relied on the law school’s statistics. See also Mark Hansen, *Judge Dismisses Alumni Lawsuits Against Two Chicago Law Schools*, ABA J. (Nov. 12, 2012, 3:02 PM), [http://www.abajournal.com/news/article/judge\\_dismisses\\_alumni\\_lawsuit\\_against\\_john\\_marshall\\_law\\_school/](http://www.abajournal.com/news/article/judge_dismisses_alumni_lawsuit_against_john_marshall_law_school/) (reporting dismissal of class-action suits against John Marshall Law School and Chicago-Kent College of Law).

243. See generally William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129 (2004) (defining “Private Attorney General”).

244. For example, if the recipient of a scholarship offer requests additional information by e-mail concerning the terms of the award, a law school official (if a lawyer) would be obligated by Rule 8.4(c) to avoid misrepresentations and deceit when replying.

gal education, and those who come forward should be admired for their courage.<sup>245</sup>

Another advantage of pursuing bar discipline is that, despite its problems, it beats the alternatives—at least some of them. Professors Morgan Cloud and George B. Shepherd have argued for criminal prosecution of law schools, their deans, and others for “mail and wire fraud, conspiracy, racketeering, and making false statements.”<sup>246</sup> I expect, however, that few if any prosecutors will jump at the chance to indict law school deans for federal felonies related to misleading law school marketing, irrespective of whether a good case exists in theory. Similarly, although the prospects of class action litigation against law schools are beyond the scope of this article, it will suffice to say that the plaintiffs’ success is far from certain.<sup>247</sup> Bar complaints, by contrast, may be filed without waiting for a prosecutor to bring a case, and complainants will not need to prove complex class action requirements such as “typicality.”<sup>248</sup> Given the quick response of the Illinois bar to *Himmel*—in which the state supreme court suspended a lawyer

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245. Complainants should of course have a good-faith basis for any complaints; frivolous complaints are not helpful. Even when acting with solid evidence of violations, however, complaining students and lawyers will take significant risks. See, e.g., *Jacobson v. Knepper & Moga, P.C.*, 706 N.E.2d 491 (Ill. 1998); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199 (2007).

246. Morgan Cloud & George B. Shepherd, *Law Deans in Jail*, MO. L. REV. (forthcoming). For some other perspectives on misleading law school marketing, see Daniel S. Harawa, Note, *A Numbers Game: The Ethicality of Law School Reporting Practices*, 24 GEO. J. LEGAL ETHICS 607 (2011); Bruce Strong, *Jewish Law and the Ethics of Law School Admissions Practices*, 25 GEO. J. LEGAL ETHICS 787 (2012); see also John Steele, Comment to *Ben Trachtenberg’s Article on Deceptive Law School Marketing*, LEGAL ETHICS FORUM (Dec. 27, 2012, 6:19 PM), <http://www.legalethicsforum.com/blog/2012/12/ben-trachtenbergs-article-on-deceptive-law-school-marketing.html> (linking to various earlier posts on related issues).

247. See *supra* note 242 (noting dismissal of suits against various schools); see also *MacDonald v. Thomas M. Cooley Law Sch.*, Case No. 1:11-CV-00831-GJQ, 2012 WL 2994107, at \*11 (W.D. Mich. July 20, 2012) (dismissing suit by alumni despite finding that “the statistics provided by Cooley and other law schools in a format required by the ABA were so vague and incomplete as to be meaningless and could not reasonably be relied upon”). But see *Arring v. Golden Gate Univ.*, No. CGC-12-517837 (Cal. App. Dep’t Super. Ct. July 19, 2012) (denying motion to dismiss); *Hallock v. Univ. of San Francisco*, No. CGC-12-517861 (Cal. App. Dep’t Super. Ct. July 19, 2012) (denying motion to dismiss); Mark Hansen, *Saying ‘Labels Matter,’ Judge Permits Law School Alumni Suit over Job Stats*, ABA J. (Dec. 4, 2012, 9:07 AM), [http://www.abajournal.com/news/article/judge\\_denies\\_thomas\\_jefferson\\_sols\\_motion\\_for\\_summary\\_judgment\\_of\\_alumni/](http://www.abajournal.com/news/article/judge_denies_thomas_jefferson_sols_motion_for_summary_judgment_of_alumni/) (reporting on denial of Thomas Jefferson School of Law’s summary judgment motion against lead plaintiff).

