Ethics and Law School Admission

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In this decade, the number of applicants to law school has declined while first year enrollments have remained stable. There has been an alarming and widespread perception that some law school personnel, under pressure to maintain registration levels in a shrinking market, are engaging in potentially unethical practices. Due to the increasingly competitive nature of law school admissions and recruitment, an environment is evolving which may encourage unethical admissions and recruitment practices. Allan Stillwagon, of the University of Michigan, commenting on the admissions statistics reported by law school admissions officers, said: "Statistics are often superb pieces of fiction . . . I have some very good friends about whose numbers I have some doubts."

The willingness of Dean Stillwagon to acknowledge the problem of unethical practices is commendable. However, while the Law School Admissions Council ("LSAC") has issued a statement about good admissions practices, admissions officers have no real code of ethics by which to measure their ethical standards. It is, of course, difficult to define who is an admissions professional, and it is rather useless to police the admissions cadre without taking notice of the wide range of persons involved in law school admissions. Moreover, as institutions realize that each school, particularly within a given level, is in competition with other schools, the desire for enforcement provisions is naturally complicated by individual schools' perceptions of the appropriateness of various admissions practices.

Developing ethical norms is always a complex group process. This process is made even more difficult when the group members, cast in con-

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* Director of Development, Correctional Ass'n of New York and Osborne Ass'n.
1 See Section of Legal Education & Admissions to the Bar, A Review of Legal Education in the United States, Fall, 1987—Law Schools and Bar Admission Requirements, 1987 A.B.A. 66 (listing first year enrollments and number of LSAT administrations between 1963-64 and 1987-88 academic years).
2 Fiske, Law Schools Turn to Competing to Win Students, N.Y. Times, July 7, 1986, at B7, col. 4.
flict or in competition with each other, are not clearly defined. Thus, the first step in developing a code for law school admissions is to ascertain the fundamental underlying principles for that code rather than attempting to discuss specific ethical problems. According to Edward L. Wright, the president-elect of the A.B.A.:

An essential first step in the formulation of any code of conduct is the determination of the fundamental concept to be followed. This resolution is inherently controlled by the importance and the public influence of the conduct. Every code is initially molded, either consciously or unconsciously, in reliance upon such a fundamental concept, and questions that arise in drafting are resolved with reference to it.

Because law school admissions officers serve the legal profession, the underlying goal should be to inculcate admissions personnel with values sacred to the legal profession. An admissions system designed to be open, honest, and responsible could help students entering law school see the transfer of these values as relevant to the legal profession. Establishing high ethical norms during the admission process certainly could help set the tone for higher ethical standards in the profession itself. Derek Bok, president and former Law School Dean at Harvard, among others, has indicated that preaching and teaching about ethics is meaningless unless we teach by example. The admissions office is a good place to start.

Even with a solid underlying principle based upon responsibility to the profession's ethical standards, the ethical problems created by competitive admissions are obviously complex. Moreover, the ethical posture of the legal profession itself is often criticized for tolerating questionable practices. R.K. Burke, a professor at the University of Arkansas, suggests that:

Our present deplorable public image does not stem from lack of competency or failure to provide adequate legal services. Rather, it stems from many years of tolerance by the bench and bar of dishonest and deceptive practices hiding under the benign cloaks of attorney-client privilege, the rights of the

10 Indeed, there is some data to show that legal educators do have an impact upon ethical perceptions of law students. See Rathjen, The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students, 44 Tenn. L. Rev. 85, 118 (1976).
12 See, e.g., Hellman, Considering the Future of Legal Education: Law Schools and Social Justice, 29 J. LEGAL EDUC. 170, 193 (1978) ("for the institution to exert a positive influence on the value formation process, the collectivity of people who make up the faculty and administration of the school must consciously endeavor to shape the institutional personality in a constructive mold").
accused, conventional practices, confidentiality, and the like. When one considers the few, and usually unconscionable, gains derived by the individual lawyer or his client from lying and deceit, as well as the incredible public loss of faith and trust in the profession and the system, there is no choice but to condemn those practices.

Full disclosure of relevant facts and law, truthtelling in all legal environments, and fairness to others in all of our roles, should be our standards. We have truth in lending, truth in trade practices, truth in labelling, truth in real estate, and truth in securities. We even have our own truth in advertising rule. Why not Truth in Lawyering?

Why not Truth in Law School Admission? Of course, the ethical questions among members of the bar or law school admissions personnel rarely are as simple as the truth or falsehood of an issue. The root of the truthfulness problem is that the promotion and even "hucksterism," which has played a large role in recruiting and admissions, produces significant misconceptions on the part of a prospective student who attempts to evaluate such unrestrained claims of law school purveyors. The Carnegie Council on Policy Studies aptly describes the problem:

Painting a school in too positive a light makes a catalogue inaccurate and unreliable; so does inadvertently including in a catalogue out-of-date information, courses that are no longer offered, course descriptions that differ from the substance of the courses actually given, pictures of undergraduates working with scientific equipment that is not ordinarily available to them, suggestions that a program will lead to employment, photographs of students in small seminars or a student and teacher casually talking when freshmen are unlikely to enjoy such experiences, or several pictures of minority events when an institution has only a few minority students.

