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THE PREEMPLOYMENT ETHICAL ROLE OF LAWYERS: ARE LAWYERS REALLY FIDUCIARIES?

FRED C. ZACHARIAS*

ABSTRACT

This Article considers the nature and extent of lawyers' obligations to prospective clients. Most jurisdictions have rules forbidding certain kinds of representation, requiring that particular information be given clients in writing, and regulating fees. Professional code drafters, courts, and commentators, however, have never addressed the broader issue of the lawyer's role at the retainer stage of representation, including whether lawyers have responsibility for providing prospective clients with candid advice regarding the course they should pursue.

The issue is important to clients. A lawyer's action may determine whether a client obtains any representation, competent representation, or a lawyer well suited to the task. It also affects the client's consideration of alternatives—including alternative methods of resolving the legal matter and whether lower cost or specialized representation might be available.

The issue is equally important to the bar. Most legal ethics codes free lawyers to compete for all types of legal work, regardless of how experienced or qualified they are. The fiction that lawyers are fungible, or (at some level) equally competent, underlies the current regime of lawyer regulation and is designed, at least in part, to protect the guild. Although legal ethics regulation places restrictions on how lawyers may solicit business, once a prospective client comes to a lawyer, virtually the only explicit constraint on the lawyer's

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ability to accept the case is that the lawyer provide minimally competent service.

This Article argues that the professional regulatory scheme should clarify and facilitate enforcement of lawyers' preemployment obligations. Depending on one's view of existing law, this can be accomplished either through refined interpretation of the professional rules and common law standards or through amendments to the legal ethics codes. The Article then analyzes the significance of defining a lawyer's preemployment role for the legal ethics regime and external law regulating the bar. The Article concludes by offering options, some designed to enhance enforcement of lawyers' preemployment obligations and others that might serve as independent alternatives for achieving client protection.

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This Article raises an issue long neglected in legal ethics regulation: what is a lawyer's role at the retainer stage of representation? Most jurisdictions have rules forbidding certain kinds of representation,¹ requiring particular information to be given to clients in writing,² and regulating fees.³ A few judicial opinions and scholarly works have also asserted either that retainer agreements are arm's length in nature,⁴ on the one hand, or that lawyers have fiduciary responsibilities even before formal employment, on the other.⁵ No

1. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7-1.8 (2006) (forbidding certain representations freighted with conflicts of interest).

2. See, e.g., CAL. BUS. & PROF. CODE § 6148 (West 2003) (requiring written retainer agreements in particular cases); MODEL RULES OF PROF'L CONDUCT R. 1.5(b)-(c) (2006) (requiring lawyers to give fee and cost information "preferably in writing"); *id.* R. 1.8(a) (involving business transactions with clients).

3. See, e.g., CAL. BUS. & PROF. CODE § 6146 (West 2003); MODEL RULES OF PROF'L CONDUCT R. 1.5 (2006).

4. *E.g.*, *Setzer v. Robinson*, 368 P.2d 124, 126 (Cal. 1962) (holding that an attorney and client deal at arm's length when agreeing upon the terms of their contract); *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 558 (Ct. App. 1994) (noting that "in general, the negotiation of a fee agreement is an arm's-length transaction"); *In re Silvertown*, No. 95-0-10829, 2001 WL 664251, at *4, *9 (Cal. Bar Ct. May 22, 2001) (holding that negotiation of a fee ordinarily is an arm's-length transaction, but nevertheless finding discipline appropriate for overreaching); *Brillhart v. Hudson*, 455 P.2d 878, 879-80 (Colo. 1969) (affirming the trial court's finding "from the pleadings that the parties entered into a contract, if in fact they entered into any contract, for a contingent fee and were dealing at arm's length and the fiduciary relationship is unimportant in a case of this kind"); *Elmore v. Johnson*, 32 N.E. 413, 416 (Ill. 1892) ("Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists, and the parties deal with each other at arm's length."); *Edler v. Frazier*, 156 N.W. 182, 184-85 (Iowa 1916) (holding that no confidential relation existed when the parties were negotiating fees because the parties were dealing at arm's length); *Higgins v. Beaty*, 88 S.E.2d 80, 82-83 (N.C. 1955) (noting that when an attorney contracts with his client regarding his fees, parties deal with each other at arm's length); *cf.* *Lutz v. Belli*, 516 N.E.2d 95, 98 (Ind. Ct. App. 1987) ("The facts established by Belli demonstrate that he and Lutz dealt at arm's length. Under these circumstances, the parties were free to fix the compensation at whatever figure they thought proper."); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer, & Feld, L.L.P.*, 105 S.W.3d 244, 264-65 (Tex. App. 2003) (upholding an arbitrator's ruling that fee negotiations between a lawyer and a sophisticated client were conducted at arm's length).

5. See, e.g., *Nolan v. Foreman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982) ("The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention."); Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1197-98 (suggesting that courts have recognized a fiduciary obligation of lawyers to clients at the retainer stage of representation, especially with respect to fee arrangements); Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 984 (1998)

one, however, has directly addressed the broad core question of the lawyer's ethical role when clients come to discuss potential representation.⁶

The issue is important to clients. A lawyer's preemployment conduct may determine whether a client obtains any representation, competent representation, or a lawyer well-suited to the task. It also affects the client's consideration of alternatives—including alternative methods of resolving the legal matter—and whether lower cost or specialized representation might be available.

The issue is equally important to the bar. Most legal ethics codes free lawyers to compete for all types of legal work, regardless of how experienced or qualified they are.⁷ The fiction that lawyers are fungible, or (at some level) equally competent, underlies the current regime of lawyer regulation⁸ and is designed, at least in part, to

(identifying fiduciary duties lawyers may owe clients at the retainer stage of representation); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 433 n.138 (1998) [hereinafter Zacharias, *Waiving Conflicts*] (arguing that "the lawyer's obligation to prioritize her client's interests over her own extends to the retainer stage of the representation"); Mark G. Anderson, Note, *Arbitration Clauses in Retainer Agreements: A Lawyer's License to Exploit the Client*, 1992 J. DISP. RESOL. 341, 358 (asserting that a lawyer has a fiduciary obligation to the client at the retainer stage); cf. Philip Ridenour, *Attorney Fees: Where Are We in Kansas*, J. KAN. B. ASS'N, Sept. 2004, at 6, 8 (noting the judicial view that "lawyers are not business people entitled to charge what the traffic will bear.... [E]ngagement retainers are inconsistent with the fiduciary duties incumbent on the attorney").

6. Some professional codes do address lawyers' obligations to protect the confidences of potential clients and to avoid conflicts of interest that may injure them. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.18(b)-(c) (2006). In the context of discussing lawyer-client fee arrangements, particularly contingency fees, Lester Brickman has argued that a fiduciary duty "attaches whenever a potential client approaches a lawyer in a professional capacity—even to seek information about the lawyer's fee." Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 55 (1989). The Restatement of the Law Governing Lawyers also suggests that the validity of fee arrangements should depend on some of the factors identified in this Article, including whether "the client was sophisticated in entering into such arrangements," "the client had a reasonable opportunity to seek another lawyer," "the lawyer adequately explained the ... implications of the proposed fee contract," "the client understood the alternatives available from this lawyer and others," and whether "the contract provide[s] for a fee within the range commonly charged by other lawyers in similar representations." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. c (2000). This Article addresses the broader question of what general obligations lawyers have, or should have, at the pre-representation stage and how those obligations might be implemented.

7. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2006) ("A lawyer can provide adequate representation in a wholly novel field through necessary study.").

8. See Fred C. Zacharias, *The Future Structure and Regulation of Law Practice:*

protect the guild.⁹ Although legal ethics regulation places restrictions on how lawyers may solicit business,¹⁰ once a potential client comes to a lawyer, virtually the only explicit regulatory constraint on a lawyer's ability to accept the case is that the lawyer provide minimally competent service.¹¹

Complicating the issue is the fact that clients differ. One might expect a lawyer's obligations at the retainer stage to vary with a potential client's sophistication, experience in legal matters, the representation options the client might have, and the complexity of the matter. For the most part, however, the legal ethics codes do not—on the surface, at least—make these distinctions.¹²

This Article argues that the professional regulatory scheme should clarify and facilitate enforcement of lawyers' preemployment obligations. Resolving all questions pertaining to a lawyer's ethical role at the retainer stage, however, is not the Article's purpose. The issues are complex. Any resolution will have significant effects on legal practice and the common law and, as a consequence, is likely to prove controversial. The Article's primary goal is simply to make sure the subject receives the attention it deserves.

Part I of the Article considers why it makes sense to impose obligations on lawyers at the retainer stage of representation.¹³ Part II describes the current regulatory scheme. Part III sets forth this Article's view of the appropriate contours of lawyers' obligations,

Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 ARIZ. L. REV. 829, 838-40 (2002) [hereinafter Zacharias, *Confronting Lies*] (discussing the "fiction" that all lawyers are competent).

9. In other words, enabling lawyers to take matters beyond their current expertise allows members of the bar, particularly new and inexperienced attorneys, to expand their practices.

10. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006) (regulating lawyer advertising); *id.* R. 7.3 (regulating solicitation of clients).

11. 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, 1003-04 (2002) [hereinafter Zacharias, *What Lawyers Do*] (noting that advertising rules are rarely enforced, in part because the regulators focus more on lawyers' actions that actually harm clients).

12. See *infra* note 45 and accompanying text.

13. This Article limits itself to the obligations of lawyers. It does not focus or depend on the argument that lawyers are unique, though some observers (particularly judges and practitioners) have taken that position. The Article also does not address whether and how contracts with doctors, psychologists, and other professionals, who share some characteristics with lawyers, should be regulated.

either under a refined interpretation of existing law or through amendments to the professional standards. Finally, Part IV examines the significance of defining a lawyer's preemployment role for the legal ethics regime and for external law regulating the bar. Part IV tentatively offers several options, some designed to enhance enforcement of lawyers' preemployment obligations and others that might serve as independent alternatives for achieving client protection.

I. DO CLIENTS NEED REGULATORY PROTECTION AT THE RETAINER STAGE OF REPRESENTATION?

Before examining the current regulatory scheme and considering its amendment, it is worth considering why regulation might even be contemplated. The answer to that question turns on two factors: (1) the importance to clients of making good decisions and receiving the assistance of objective legal advice at the preemployment stage of representation; and (2) the reasons why consumers of legal services might be prone to poor decision making in the absence of their prospective lawyers' help. The following sections address each factor in turn.

A. Clients' Stake in Lawyers' Approaches to Their Preemployment Role

In discussing lawyers' obligations when setting fees, the Restatement of the Law Governing Lawyers distinguishes between sophisticated and unsophisticated clients.¹⁴ That distinction may be insufficiently nuanced. Clients can be sophisticated—in other words, intelligent and worldly—without truly grasping what lawyers do, how they operate, and when they are needed. Other clients may know and understand the pertinent information, but still not be in a position to act on their knowledge.

14. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (2000) (noting that "[c]ourts are concerned to protect clients, particularly those who are unsophisticated in matters of lawyers' compensation"). But see STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 35 (7th ed. 2005) (arguing that the Restatement inadequately protects unsophisticated clients in fee discussions).

Prospective clients can be categorized in one of the following five ways, with each category reflecting the clients' need for protection against bad decision making at the retainer stage. Most vulnerable are potential clients who are completely unsophisticated. Next come intelligent potential clients, but those who have had no experience with lawyers. The middle group consists of potential clients of reasonable intelligence who have had some legal experience, but who simply have no way of identifying alternative representation. Repeat clients probably require somewhat less protection because they at least have specific experience with a particular lawyer, which gives them some feel for the lawyer's qualities.¹⁵ Needing the least protection are highly sophisticated clients who have both the knowledge and wherewithal to select the best lawyer for a particular matter, such as corporate clients who rely on in-house counsel to select outside representation.

Just as there is a range of prospective clients, there is a range of matters about which clients need information before hiring a particular lawyer. A consulted lawyer often will have personal incentives not to address a prospective client's lack of information because the client's focus on the information may cause her to seek representation elsewhere or not to seek legal representation at all.¹⁶

Initially, it is important for prospective clients to know whether it is necessary, or wise, to hire a lawyer (or a particular type of lawyer). This issue encompasses several considerations. The merits of the client's position may determine whether the matter is worth pursuing. Alternatively, the case may call for the prospective client to employ a strategy for which no lawyer is necessary or that some lawyers are not qualified to implement. For example, although a client initially may believe that litigation is imminent or necessary, the consulted lawyer may realize that mediation, arbitration, or immediate settlement is the wiser approach. As a practical matter, however, a consulted lawyer may not always have sufficient

15. Of course, even these clients may not realize that a difference in subject matter might significantly affect a lawyer's competence or suitability for the case. They also may have misperceived the lawyer's competence in the first matter.

16. To avoid confusion, this Article refers to the consulted lawyer as male and to other actors in the process, such as judges and clients, as female.

information at the retainer stage to advise the client regarding all the considerations pertinent to the decision of how best to proceed.

To be valuable, part of the preemployment discussion also should address the threshold issue of what the representation will, and ought to, include. In some situations, a client is well advised to use a particular lawyer for limited purposes, leaving other aspects of the potential representation to another lawyer, a non-lawyer service provider, or pro se representation.¹⁷ Unbundling of legal services is becoming ever more common and viable.¹⁸ When realistic, the possibility of unbundling is an eventuality lawyers might be expected to discuss honestly with clients at the outset of representation, even though lawyers' self-interest may lie in convincing prospective clients to engage full legal representation for all related matters.