248. See FED. R. CIV. P. 23. Another benefit of bar discipline over litigation is that a bar complainant need not show damages. Deceit violates Rule 8.4(c) even if no one suffers harm. See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2012).

for failing to report the misconduct of another<sup>249</sup>—chances are that even a very small number of successful discipline cases concerning law school marketing could have a significant effect on the marketing practices of American law schools. If the supreme court of one state imposes some level of public discipline on a law school employee for sending a misleading brochure, greater attention to accuracy is likely to follow across the country.

In addition, because many bar associations offer advisory opinions about professional conduct rules,<sup>250</sup> lawyers could inquire about whether certain law school marketing tactics violate the rules of various states.<sup>251</sup> If the facts of an inquiry were sufficiently close to the actual practices of law schools, an opinion advising that the conduct violates ethical rules could be quite effective in encouraging law schools to adopt greater “fairness and straightforwardness.”<sup>252</sup> These advisory opinions could also serve to bring greater attention to misleading law school marketing among the bench and bar. Many lawyers and judges subscribe to the advisory opinions issued in their jurisdiction to stay on top of developments in legal ethics. For those who have not considered the misleading practices common at American law schools, a few dispassionate analyses by bar counsel applying state professional conduct rules could be quite informative.<sup>253</sup> Further, if bar counsel concludes that law school officials may continue to mislead without violating any current professional rules, that finding might help justify law reform efforts.

A few caveats are in order here because despite its potential advantages, bar discipline cannot cure all that ails us. First, many law school officials, including those in charge of admissions and career services offices, are not lawyers, meaning they are beyond the authority of bar discipline. The same misleading law school marketing might or might not justify action by bar counsel depending on who precisely at

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249. *See supra* note 223.

250. *See, e.g., Advisory Opinion Process*, SUP. CT. OHIO & OHIO JUD. SYS., [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/Advisory.asp](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/Advisory.asp) (last visited Jan. 8, 2013).

251. I am considering making such inquiries myself and may present the results in a subsequent article. Inquiries might be especially useful in New York, where an appellate court—in the process of affirming the dismissal of a lawsuit against New York Law School—stated that NYLS “and its peers owe prospective students more than just barebones compliance with their legal obligations” and that “to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty.” *See Gomez-Jimenez v. N.Y. Law Sch.*, 956 N.Y.S.2d 54, 60 (N.Y. App. Div. 2012).

252. *See supra* notes 198–200 and accompanying text (discussing how a lack of “fairness and straightforwardness” may constitute dishonesty even absent false statements).

253. The same would be all the more true of actual discipline cases.

the law school is responsible, and in at least some cases, it will be difficult to determine before conducting an investigation whether any lawyer conduct is at issue. Further, unless bar counsel in one state feels like expending resources to investigate the wrongdoing of lawyers licensed elsewhere, misleading law school marketing committed by lawyers not licensed where they happen to work will be difficult to police. If, for example, a lawyer licensed in Oregon commits misconduct related to his job as the admissions director of a law school in Florida, the lawyer's home bar counsel would face substantial logistical hassles if it wished to pursue the matter. Bar counsels have limited budgets, making it difficult to meet with witnesses located across the country.

Second, because the misleading nature of garden-variety law school statistics is common in legal education, law school officials charged with misconduct not involving brazen deceit will have a plausible defense that their adherence to industry standards—however flawed—should not subject them to individual discipline. The argument might go something like, “If my presentation of overly-cheery salary data on a law school webpage constitutes misconduct under Rule 8.4(c), then hundreds of lawyers are equally guilty. Surely we cannot all be deemed dishonest.” Especially in states requiring knowing dishonesty to establish a Rule 8.4(c) violation, an industry standards “safe harbor” may seem plausible. Even recklessness may be difficult to prove in some cases.

#### IV. THOUGHTS FOR THE FUTURE

If current rules of professional conduct cannot stop misleading law school marketing, at least two additional avenues for reform exist. First, current rules—particularly Rule 8.4(c) and Rule 7.1—can be amended if necessary. Second, organizations responsible for reviewing the conduct of law schools, such as the ABA and the Association of American Law Schools (AALS), can use their power to encourage better behavior at recalcitrant law schools.