Thus, part of the basic ethical sense of law school admissions personnel must be a notion that the admissions officers' claims should accurately portray the actual characteristics of the university or law school.

However, it is difficult for many admissions officers to define a law school. Admissions officers are often unaware of all of the facets of their institutions or are simply not sensitized to possible misstatements which they sometimes unwittingly make. For example, a law school's representative might advise a student about certain career paths which may not be available at a particular school or, if available, may only be realistically achieved by those students who are able to maintain a very high academic ranking within their graduating class at the institution.

* CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, FAIR PRACTICES IN HIGHER EDUCATION 34 (1979) [hereinafter CARNEGIE COUNCIL].
* Cf. Hedegard, Causes of Career-Relevant Interest: Changes Among First Year Law Stu-
may be wrong. An admissions officer may create the impression that he or she is advising a prospective student without making it clear that the student and the law school’s representative may not have mutual interests.\(^{11}\)

Moreover, law schools which seek and receive so much information from applicants sometimes fail to provide the same level of specific verifiable data about itself.\(^{12}\) As Professor First, a professor of antitrust law at N.Y.U., noted, “in choosing between different sellers of the same kind of education, it is difficult for the shopper to get good information; unlike the purchase of goods that are repeatedly used, there is probably no previous experience from which to draw.”\(^{13}\) Law schools certainly do provide information about some available resources. However, this data may be clothed with a mystique that makes them appealing without a logical basis. Library books or book equivalents may really not be the kind of information a student needs.\(^{14}\) Nor does the student-faculty ratio necessarily mean that the law student will be exposed to a more responsive faculty member.\(^{15}\) Yet the ethical issue concerning the amount and type of data supplied to applicants is sharply focused on the quantifiable measures of the accreditation agencies, such as the differences between resources.

Secretary of Education Bennett has specifically called upon accrediting groups themselves to move towards a system which measures and rewards success rather than letting a school define goals in terms of existing resources.\(^{16}\) The LSAC has also recognized the need to develop measurement techniques applicable to various teaching methods. Such information is more related to the success of a school’s educational mission on the exit side rather than high statistical test or undergraduate data of the entering class.\(^{17}\)

Undergraduate schools are currently struggling with this issue as they develop exit examinations. In order to inform prospective students about the schools they are considering, the test results would be published. The hope is that the inclusion of such exit data as part of any...


\(^{13}\) First, Competition in the Legal Education Industry (1), 53 N.Y.U. L. Rev. 311, 316 (1978).

\(^{14}\) Katz, supra note 12, at 342.


\(^{17}\) Law School Admissions Bulletin 5 (May 1984).
information sent to the prospective students would protect the applicants from falling "prey to misleading advertising."\textsuperscript{18}

Law schools, of course, already have exit examinations. But the question of the suppression of the bar examination results of a particular school is certainly open. Educationally, there is an argument against releasing this data since law schools teach many things which are not covered by the examination. Ethically, however, it is troublesome to prevent customers from having access to such basic information.

The selective release of data is, unfortunately, part of the law admissions cadre's long tradition of secretiveness. Law schools, for example, have not been very revealing about how the admissions process works. Shielding the applicant from the brutal truth may well have been motivated by honorable intentions. For example, thousands of person-hours are devoted to letters of recommendation or personal statements, while statistical evidence suggests that the numbers, LSAT and UGPA, are largely determinative of admission.\textsuperscript{19} A whole liturgy of admissions, support documents, interviews, etc., is available. Yet, as Robert Klitgaard, an educational researcher, points out, admissions at Law School "are primarily determined by two major considerations: predicted first-year grades and race."\textsuperscript{20} Klitgaard reveals that 3,500 to 3,800 applicants at Harvard Law School were "automatically" rejected on the number.\textsuperscript{21} While one could argue that the definition of "automatic" in law school admissions and the range of the "numbers" would vary widely at different institutions, ethically, students should be told of the essentially ministerial nature of many admissions decisions rendered by a substantial number of institutions. Since law school personnel know that nonquantitative factors play little part in the world of competitive law school admission, full disclosure about the admissions process is a concern of those addressing various ethical questions pertinent to law school admission. Using popular "buzz" words like accepting the "best" or purporting to consider the entire application of every individual in a serious way, which is a practical impossibility, leads to terrible disappointments based upon false assumptions.\textsuperscript{22} There will always be borderline cases, but customers should reasonably expect to have a more detailed sense about standards of

\begin{footnotes}
\footnotetext{18}{A. Daniere, Higher Education in the American Economy 139 (1964).}
\footnotetext{19}{See, e.g., Pipkin & Kath, Undergraduate Legal Studies and Law School Gatekeepers, 28 J. Legal Educ. 103, 107 (1976) (tabulated differences between admissions criteria used by seven different law schools).}
\footnotetext{20}{R. Klitgaard, Choosing Elites 47 (1985).}
\footnotetext{21}{Id. at 39.}
\footnotetext{22}{See, e.g., J. Seligman, The High Citadel: The Influence of Harvard Law School 95-101 (1978) (apparently qualified applicant to Harvard Law School sued after being rejected, claiming admissions criteria were wholly unrelated to academic or professional merit or aptitude).}
\end{footnotes}
acceptability.