Once a potential client determines that she should hire some lawyer, she confronts two broad questions: is this the best lawyer for the job and is this the best lawyer for the price the lawyer proposes to charge? Obviously, these questions are not absolute. Compromising on the two issues in a reasonable way may well be necessary in order to obtain suitable counsel.

17. See, e.g., Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) (characterizing the bundling of legal services as inefficient); Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 408 (1994) (noting the "new reality" of pro se divorce representation).

18. See, e.g., FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 105 (2000) (arguing that unbundling is "practiced by lawyers with solid reputations in many fields of practice"); Steven K. Berenson, *Cloak for the Bare: In Support of Allowing Prospective Malpractice Liability Waivers in Certain Pro Bono Cases*, 29 J. LEGAL PROF. 1, 1 (2005) ("Substantial strides have been made in the effort to increase access to justice for poor persons in areas such as ... 'unbundling' legal services"); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2005 (1999) (noting that "the concept [of unbundling] has attracted increased attention"); David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 978 (1998) (advocating "routine unbundling and 'deskilling' of legal services"); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 339 (1997) (noting that "[i]n time, discrete-task representation may be a practical alternative for providing legal assistance to the moderate-income elderly," but urging caution); Marcus J. Lock, Comment, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459, 484-88 (2001) (discussing the adoption of Colorado rules facilitating unbundling).

What goes into the determination of whether this is the best lawyer for the matter? Typically, a lawyer's suitability depends upon three factors: his general ability (including his native ability and legal skills), his general experience, and his specific experience handling this type of case. Prospective clients rarely can expect to retain the very best lawyer for a particular matter, even if that single person could be identified. But there are lawyers who fit within a range of suitability that consumers of legal services should be able to identify.

Whether a particular lawyer is the best lawyer for the price he proposes to charge is a more complicated calculation. Because the factors comprising competence are variable, clients inevitably will find it difficult to price lawyers' relative worth. There are several pertinent pieces of information, however, that a well-informed prospective client might expect a straightforward lawyer to provide.

First, a prospective client arguably would expect the lawyer to alert the client to the availability of free representation for someone in the client's position—be it a public defender, legal aid, or public interest organizations. Second, the prospective client probably would expect the lawyer to—and might even be legally entitled to have the lawyer—accurately identify the availability of true specialists in the subject matter at issue, the degree of the lawyer's own expertise, and (if the lawyer is not a specialist) the identity of lawyers who can provide specialist services.¹⁹ In light of the failure of most jurisdictions to certify true specialists in an official way,²⁰

19. The comments to Model Rule 1.1 limit the cases lawyers can accept to those in which they are, or can make themselves, competent. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. 1-6 (2006). Arguably, a lawyer's limited experience is something a client should know in order to make decisions in the matter, and therefore must be communicated to the client under Model Rule 1.4. See *id.* R. 1.4 (requiring the lawyer to provide explanations that allow the client to make informed decisions); cf. *Togstad v. Vesely, Otto, Miller, & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (holding lawyer responsible for failing to advise client to have an expert evaluate the matter in light of lawyer's own lack of expertise). At least one court has found a legal duty on a lawyer's part to refer a matter in which he is incompetent to a specialist. *Horne v. Peckham*, 158 Cal. Rptr. 714, 720 (Ct. App. 1979); see also Karen J. Feyerherm, Recent Development, *Legal Malpractice—Expansion of the Standard of Care: Duty To Refer*, 56 WASH. L. REV. 505, 507 (1981) (questioning *Horne*). In *Horne*, however, the referring attorney maintained a full attorney-client relationship with the client in the matter in question. See *Horne*, 158 Cal. Rptr. at 716-17.

20. See *infra* notes 32-35 and accompanying text.

however, it may be difficult for the lawyer to define specialists and the fields in which specific substantive expertise is required.

In attempting to identify the best lawyer for the price, some prospective clients will rely on a consulted lawyer to provide referrals to better or cheaper options. Is this expectation justified? Practical problems abound: will a lawyer be able to acknowledge to himself that another attorney is superior; do lawyers know the prices their competitors charge; how can lawyers develop accurate impressions about the competition? Moreover, it may be difficult for a lawyer to compare the services he expects to provide against the services of a competitor because the competitor may do more or less for the same pay. Imposing upon lawyers a referral obligation would require them to conduct an inquiry into the market that they otherwise might never undertake.

Suppose a prospective client has in some manner determined that a particular lawyer is suitable and fairly priced. And suppose the consulted lawyer has provided the minimal information that is required under state law regarding the extent and nature of fees and the allocation of expenses. What other information can the client reasonably expect the lawyer to share before a retainer is signed?

When a potential conflict of interest exists, the professional rules require the lawyer to inform the prospective client of the advantages, disadvantages, and risks of waiving the conflict.²¹ But the client may have a right to receive more, namely, objective advice regarding whether the client should, in fact, execute a waiver.²²

Moreover, to the extent a lawyer provides a prospective client with written information about conflicts, fees, and expenses, the client often will need help in interpreting the information.²³ Like boilerplate disclaimers, information buried within a lengthy

21. Compare MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006) (requiring informed client consent to a waiver confirmed in writing), with MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (2000) (requiring a lawyer to explain "the implications of the common representation and the advantages and risks involved").

22. See Zacharias, *Waiving Conflicts*, *supra* note 5, at 432 (arguing that lawyers should be required to advise clients objectively regarding waiver).

23. See Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 173-74 (1996) [hereinafter Zacharias, *The Civil-Criminal Distinction*].

retainer agreement is likely to be overlooked by the prospective client.²⁴ In one sense, it may be the client's obligation to protect herself. On the other hand, anticipating a lawyer-client trust relationship, the prospective client arguably is justified in expecting the lawyer to point out issues of real concern.²⁵

The normative decision of what obligations to impose on lawyers to guide their clients at the preemployment stage depends, in part, on the extent to which regulators believe potential clients can know, judge, or investigate the above information on their own. Few, if any, external tools exist to assist clients in investigating lawyers.²⁶ No consumer reports on the subject exist, precisely because the assessment is imprecise and varies with the nature of each case.

Some issues, however, are within the capacity of some potential clients to ascertain through investigation of the market, interviews, and probing questions. For example, sophisticated clients are capable of determining each lawyer's education and experience, requesting references (to the extent former clients agree to serve as references),²⁷ and comparing the fees of multiple lawyers they consult. They also can be expected to read and interpret the information that prospective attorneys do provide regarding fees, conflicts, and waivers. Less intelligent but motivated clients might find it more difficult to compare the competence and experience of competing lawyers. Nevertheless, by addressing questions to local bar associations, these clients at a minimum should be able to ascertain whether organizations exist that provide free or reduced-fee services. In contrast, it may be beyond the capacity of unsophisticated or inexperienced potential clients to investigate even relatively concrete factors because they may not realize they should,

24. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1367 (1995) [hereinafter Zacharias, *Reconciling Professionalism*].

25. See, e.g., *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 607-08 (Ct. App. 1993) (suggesting that a lawyer's duty to provide advice extends beyond the scope of the retention agreement); *Domen v. Sugarman*, 54 Va. Cir. 176, 178 (Cir. Ct. 2000) (noting that a lawyer has a duty to advise a client of steps that a client should take to protect his or her interests).

26. See *infra* Part I.B.3.

27. One issue that lawyers and former clients must be cautious about is the potential waiver of attorney-client privilege or confidentiality that may occur when a former client speaks to the potential client about the lawyer's past performance. Moreover, the lawyer must avoid breaching confidentiality even in suggesting that he represented a former client and that she might be willing to serve as a reference.

may be too dependent to shop around or probe, or may not know the questions to ask.

B. Reasons Why Prospective Clients Might Not Protect Themselves

Like all other service providers, lawyers are subject to basic constraints in soliciting and contracting for business. They may not commit fraud or misrepresent their abilities in a way that ultimately damages the client.²⁸ They must be able to perform promised services well enough to withstand scrutiny under malpractice or breach of contract standards.²⁹ They may not charge unconscionable fees.³⁰

Beyond those constraints, the tradition of caveat emptor suggests that prospective clients, like other consumers, should be expected to protect themselves in their dealings with lawyers. Three factors, however, provide possible justifications for imposing special obligations on lawyers. First, the nature of legal work and the legal profession often makes it difficult for prospective clients to identify their own interests. Second, lawyers' clients are a peculiar type of consumer, and only some have the tools to make appropriate decisions. Third, the market is not effective in providing information that enables consumers of legal services to protect themselves.

28. Only service providers who can be characterized as "fiduciaries" risk liability in the absence of damages. *See, e.g.,* Hendry v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996) ("Even courts that sometimes *do* require a showing of injury and causation in claims seeking only forfeiture of legal fees have stated that it is not necessary when the clients' claim is based ... on a breach of the duty of loyalty."); Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969) (noting that a cause of action based on a breach of fiduciary duty does not require an allegation of damages); Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (holding that a "client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client"); *see also* United States v. Carter, 217 U.S. 286, 306 (1910) (holding that "[i]t would be a dangerous precedent" to require a showing of actual damages in breach of fiduciary duty cases).

29. *See infra* Part II.D.1.

30. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2006) (forbidding agreements for unconscionable fees).

1. The Nature of Lawyers, Their Work, and the Role They Have Been Assigned

Only a small percentage of legal work is rote. A few types of contracts are formulaic. Divorces in the absence of children or familial assets can be routine. But most representation involves nuance, negotiation, and predictions that do not lend themselves to automatic resolution.

This has important consequences for consumers of legal services. Legal representation is foreign to most prospective clients' everyday experiences. Laypersons usually cannot determine how well a lawyer has performed—for example, whether counsel has drafted or negotiated a good contract—until a transaction falls apart. Indeed, many experienced clients will *never* know how good or bad their lawyer's service really was. Accordingly, consumers of legal services will have difficulty assessing a potential lawyer's expertise on their own and may be unable to rely on word-of-mouth reports by the lawyer's previous clients.

The complexity of legal work also means that one cannot assume all lawyers will perform a particular service equally well. Each piece of legal work ordinarily can be completed in a range of ways, with a broad range of quality. An individual lawyer's competence with respect to each type of work also varies, in part because lawyers often are willing to perform a spectrum of services without specialized training even when true specialists in the field exist.³¹ This stands in contrast, for example, to the medical profession. Although primary care physicians may be willing to consider treating a range of conditions initially, as soon as specialized treatment becomes appropriate, doctors ordinarily refer patients to a physician specially trained and certified.

Professional regulation in most jurisdictions makes it difficult for consumers of legal services to select among alternative lawyers by imposing roadblocks to a lawyer's ability to claim a specialty.³²

31. Such action is sanctioned by the Model Rules. See *id.* R. 1.1 cmt. 2.

32. The U.S. Supreme Court's decision in *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 110-11 (1990), imposed limits on a bar association's ability to outlaw specialty claims, but some jurisdictions nonetheless persist in regulating them to the extent

Equally problematic are jurisdictions that do not regulate specialization claims at all, allowing self-identification by self-proclaimed specialists;³³ this approach renders lawyers' claims of expertise dubious indicators of quality. States that try to walk the line between over-regulation and non-regulation—for example, by requiring certification before a lawyer may claim a specialty³⁴—

they can. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.4 (2006) (limiting claims of fields of practice and specialization to lawyers who have received very specific (and sometimes unavailable) certifications); W. VA. RULES OF PROF'L CONDUCT R. 7.4 (2006) (limiting self-identification as a "specialist" to attorneys who practice patent or admiralty law); see also Adrian Evans & Clark D. Cunningham, *Specialty Certification as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries*, 54 S.C. L. REV. 987, 989 (2003) (stating that current specialty certification regulations in the United States are based on unduly restrictive criteria, and should be widened to include high quality service to clients and high ethical standards). Most jurisdictions that allow certification of specialists predicate certification on the passing of an examination. See Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273, 298 (1997) (discussing the prevalence of specialty examinations). Typically, however, examinations are available in only a few subject matters.

33. See, e.g., GA. RULES OF PROF'L CONDUCT R. 7.4 (2006) (allowing lawyers to communicate specialties gained by "experience, specialized training or education" or "certified by a recognized and bona fide professional entity," subject only to the requirement that the communication not be false or misleading); IOWA RULES OF PROF'L CONDUCT R. 32:7.4 (2005) ("A lawyer may communicate the fact that the lawyer practices in or limits the lawyer's practice to certain fields of law."); OR. RULES OF PROF'L CONDUCT R. 7.1(a)(4) (2006) (limiting specialty claims only insofar as they are "false or misleading"). Many of these jurisdictions require claims of certification to be accompanied by disclaimers that the state has not participated in the certification process. See COLO. RULES OF PROF'L CONDUCT R. 7.4 (2006) (permitting lawyers to state that they are specialists and allowing lawyers to claim certification as a specialist by any certifying organization, provided that the claim is accompanied by the disclaimer that "Colorado does not certify attorneys as specialists in any field"); ILL. RULES OF PROF'L CONDUCT R. 7.4 (2006) (allowing lawyers to designate themselves as certified specialists provided the claim is accompanied by a disclaimer that the state does not certify specialists); MO. RULES OF PROF'L CONDUCT R. 4-7.4 (2006) (allowing specialty claims accompanied by a disclaimer of state involvement); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-105(A)(5) (2006) (allowing claims of certification by an unapproved organization if accompanied by a disclaimer); VA. RULES OF PROF'L CONDUCT R. 7.4(d) (2006) (allowing lawyers to claim certification as a specialist as long as the lawyer names the certifying organization and provides a disclaimer stating that Virginia has no procedure for approving certifying organizations).