##### **A. Current Rules Could Be Amended if Necessary**

If existing rules of professional conduct governing lawyers do not prevent a lawyer from disseminating misleading law school marketing, they could be amended so that they do. The rule prohibiting dishonesty could be interpreted (where it is not already) to cover statements made with reckless disregard for their falsity, particularly if those statements concern legal education. And the scope of rules regulating lawyer advertising can be expanded to include advertisements for legal education.

### 1. Rule 8.4(c)

As discussed above, Rule 8.4(c) is already interpreted as prohibiting dishonesty outside the practice of law.<sup>254</sup> Not all states, however, have decided what mental state is required for a violation. That is, must dishonesty be intentional, or can reckless falsehoods qualify?<sup>255</sup> Because the rule exists to ensure the “trustworthiness” of lawyers,<sup>256</sup> reckless falsehoods should count when they concern matters of great importance. Put simply, someone who is reckless with the truth—at least when communicating about grave matters—is not trustworthy. The more important the subject of a communication, the more appropriate it is for the bar to punish reckless falsehoods.<sup>257</sup> As the Preamble to the Model Rules notes, “a lawyer should cultivate knowledge of the law . . . and work to strengthen legal education.”<sup>258</sup> Misleading law school marketing undermines legal education by breeding cynicism among the next generation of lawyers and by enabling schools to charge fees the market otherwise might not bear. Misleading marketing increases the indebtedness of future lawyers, thereby increasing unhappiness among lawyers and decreasing their ability to serve the public interest. It also increases the likelihood of outside intervention in legal education—for example, by United States Senators concerned about misuse of federal loan funds<sup>259</sup>—which undermines the largely self-governing nature of the profession.<sup>260</sup>

### 2. Rule 7.1

Rule 7.1, which by its terms applies only to lawyer advertising, prohibits inaccuracies far more strictly than does Rule 8.4(c).<sup>261</sup> Because Rule 8.4(c) can potentially cover any area of a lawyer’s life, a

254. See *supra* notes 175–85 and accompanying text.

255. See *supra* note 204.

256. See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2012).

257. This in keeping with the general limitation of Rule 8.4(c) to material statements. See *supra* note 176.

258. MODEL RULES OF PROF’L CONDUCT pmb. 6 (2012). The importance of legal education is further demonstrated by bar admission requirements imposed by most states. See *infra* note 268. Because aspiring lawyers generally need law degrees—a regulatory fact of great economic value to law schools—it is fair for the profession to regulate statements concerning legal education more strictly than other statements unrelated to the practice of law.

259. See Mary Beth Marklein, *Law Schools Pressed to Tell the Truth on Job Placement, Debt*, USA TODAY (Oct. 25, 2011, 1:37 PM), <http://usatoday30.usatoday.com/news/education/story/2011-10-24/ABA-law-schools-student-debt/50898362/1> (reporting efforts by Sens. Barbara Boxer and Chuck Grassley).

260. See MODEL RULES OF PROF’L CONDUCT pmb. 11 (2012) (“To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination.”).

261. See *supra* note 206.

narrower scope for Rule 7.1 is appropriate. However, the close connection of legal education to the legal profession, along with the demonstrated inability of law schools to police their own communications for inaccuracies, may justify expanding the scope of Rule 7.1 to include advertisements for legal education. The first sentence of Rule 7.1 reads, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”<sup>262</sup> A potential new comment to Rule 7.1 could read, “For purposes of this rule, ‘the lawyer’s services’ include legal education being offered or provided by the lawyer or the lawyer’s employer.” Advertisements for legal education would then be subjected to the strict regulations on lawyer advertisements, including the prohibition on innocent misstatements and on boastful statements not capable of verification.<sup>263</sup> If that medicine is too strong, the following clause could instead be added to the first sentence of the rule: “nor shall a lawyer negligently make a false or misleading material communication about legal education services offered or provided by the lawyer or the lawyer’s employer.”<sup>264</sup>

## **B. ABA and AALS Law School Accreditation Reviews Should Assess Honesty in Marketing**

Independent of professional conduct rules governing lawyers, organizations already tasked with regulating law schools can encourage honest marketing by enforcing existing rules and, if necessary, developing new ones. The ABA and the AALS conduct regular evaluations of most American law schools, and their paying more attention to misleading law school marketing could sharply reduce the problem. If these organizations prove unable to solve the problem, the federal government (which empowers the ABA to accredit law schools for purposes of certain federal programs) and state supreme courts (many of which limit bar admission to graduates of ABA-accredited schools) can replace or supplement the ABA with a more effective regulator.<sup>265</sup>

### *1. ABA*

Under federal regulations,<sup>266</sup> the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to

262. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2012).