The admissions retrenchment and economic hardships of the 1980's have created new and fundamental ethical dilemmas. For example, ethical recruitment is difficult when an admissions person knows his or her school is drastically cutting back specific programs or even contemplating closing. Reviewing this kind of situation at Colorado Women's College, Garry Knight, an admissions officer, stated that:

As I have hinted previously, the professional organizations have an ethical responsibility as well. I believe that the professional organizations should be responsible for the development of a system of financial accreditation of colleges and universities, and be prepared to provide information about a college's endowment, its indebtedness, its income and their sources, and an overall evaluation of the institution's future financial prospects, not unlike a Moody's bond rating. Colleges that are in serious financial difficulty and for whom small financial reverses cause major disfunctions in their operation would be identified, and parents, students and counselors could use this information for their own benefit.25

These ethical tensions and ethical ambiguities led to an LSAC effort to clarify several issues,24 but the focus of the LSAC activity has been on enforcement of Board established policies without much attention to underlying ethical matters or the general concerns of field representatives. In 1976, for example, the LSAC, through their attorneys, examined whether the LSAC could sanction schools violating LSAC policies.25 Surprisingly, the concern for enforcement antedated the establishment of the board's policies. As reflected by the board minutes:

Ms. Lyndon, Harvard Law School Admissions Dean, raised the question of whether there should be an attempt to draw up and classify a list of potential violations. Mr. Read, another retired member and then dean at Tulsa, felt that it would be a waste of time to try to develop a code of conduct and that it was better to handle cases on an ad hoc basis.26

However, in 1978, a set of Cautionary Policies, mainly including advice on the use of LSAC data, was developed. Unfortunately, the Cautionary Policies are only marginally related to the major emerging ethical

18 Knight, Ethical Recruitment and the Financially Troubled College: The Case of Colorado Women's College, Nat'l Ass'n College Admissions Counselors, Jan. 1977, at 8, 10. The situation at Antioch Law School, which is to cease operation largely due to financial considerations, would make an interesting case study. See Feinberg, Drive Launched to Save Antioch Law School, Washington Post, Oct. 26, 1985, at C3, col. 1.
24 See Law School Admission Council, 1979 Annual Report 184-85 [hereinafter 1979 Annual Report]. "Ethics" in admissions was understood to mean responsibility to major societal issues like affirmative action, not individual or institutional activities. Id.
26 Id. at 200.
problems. Furthermore, the use of LSAC data under the *Cautionary Policies*, although based on numerous research studies, was open to various legitimate interpretations. Another problem was enforcement, since law school representatives did not adopt the cautionary statement and the structure and nature of the LSAC diminishes its ability to establish rules and enforce penalties. The LSAC is not, strictly speaking, a professional organization, and the authority is vested mainly in the Board. As a result, there was little possibility of the member schools participating in the development of a code calling for enforcement procedures.

Surveys revealed that many LSAC member schools were not following the LSAC *Cautionary Policies*. Consequently, in 1984, the LSAC began drafting the *Statement of Good Admissions Practices* (the "Statement") to both clarify board policies and to expand the *Cautionary Policies* to include ethical recruiting guidelines.

The *Statement* is not an enforceable code of ethics as indicated in its introduction. It is essentially a discussion highlighting some of the ethical and educational concerns of admissions officers. As the opening sentences explain:

> This Statement of Good Admission Practices is designed to focus attention on principles that should guide law school admission programs. No attempt has been made to develop "legislative" guidelines, because no absolute rules apply to every situation. The Statement is intended to improve the admission process in law schools and to promote fairness for all participants.

However, even with this disclaimer, the document contains very strong language about the honesty required of admissions personnel:

> Law schools should strive to achieve and maintain the highest standards of accuracy and candor in the development and publication of print and other materials designed to inform or influence applicants. . . . If statistics are provided regarding admissions, financial aid, and placement, law schools should provide the most current information and should present it in an easily understood form. Significant errors of fact, as well as errors of omission, should be corrected promptly and prominently.