34. Many jurisdictions rely exclusively on certifying organizations approved by the ABA, which appears to evaluate specialist claims fairly stringently. There are, however, a limited number of such organizations, and they do not certify a broad range of specialties about which consumers might like information. See ABA Standing Committee on Specialization, *Sources of Certification*, <http://www.abanet.org/legalservices/specialization/source.html> (last visited Oct. 13, 2007) (listing seven ABA-approved certifying organizations). Indeed, in most jurisdictions that sanction certification programs, certification is in only a handful of subject

typically fall short in practice because they rely on organizations that certify specialists based on only superficial training or examination in the limited area.³⁵ Thus, the three current regulatory regimes each, in its own way, makes it difficult for prospective clients to identify which lawyers truly are well versed in the field that the representation involves.

The notion that legal consumers should be able to depend on their potential lawyers for assistance in identifying their needs at the retainer stage is consistent with the image of lawyers that the profession has always promoted. The professional codes are designed to induce clients to use and trust lawyers.³⁶ The bar has always attempted to persuade society that the codes effectively regulate lawyers, allowing clients to rely upon the bar's "professionalism";³⁷ in other words, the profession itself has suggested that

matters is available. See ABA Standing Committee on Specialization, State Status Report on Lawyer Specialty Certification, <http://www.abanet.org/legalservices/specialization/statestatus.html> (last visited Oct. 13, 2007) (listing certification programs in each state).

35. New Mexico, for example, directly certifies specialists, but does not require any examination for any specialties other than civil litigation. ABA Standing Committee on Specialization, State Status Report on Lawyer Certification, <http://abanet.org/legalservices/specialization/statestatus.htm>. (last visited Oct. 13, 2007); State Bar of New Mexico, Summary of Requirements for First Time Certification in a Specialty, http://www.nmbar.org/template.cfm?Section=Summary_of_Requirements (last visited Oct. 13, 2007). Similarly, in Nevada, lawyers in theory may be certified by any state-approved organization (including ABA-approved organizations) that monitors satisfaction of objective requirements. See, e.g., NEV. RULES OF PROF'L CONDUCT R. 7.4(d)(1)-(d)(2)(i)-(ii), R. 7.4A(a)-(b) (2006) (allowing certification of any lawyer who has devoted one-third of the past two years to practicing in the specific field and has completed ten hours of continuing legal education in the designated field in the year preceding certification). Although certifying organizations must submit any examinations they use to the state approval body and, in practice, may rely on examinations, the state rules do not seem to require certifying organizations to employ an examination process. Nev. State Bar Bd. of Governors, Governing Rules for Attorney Specialization 4-5, <http://www.nvbar.org/specialization/Exhibit%203%20governing%20rules.doc> (last visited Oct. 13, 2007).

36. See, e.g., Zacharias, *The Civil-Criminal Distinction*, *supra* note 23, at 182 (discussing the paradigm of the professional codes that "assumes a client who enters the lawyer-client relationship so afraid or distrustful that only total partisanship, and the lawyer's promise of total partisanship, will induce the client to trust and use counsel"); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 361-63 (1989) [hereinafter Zacharias, *Rethinking Confidentiality*] (discussing the goal of confidentiality rules as being, in part, to induce clients to use and trust lawyers).

37. See MODEL RULES OF PROF'L CONDUCT, pmbl. (2006) ("The legal profession is largely self-governing.... To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."); cf. Fred C. Zacharias, *The Humanization*

lawyers are not ordinary, profit-maximizing businessmen and are client-oriented in their approaches. It would be surprising if a potential client did not begin her association with a lawyer assuming that the lawyer will bring these characteristics to bear from the outset.

Consider a hypothetical lawyer who meets with a client for the first time. If one takes the position that the lawyer will treat the initial consultation as an arm's-length transaction, one has to assume that the lawyer will speak to the client differently than he will after the contract is signed. In reality, however, lawyers typically assure clients of confidentiality from the outset. They make it clear that, if retained, they will be the client's ally, perhaps even their only friend. They also effect a posture of objectivity and professional detachment.

In the context of this conversation, how is the potential client likely to react? Will she assume that the lawyer has two souls—one in advising whether the client should proceed, how the client should proceed, with whom as counsel, and at what price and the other in advising on the merits of the case? Or will the potential client assume that the lawyer is providing objective (though perhaps partly self-interested) advice that serves the client's goals? The image of professionalism fostered by the individual lawyer and the bar as a whole induces the client into assuming a level of professionalism that the client might not assume vis-à-vis other service providers.

It is important to distinguish the public's general image of lawyers from the conduct the public expects of particular lawyers once they are consulted. The legal profession has a poor reputation, so a prospective client/consumer may well anticipate that any lawyer she visits will be greedy and amoral. At the same time, however, laypersons picture lawyers as aggressive and relentless in pursuing each client's goals, because that is part of the bar's public image as well.³⁸ The profession has cultivated client trust, educating

of Lawyers, 2002 SYMP. ISSUE, THE PROF. LAW. 9, 28 (arguing that the bar should defer more to outside regulation of lawyers); Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505, 1509-14 (discussing the diminishing role of bar associations as "regulators-in-chief").

38. See Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*,

the public that laypersons in trouble need lawyers' help and that lawyers will serve only their interests.³⁹ Hence, it is not anomalous for a prospective client to view lawyers with some distrust in their demand for high fees (i.e., lawyers are greedy), yet simultaneously to assume that a consulted lawyer will serve her well in other respects, even at the retainer stage.

2. *The Nature of Prospective Clients*

Professional regulation historically has assigned lawyers a duty to safeguard their clients' interests, or at least to put their clients' interests ahead of their own. Rules such as those governing conflicts of interest and attorney-client confidentiality are premised in part on clients' inability to understand the complicated legal system.⁴⁰ The rules designate lawyers as clients' interpreters or navigators of the (otherwise incomprehensible) legal system.⁴¹

Prospective clients arguably have the same characteristics and needs as enlisted clients. It is no stretch to conceptualize prospective clients as ignorant of the law and requiring assistance in identifying and contracting for appropriate representation. Unless one can assume that prospective clients are fully capable of negotiating for their representation or that they understand the need for independ-

75 CAL. L. REV. 379, 380-81 (1987) (discussing the public's conflicting opinions about, and expectations of, lawyers).

39. *See id.*

40. *See, e.g.,* MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 4 (1975) (noting the client's incompetence "to evaluate the relevance or significance of particular facts"); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 621 (1990) ("Because clients have little hope of navigating the legal system alone, the system imposes significant incentives for clients to give lawyers secrets."). Such regulation views clients, particularly criminal defendants, as uneducated, ignorant of the legal system, dependent on lawyers, and incapable of making decisions without a lawyer's assistance. *See generally* David Luban, *Paternalism and the Legal Profession: A Problem of Imputed Ends*, 1981 WIS. L. REV. 454, 458 (discussing paternalistic lawyer practice); Zacharias, *The Civil-Criminal Distinction*, *supra* note 23, at 182 (discussing the role of the paradigm of the unsophisticated client in client-centered ethical regulation).

41. *See, e.g.,* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976) (stating that "without the assistance of an expert adviser an ordinary layman cannot exercise that autonomy which the system must allow him"); *cf.* Zacharias, *The Civil-Criminal Distinction*, *supra* note 23, at 182 (noting that "the [criminal] paradigm assumes an unintelligent, or at least unsophisticated, client who is unable to navigate the legal system").

ent advice before signing retainers, the prospective lawyers seem to be in the sole position to guide the clients.⁴²

The reality, however, is more complex. The professional codes, for example, refer to a second paradigm that treats clients as relatively sophisticated individuals.⁴³ Under some circumstances, the codes take as a given that clients who are provided information are fully capable of making informed, autonomous decisions.⁴⁴

Most professional rules—whether they rely on the paradigm of clients as dependent or the paradigm of clients as sophisticated—seem to deem all clients to be alike.⁴⁵ For purposes of retainer ethics, however, the range of clients is actually broad.⁴⁶ One can reasonably assume that sophisticated corporate clients who deal with their attorneys through in-house counsel will evaluate their need for representation and the qualifications of potential lawyers relatively objectively.⁴⁷ Conversely, unsophisticated, inexperienced, and vulnerable clients who do not know how to deal with lawyers are less likely to perceive transactions with potential counsel as fully arm's-length transactions.⁴⁸ The majority of clients fit somewhere between these extremes.

42. See FREEDMAN, *supra* note 40, at 4.

43. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(a), (b), (f), (g) (2006) (allowing lawyers to take various actions when a client possesses sufficient information to make an adequate decision).

44. See generally Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 203-14 (2001) (distinguishing among rules that accord clients different levels of autonomy and identifying rules that accord clients autonomy once assured clients have the requisite information to make intelligent decisions); see also Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336-39 (1987) (arguing for regulation allowing increased autonomy in client decision making, based on an informed consent model).

45. See Zacharias, *Confronting Lies*, *supra* note 8, at 840-41 (discussing the tendency of professional codes to treat all clients as identical).

46. See *supra* text accompanying note 15; cf. Zacharias, *The Civil-Criminal Distinction*, *supra* note 23, at 173-74 (discussing variations in client sophistication).

47. Cf. Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581, 608 (1997) (discussing ways sophisticated clients evaluate lawyers' fees and fee proposals); see also *id.* at 609 n.125.

48. See *id.* at 587 (arguing that the Restatement of the Law Governing Lawyers proposal regarding attorney-client fee arrangements "leaves unsophisticated consumers of legal services inadequately protected" and that strict written disclosure rules should be required).

This background makes it possible to consider whether consumers of legal services, provided only with their potential lawyers' representations, can safeguard their own interests. Two characteristics of prospective clients support the notion that they require regulatory protection. First, many prospective clients suffer from psychological disabilities that do not impede purchasers of other types of services. Second, at least some potential clients perceive lawyers (and the regulation of lawyers) to be unique and reasonably rely on the prospective lawyers for objective advice.

The history of legal advertising rules suggests that the regulating institutions have always presumed consumers of legal services to be psychologically incapable of interpreting lawyers' representations about their qualifications. Before the Supreme Court intervened, legal ethics codes banned all legal advertising.⁴⁹ Thereafter, the ABA and all American jurisdictions continued to ban "misleading advertisements."⁵⁰ Many states have fleshed out this notion, concluding that consumers of legal services cannot adequately evaluate dramatizations, testimonials, claims of relative competence based on past performance, or even well-intentioned references from past clients.⁵¹ The asserted justifications for such regulation are that all

49. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (holding unconstitutional absolute prohibitions on advertising); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (holding unconstitutional a full ban on legal advertising). See generally LOUISE L. HILL, *LAWYER ADVERTISING* (1993) (describing the history of legal advertising regulation); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take*, 2005 SYMP. ISSUE, THE PROF. LAW. 45, 46 [hereinafter Zacharias, *Legal Advertising*] ("When the Supreme Court held a total ban unconstitutional, the bar continued to enforce slightly less prohibitive regulation, but the Supreme Court consistently found these efforts to be overreaching as well." (footnotes omitted)).

50. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2006); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982) (disapproving absolute bans on targeted advertisements, but upholding prohibitions against misleading advertising); Zacharias, *What Lawyers Do*, *supra* note 11, at 988-95 (cataloguing state advertising regulations).

51. Many of these state regulations are described in Zacharias, *Legal Advertising*, *supra* note 49, at 47 nn.10-12. See, e.g., CAL. BUS. & PROF. CODE §§ 6157.2(c)(2), 6158.1(b) (West 2005) (creating a rule that dramatizations must have disclaimers and a rebuttable presumption that advertising using past results or dramatizations is misleading); ARK. RULES OF PROF'L CONDUCT R. 7.2(e) (2007) (prohibiting the use of dramatizations as well as former and current clients in advertisements); CAL. RULES OF PROF'L CONDUCT R. 1-400 Standards (2), (13) (2006) (requiring dramatizations and testimonials in advertisements to have disclaimers); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b) (2005) (prohibiting the use of past results, testimonials, and some dramatizations); N.J. RULES OF PROF'L CONDUCT R. 7.2(a)

legal matters are unique, that laypersons will draw unwarranted inferences from past results, and that potential clients are too likely to trust lawyers' statements.⁵²

These assumptions about potential clients' psychological inability to protect their own interests reappear in other professional rules, such as those governing conflicts of interest and transactions with clients, which require lawyers to give prospective clients warnings before accepting client waivers.⁵³ Similarly, the traditional designation of lawyers as fiduciaries rests on a belief that clients of all stripes are unusually dependent on lawyers, in part because they reveal confidences to the lawyers.⁵⁴ The common image is that laypersons trust lawyers to look after their interests, are vulnerable in their transactions with lawyers, and are hesitant to discharge counsel or to shop around once having consulted an attorney.⁵⁵

The psychology extends further, however. Laypersons visiting lawyers for the first time typically approach them with a different

(2004) (prohibiting dramatizations in advertisements); PA. RULES OF PROF'L CONDUCT R. 7.2(g) (2005) (requiring disclaimers for dramatizations).

52. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2007) (stating that client endorsements are likely to create unjustifiable expectations); FLA. RULES OF PROF'L CONDUCT R. 4-7.2 cmt. (2006) (stating that testimonials are prohibited because potential clients are likely to draw the conclusion from a testimonial that the lawyer will get the same results in their cases); Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 621 (1986) (noting that prohibitions against the use of testimonials are typically based on an assumption about the public's naiveté).

53. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006) (requiring lawyers to obtain informed consent, confirmed in writing, for a conflict waiver); *id.* R. 1.8(a)(1) (requiring disclosures preceding a transaction with a client).