263. See *supra* note 206.

264. The medicine could be watered down further by replacing “negligently” with “recklessly.” Because a specified culpable mental state already includes all more serious mental states, see MODEL PENAL CODE § 2.02(5) (1985), the amended rule need not provide that intentional misstatements are covered.

265. Also, *U.S. News* could effect important changes by altering the data it collects from law schools, and especially by checking reported data for accuracy—and lowering the rankings of schools that report inaccurate information.

266. See 34 C.F.R. § 602 (2012).

the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree.<sup>267</sup> In addition, states consider ABA accreditation when deciding who may apply for admission to the bar, with many states requiring a degree from an ABA-accredited school and many others imposing significant additional requirements on applicants without such degrees.<sup>268</sup> In effect, the state supreme courts and legislators requiring ABA accreditation have delegated their authority to evaluate the quality of legal education possessed by would-be members of state bars. Some delegation of this kind is sensible because it avoids the needless duplication of effort that would be required were every state to conduct its own assessments of all legal education providers.

The particular delegation at issue, however, remains sensible only as long as the ABA discharges its responsibilities well.<sup>269</sup> If the ABA cannot use its accrediting power to ensure honest law school marketing, state authorities should consider supplementing ABA accreditation (or replacing it entirely) with approval by another organization capable of evaluating law school advertising for honesty and trustworthiness. Such an organization could audit employment statistics, review law school brochures, websites, and other marketing materials, and conduct whatever further investigations are necessary to assess compliance with professional standards.

At a minimum, the ABA should recognize the importance of honest law school marketing, and schools engaging in deceit and misrepresentation should be sanctioned. The ABA already has Standard 509(a) (“Basic Consumer Information”) on the books,<sup>270</sup> which provides, “A law school shall publish basic consumer information. The

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267. In the remainder of this section, I use “ABA” as a shorthand for the Council and the Section, as well as for the ABA more generally. For background on the ABA’s role, see the ABA’s publication on the law school accreditation process at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2010\\_aba\\_accreditation\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure.authcheckdam.pdf).

268. See NAT’L CONF. OF BAR EXAMINERS & ABA SECTION OF LEGAL ED. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012, at 8–13 (2012).

269. See Mark Hansen, *Sen. Grassley Questions ABA’s Law School Accreditation Process*, ABA J. (July 13, 2011, 12:57 PM), [http://www.abajournal.com/news/article/grassley\\_seeks\\_answers\\_on\\_abas\\_law\\_school\\_accreditation\\_process/](http://www.abajournal.com/news/article/grassley_seeks_answers_on_abas_law_school_accreditation_process/) (“In the letter, Grassley cited a report last month in the Chronicle of Higher Education saying the ABA’s Section of Legal Education and Admissions to the Bar, the U.S. Department of Education’s recognized accreditor of law schools, had been found noncompliant with 17 department regulations by a federal panel that reviews accrediting agencies, including failing to consider student-loan default rates in assessing programs; having no set policy for handling student complaints; and not having a standard for job placement by its member institutions.”).

270. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2011–2012, Approval Standard No. 509 (2011) [hereinafter ABA STANDARDS FOR APPROVAL 2011–2012]. Following amendments in summer 2012, the standard is

information shall be published in a fair and accurate manner reflective of actual practice.”<sup>271</sup> Consumer information is defined as including admission data, tuition, fees, living costs, financial aid, and refunds, placement rates, and bar passage data, among other items.<sup>272</sup> Interpretation 509-4 explains further: “Standard 509 requires a law school fairly and accurately to report basic consumer information whenever and wherever that information is reported or published.”<sup>273</sup> Accordingly, no new rulemaking is required before the Council and the Section can take action against dishonest law school marketing.