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28 The various enforcement issues are expounded from both perspectives in a “debate” between Messrs. McCormack (Utah) and Simpson (Harvard). See *Law School Admission Council, 1982 Annual Report* 20-21 [hereinafter 1982 *Annual Report*].
31 Id. at 120-21.
32 *Law School Admission Council, Statement of Good Admission Practices* 1 [hereinafter *Statement*].
33 Id.
The *Statement* requires honesty and candor on a wide variety of admissions procedures and, additionally, includes provisions requiring an accurate account of campus life and the surrounding community. According to the *Statement*, schools must accurately describe how particular criteria, such as test scores, are used in the admissions process. Indeed, the *Statement* requires that "[e]ach law school's admission policies should be adequately disclosed to all prospective applicants at the outset of the admission process."\(^{24}\) The *Statement* also suggests that the ability to be "candid" and not just honest is not possible until the law school has policies which, in fact, can be described:

Law schools should develop and promulgate concise and coherent admission policies designed both to regularize the admission process and to inform fully prospective applicants and prelaw advisors of the means used to select new law students. The policies should include consideration of the various criteria and processes used to make admission decisions, such as the Law School Admission Test (LSAT), prior academic performance, professional and other work experiences, equal opportunity considerations, disabled status, geographical diversity, letters of recommendation, personal statements, and personal interviews, if required.\(^{25}\)

This call for candor is practiced in the statement itself when the *Cautionary Policies* are invoked:

Use of cut-off LSAT scores below which no candidate will be considered is explicitly discouraged in the LSAC/LSAS Cautionary Policies. However, a particular law school may discover evidence that applicants scoring below a certain point have substantial difficulty in performing satisfactorily in its program of studies. Based on that evidence, the law school may rationally choose to implement a policy of discouraging applications with LSAT scores below a certain point. Should a law school make that determination, applicants should be informed of that fact.\(^{26}\)

The guidelines attempt to resolve several still open questions. For example, the *Statement* says, "Letters of recommendation often have a significant impact on admission decisions."\(^{27}\) Many would disagree with this.\(^{28}\) In what appears to be a rather unrealistic expectation, the *Statement* permits law schools to withdraw an offer of admissions if the student accepted an offer at another institution even though multiple deposits are common.\(^{29}\) Considerable attention is also placed on rules

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\(^{24}\) *Id.* at 2.

\(^{25}\) *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 3.

\(^{28}\) R. KLITGAARD, *supra* note 20, at 47.

\(^{29}\) "No law school has an obligation to maintain an offer of admission if it discovers that the applicant has accepted an offer at another institution." *STATEMENT,* *supra* note 32, at 5.
pertaining to an early decision plan which seems mainly to discourage law schools from asking for a student's list of preferences. Some law schools might reasonably disagree with the notion that anything is wrong with a preference system.

More questionable is the Statement's advice concerning an applicant's misstatements on their application form which might be viewed with dismay by a profession based upon the honesty of its members. For example, would it be unreasonable for schools concerned about the veracity of future lawyers to object to the proviso, "[l]aw schools should provide an opportunity for applicants to correct any false, misleading or otherwise inaccurate information contained in their application materials?" But the Statement attempts to direct or form the behavior of the group known as professional admissions officers without actually defining the group.

Admissions officers are, of course, actually salespersons, an honorable occupation in a capitalist society. Unlike the more traditional or learned professions, the salesperson does not usually receive his or her training in a structured or organized effort. Quite simply, salespeople learn their craft by selling. Law school admissions officers learn to be admissions officers at law school forums or prelaw events. Even the most sophisticated law schools have no formal training program for new admissions officers. The LSAC does conduct sessions for new admissions officers, but, like sales meetings, these must be seen as helpful but not seminal learning experiences for salespersons.

"Except under early decision plans, law schools should not require applicants or other persons to indicate the order of applicants' law school preferences." Id.

Similarly, some in legal education may not agree to comply with the Statement's assertion that "[l]aw schools should not suggest that acceptance of their offer of admission creates a moral or legal obligation to register at that school." Id.

Id.


Comment by Myres S. McDougal, in THE LAW SCHOOL OF TOMORROW 201, 204 (D. Haber & J. Cohen eds. 1968) (paraphrasing Professor Lasswell).


See R. Klitgaard, supra note 20, at 44.

In a sense, of course, law school admissions officers have professional claims because they are consistently referred to as professionals, at least by legal educators. This is because during the years of explosive growth, law schools turned to the "admissions administrator" to handle and manage the paper flow. As new schools opened, or old schools attempted to improve academic quality, the admissions managers became salespeople because they were directed to improve the "class" of customers either geographically or, more commonly, through the attempt to raise the LSAT medians of their schools' entering class. They were "professional" in the sense that they devoted most or all of their time to admissions. Furthermore, as the sales role became clearer and almost universal, attempts to control marketing excesses (as described in the Statement) were largely based on appeals for "professional conduct."

This quasi-profession is at the vortex of tremendous competition among schools, making it difficult to gently elaborate "norms." The high-pressured atmosphere created by such competition is not conducive to the formulation of a code. Additionally, even where such codes are implemented, rapidly changing circumstances can limit their effectiveness.