54. See, e.g., *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994) (stating that lawyers occupy a "unique position of trust and confidence" vis-à-vis clients); *Goldman v. Kane*, 329 N.E.2d 770, 773 (Mass. App. Ct. 1975) (implementing fiduciary duty principles to create a presumption that a lawyer's business transaction with a client was improper even though the lawyer had advised the client not to engage in the transaction); see also GILLERS, *supra* note 14, at 63 (identifying reasons supporting the imposition of fiduciary obligations on attorneys).

55. Thus, for example, some courts have gone so far as to find that lawyers breached their fiduciary duty by engaging in sexual relations with their clients, even when the clients initiated or insisted on the encounter. See, e.g., *Comm. on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Hill*, 436 N.W.2d 57, 58-59 (Iowa 1989) (disciplining a lawyer despite the fact that the client solicited the lawyer and the lawyer initially demurred); *cf.* *Brickman*, *supra* note 6, at 65 (assuming that most personal injury claimants are "not legally sophisticated and do not have access to legal counsel to evaluate the proposed contingent fee retainer agreement").

mindset than when consumers approach other service providers. Although most potential clients recognize that lawyers, like plumbers, plan to make a living, many perceive lawyers as “professionals” rather than profit maximizers. That is especially true of those potential clients who start from a position of dependence or vulnerability, either because of the threat of a cataclysmic event that they have not experienced in the past (such as a lawsuit or criminal prosecution) or because they are involved in an emotional legal matter (such as a divorce). These individuals tend to view lawyers, at least in part, as a “friend”⁵⁶ or immediate ally.⁵⁷

This perception is bolstered by the public’s assumption that lawyers are specially regulated, in a way that prevents lawyers from taking advantage of clients. Prospective clients’ confidence in the lawyers they meet is reinforced when the lawyers promise to keep the potential clients’ secrets and to be on their side.⁵⁸ It is in part for these reasons that the designation of lawyers as fiduciaries initially arose.⁵⁹

56. See generally Fried, *supra* note 41, at 1060 (developing a theory of the lawyer as “friend” of the client).

57. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 7-8 (3d ed. 2004) (arguing that the “central concern of lawyers’ ethics is ... how far we can ethically go ... to achieve for our clients full and equal rights under law”).

58. At least two states encourage this perspective by requiring or encouraging lawyers (or groups of lawyers) to provide clients with a “Client Bill of Rights” at the outset of the representation. See N.Y. COMP. CODES R. & REGS. tit. 22, § 1210.1 (2001) (requiring New York lawyers to post a bill of rights prominently); Doris B. Truhlar et al., *Committee Writes Clients’ Bill of Rights and Responsibilities*, COLO. LAW., Feb. 2002, at 21 (describing proposed Clients’ Bill of Rights and Responsibilities to be provided by matrimonial lawyers in Colorado); see also Patrick M. Connors, *Professional Responsibility*, 48 SYRACUSE L. REV. 793, 811 (1998) (noting that the justification for New York’s Client Bill of Rights is that it “helps to instill confidence in lawyers and provides each law office with an opportunity to advertise the high standards of practice guaranteed to each client”); Anna Snider, *Firms Put Client Bill of Rights on Display*, N.Y. L.J., Dec. 31, 1997, at 1 (describing the New York Client Bill of Rights).

59. See *Konover Dev. Corp. v. Zeller*, 635 A.2d 798, 805 (Conn. 1994) (“[A] ‘fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.’” (quoting *Dunham v. Dunham*, 528 A.2d 1123, 1134 (Conn. 1987))); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000) (“A lawyer is a fiduciary, that is, a person to whom another person’s affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary.”); cf. *Brickman*, *supra* note 5, at 1209 (“Most clients lack sufficient information upon which to base an informed judgment regarding the fee structure and hence must rely on their lawyer for that knowledge.”).

These expectations of some (but, of course, not all) potential clients do not mean that lawyers should be forbidden to profit from plying their trade. Even trustees are entitled to a reasonable fee for their services.⁶⁰ Existing regulations limiting lawyers to reasonable fees protect clients from overreaching in that regard.⁶¹ However, the distinct psychological attributes of potential clients and their reasonable perceptions when entering upon representation may call for more than simple fee regulation. At least some prospective clients require help evaluating the need for representation, the form it should take, and who can best supply it—help that perhaps only the initial lawyer can provide.

3. Does the Market Enable Lawyers' Potential Clients To Protect Themselves?

The issues just described would largely disappear if prospective clients could easily obtain the information they need and understand it before visiting counsel. Certainly, not all clients suffer from psychological impediments to evaluating potential representatives. Nevertheless, the market for legal services itself imposes barriers to the informed selection of an appropriate lawyer.

The main way the market provides information to potential clients is through lawyers' reputations. An important issue, therefore, is what type of reputational information actually is of value to prospective clients. As a practical matter, reputation ordinarily focuses on a lawyer's general, or relative, competence; in other words, whether the lawyer is "good." Yet, as already noted, a prospective client often needs more specific information about the lawyer's expertise in matters like the client's matter, about the lawyer's fees relative to those of other lawyers, and about the

60. See generally RESTATEMENT (THIRD) OF TRUSTS § 38(1) (2003) ("A trustee is entitled to reasonable compensation out of the trust estate for services as trustee, unless the terms of the trust provide otherwise or the trustee agrees to forgo compensation."); MARY F. RADFORD ET AL., THE LAW OF TRUSTS AND TRUSTEES § 975 (3d ed. 2006) (noting that trustees are entitled to reasonable compensation).

61. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2006) (forbidding lawyers to charge an "unreasonable fee").

availability of alternative services such as mediation or free legal representation.⁶²

Equally significant, a lawyer's reputation may vary in different circles and among different types of clients. A lawyer may be well regarded among attorneys and judges based on his professionalism. But potential clients might well prefer (or require) a less "professional" or "civil" lawyer—one who is highly aggressive and cuts corners. Only if the consumer knows to ask the right questions will a report about reputation help her obtain appropriate counsel.

It is difficult for most clients to identify the best lawyer for a particular legal matter, but the level of difficulty varies depending on the nature of the client. Lawyer-savvy clients—ones who use lawyers regularly and understand their differences—find it easier to analyze reputations and investigate representation than even intelligent, yet inexperienced clients.⁶³ Conversely, unsophisticated clients may not recognize that there are differences among lawyers at all.

To the extent that potential clients do rely on the market to identify lawyers, they often desire lawyers who, according to some grapevine, have been successful in the past. Yet clients often will have a hard time accurately identifying a lawyer's past performance, for a variety of reasons.

First, the potential client may hesitate to speak with others about the need for a particular type of lawyer for fear of revealing sensitive or confidential information. If a potential client does seek to take advantage of word of mouth, her legal matter often cannot be compared generically to a lawyer's past cases, even when the work is in the same field.⁶⁴

62. See *supra* Part I.A.

63. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 23, at 173-74.

64. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2006) (stating that an attorney's work for previous clients cannot be compared without reference to specific factual and legal circumstances); COLO. RULES OF PROF'L CONDUCT R. 7.1 cmt. (2006) (stating that factually unsubstantiated results obtained for previous clients are likely to mislead potential clients); Daniel M. Filler, *Lawyers in the Yellow Pages*, 14 LAW & LITERATURE 169, 179 (2002) (arguing that clients cannot properly compare legal work because the nature of each case differs).

Second, legal advertising regulation forbids lawyers themselves to establish their worth by pointing to previous successes.⁶⁵ Some jurisdictions also restrict the word-of-mouth grapevine, forbidding lawyers to provide testimonials from past clients⁶⁶ and limiting the types of information lawyers may give potential clients about themselves.⁶⁷

Third, public information about potential lawyers is limited. Regulation restricts the identification of specialists.⁶⁸ Bar referral services typically do not evaluate lawyers' qualifications carefully before placing them in the referral pool.⁶⁹ Publications that list

65. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2006) (prohibiting advertising of previous results because such advertising can create unjustified expectations); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1)(B) (2005) (prohibiting references to past results).

66. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.1(d) (2006) (stating that a communication is false or misleading if it contains a testimonial or endorsement); CAL. BUS. & PROF. CODE § 6158.1 (West 2005) (establishing a rebuttable presumption that advertisements of past performance are false, misleading, or deceptive); N.Y. CODE OF PROF'L RESPONSIBILITY, DR 2-101(c)(1) (2007) (precluding advertisements from containing an endorsement or testimonial about a lawyer from a current client); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02 cmt. 4 (2007) (prohibiting testimonials from past clients); WYO. RULES OF PROF'L CONDUCT R. 7.1(d) (2006) (stating that a communication containing a testimonial or endorsement is false or misleading).

67. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(6) (2006) (limiting when an attorney can inform clients he is a certified specialist); COLO. RULES OF PROF'L CONDUCT R. 7.1 cmt. (1998) (forbidding characterizations of attorney's skills that cannot be factually substantiated and statements of past results); IND. RULES OF PROF'L CONDUCT R. 7.2(b) (2005) (forbidding self-laudatory statements); N.J. RULES OF PROF'L CONDUCT R. 7.1(a)(4) (2004) (limiting the advertisement of fees); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101(A)(1) (2003) (forbidding self-laudatory statements).

68. See *supra* note 32 and accompanying text. Of course, the degree to which bar associations may restrict a lawyer's claims of specialization has been significantly limited by the Supreme Court's decision in *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

69. For example, in California, the San Diego County Bar Association offers referrals to attorneys in thirty-nine different areas of law. San Diego County Bar Association Lawyer Referral & Information Service, Referral Request Form, <http://www.sdcbas.org/LRIS/form.html> (last visited Oct. 13, 2007). Before an attorney is listed, the lawyer must request the listing and submit references. A board then verifies that the attorney is in good standing and has experience in the specific area of law. Telephone Interview by Wayne Lo with Monica Gomez, Counselor, San Diego County Bar Ass'n Lawyer Referral & Info. Serv., in San Diego, Cal. (June 9, 2006).

The Los Angeles County Bar Association offers referrals to attorneys in twenty-five large categories of law. LABCA Lawyer Referral Service, Select Type of Lawyer, <http://iris.lacba.org/vlris/index.cfm> (last visited Oct. 13, 2007). Los Angeles County's Lawyer Referral and Information Service, however, lists attorneys specializing in 168 specific areas of law. To be listed, an attorney must be in good standing and must submit professional references with the

lawyers, such as the Yellow Pages, Martindale-Hubbell, and membership rolls of lawyer organizations usually allow lawyers to self-select or self-identify their expertise.⁷⁰

All of this renders an interview process, including reference checking, as the only viable method for evaluating potential counsel. The process itself has costs, particularly if a lawyer charges for his participation in it. More importantly, though, for the psychological reasons identified above,⁷¹ only the most sophisticated and experienced clients, such as corporations represented by in-house counsel, are likely to undertake this form of investigation.

It is fair to conclude that the market—including reputational information that signals whom clients should hire and the legal remedies for a lawyer's failure to perform adequately—does not result in appropriate lawyer-client relationships by itself. Under an arm's-length regime, one cannot be confident that prospective clients will make reasonable choices. One also cannot rely on prospective lawyers to protect consumers' interests naturally, because lawyers' and clients' interests at this stage diverge.⁷² Even if market remedies were adequate, they would only provide remedies interstitially; in other words, occasionally and after damage has been done.

application. Applications are usually handled by administrative personnel, and go before a committee only if issues arise. Telephone Interview by Wayne Lo with Alan Rodriguez, Supervisor, L.A. County Bar Ass'n Lawyer Referral and Info. Serv., in San Diego, Cal. (June 9, 2006).

In San Francisco, attorneys may join eighteen different panels specializing in different areas of law. Join the Lawyer Referral Network at BASF, <http://www.sfbay.org/lawyerreferrals/att-join.aspx> (last visited Oct. 13, 2007). Each area has its own requirements. An attorney must have handled a required number of cases in the specific area of law in the recent past. Additionally, attorneys must submit professional references and be in good standing with the California Bar Association. A committee reviews and makes decisions on applications. Telephone Interview with Chris Cohade, Supervisor, Bar Ass'n of S.F. Lawyer Referral and Info. Serv., in San Diego, Cal. (June 12, 2006).

70. Cf. LexisNexis Martindale-Hubbell, Peer Review Ratings—Frequently Asked Questions, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_faqs.xml (last visited Oct. 13, 2007) (noting that Martindale-Hubbell initiates most ratings reviews, but that a "lawyer, partner, marketing director or colleague can also request a Peer Review Rating review").

71. See *supra* notes 53-57 and accompanying text.

72. In other words, the lawyer's interest is in obtaining the client and maximizing the fees. The client's interest is in determining whether this lawyer is the best to hire and in minimizing the fees.

On the other hand, it is undebatable that some clients can understand the nature of the services they seek and how to go about determining the best representatives. One response to the failure of the market therefore might be that the status quo is the best one can hope for—that additional regulation cannot solve the problem or that it will not be worth the costs. This response necessarily rests on one of several empirically untested conclusions: that (1) the costs of limited information to potential clients is not high, (2) additional regulation will be ineffective in producing information, or (3) the systemic costs of providing additional information, through regulation or otherwise, are relatively significant.

As a theoretical matter at least, the first claim seems unlikely. Lawyers probably are not fungible in the services they provide. In the absence of protective regulation or a working market that provides consumers with meaningful reputation information, one can expect many consumers to make poor choices.

As to the second contention, how effective new regulation can be in enhancing prospective clients' decision making depends on the nature of the regulation and its enforcement. If regulation simply requires lawyers to provide information, self-interested lawyers arguably will find a way to cast the information in terms favorable to them or will ignore the rules. Nevertheless, it is likely that at least some lawyers are guided by the letter and spirit of professional regulation. If instructed that their obligations include educating prospective clients about their options, they will obey.