New rules (beyond the amendments enacted over the past year) would nonetheless be useful—as would better-designed ABA data collection forms, which could be introduced under existing rules. More specific disclosure requirements could assist law schools in their efforts to produce honest data, and they could be particularly helpful in ensuring the creation of comparable reports across institutions, allowing prospective students to compare schools against one another. In addition, if the ABA promulgates rules requiring transparent reporting of data, a school’s failure to obey the rules would be relevant in professional discipline cases. Today, a law school official accused of violating Rule 8.4(c) on the basis of misleading statistics posted to a law school website might well assert that the school’s page was no worse than those of pretty much every other American law school; indeed, this Article could help establish an “everyone was doing it” defense. In the future, however, violations of ABA reporting rules—while not themselves directly punishable under professional conduct rules—could demonstrate the intentional (or, in some states, reckless) mental state needed for a finding of punishable dishonesty.

Despite the existence of Standard 509—as well as others requiring honest reporting<sup>274</sup>—the ABA declined to impose any significant sanction on Villanova after discovering that the law school dean and three other administrators had conspired to lie to *U.S. News*, prospective students, and the ABA itself about the composition of its entering clas-

entitled “Consumer Information.” ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 509.

271. ABA STANDARDS FOR APPROVAL 2011–2012, *supra* note 270, Approval Standard No. 509.

272. *Id.* Approval Standard No. 509 Interpretation 509-1. As amended, this requirement now appears at Standard 509(b). ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 509(b).

273. ABA STANDARDS FOR APPROVAL 2011–2012, *supra* note 270, Approval Standard No. 509 Interpretation 509-4. As amended, this requirement now appears at Standard 509(a). ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 509(a).

274. *See, e.g.*, ABA STANDARDS FOR APPROVAL 2012–2013, *supra* note 101, Approval Standard No. 101 Interpretation 101-1 (“These documents must be complete and accurate and submitted timely in the form specified.”).



ses.<sup>275</sup> The ABA concluded that “the conduct of the Villanova University School of Law in connection with the intentional reporting of inaccurate admissions data to the ABA and to the public was reprehensible and damaging to prospective law school applicants, law students, law schools, and the legal profession.”<sup>276</sup> The ABA’s sanctions consisted of (1) a public censure, which the law school must post on its website and elsewhere, (2) a requirement that Villanova make a public statement about good data reporting practices, and (3) a requirement that the law school hire a compliance monitor for at least two years.<sup>277</sup> This light punishment, imposed after the law school’s dean was caught committing “reprehensible” conduct, appeared to effectively preclude the ABA from taking serious action against the many law schools disseminating merely misleading data. How could the ABA justify sanctions against Rutgers-Camden for its misleading e-mail advertising or New York Law School for its misleading website, much less a law school whose unreliable statistics are no worse than is common in the industry? After all, Villanova received a slap on the wrist for brazen deceit committed at the highest levels.

More recently, however, the ABA punished the University of Illinois College of Law for its deceit—along with the environment that encouraged it—fining the school \$250,000.<sup>278</sup> Rejecting arguments that similar conduct (i.e., that of Villanova) had resulted in censure but no fine, the ABA concluded:

[T]he College of Law did not adequately appreciate the connection between (a) establishing aggressive goals, placing authority for admissions decisions in a single individual who stood to gain personally and professionally from meeting or exceeding the established goals, and the lack of oversight of data reporting; and (b) the ultimate publication and reporting of false data.<sup>279</sup>

Time will tell whether the ABA’s more vigorous policing of law school marketing will reach conduct less outrageous than that of Paul Pless and those who enabled him.

Rather than merely punishing deception that comes to light (or, in the case of the ABA, often failing to do even that), an accrediting body committed to ensuring honest marketing would take affirmative steps to promote transparency, good faith, and fair dealing. For example, ABA site visits could include an evaluation of the law school’s marketing material, including a careful comparison of employment statistics posted online and elsewhere against the underlying data possessed by

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275. See VILLANOVA CENSURE, *supra* note 10.

276. *Id.*

277. *Id.*

278. See Mark Hansen, *U of Illinois Law School Is Publicly Censured by the ABA, Fined for Misreporting Admissions Data*, ABA J. (July 24, 2012, 3:20 PM), [http://www.abajournal.com/news/article/u\\_of\\_illinois\\_law\\_school\\_is\\_publicly\\_censured\\_for\\_misreporting\\_admissions\\_d/](http://www.abajournal.com/news/article/u_of_illinois_law_school_is_publicly_censured_for_misreporting_admissions_d/).