Other nonprofessions and quasi-professions, however, have made themselves into a profession or at least organized themselves along professional lines and established professional codes. Various business groups have evolved into professional organizations from a sense of stewardship or social and, of course, self-interests. For groups producing dangerous products, for example, there is an easier task of evolving a consensus about minimal ethical standards. Or, as government regulations have increased, different sectors of the business community have followed these regulations to effect an ethical climate through the prohibition of such illegal activities as price-fixing, bribery, or the marketing of danger-

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44 The Statement uses the phrase “Law school admission professionals” or similar language throughout. See Statement, supra note 32, at 1, 4. The A.B.A. standards use the term “admitting officer,” which certainly sounds professional. See, e.g., Standards for Approval of Law Schools § 505 (1987) [hereinafter Standards].
45 See P. Shelton, Memorandum to LSAC Meeting (Dec. 9, 1981) (conference materials).
46 See Carnegie Council, supra note 9, at 47.
52 See G. Benson, supra note 3, at 42-43.
ous products.57

The impetus for codes of ethics has also been aided by the growing sense among many corporate organizations that absolute profit maximization is not only morally wrong, but bad for business as well.58 Experience has shown many companies that unethical short-term strategies aimed at cutting costs will often result in negative long-term effects. Thus, as a prelude to effective codes of ethics for business there is a consensus that profit maximization be constrained by product quality and societal responsibility. An indication of the pervasiveness of this restricting ethical principal in large corporations is that three quarters of the Fortune 500 companies have written policies on ethical conduct.59 For new professions like the college or law school admissions fields, these corporate models provide an invaluable resource.

American business has had several decades of experience with developing codes of ethics for quasi-professionals. Especially after the Second World War, both management and labor adopted various written codes. Like the National Association of Manufacturers’ adopted code, however, these were really attempts to highlight norms but not, strictly speaking, to create a code of ethics since there were few enforcement procedures. Similarly, the 1957 AFL-CIO Ethical Practices Code was an attempt to raise ethical concerns rather than an attempt to publish an instrument useful in helping insure that these concerns were addressed.60

Watergate and other highly publicized scandals of the 1970's had a direct impact upon codes of ethics inside corporate America. Companies could no longer hide behind platitudes of noble sounding, but unenforceable, codes. Shocked by the outrageous behavior of the nation's chief executive and his subordinates, businesspersons felt that they had to act. Since 1976, eighty percent of corporations have rewritten their internal codes of corporate practices. There now exist more than fifteen centers for the study of business ethics and several professional societies for business ethics. From 1971 to 1980, 1,150 books and thousands of articles appeared on the subject. While a wide variety of journals publish articles dealing with business ethics, The Business and Professional Ethics Journal, Professional Ethics, and The Journal of Business Ethics are devoted specifically to this topic. There is also a Corporate Ethics Digest, a bimonthly annotation of new publications in this field.61

Codes of ethics in business illustrate that there are three fundamen-
tal issues which must be resolved before formulating an effective code of ethics for law school admissions. First, there must be the realization that law schools are business entities, each with a share of the market. Accordingly, any code of ethics which is implemented must be structured consistently with the constraints of antitrust laws. Second, law schools must overcome their hesitancy to include enforcement mechanisms. And third, specific individuals must be held accountable for compliance with any code of ethics.66

Law schools have long competed with each other, either for tuition-bearing students, or, particularly during the 1970's and increasingly so today, for the brightest students among a very bright national applicant pool. Thus, even with an 812% increase in LSAT registrants, schools were in competition.63 The temporary decrease in the applicant pool, the change in the sociology of the law school applicant,64 and the economic pressure for large student bodies in a decreasing population made this competition quite real and perhaps even, like some undergraduate recruiting, a bit cutthroat.65 The problem of norm development for law school admissions is further complicated by the varying degree of competition among law schools. Some academically selective institutions may be overly concerned about issues impacting on the very brightest students, like an early admissions program, and less interested in issues of importance to marginal students and the schools they attend. Schools that must admit seven or eight candidates to fill one seat will more likely favor a restriction on multiple deposits by applicants. Other schools would be harmed by a system which would lock them out of accepting students late in the summer.66 While schools competing against publicly financed institutions may think "no-need" scholarships are essential, schools without scholarship funds may disagree and may even consider such scholarships unethical.67

The danger is that the process utilized to resolve these complicated

66 Many of these issues have already been confronted by undergraduate institutions. See Woodward, Ethics in Recruitment in the 1970's, 17-3 NACA 1, 1 (1972).
ethical questions may exclude, either in form or practice, diverse opinions. In legal education, a few schools have tended to dominate curricular and personal matters. This may be attributed in part to the disproportionate share of faculty positions held by graduates of these select schools. In law school admissions too, a few individuals have tended to influence the decision process in the LSAC. And, in the process of securing the sound management of LSAC/LSAS, the most active in board or board-related committees have eliminated any structure that might have encouraged vital discussions on these ethical questions. The LSAC leadership inadvertently destroyed the LSAC meeting and governance structure that would have included dissenting schools or groups of schools from active participation. Nor, it must be observed for those unfamiliar with law school admissions, are these perceptions of alienation found only among less elite schools. Some LSAC policies have frequently impacted unfavorably on the most academically prestigious institutions. Ethical questions concerning sales and pricing are sometimes quite complex and controls impossible if competing groups design a code that alienates groups of competitors.