The relative costs of further regulation present the most difficult of the three untested empirical issues. Obviously, the potential costs of providing information or new protections for prospective clients would require regulators to reach a balance between appropriate regulation and maintaining the status quo. Part IV of this Article will discuss some of these costs (including the likely effects on the profession and the availability of legal services), as well as alternatives the profession might pursue if the regulators decline to strengthen the professional rules. At a minimum, however, the above analysis illustrates that there is a real need on the part of prospective clients, which regulators ought to take into account.

II. THE CURRENT REGULATORY REGIME

The legal ethics codes include only a few explicit regulations of lawyer activity at the retainer stage of representation. Some rules governing conflicts of interest contain language that might give rise to a broad obligation to advise clients fully. In practice, however, the profession has assumed that the codes allow lawyers to treat the retainer stage as an arm's-length negotiation.

A. *The Status Quo*

Under the pre-2002 Model Rules, which remain in force in many jurisdictions, a lawyer "shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests," unless the client is fully informed of the advantages and risks of waiving the conflict and the lawyer believes the representation will not be adversely affected.⁷³ The post-2002 Model Rules are a bit less stringent. They identify a concurrent conflict when "there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer."⁷⁴ Under both conflict rules, the issue for purposes of this Article's subject is whether "representation" includes the retainer negotiation.⁷⁵

The code drafters always have assumed that lawyers represent prospective clients at least for the limited purpose of determining whether a full attorney-client relationship should be consummated.⁷⁶ Courts, for the most part, have agreed with that proposition.⁷⁷ Accordingly, some obligations do run from a lawyer to a

73. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1999).

74. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2006).

75. The ABA's original 1908 code made it clear that lawyers had at least some obligation to protect clients at the retainer stage. It provided, in pertinent part: "It is the duty of a lawyer *at the time of retainer* to disclose to the client all circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." CANONS OF PROF'L ETHICS Canon 6 (1908) (emphasis added).

76. This assumption finally was codified in MODEL RULES OF PROF'L CONDUCT R. 1.18 (2006).

77. See, e.g., *Miller v. Metzinger*, 154 Cal. Rptr. 22, 27 (Ct. App. 1979) (holding that a prima facie attorney-client relationship is established when a prospective client seeks advice from attorney); *Herbes v. Graham*, 536 N.E.2d 164, 168 (Ill. App. Ct. 1989) (finding an

prospective client, including a duty of confidentiality and a duty to preserve some of the prospective client's rights.⁷⁸ It nevertheless is unclear whether the basic conflict of interest precept envisions the retainer stage as encompassing full "representation." The conflict principle also is ambiguous on the extent to which lawyers have a duty to explain how personal interests might affect their advice at the retainer stage, because at some level any fee negotiation encompasses a conflict of interests.⁷⁹

In practice, lawyers typically view the retainer stage as an opportunity to sell themselves and garner business. They may discuss whether the client needs legal representation and the client's options, as well as the cost of retaining the lawyer to pursue those options. Lawyers who decide not to accept particular cases sometimes refer the prospective clients elsewhere. But lawyers rarely discuss the possibility that another lawyer or legal organization may provide better or cheaper services, or the possibility that a form of representation they do not handle might be a better alternative than hiring them.⁸⁰

attorney-client relationship established even though the attorney eventually declined the representation); *Bays v. Theran*, 639 N.E.2d 720, 723-24 (Mass. 1994) (holding that an attorney-client relationship can be formed even if no fee is paid and prospective client does not hire the attorney); *Herbert v. Haytaian*, 678 A.2d 1183, 1187-88 (N.J. Super. Ct. App. Div. 1996) (holding that consultations for the purpose of determining whether to hire an attorney form an attorney-client relationship even in the absence of payment of a fee or eventual retention of the attorney).

78. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2006) (safeguarding prospective clients' secrets); *id.* R. 1.18(c)-(d) (safeguarding prospective clients against conflicts of interest).

79. The current model conflict of interest rule is unclear, but it does note that a lawyer "shall not represent a client" unless its prerequisites are satisfied. *Id.* R. 1.7. Thus, the fairest reading of the rule is that it imposes obligations on the lawyer that arise before the lawyer may sign an agreement to represent the potential client.

80. Some courts, in passing, have assumed that these practices are appropriate because, in their view, retainer negotiations should be deemed arm's-length transactions. See, e.g., *Baron v. Mare*, 120 Cal. Rptr. 675, 679 (Ct. App. 1975) ("A lawyer legitimately may bargain with a prospective client and deal at arm's length in entering into a contract of employment."); *Potter v. Daily*, 40 N.E.2d 339, 345 (Ind. 1942) ("[I]n the matter of fixing and agreeing upon the amount of appellees' fees the appellant was not relying on the appellees but was dealing at arm's length with them. This was not such a confidential relationship"); *Dockery v. McLellan*, 67 N.W. 733, 736 (Wis. 1896) ("Before an attorney undertakes the business of his client, he may contract with reference to his services and the amount of his compensation ... because no confidential relation then exists, and the parties deal with each other at arm's length"); see also authorities cited *supra* note 4.

The professional codes do require lawyers to provide some information to prospective clients in writing. For example, the Model Rules encourage written retainer agreements that make clear “[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.”⁸¹ Some jurisdictions explicitly require that particular forms of agreement, most notably contingency agreements, be reduced to writing and that the terms be fully explained.⁸² Other rules forbid or limit particular types of arrangements with clients, including payment through the assignment of media rights to an attorney,⁸³ payments by third parties,⁸⁴ and business transactions with the client.⁸⁵ Still others regulate the size of fees directly.⁸⁶ But none of these rules go to the issue addressed here, because they at most require lawyers to explain and constrain fees. They do not require discussion or advice concerning other matters that a client might wish (or need) to know before making an intelligent decision about whether to engage the lawyer.

The details of the common law regulatory scheme are discussed below,⁸⁷ but it is important to note at this point that the common law is just as ambiguous as the professional codes on the issue of lawyers’ preemployment obligations. Unconscionability and fraud standards govern the size of fees lawyers can charge. Judicial decisions, however, have been unclear about whether lawyers have additional obligations to provide clients with objective advice on the wisdom of entering into retainer agreements.⁸⁸ The courts for the most part have remained silent or sent mixed signals about other duties lawyers might have at the retainer stage.

81. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2006).

82. *See, e.g.*, CAL. BUS. & PROF. CODE § 6147 (West 2003).

83. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.8(d) (2006) (forbidding a lawyer to acquire media rights before the “conclusion of representation”).

84. *See, e.g., id.* R. 1.8(f) (regulating third-party payments).

85. *See, e.g., id.* R. 1.8(a) (regulating business transactions with clients).

86. *See, e.g., id.* R. 1.5(a) (forbidding agreements for “an unreasonable fee”).

87. *See infra* Part II.D.

88. *See infra* Part II.D.2.

B. The Conflicting Assumptions of the Professional Codes

The above description of the codes and common law highlights what the current standards do not say. But the description does not resolve the question of what obligations the professional codes and other regulation of lawyers *mean* to impose. Nor does it tell us what obligations should be imposed in the absence of any clear regulatory intent.

The professional codes' advertising and solicitation rules are all premised on the assumption that potential clients are limited in their ability to interpret or act upon what lawyers say when selling their services.⁸⁹ The rules initially constrained lawyer advertising dramatically and only recently (and as a result of constitutional litigation) have allowed much advertising at all.⁹⁰ Even today, however, the codes caution against "misleading" advertising,⁹¹ which many states take to mean far more than simply false, inaccurate, or fraudulent advertising.⁹² Rather, these states assume that potential clients are unable to assess even advertising that is typical in other fields, including testimonials and dramatizations.⁹³ Similarly, lawyer solicitation rules continue to assume that many potential clients are psychologically vulnerable and incapable of resisting a lawyer's attempt to convince them to retain the lawyer's services.⁹⁴

89. See *supra* notes 51-52 and accompanying text.

90. See *supra* notes 49-51 and accompanying text.

91. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.1 (2006).

92. See, e.g., CAL. BUS. & PROF. CODE § 6158.1 (West 2005) (establishing a rebuttable presumption that advertising of past performance, dramatizations, and amounts recovered is misleading); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1) (2005) (providing that misleading advertising includes testimonials and dramatizations); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02(a) (2007) (providing that advertising of past results without adequate information and portrayals by actors are misleading); WIS. RULES OF PROF'L CONDUCT R. 20:7.1 (2004) (providing that paid testimonials and comparisons with other attorneys that cannot be factually substantiated are misleading).

93. See *supra* notes 51-52 and accompanying text.

94. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 7.3 cmt. (2006) (noting the potential for abuse inherent in direct solicitation of prospective clients); ARIZ. RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (2003) (noting that direct solicitation of clients is fraught with the possibility of abuse due to a lawyer's training and the client's circumstances); FLA. RULES OF PROF'L CONDUCT R. 4-7.4 cmt. (2005) (suggesting that prospective clients are vulnerable due to the situations giving rise to the need for legal services); TEX. DISCIPLINARY RULES OF PROF'L

There is a contradiction within legal ethics regulation, however. Advertising (and even solicitation) rules are rarely enforced.⁹⁵ The common law also fails to deter violations, because the legal remedies for lawyer malfeasance look at the competence or nature of the services a lawyer ultimately provides, not the manner in which he obtained the business in the first place. One can reasonably draw either of two opposite conclusions from the current state of advertising and solicitation regulation: (1) the existence of the prohibitive standards means that the regulators believe clients need protection from lawyers seeking employment; or (2) the failure to enforce the standards means that protections against incompetence adequately protect clients from harm, and that it matters not how the representation commenced.

The same contradiction is inherent in the regulation of lawyers' fees. On the one hand, both the codes and common law insist that lawyers may only charge "reasonable fees."⁹⁶ This implies that potential clients need regulatory protection from lawyer overreaching.⁹⁷ On the other hand, courts have characterized fee agreements as arm's-length transactions, which suggests the contrary.⁹⁸

CONDUCT R. 7.03 cmt. 1 (2007) (stating that direct solicitation of clients involves well-known opportunities for abuse).

95. See generally Zacharias, *What Lawyers Do*, *supra* note 11 (providing an empirical analysis of the enforcement of advertising rules).

96. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2006) (forbidding the charging of unreasonable fees); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2000) ("A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law.").

97. See, e.g., *Walton v. Hoover, Bax & Slovacek, LLP*, 149 S.W.3d 834, 847 (Tex. App. 2004) (stating that even an informed client is without power to ratify an unconscionable fee agreement because the agreement "violates public policy").

98. See, e.g., *King v. Fox*, 851 N.E.2d 1184, 1190 (N.Y. 2006) (suggesting that adequately informed clients may be competent to ratify even unconscionable fees); Brickman, *supra* note 6, at 55 ("[I]t is a widely held view that fee contracts ... are irrebuttably presumed to be arm's length transactions, governed by contract and not by fiduciary law.").

Indeed, some states have adopted statutes, modeled on the 1848 Field Code, which provide that compensation of attorneys is governed by the contract agreed upon, and is not "restrained by law." *Id.* at 36, 37 nn.26-27 (citing state statutes and quoting N.Y. Code of Remedial Justice ch. 1, tit. II, art. 2 § 66 (1876)); see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.1.4, at 496 n.4 (1986) (noting statutes that declare that the measure of a lawyer's compensation is to be fixed by the client-lawyer agreement). *But cf.* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149, 170 (1988) [hereinafter Brickman & Cunningham, *Nonrefundable Retainers*] (arguing that a strict interpretation of these statutes

Similarly, the provisions of conflict of interest rules that require lawyers to fully disclose and explain personal interests in representation⁹⁹ and in business transactions with clients¹⁰⁰ suggest both that clients are not always able to identify pertinent considerations on their own and that lawyers have some fiduciary-type obligation to help their clients understand the situation even when doing so is against the lawyers' own interests. On the other hand, although psychological factors affect potential clients equally, the conflict rules are unclear about whether the obligation to advise arises at the preemployment stage.¹⁰¹ Moreover, the conflict rules only specify that lawyers must inform clients of the competing considerations; they do not forbid lawyers to attempt to sway the client to waive the conflict.¹⁰² One could, therefore, reasonably interpret the code drafters' intent in competing ways. The codes may envision clients as needing a lawyer's assistance in making decisions or they may view clients as capable of exercising autonomy, provided that they have adequate information.

The professional codes are equally equivocal with respect to the way information must be transmitted. The codes require writings about some specific aspects of retainer agreements,¹⁰³ which suggests a need for formality that will impress the client with the importance of the information and a need to establish evidentiary support for a lawyer's after-the-fact assertion that the client was fully informed. Yet the codes also seem to allow lawyers to bury the necessary information in long retainer documents that unsophisticated clients may not read or fully understand.¹⁰⁴ Once again, these

is "inconsistent with judicial doctrine treating the attorney-client contract as an aspect of fiduciary law").

99. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2006) (requiring lawyers to identify personal conflicts and to obtain "informed consent" for a waiver).

100. See, e.g., *id.* R. 1.8(a) (requiring full disclosure).

101. See *supra* notes 76-79 and accompanying text.

102. See Zacharias, *Waiving Conflicts*, *supra* note 5, at 432 (discussing Model Rule 1.7 and noting its failure to identify a duty of the lawyer to provide objective advice regarding conflict waivers).

103. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2006) (requiring written contingent fee contracts); *id.* R. 1.7 (requiring written conflict waivers).

104. Under a model that truly seeks to preserve client interests, a lawyer would be required to highlight key information, explain it, ensure the client understands it, and ensure the client is processing it in an intelligent fashion. This is the model adopted in Model Rule

conflicting approaches send mixed signals regarding the extent of clients' abilities to exercise autonomy in retainer-related decision making and the extent of lawyers' obligations to assist them.