279. See ILLINOIS CENSURE, *supra* note 30, at 2–3.

the law school. Careful attention would have revealed that for years, when asked by the ABA to report average total indebtedness of their graduates (i.e., the amount borrowed to finance three years of study), some schools instead gave the ABA figures representing only one year of borrowing (numbers then reported by publications like *U.S. News* and the *National Jurist*), thereby allowing the schools to appear two-thirds less expensive than peer institutions.<sup>280</sup> Those debt numbers were not plausible, yet neither the ABA nor *U.S. News* investigated.<sup>281</sup> Even after the errors came to light, schools continued to boast of their recognition for “financial value” on the basis of inaccurate data.<sup>282</sup> A recent announcement that the ABA will work with the Law School Admission Council to check the accuracy of certain data reported by law schools—such as incoming students’ LSAT scores and college GPAs—is a good first step.<sup>283</sup> Further ABA action, such as random auditing of law school statistics, may be made possible by the fine collected from the University of Illinois.<sup>284</sup>

If the ABA is unwilling to enforce Standard 509 effectively, the DOE should find a new accrediting agency for J.D. programs. Further, state supreme courts (and other state authorities charged with deciding who may sit for the bar) could consider requiring certification

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280. See Paul Campos, *The Wisdom of Solomon*, INSIDE L. SCH. SCAM (July 26, 2012, 7:07 AM), <http://insidethelawschoolscam.blogspot.com/2012/07/the-wisdom-of-solomon.html> (reporting that Barry, Georgia State, and Rutgers-Camden misrepresented their student debt loads, causing national publications to list them as good values); see also Rebecca Larsen, *Best Value Law Schools*, NAT’L JURIST, at 24–25 (Nov. 2011), available at <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist1111/#/24> (relying on inaccurate data to rank Georgia State first in the nation for value and to give Rutgers-Camden an “A-” for value).
281. See Katy Hopkins, *10 Law Degrees with Most Financial Value at Graduation*, U.S. NEWS (Mar. 29, 2011), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2011/03/29/10-law-degrees-with-most-financial-value-at-graduation> (listing average student debt for Rutgers-Camden as \$32,235, a number one-third of that reported by Rutgers-Newark, a school with about the same tuition).
282. *Rutgers School of Law-Camden Earns Recognition as Smart Career Investment*, RUTGERS (Nov. 15, 2011), <http://news.rutgers.edu/medrel/camden/rutgers-school-of-la-20110404/> (“According to the article, Rutgers–Camden ranks third among the nation’s law schools in terms of graduates commanding the highest first-year salaries relative to debt load.”); *U.S. News Ranks Georgia State Law Second in Nation for ‘Financial Value at Graduation’*, GA. ST. U. C. L. (Apr. 1, 2011), <http://law.gsu.edu/admissions/6202.html>. As of February 17, 2013, both webpages remain available.
283. See *ABA and LSAC Announce Program for Reporting of Entering-Class Data*, A.B.A. (June 15, 2012), <http://www.abanow.org/2012/06/aba-and-lsac-announce-program-for-reporting-of-entering-class-data/>.
284. See ILLINOIS CENSURE, *supra* note 30, at 1 (listing, among other sanctions imposed, “the imposition of a \$250,000 monetary sanction on the College of Law that will be placed in a separate, designated fund and used by the Section for monitoring and enhancing compliance with the data reporting and publication requirements of the Standards by all ABA-approved law schools”).

by an independent auditor that the school's marketing complies with best practices (and, at a minimum, does not violate Rule 8.4(c)) before a school's graduates become eligible for admission to the bar, just like many now require ABA accreditation.<sup>285</sup> State regulators could also conduct independent reviews of law schools located within their jurisdictions, evaluating whether the schools' marketing materials meet the standards of good faith and fair dealing that the state courts apply in other consumer protection contexts.

## 2. AALS

The Association of American Law Schools, which conducts site visits and evaluations of law schools before approving their continued membership in the AALS, should recognize the importance of honest law school marketing, and the AALS should sanction schools engaging in deceit and misrepresentation. The University of Missouri hosted a joint ABA/AALS site visit during October and November of 2011. Although the resulting AALS report is confidential, I am willing to reveal that while it contains sections on matters as diverse as scholarship, teaching, externships, nondiscrimination, library resources, and the physical plant, there is no section assessing the fairness and accuracy of the law school's marketing.<sup>286</sup>

Like the ABA, the AALS already has rules in place that—if enforced—could largely eliminate misleading law school marketing among its members. For example, the requirements of membership for an AALS law school include, “A member school shall deal fairly with applicants for admission.”<sup>287</sup> Pursuant to an AALS executive committee regulation,

A member school shall provide to anyone requesting an application the following information: recent historical data regarding the academic qualifications of its student body, attrition rate, student activities and groups, and employment patterns of its graduates; and information concerning the school's grad-

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285. The creation and maintenance of such an organization would require a great deal of effort (and would cost law schools money), and the project should be undertaken only if the ABA refuses to take its responsibilities more seriously. Also, some provision would be necessary for students who enrolled at a school reasonably believing it to be adequately accredited.