The critical tension in the ethics of any sales force is not, however, between the institution and the public, or even between institutions. Often, the most difficult ethical conflicts are between the senior manager and the sales representative. Indeed, substantial empirical data exists which illustrates that junior managers tend to move towards compromised behavior in an effort to show their willingness to cooperate with superiors. In one study of salespersons, an astounding seventy-five percent of field personnel felt that supervisors were directly or indirectly asking them to perform acts contrary to their personal ethical standards. Studies at individual companies uncovered the same deeply dis-

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68 Codes, particularly those affecting groups in competition, can be used to thwart real competition. See Kintner & Green, Opportunities for Self-Enforcement of Codes of Conduct: A Consideration of Legal Limitations, in ETHICS, FREE ENTERPRISE AND PUBLIC POLICY 253 (R. De George & J. Pichler eds. 1978); Note, Legal Ethics and Professionalism, 79 YALE L.J. 1179, 1187 (1970).
70 See 1982 ANNUAL REPORT, supra note 28, at 57 (LSAC members were eligible for leadership positions and “activity” could only be possible by presidential appointment or cumbersome election process).
71 The structural changes in the LSAC were, it is widely acknowledged, perceived as a “reaction” to the successful attempt by the council members to elect a representative who was not on the official slate proposed by the nominating committee. LAW SCHOOL ADMISSION COUNCIL, 1981 ANNUAL REPORT 51.
73 W. LACROIX, PRINCIPLES FOR ETHICS IN BUSINESS 111 (1979).
74 Ferrell & Goresham, A Contingency Framework for Understanding Ethical Decision
turbining pattern. For example, fifty-nine percent of Pitney-Bowes managers and seventy percent of Uniroyal managers who were surveyed thought they were being asked to compromise their own personal ethics. Several of these studies indicate an almost desperate plea from sales personnel, at all levels, for a code of ethics that would essentially protect junior managers from their superiors. A series of essays and research projects on business ethics promoted the following blunt corollary: "[I]f you want to act ethically, find an ethical boss."77

Deans and admissions deans or directors rarely share a common professional experience, thus exacerbating the divergent perspectives prevalent in academic management. Academic deans and their faculty are frequently uncomfortable with aggressive marketing techniques. But marketing has now become an important factor in law school recruitment, and the contrasting perceptions of deans and admissions persons are such that dialogue is even more difficult today than in the pre-marketing era. Front-line admissions personnel, like middle managers in business, are much more likely to conceptualize a marketing task in human terms, i.e., they are much more likely to know the costs of even minor ethical compromises. Deans without staff or line experience unintentionally may lose sight of the individual applicant as he or she focuses on total enrollment goals and other budgetary pressures. There may not be any clearly unethical directive from a dean, but the signal to produce a body count may be interpreted as a directive without ethical restraint.

Admissions officers are full-time administrators who are part of the national growth of academic administrators. While faculties have remained stable or decreased during the 1970's and 1980's, the number of administrators has increased dramatically. Legal education, like most of higher education, has become too complicated to be run without specialists in areas such as financial aid, fundraising, and other management areas. Skilled though these experts may be, they are often hindered by the framework of authority within the law school. Thus, unless an institu-

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78 Note, supra note 51, at 42.
79 B. Scott, CRISIS MANAGEMENT IN AMERICAN HIGHER EDUCATION 169 (1983).
81 STANDARDS, supra note 48, S 205 ("the dean and faculty of the law school shall have the responsibility for formulating and administering the program of the school, including . . .

tion has an established code, specifically protecting administrators from inhumane treatment, or a corporate culture based on moral or religious principles, senior and junior administrators in conflict over an ethical issue present an unfair match. In such a collegial or ethical vacuum, an unethical senior administrator is in an unassailable position.

Administrative authority which exhibits an insensitivity towards ethical concerns is the greatest threat to the development of a code of ethics. Admissions deans, except at institutions with strong internal moral traditions or policies protecting “whistle-blowers,” cannot assume the high ethical standards expounded in the LSAC code of good admissions practices. Admissions personnel are not particularly well paid and are generally disinclined to air their grievances publicly or resign in protest. They are much more likely to silently sit by and conceal such institutional weaknesses as nonexistent placement programs, falling academic standards, or lower bar passing rates, rather than face potential reprisals or dismissals.

Thus, if institutions of legal education have a serious desire for ethical admission practices, there should be a definitive declaration of the overriding rights of administrators and applicants to command the leaders of legal education to behave in an ethical manner. Commitment to such a high standard, instead of the vague definition of a “law schools responsibility,” would more effectively achieve the desired result of ethical admission practices.

This raises the need for an effective enforcement mechanism for a code of ethics for law school admissions. The experience of corporations with codes of ethics clearly indicates that codes which do not have an enforcement provision are impotent. Weaver and Ferrell’s study of corporate policies on actual unethical behavior concludes:

A basic building block of the organizational environment is corporate policy. Formal policy is an explicit statement to encourage beliefs and behaviors

admission policies”).

Blowing the Whistle, much admired in theory, is neither a common practice nor one that is rewarded. Indeed, a study of whistle-blowers in industry and government found that a pattern of widespread retaliation led other employees to the inescapable conclusion that confronting authority over ethical issues, even when the authority was clearly wrong, led to serious reprisals including dismissal. See Glazer & Glazer, The Whistle-Blowers Plight, N.Y. Times, Aug. 13, 1986, at A23, col. 1.