One final set of code provisions is pertinent in assessing the drafters' intentions. In the basic lawyer competence rules, the codes allow lawyers to accept cases and hold themselves out as competent to represent clients with respect to any field in which the lawyers can "make themselves" competent or can enlist the assistance of specialists.¹⁰⁵ These rules cut against the notion that lawyers ordinarily should refer clients to other lawyers who can provide *better* representation—be they specialists or organizations that focus on a particular type of client. The competence rules are an aspect of a larger issue: to what extent does, or should, professional regulation encourage or officially approve specialization that might lead to better service in individual cases but also result in fewer lawyers able to provide representation?

The codes address specialization directly only in the advertising rules, which seek to prevent clients from being misled by specialty designations made by lawyers who have no legitimate claim of expertise.¹⁰⁶ The codes' position on the converse question—whether clients should be assisted in learning of true specialists and encouraged to consult them as a routine—is unclear. The same ambivalence is exhibited by bar referral services, which assist clients in finding lawyers who practice in a particular field but typically permit the participating lawyers to self-designate their expertise.¹⁰⁷ This tension between allowing lawyers to represent a broad range of clients and enabling clients to find the right lawyer for their particular cases is inherent in the issue of when and

1.8(a), which requires lawyers not only to identify the client's interests in a business transaction with the lawyer, but also to explain the "desirability" of seeking independent advice about the matter. *Id.* R. 1.8(a).

105. See, e.g., *id.* R. 1.1 cmt. 2.

106. See, e.g., *id.* R. 7.4(d) (forbidding a lawyer to claim a specialty unless certified by an approved designated certifying agency).

107. See *supra* note 69 and accompanying text; cf. *FTC Urges Texas Bar To Let Attorneys Participate in Online Matching Services*, 22 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 284 (June 14, 2006) [hereinafter *FTC Urges*] (discussing FTC decision to urge Texas State Bar to reconsider Texas Ethics Op. 561, which forbids lawyer participation in online services that attempt to match clients and lawyers on the basis that such services constitute a "prohibited lawyer referral service rather than permissible advertising").

whether lawyers must advise potential clients to seek representation elsewhere.

C. Person-specificity of Representation Under the Legal Ethics Codes

One relevant consideration in assessing lawyers' duties to clients at the retainer stage is whether, as a general matter, the legal ethics codes expect lawyers to treat clients generically or as individuals whose personal needs must be met. By definition, rules make group distinctions. At some level, instructions in the legal ethics codes must be addressed to lawyers and clients as a whole. Nevertheless, to the extent the codes envision lawyers providing information and advice based on individualized characteristics of clients, one might expect the codes to anticipate individualized retainer discussions as well.

On the surface, at least, the main provisions of the codes that mandate the provision of information—such as Model Rules 1.4,¹⁰⁸ 1.5,¹⁰⁹ 1.7,¹¹⁰ and 1.8¹¹¹—do not distinguish among clients based on their sophistication or individual needs. These rules merely require all lawyers to provide information, in some instances specifying items to be communicated that will help clients make particular decisions¹¹² or consider whether to waive particular rights.¹¹³ Under this conception of lawyers as facilitators of client autonomy, lawyers' obligations to advise clients at the retainer stage might reasonably be limited to providing fee information and making sure the prospective clients understand the obvious fact that other providers (with potentially different competence and fee structures) exist.

In other respects, however, the legal ethics codes make finer distinctions. The basic communication rules, such as Model Rule

108. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006) (requiring communication with clients).

109. *Id.* R. 1.5(b)-(c) (governing fees and contingency fee arrangements).

110. *Id.* R. 1.7(b)(4) (requiring informed consent to conflicted representation).

111. *Id.* R. 1.8(a)(1) (requiring disclosures prior to a business transaction with a client); *id.* R. 1.8(f) (requiring informed consent to third-party fee payments); *id.* R. 1.8(h)(2) (requiring written advice regarding settlement of a malpractice claim).

112. *See, e.g., id.* R. 1.4; *id.* R. 1.5(b)-(c).

113. *See, e.g., id.* R. 1.7.

1.4, specify that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹¹⁴ This suggests that the information to be provided must take into account the client’s sophistication, likely knowledge, and state of mind, because those characteristics are pertinent to whether the client can make informed decisions. Bolstering this interpretation is the inclusion of a definition of “informed consent” in new Model Rule 1.0(e) that refers specifically to the “adequacy” of the advice.¹¹⁵

Similarly, conflict of interest waiver rules typically forbid lawyers to accept client decisions allowing conflicted lawyers to represent them unless the client gives “informed consent”¹¹⁶ and the lawyer has explained “the implications” and “advantages and risks” involved in the representation.¹¹⁷ The codes also require lawyers to protect the interests of a client who has “diminished capacity, is at risk of substantial ... harm unless action is taken and cannot adequately act in [her] own interest.”¹¹⁸ The codes thus seem to make distinctions among clients and different clients’ abilities to receive and act upon information. If lawyers have obligations to provide information at the retainer stage that parallel their obligations toward existing clients, the codes arguably envision that lawyers will tailor their advice to the sophistication and needs of each prospective client.

D. Common Law Regulation

The common law regulates lawyers’ professional conduct in at least three basic ways. Malpractice law defines duties to clients and provides remedies for a lawyer’s failure to satisfy the standard of care.¹¹⁹ Common law defining fiduciary duties limits the ways in which lawyers may pursue their own interests to the detriment of

114. *Id.* R. 1.4(b).

115. *Id.* R. 1.0(e). Rule 1.0(e) defines informed consent as agreement after the lawyer “has communicated *adequate* information and explanation about the material risks of and reasonably available alternatives” *Id.* (emphasis added).

116. *See, e.g., id.* R. 1.7(b)(4).

117. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(2) (1999).

118. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2006).

119. Depending on the jurisdiction, malpractice may be a tort or contract cause of action.

clients. Fraud principles and other consumer remedies constrain what lawyers may say and do in order to induce third parties to rely upon them.

Arguably, each of these three branches of the common law might impose obligations on lawyers in their pre-representation dealings with potential clients. In individual cases, courts have sent signals that the common law has a significant role to play in regulating the retainer stage. At the same time, other aspects of the legal doctrines cast doubt on the significance of the various causes of action in providing protection to potential clients.

1. *Malpractice*

At one level, malpractice law is clear. In order to recover under a malpractice theory, a litigant must have been either a client of the lawyer or the intended beneficiary of services the lawyer contracted to perform.¹²⁰ In theory, therefore, malpractice law does not impose obligations that protect the prospective client.

In practice, however, courts have muddled malpractice doctrine in two ways. In some cases, they have found prospective clients to be clients for malpractice purposes even though they might not be considered clients under the professional codes. For example, in *Togstad v. Vesely, Otto, Miller, & Keefe*, the court held that an attorney had a duty to inform the potential client of the applicable statute of limitations despite the fact that the lawyer ultimately declined the representation.¹²¹ Assuming the lawyer made his declination of representation clear,¹²² Mrs. Togstad could not have

120. See generally Symposium, *The Lawyer's Duties and Liabilities to Third Parties*, 37 S. TEX. L. REV. 957 (1996) (addressing duties to non-clients); Fred C. Zacharias, *Lawyer Duties to Amorphous Non-Clients*, PROF. LAW., Aug. 1997, at 1, 4 (discussing when non-clients may sue an attorney for malpractice).

121. 291 N.W.2d 686, 694 (Minn. 1980); see also *Miller v. Metzinger*, 154 Cal. Rptr. 22, 29 (Ct. App. 1979) (holding a lawyer potentially liable for failure to advise client of impending statute of limitations).

122. In *Togstad*, the facts were complicated by a dispute about how the attorney responded to the client's initial inquiry. *Togstad*, 291 N.W.2d at 690-92. The court ultimately found that the lawyer's actions at least arguably gave rise to a legitimate expectation by the client that the lawyer was representing her in evaluating the merits of the case. *Id.* at 693. Accordingly, the court upheld the jury's decision to treat the potential client as a full client for malpractice purposes. See *id.*

sued him for failing to investigate or prosecute the case, but she was entitled to certain malpractice protections at the retainer stage.¹²³ Some courts have extended this rationale to a requirement that lawyers advise rejected potential clients that their cause of action may be valid and worth pursuing with a different attorney.¹²⁴

Similarly, the case law suggests that persons may be clients for some purposes and not others. During initial meetings with a prospective attorney, potential clients ordinarily must provide confidential information to the attorney. Courts uniformly recognize that this information is privileged and confidential even when the person never becomes a full client.¹²⁵ Likewise, a lawyer has an obligation to the potential client to avoid conflicts of interest, despite the fact that this duty (like the duty of confidentiality) typically runs only to clients.¹²⁶

2. *Fiduciary Duties*

Fiduciary law ordinarily requires a lawyer to place the interests of his client above the attorney's own interests. The issue for the prospective client is whether she qualifies as "a client" for purposes of fiduciary law. On the one hand, recognizing a fiduciary obligation at the retainer stage by definition is problematic because in

123. *Id.* at 693.

124. *See, e.g.,* Meighan v. Shore, 40 Cal. Rptr. 2d 744, 745-46 (Ct. App. 1995) (upholding malpractice cause of action for a lawyer's failure to advise a potential client that she might have a valid cause of action).

125. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15(1)(a) (2000) (providing that a lawyer has a duty of confidentiality to prospective clients even when no client-lawyer relationship results); 2 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17.6 (2006) (stating that "[t]he policy underlying protection of confidential disclosures justifies the application of those principles in prospective attorney-client relationships"); *cf. In re Dupont's Estate*, 140 P.2d 866, 873 (Cal. Dist. Ct. App. 1943) (holding that discussions with a prospective client were immune from discovery in a subsequent lawsuit involving the prospective client's state of mind); *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 727 N.E.2d 240, 243 (Ill. 2000) (holding that communications made for the purpose of obtaining prospective legal advice are protected from disclosure).

126. *See* *Hickle v. Malone*, 675 N.E.2d 48, 50-51 (Ohio Ct. App. 1996) (finding malpractice might have occurred at the time the prospective client's attorney agreed to represent a party adverse to the prospective client without consent); *cf. Ghidoni v. Stone Oak, Inc.*, 966 S.W.2d 573, 599 (Tex. App. 1998) (discussing disqualification of a potential client's attorney from subsequent representation involving the potential client).

negotiating a fee the prospective lawyer almost always will be placing his own interests over those of the potential client.¹²⁷ On the other hand, because fiduciary law is based on notions of trust and loyalty, it is reasonable to assume that potential clients sometimes should be able to rely on the prospective counsel to emphasize their interests, especially with respect to secrets the potential client may confide.¹²⁸

The cases reflect this ambivalence. Courts clearly recognize fiduciary duties at the retainer stage, some of which overlap malpractice duties to safeguard secrets and preserve the potential clients' interests by enabling clients to satisfy statute of limitation requirements.¹²⁹ A lawyer who agrees to represent a client on a

127. As a result, one noted professional responsibility scholar has suggested that fiduciary duties only "arise after the formation of the attorney-client relationship." GILLERS, *supra* note 14, at 63. For this conclusion, however, Professor Gillers relies on language in *In re Marriage of Pagano*, 607 N.E.2d 1242 (Ill. 1992), which focused on whether a fiduciary relationship existed after the formation of an attorney-client relationship.

128. In discussing contingency fee agreements in tort cases, two commentators have observed:

Discussion has arisen about whether the fiduciary relationship between an attorney and a potential client is formed at the *beginning* of the fee negotiation or whether the attorney is free to negotiate for as much remuneration as possible before formally entering into the relationship on the basis that the fiduciary duty does not arise until *after* the retainer agreement is signed. Some argue that where ethics are concerned, this is shaving the situation far too thinly and that an attorney has a fiduciary duty to *prospective* clients as well as actual clients. This is especially true where those prospective clients are unsophisticated and lack appreciable bargaining power. After all, even though, as frequently advertised, an attorney may agree not to charge for the initial meeting with the prospective client, that meeting is nevertheless a "consultation" with a professional, carrying with it the obligation to provide sound advice as to how to proceed.

Stephen D. Annand & Roberta F. Green, *Legislative and Judicial Controls of Contingency Fees in Tort Cases*, 99 W. VA. L. REV. 81, 89 (1996).

129. See, e.g., *Miller v. Metzinger*, 154 Cal. Rptr. 22, 29 (Ct. App. 1979) (finding a duty to preserve the client's claim against expiration); see also *Kearns v. Fred Lavery Porsche Audi Co.*, 745 F.2d 600, 603 (Fed. Cir. 1984) ("[T]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result." (quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978))); *Domen v. Sugarman*, 54 Va. Cir. 176, 178 (Cir. Ct. 2000) (noting the "ethical and moral duty" to a potential client to "take immediate steps to protect the interest of [the] potential client, or at least advise the ... potential client of what steps need to be taken to protect those interests"); 2 MALLEN & SMITH, *supra* note 125, § 17.6 ("Some courts, however, have based their analysis upon implying an attorney-client relationship. This approach is overly formalistic, because a prospective client

limited basis may nonetheless owe a duty to advise the client regarding other causes of action she might file or investigate (e.g., using a different lawyer).¹³⁰

Yet the fiduciary duty owed to a potential client also seems to be different, and less than the fiduciary duty owed a full client. In *Flatt v. Superior Court*, for example, a prospective client consulted a lawyer who determined that there was a conflict of interest with another client, whom the potential client intended to sue.¹³¹ The lawyer declined representation but did not advise the prospective client about the statute of limitations because doing so would have prejudiced the existing client.¹³² The court opined that the lawyer was “absolved” from fulfilling her fiduciary duty to the prospective client as a result of the superior fiduciary duty she owed the full client.¹³³

Similarly, although courts have recognized some obligations of lawyers in negotiating fees with potential clients, those appear to be lesser obligations than those that apply when lawyers renegotiate fees with existing full clients.¹³⁴ The former situation is governed primarily by principles of unconscionability—the lawyer may not ask for more than a reasonable fee.¹³⁵ The renegotiation situation,

can enter into a fiduciary relationship, without an attorney-client relationship.” (footnote omitted)).