286. It is possible that AALS reports have confronted some law schools about their marketing practices. Because these reports are confidential, however, I have no way of knowing.

287. ASS'N OF AM. LAW SCHS., 2012 HANDBOOK 60 (2012), available at [http://www.aals.org/about\\_handbook.php](http://www.aals.org/about_handbook.php) (AALS Bylaw § 6-2(c)). In November, the AALS sanctioned Villanova pursuant to Bylaw 6-2(c) for the misconduct described earlier in this article. See Letter from Susan Westerberg Prager, *supra* note 29 (announcing AALS Executive Committee decision placing law school on probation for two years). Action against Illinois is likely forthcoming.

ing system, retention rules and procedures, non-discrimination policies, and financial aid programs and policies.<sup>288</sup>

Violation of AALS rules can result in sanctions, including suspension from the association.<sup>289</sup> The AALS therefore already has authority to sanction member schools failing to provide accurate information concerning the “employment patterns of its graduates.” In addition to sanctioning offenders, the AALS could issue a “statement of good practices” announcing appropriate methods of law school marketing.<sup>290</sup> If well-written, this document would not only assist schools desiring to behave well but would help expose misbehaving schools as falling below industry standards. Like violations of ABA rules, violations of AALS best practices would not themselves be punishable under professional discipline rules. They could, however, help bar counsel prove allegations of intentional (or reckless) dishonesty, thereby providing additional incentive for compliance.

## V. CONCLUSION

In a primer on business law, a New York lawyer once warned prospective law students about “deceptive statistics,” which “give interesting reports of the alleged net earnings of [law] graduates.”<sup>291</sup> The author warned that the results of a salary study “are entirely misleading and deceptive” to the ordinary reader because (1) of the law graduates surveyed about their salaries, “only about one-half replied,” and (2) “those who failed and those who were making small returns”—as well as “those who had dropped out of the law altogether”—did not answer.<sup>292</sup> The resulting number therefore “was averaged really only from the earnings of the most successful graduates.”<sup>293</sup> Ninety years have passed since the publication of this advice book, and too little has changed. It is far past time for law schools to publish better statistics.

Seeking to attract students, and the tuition that comes with them, law schools have engaged in misleading marketing, occasionally committing outright deceit. Because lawyers are prohibited from engag-

288. ASS'N OF AM. LAW SCHS., *supra* note 287, at 92 (AALS Executive Committee Regulation 6-2.3).

289. *See id.* at 65–67 (including Article 7 of the AALS Bylaws).

290. The AALS has issued statements of good practices on topics such as faculty recruitment, handling the resignation of faculty members, and the discharge of ethical responsibilities by faculty members. *See id.* at 125–48.

291. *See* 2 THOMAS CONYNGTON, BUSINESS LAW: A WORKING MANUAL OF EVERY-DAY LAW § 652, at 733 (2d ed. 1922).

292. *Id.*

293. *Id.* The author also noted that if his book was less bullish on the legal profession than was another volume then in print, “it is because it considers more carefully the situation of the ambitious young man who must work his own way, who is not a graduate of Harvard or Yale, and who must force his upward way from the outside with no foundation of family and social connection upon which to build.” *Id.* § 653, at 735 n.3.

ing in dishonesty and misrepresentation, this misleading law school marketing violates rules of professional conduct and exposes participating lawyers to professional discipline. Lawyers with knowledge of these violations should report offending lawyers to disciplinary authorities, whose members should safeguard the integrity of the profession by treating misleading law school marketing with the seriousness it deserves. In addition, the ABA and the AALS—or a new accrediting organization, should the ABA and AALS fail to rise to the occasion—should take responsibility for ensuring honest marketing by American law schools. Legal education is in crisis, and a commitment to good faith and fair dealing in law school marketing is a necessary part of any worthwhile solution.