Americans simply do not have a tradition of resigning as an act of protest. It is much more likely for admissions personnel to sit silently by while unethical practices occur. See Berlo, “Morality or Ethics?”: Two Approaches to Organizational Control, 20 PERSON ADMIN. 16, 19 (1975).

The need for “enforcement” is almost the universal experience of those developing codes. See Carey, The Ethics of Public Accounting, 297 ANNALS AM. ACAD. POL. SOC. SCI. 1, 4 (1955); Smith, Commentary on Code of Ethics of Public Relations Society of America, in ETHICAL BASIS OF ECONOMIC FREEDOM 284 (I. Hill ed. 1976).
either ethical or unethical. Based on these findings, policy appears to be a viable consideration to influence ethical conduct. If the associations discovered in this limited study are typical, individuals that make policy decisions must assume some part of the responsibility for the ethical environment of the organization. Also, these findings question the impact of 'codes of ethics' that are not enforced; top management should establish policy as well as express a commitment to ethical conduct. 84

Successful codes within business organizations have often featured significant third party involvement, such as the appointment of an independent code administrator responsible for conducting investigations into alleged code violations. 85 Virginia Knauer, who was assistant to the president for consumer affairs under Jimmy Carter, found that the existence of the third-party complaint process made the codes effective and prevented the need for more cumbersome governmental regulation. Ms. Knauer also noted that the failure to have an effective code, one with enforcement procedures, invites government intervention, something well-known among academic administrators. 86

Organizations representing competing companies have been particularly effective in enforcing their codes. Sanctions imposed by these organizations range from the detailed investigative procedures of the Direct Selling Association to the censure and graded sanction provisions of the National Association of Realtors. 87 These organizations report that the existence of these sanctions and the commitment to use them means they rarely must be used.

Undergraduate admissions officers facing similar ethical tensions have also concluded that sanctions are what make a code of ethics more than simply a list of approved admissions practices or worse, and more cynically, ideals not particularly followed by the trade. 88 Reviewing the ethical code developed in the early years of the undergraduate admissions crisis, David McKenna, a former professor of Education at Ohio State and president of Seattle Pacific College, noted:

One of the questions you are asked to ponder is, “What should be done about known violations of our ethical standards?” Obviously, you have been reluctant to impose sanctions on your members; consequently, others are doing it for us under the label of “consumer protection.” Your code of ethics needs what is called the “power of the gate.” For those who wish to join

84 Weaver & Ferrell, supra note 75, at 480.
88 Woodward, supra note 66, at 3.
your company, the gate swings open when they agree to the ethics and values you hold; but, the gate must swing both ways. Members who violate the standards know that they can be excluded after fair warning and due process. If you are serious about governing the values as well as the practices of your profession, an ethics board with the power to recommend the sanctions of rewards and punishment may make sense. Otherwise, you will have to rely upon a climate of consensus in which individuals carry their own sanctions in their conscience.

*Ethical consequences* reach beyond individuals to institutions and the system itself. Survival is a consequence of note. Unless we anticipate the emergencies of the tent, the waterhole, and the earthquake by developing an ethic of interdependence, triage will take place through the process of natural selection. In some cases, death may be merciful. In others, immediate treatment may mean survival.88

Legal education already has a number of possible enforcement mechanisms through various local bar organizations, state courts, and through the A.B.A. accreditation process. This self-regulation has made legal education, and the legal profession, largely independent of government intrusion. In an era of real competition, however, increased diligence must be exercised in seeing that the present A.B.A. restrictions on unethical admissions practices are enforced.

Although the A.B.A.'s *Standards for Approval of Law Schools* are appropriately designed to impact upon the broad concerns of educational quality, their impact upon ethics in admission is obvious as well. Several standards are particularly relevant to a discussion of the ethics of law school admissions.

Standard 501 states, in part: "The school may not admit applicants who do not appear capable of satisfactorily completing that program."89 The interpretations of standard 501 present a possible enforcement procedure for an admissions ethics code. For example, the published interpretations state:

In an effort to assist students in making informed judgments regarding law school programs, and in recognition of significant investment by students and institutions arising from such judgments, a school's bulletin of information, and other materials which are made available to students considering a course of study at the law school, should fairly and adequately reflect: the educational objectives of the school; its admission and financial aid policies; the nature of the curriculum; the composition and size of the faculty and library; and curricular and placement opportunities.90

Moreover, the interpretations advise that:

89 *STANDARDS*, supra note 48, § 501.
90 *Id.* I 501.
A law school which denies almost no one admission for academic reasons and which is experiencing consistently declining average LSAT scores combined with low GPA's for admitted students and which has operating deficits and heavy dependence on tuition income, does not comply with Standards 209(a) and 501.95