130. See, e.g., *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751, 758-59 (Ct. App. 2004) (finding a duty of class action lawyers to inform the clients of possible claims other than those the court has certified); *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 610 (Ct. App. 1993) (“[A] lawyer who signs an application for adjudication of a workers’ compensation claim and a lawyer who accepts a referral to prosecute the claim owe the claimant a duty of care to advise on available remedies, including third party actions.”); *Keef v. Widuch*, 747 N.E.2d 992, 999 (Ill. App. Ct. 2001) (agreeing with *Nichols* that even when representing clients on a limited basis, an attorney in a workers’ compensation matter has a duty to inform a client of potential claims of which he is unaware); see also *Brickman*, *supra* note 6, at 58 (“[F]iduciary obligations can arise in the absence of a full representational relationship.”).

131. 885 P.2d 950, 951 (Cal. 1994).

132. *Id.* at 952.

133. *Id.* at 953, 959.

134. See *WOLFRAM*, *supra* note 98, § 9.2.1, at 503 (noting courts’ skepticism toward fee agreements that change original agreements in the midst of representation); *Brickman*, *supra* note 5, at 1183 (noting the existence of a fiduciary obligation in negotiating fees with potential clients, but lax judicial enforcement of the duty).

135. See, e.g., *Fourchon Docks, Inc. v. Milchem Inc.*, 849 F.2d 1561, 1568 (5th Cir. 1988) (applying a reasonableness requirement of Model Rule 1.5); *Allen v. United States*, 606 F.2d 432, 435 (4th Cir. 1979) (“Associated with a court’s power to allocate part of the recovery to

however, commonly is viewed as a separate "business transaction" with the client, which triggers a series of requirements of fairness and care.¹³⁶

3. *Fraud and Other Consumer Remedies*

Some courts have determined that fee agreements with prospective clients are arm's length in nature and so, absent fraud, misrepresentation, or unconscionability, are enforceable.¹³⁷ Other

counsel is its obligation to limit the fee to a reasonable amount. A court abuses its discretion if it allows a fee without carefully considering the factors relevant to fair compensation."); *Dunn v. H. K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3d Cir. 1979) (stating that courts may supervise the reasonableness of fee contracts); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975) (holding that a court has inherent power to examine the amount charged by an attorney in order to protect client from excessive fees); *see also* *Brickman*, *supra* note 5, at 1196 ("Under fiduciary principles, fee contracts between a lawyer and a client must be objectively reasonable; unreasonable fees are unenforceable.").

136. *See* *Mayhew v. Benninghoff*, 62 Cal. Rptr. 2d 27, 28 (Ct. App. 1997) ("There are higher presumptions, designed to protect clients in their business dealings with their attorneys. The onus is on the attorney to show no advantage was taken and that the client was given full and frank disclosure."); *Baron v. Mare*, 120 Cal. Rptr. 675, 679-80 (Ct. App. 1975) (holding that after a fee agreement is signed, a fiduciary relationship is established and a presumption of insufficient consideration and undue influence in a fee renegotiation takes effect); *see also* *Anderson v. Sconza*, 534 N.E.2d 445, 448 (Ill. App. Ct. 1989) ("The presumption of undue influence where an attorney fee contract is entered into after the establishment of the attorney-client relationship ... is a strong presumption."); *Alexander v. Inman*, 903 S.W.2d 686, 693 (Tenn. Ct. App. 1995) ("The amount of good faith which an attorney must exercise in transactions with a client is, therefore, much higher than that required in other business transactions where the parties are dealing at arm's length."); *cf.* Douglas R. Richmond, *Changing Fee Agreements During Representations: What Are the Rules?*, 15 PROF. LAW. 2 (2004) (discussing renegotiation of fees).

137. *See, e.g.*, *Griffin v. Birch Brook Agency, Inc.*, 727 F. Supp. 142, 143-44 (S.D.N.Y. 1989) (rejecting a request for additional attorneys' fees on the basis that the original payment of fees reflected an arm's-length agreement); *Potter v. Daily*, 40 N.E.2d 339, 344 (Ind. 1942) (upholding a fee agreement, including subsequent modification); *Edler v. Frazier*, 156 N.W. 182, 185 (Iowa 1916) (explaining that if a client accepts the terms of the retainer agreement, the client "is bound by every principle of law and good morals to make payment accordingly"); *Holt v. Swenson*, 90 N.W.2d 724, 727-28 (Minn. 1958) (holding that the contingent fee contract is valid unless the attorney took advantage of a client's circumstances to extract an unreasonable or unconscionable fee); *Dockery v. McLellan*, 67 N.W. 733, 735 (Wis. 1896) ("The parties stood to each other at arm's end, and, there being neither fraud nor undue influence, it was competent for the plaintiff to make the contract; and the transaction having succeeded ... we do not see upon what ground he can resist the plaintiff's claim for the stipulated one-third of his share of the profits."); *cf.* *C.W. Higgins v. Beaty*, 88 S.E.2d 80, 83 (N.C. 1955) (stating that a contract made at arm's length "is as valid and unobjectionable as if made between other persons not occupying fiduciary relations").

courts, however, have refused to enforce a retainer agreement “in the absence of proof that it was fully comprehended by the client.”¹³⁸ These courts seem to be enhancing ordinary fraud remedies for prospective clients, imposing an affirmative duty of explanation to ensure the prospective client is not confused, above and beyond the duty not to misrepresent.¹³⁹

E. Conclusions About the Current Regulatory Regime

The preceding analysis demonstrates that the current regulatory regime is ambiguous about lawyers’ obligations to potential clients at the retainer stage of representation. Legal ethics codes are limited in their explicit mandates and some cases suggest that retainer discussions should be conceptualized as arm’s-length negotiations. On the other hand, both the codes and the common law contain suggestions that private individuals are entitled to depend on lawyers to advise them fully and that lawyers should tailor advice to each individual’s need for information and guidance *before* the individuals make decisions or assign their rights.

Many prospective clients can obtain the information necessary for making informed retainer-related decisions only from the lawyers they consult.¹⁴⁰ Moreover, as an empirical matter, prospective clients are not always capable of soliciting that information without prompting from the attorney. There is ample room for interpretations of both the legal ethics codes and the common law that would

138. *Larrison v. Scarola Reavis & Parent LLP*, 812 N.Y.S.2d 243, 248 (Sup. Ct. 2005) (citing *Ransom v. Cutting*, 98 N.Y.S. 282 (App. Div. 1906), and *Cohen v. Ryan*, 311 N.Y.S.2d 644 (App. Div. 1970)). Lawyers also have been found liable for violations of ordinary consumer protection statutes that regulate deceptive practices. *See, e.g., Crowe v. Tull*, 126 P.3d 196, 200 (Colo. 2006) (finding lawyers potentially liable for deceptive advertising under Colorado law).

139. *See, e.g., Winburn, Lewis & Barrow, P.C. v. Richardson*, 504 S.E.2d 480, 481-82 (Ga. Ct. App. 1998) (upholding a verdict based on a lawyer’s failure to explain the fee agreement); *cf. Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 561 (Ct. App. 1994) (upholding insertion of provision into retainer agreement that client did not understand on the basis that it was “fair”).

140. *Cf. Brickman & Cunningham, Nonrefundable Retainers*, *supra* note 98, at 154 (arguing that the “better view” is that lawyers are fiduciaries at the retainer stage because “the client’s retention of an attorney to exercise ‘professional judgment’ on his behalf necessarily requires the client to repose trust and confidence in the attorney” (footnote omitted)).

require attorneys to protect prospective clients' interests by conducting retainer discussions tailored to the clients' needs.

III. WHAT IS THE APPROPRIATE ETHICAL POSTURE FOR LAWYERS AT THE PREEMPLOYMENT STAGE?

The analysis above suggests that one could—and that regulators might—interpret existing law as imposing preemployment obligations on lawyers. The current ambiguity in the law also suggests that regulators would do well to clarify the role of lawyers at the retainer stage. It therefore becomes important, both for lawyers seeking to do the right thing and for regulators defining lawyers' duties, to identify the appropriate contours of lawyers' preemployment roles.

Legal ethics standards typically are premised on the assumption that lawyers should not, and should not be allowed to, take advantage of client weaknesses.¹⁴¹ Lawyers are held to a high standard of conduct that encompasses dealing fairly with clients¹⁴² and unrepresented third parties.¹⁴³ Overall, the professional codes are firm in subordinating lawyers' personal interests in obtaining business to prospective clients' interests in making calm and informed decisions about representation.¹⁴⁴

What about countervailing values? Although we have seen that the professional codes and common law regulatory scheme send mixed signals about the extent of lawyers' preemployment obligations (fiduciary or otherwise), the ambiguity is not based on a calculus that independent societal or third party interests justify limiting prospective clients' rights. In some areas of professional regulation, the codes seem to implement independent substantive

141. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2006) (strictly regulating lawyers' business transactions with clients).

142. See, e.g., *id.* R. 1.4 (requiring communication with clients); *id.* R. 1.7 cmt. (emphasizing loyalty to clients).

143. See, e.g., *id.* R. 4.3, 4.4 (defining lawyer obligations to third parties).

144. That is the premise underlying the various code rules against soliciting clients in circumstances in which the client might feel pressured or might make an overly emotional decision. E.g., *id.* R. 7.3; see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (upholding the constitutionality of a restriction on targeted mail solicitations of accident victims within thirty days of an accident).

values such as lawyer autonomy¹⁴⁵ and lawyers' freedom to compete for business,¹⁴⁶ but never at a cost to loyalty to clients. Indeed, the conflict of interest rules make clear that lawyers' personal interests must always be subordinated to clients' or prospective clients' interests, absent informed consent to the contrary.¹⁴⁷ The code drafters' failure to emphasize preemployment obligations through specific rules seems to be attributable either to oversight or to a *sub rosa* practical decision that particular rules would not be worth the costs (e.g., in enforcing regulation).¹⁴⁸

Because the substantive values emphasized by the codes are consistent with the finding of preemployment duties, it is fair to consider those values in formulating the contours of possible preemployment obligations. The codes' general orientation towards the interaction between laypersons and lawyers provides guidance. The codes rely on the principle that lawyers should not take advantage of clients' and unrepresented third parties' weaknesses.¹⁴⁹ Given the range of potential clients' sophistication and expectations of the bar, that principle suggests that lawyers' responsibilities to prospective clients would need to include at least the following: lawyers should make sure that potential clients are in a position to make reasonable decisions regarding the representation agreement.¹⁵⁰ A lawyer who is not willing to do so at a minimum should warn the potential client that he is dealing with the client at arm's length, that the lawyer's and potential client's interests in reaching a retainer agreement diverge, and that it may be wise for the potential client to comparison shop and (depending on the client)

145. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 280 (2006) (discussing rules arguably emphasizing lawyer autonomy).

146. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.2 (2006) (permitting lawyer advertising).

147. *Id.* R. 1.7(a)(2) (forbidding a lawyer to represent a client when the representation would be affected by the lawyer's own interests).

148. Regulators certainly can reasonably reach such practical judgments once particular rules are proposed. But it is important to note that those judgments are different in nature than a decision based on normative principles militating against the creation of preemployment obligations.

149. See *supra* text accompanying notes 141-44.

150. Cf. Brickman, *supra* note 6, at 53 (arguing that a lawyer proposing a contingency fee arrangement owes a duty to "provid[e] the means for the client to assess what fee structure is in his best interests").

seek independent advice regarding the wisdom of the representation.¹⁵¹

The practical ramification of finding that the lawyer's role encompasses these client-protective attributes is that each lawyer, before signing a retainer agreement, would be expected to ascertain that the client has a requisite level of information and is in a position to act upon it. A lawyer must be confident that the potential client has been educated regarding three important factors. First, the client should know before proceeding that it is wise to engage representation of the type the lawyer proposes to provide. Second, the client should have the information necessary to determine that this lawyer is a reasonable choice of counsel, which includes having a sense of the available alternatives and the level of this lawyer's qualifications and expertise. Third, the client should be sufficiently informed to reach a decision that the fees the lawyer proposes to charge are reasonable; she must know what alternative fee arrangements are possible and the extent to which cheaper representation is likely to be available.

In some cases, particularly those involving unsophisticated clients, merely providing information may not be enough. Information is meaningless unless the lawyer assures himself that the client is in a position to act upon the information she has received. The provision of information therefore must be sufficient to counteract the client's dependence on counsel and enable the client to assess the need for this type of representation and the lawyer's abilities. In other words, the client must have both the tools and the capacity to investigate alternatives.