Where a law school has a declining median LSAT score and a declining GPA for the entering class and where the school contemplates expansion in the size of the student body, further expansion of the entering class may threaten the quality of the school's student body and the school's capacity to comply with Standards 201, 209, 210 and 304(c).96

These issues are all important. However, specific enforcement, outside of sabbatical inspection, is left to the faculty. Indeed, violation of Standard 501 is understood in a way that might seem inconsistent with an economic analysis of legal education. Admitting students of low academic ability is understood as violative of the requirements of "[f]aculty control in the admissions process."97 Yet, this 1978 interpretation of 501 assumes that the faculty, if they were able, would be willing to maintain academic standards in the light of various other economic pressures.98 Thus, the ideal expressed in the Standards, as interpreted, is excellent, if somewhat vague. But the responsibility of faculty enforcement, in light of the economic realities, is not likely to create a system with an effective policing procedure.

The threat to removing a school's accreditation over the absolute abandonment of standards may be genuine, but is not a very effective enforcement mechanism.99 Even within the LSAC, the only sanction available, the withholding of LSAC services, has not been perceived as likely.100 In effect, while everyone in legal education thinks ethics is important, enforcement is usually left elsewhere, or assigned to the A.B.A., which cannot monitor every action that might require it, or to a sanction so drastic that few would be willing to invoke it.

In sum, the vital first step is the decision to have a code of ethics. Unlike so much of higher education, hierarchical by tradition, both the decision to seek a code and the writing of the code must be a collaborative effort. The document must belong to all aspects of the community of legal educators or it will belong to none.

For legal education, particularly law school admissions, this would be

95 Id.
96 Id. I 210.
97 Id. S 501.
98 See First, supra note 64, at 201-04.
99 The travail of the accreditation process has been well documented in the Antioch case. See A.B.A. Urged to Back Antioch, N.Y. Times, Dec. 17, 1985, at B14, col. 5.
100 Raushenbush, Memorandum to LSAC Delegates: Possible Enforcement of LSAC Policies (Jan. 7, 1982) (conference materials).
a change. Law deans, admissions personnel, and LSAC board members no longer hold joint conferences. As has been noted, however, all segments of the law school admissions are linked and must jointly explore the ethical questions presented by the new competitiveness among law schools.

Each law school, through the signature of the dean, must agree to the terms of any code adopted and its concomitant enforcement procedures. This will be a visible and meaningful symbol that demonstrates the fact that law deans are and want to be ethical, and will provide a structure within their own institution, a written document, outlining a particular institution's code of ethics.

Thus, what might emerge is a multi-leveled admissions ethics code. A national code would provide for the basic principles which ought to underlie the entire admissions process. Locally, deans and their subordinate deans could establish an internal code of ethics, based on the school's own individual admissions policies. In instances where problems arise, the national statement would be an excellent vehicle for dispute resolution.

Moreover, because law schools and universities are institutions dedicated to dialogue and discussion, neither the national or local document would survive intact for long. Constant evolution and changes would make the issue of ethical admission practices part of the law school deans and admissions officers public conscience. Case studies and relevant materials would be utilized as part of this ongoing educational process.

Highlighting unethical admissions practitioners is a secondary justification for a code of ethics. Indeed, the purpose of a code is to encourage and even inspire ethical admissions practices and norms. The fact that law school admissions officers act unethically should not be viewed as simply another case of marketing excesses because the salesperson cannot separate himself or herself from the product being sold. Those who sell a legal education must also sell the highest ideals of that profession. And, because marketing has peculiarities not traditional to the practice of law, law school admissions officers, specifically those who do not lie, deserve a code of ethics.

The debate about a code of ethics for legal education and law school admissions is quickly becoming academic. The steadfast refusal of the law schools to publish simple exit data like bar examination results is an invitation for governmental intervention in the form of a consumer bill of rights for college and graduate school admissions, superseding any attempt by the schools at self-regulation.

Of course, there would be little pressure for government intervention if law school admissions officers had more credibility or if a strong code of ethics was in place. But as has been pointed out in several non-LSAC sponsored research projects, there are several dramatic contrasts between what admissions officers tell applicants and how the admissions process
really works. Many admissions officers, for example, claim that there is no such thing as a "cut-off" score or that letters of recommendation are a statistically important element in the admissions of law students. However, the reality is that schools tend to reject whole categories based on the "numbers." This practice is so well known and documented that striving to maintain the illusion of holistic admissions is more foolish than it is deceptive.

More importantly, the absence of any protection for admissions officers or admissions deans from the possibility of an unethical and vindictive dean creates a legitimate government interest in protecting its investment in the absence of an effective code. This failure to protect the rights of the admissions cadre and the public they serve is particularly troublesome because the law schools serve a profession dedicated to protecting rights of the individual.

For all these reasons, legal education ought to be a leader in the student consumer rights movement. By exposing the admissions process to scrutiny instead of suppressing data we know to be true, legal education can create a positive, non-confrontational atmosphere in which a new culture of law school and college admissions might emerge. It will be a culture based upon the true professional, protected from unethical intrusions and one which stresses our sensitivity to the ethical considerations which are the essence of any humanistic admissions process.