If this is an accurate assessment of clients' needs and the corresponding responsibilities of lawyers at the preemployment stage, it seems clear that the degree of assistance lawyers must provide prospective clients ultimately will depend on each client's sophistication and experience. Highly sophisticated clients will know much of the necessary information before even consulting the lawyer, including the need for particular representation and the

151. See Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 95 (2007) [hereinafter Zacharias, *Images of Lawyers*] (arguing that the professional codes should require lawyers to identify the existence of lawyer self-interest at the beginning of the representation).

range of likely fees. On the other hand, clients who do not have the wherewithal to understand or investigate alternatives may be entitled either to affirmative efforts by the lawyer to help them determine the choices or to an explicit disclaimer informing the clients that they should seek external assistance in making the hiring decision.¹⁵²

This leads to the devil that lies in the details of the lawyer's preemployment ethical role. First, what precisely must lawyers do at the retainer stage? Second, what do they not need to do; in other words, what is simply expecting too much of the bar? And third, can professional rules or common law regulation effectively encourage lawyers to fulfill their obligations at a reasonable cost?¹⁵³

The first issue has been partly answered. At a minimum, the lawyer ought to make sure the prospective client has focused on the three core questions: Is the proposed type of representation appropriate? Is this lawyer a reasonable choice for the client? Is the fee arrangement fair and appropriate given the available alternatives? The lawyer must also provide the information that the client needs to resolve these questions, or educate the client on why she should obtain the information independently. Finally, the lawyer should be confident that the client can obtain and understand the information in a way that will enable her to make an informed choice of counsel.

What are the lawyer's obligations, however, when he does not have the information at hand? For example, suppose the lawyer does not know precisely who has special qualifications to practice in the area in question or what fees other lawyers would charge. Must the lawyer himself conduct an investigation of the alternatives?¹⁵⁴

At one extreme, the professional rules already make clear that the lawyer may not misstate the facts.¹⁵⁵ He may not misrepresent,

152. See authorities cited *supra* note 14.

153. The third issue will be addressed partly in this section, which considers the negative effects particular requirements might have. Other aspects of the question—particularly enforcement of existing and any new rules—are addressed in Part IV.

154. Presumably, the lawyer could not charge the potential client a fee for this investigation without the client's consent.

155. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2006) ("It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

or convey to the potential client, that his expertise and charges are in the mainstream. Lawyers have obligations to third parties, including potential clients, not to mislead.¹⁵⁶

The ethical role described above suggests that lawyers also have an affirmative duty of disclosure. To the extent they do not know important information, they need to advise the potential client that they do not know, make clear that the information is important, and suggest ways in which the client might go about informing herself. This obligation is consistent with the requirements, identified in judicial decisions, that lawyers who reject potential clients' cases must advise the clients of the statute of limitations and must avoid expressing inaccurate opinions regarding the merits.¹⁵⁷ Lawyers' obligations to prospective clients may be limited, but they encompass some duty to help prospective clients preserve their rights.

Remaining is the issue of whether a lawyer has any duty to investigate the competition, so as to put himself in a position to provide the information he does not know.¹⁵⁸ Certainly, lawyers

156. *Id.*

157. See, e.g., *Miller v. Metzinger*, 154 Cal. Rptr. 22, 27 (Ct. App. 1979) (holding that an attorney who investigated a prospective client's case had a duty to inform client of statute of limitations); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (finding negligence by an attorney who declined representation but gave the prospective client erroneous advice and failed to inform her of the statute of limitations); *Procanik v. Cillo*, 543 A.2d 985, 994 (N.J. Super. Ct. App. Div. 1988) (holding that an attorney who states the law to a prospective client is responsible for giving accurate advice).

158. This issue has arisen in a few isolated cases in which clients, or potential clients, have sued referring attorneys for "negligence" in the referral. See generally Emily S. Lassiter, Comment, *Liability for Referral of Attorneys*, 24 J. LEGAL PROF. 465, 465 & n.1 (2000) (stating that the number of jurisdictions recognizing the cause of action "is growing rapidly," but citing only three cases); Andrew J. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral as a Cause of Action*, 29 CUMB. L. REV. 679, 690 (1999) (analyzing cases in which courts have recognized a cause of action). For the most part, such causes of action have been recognized only where the referring lawyer has a full attorney-client relationship with the person being referred or has accepted a fee for making the referral. See, e.g., *Tormo v. Yormark*, 398 F. Supp. 1159, 1171 (D.N.J. 1975) (holding referring lawyer negligent for failing to learn that out of state counsel had been indicted for fraud); *Noris v. Silver*, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997) (holding that a referring lawyer who accepts a fee may be liable for supervising the other attorney); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1514, at 559 (1985) (equating acceptance of a referral fee to acceptance of joint responsibility for the management of the case). To impose liability on a lawyer who merely suggests other lawyers in a case in which he may not be qualified would provide significant disincentives for lawyers to make referrals and perverse incentives for clients to request referrals in the hope of being able to sue the referring lawyer if the case ultimately goes awry.

should not have such a duty across the board. When a client is sufficiently sophisticated to investigate on her own and knows she should do so, there simply is no reason to transfer the cost and responsibility for conducting the investigation to the lawyer. A contrary rule would create disincentives for clients to make reasonable choices; it would encourage prospective clients to rely on counsel and file suit against the lawyer at a later time if the reliance proves misplaced. A better argument exists that lawyers should bear the responsibility to investigate when it is clear that the client is unable to do so on her own. Even in those situations, however, imposing this duty would be inefficient (e.g., in its deterrent effects), a factor that regulators would have to take into account in determining whether to impose responsibility.

A different conclusion seems warranted on the question of whether lawyers should be required to research the appropriateness of alternative approaches to the matter, such as mediation, if the lawyer has no personal experience in that field. In agreeing to represent the client, the lawyer holds himself out as sufficiently knowledgeable to decide how to proceed. By definition, whether alternative approaches make better sense is part of the advice the lawyer will need to provide, even if the lawyer himself would not handle the alternative representation.¹⁵⁹ A priori, the lawyer should not be able to use personal ignorance of the alternative field as a justification for failing to provide potential clients with information about the possible alternatives before the client invests in the case. An uninformed lawyer has a duty to inform himself, at least to the extent necessary to help the client decide whether representation by the lawyer is the best choice.

When, if ever, should a lawyer be obliged to refer potential clients to other providers who might charge less for the same services? After all, law is a business.¹⁶⁰ Even unsophisticated clients are likely

159. The recent revisions to the Model Rules include a suggestion to this effect, incorporated after the ABA rejected a proposal to mandate advice regarding alternative dispute resolution possibilities. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2006) ("[W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."). For a discussion of the proposed rule, see Gerald F. Phillips, *The Obligation of Attorneys To Inform Clients About ADR*, 31 W. ST. U. L. REV. 239 (2004).

160. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding*

to understand that some variation exists in what lawyers charge. Clients know they have an option to comparison shop, although for psychological reasons some will hesitate to do so.¹⁶¹ The mere fact that prospective clients might want help in identifying alternative counsel at the retainer stage does not itself justify overemphasizing the potential lawyer's obligations.

Because malpractice law tends to hold lawyers accountable for the unintended consequences of actions they take with respect to potential clients,¹⁶² it seems particularly unfair to impose on lawyers a general obligation to suggest other possible representatives. Doing so might also create perverse incentives within the bar—causing an increase in advertising specifically designed to promote referrals¹⁶³ and tacit agreements among groups of lawyers to cross-refer.¹⁶⁴ Moreover, because referrals to all cheaper alternatives ordinarily will not be possible, lawyers who still have a hope of getting the business would have an incentive to refer potential clients to alternative lawyers who will make the worst impression.

One exception to the conclusion that lawyers should not be required to make specific referrals seems appropriate, however. When governmental or subsidized public interest organizations exist that specialize in the work a potential client requires and might provide free or low-cost service, the lawyer arguably should be obliged to discuss that alternative with the client. Unsophisticated clients commonly carry the inaccurate perception that such

Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229, 1233 (1995) (arguing for professional regulation based on a "Business Paradigm" that would "promote respect for the legal system by removing the taint of duplicity resulting from the Professionalism Paradigm's assertions of lawyer altruism to a disbelieving public"); Zacharias, *Images of Lawyers*, *supra* note 151, at 84-85 (discussing aspects of the professional codes that recognize lawyers as businesspersons).

161. See *supra* notes 54-59 and accompanying text.

162. See, e.g., *Togstad v. Vesely, Otto, Miller, & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (finding that a lawyer unintentionally created a lawyer-client relationship through his conversations with the client and therefore would be liable for failure to investigate and prosecute the client's claims before the expiration of the statute of limitations).

163. In other words, if referring is mandated, particular lawyers might be able to force referrals to them by increasing their name recognition through advertising.

164. Cross-referral arrangements already exist among groups of lawyers. The difference in the scenarios discussed above is that a referring lawyer may still have a realistic hope of obtaining the client's business when making the referral, which gives him an incentive not to send the client to the best options available.

organizations do not exist or, by definition, provide sub-standard representation.¹⁶⁵ Although comparing ordinary competitors may be difficult or impossible for a lawyer (e.g., because the assessment of relative quality-for-the-price may be subjective), a lawyer who is aware that the client is eligible for subsidized representation by a reputable organization should know that the client has a clear choice to make. Even recognition of a rudimentary fiduciary obligation on the lawyer's part would require the lawyer in this context to avoid placing his own interests ahead of the client's.

Finally, there is the question of lawyers' obligations, if any, with respect to alternative fee arrangements that the client may prefer. For example, must a lawyer who wishes to charge a reasonable fixed fee also offer a contingency arrangement or refer the client to lawyers who might represent them on a contingency basis?

In a peculiar ethics opinion, the ABA has interpreted the ethics rule requiring fees to be reasonable as also requiring lawyers in most circumstances to offer clients alternative fee arrangements.¹⁶⁶ On the surface, the opinion seems an unwarranted intrusion into lawyers' freedom to conduct their business and to reject cases when the terms of representation are unsatisfactory to them.¹⁶⁷ There are two possible explanations for the ABA decision. It may stem from a sense that lawyers have a separate obligation to make legal services available¹⁶⁸ and that offering alternative fee possibilities helps fulfill that obligation. More likely, however, the decision reflects the ABA's desire to limit the ability of lawyers to induce clients to engage fee-for-service representation that they cannot afford when contingency, or alternative, arrangements might be available.¹⁶⁹

165. See, e.g., Robert J. Aalberts et al., *Public Defender's Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 527-28 & n.4 (2000) (presenting "research which indicates that public defenders are likely to be perceived unfairly and inaccurately by criminal defendants" and cataloging previous empirical studies to the same effect).

166. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1521 (1986). The ABA opinion is analyzed in Green & Zacharias, *supra* note 145, at 292.

167. See Green & Zacharias, *supra* note 145, at 292-94.

168. Cf. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006) ("[E]very lawyer has a professional responsibility to provide legal services to those unable to pay.").

169. Alternatively, the ABA may have been concerned with lawyers presented with easily winnable cases turning those cases into contingency representation against the clients' interests.

If the latter explanation justifies the opinion, however, the response of the ABA should have been an informational requirement, not a requirement that lawyers personally offer alternative fee arrangements. It is inaccurate to say that an hourly fee arrangement is "unreasonable," irrespective of the size of the fee, if no contingency arrangement is offered. As a practical matter, lawyers can circumvent the ABA's requirement simply by sizing up their clients before making any offer of representation and, when they do offer alternative (e.g., contingency) arrangements that are unpalatable to them, to make them unpalatable to the potential clients as well.

In contrast, it would make perfect sense for regulators to expect lawyers to advise potential clients that some lawyers might be willing to provide similar representation on an alternate basis. Clients may be unaware of this information and, in the absence of such advice, may assume they have no choices. To the extent a lawyer has an obligation to assist the client in making informed decisions at the retainer stage, such information would appear to be a key, and fair, component.

IV. CURRENT REMEDIES FOR VIOLATIONS OF THE PREEMPLOYMENT ETHICAL DUTY AND ALTERNATIVES FOR PROTECTING PROSPECTIVE CLIENTS' INTERESTS

For purposes of argument, suppose that regulators—including code drafters, disciplinary agencies, and courts—come to the conclusion that the lawyer's ethical role, as defined in the codes and common law, already encompasses a duty of fair dealing with prospective clients, as outlined above. Suppose further that a lawyer violates that duty, either by taking a case he should not or by failing to offer the potential client information about the alternatives. The lawyer, however, ultimately provides legally competent representation in the matter. What are, or what should be, the client's remedies for the lawyer's misconduct?

A. Remedies Under the Current Regime

Under the prevailing professional rules, it is hard to imagine that regulators could establish a successful case for discipline. Arguably, the hypothetical lawyer violated conflict of interest rules requiring him to alert the client to “a significant risk” that the representation would be “materially limited by ... a personal interest of the lawyer.”¹⁷⁰ Yet the fact that better alternative representation might have been available does not establish a significant risk of “limited representation,” particularly in a case in which the lawyer can prove that the ultimate representation was competent. The regulators also might claim that the lawyer ran afoul of the rule governing communications with clients.¹⁷¹ However, the reasonableness standards in the communication rule, combined with the necessity of establishing that potential clients are covered, make the rule a weak tool for discipline. At a minimum, the first violators targeted for discipline under the rule would have a solid claim that prosecution violates due process,¹⁷² based on the inadequacy of notice the rule provides.¹⁷³

170. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2006).

171. *Id.* R. 1.4.

172. *See, e.g., In re Ruffalo*, 390 U.S. 544, 552 (1968) (reversing disbarment on grounds that the disbarred attorney received insufficient notice that his conduct was subject to discipline); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102-05 (1963) (noting that due process requirements apply to hearings regarding lawyer fitness to practice). Typically, however, courts have implemented due process requirements loosely in lawyer disciplinary cases. *See, e.g., Crowe v. Smith*, 151 F.3d 217, 229 (5th Cir. 1998) (“Although both the Supreme Court and this court have often relied on this ‘quasi-criminal’ characterization to hold that ‘an attorney is entitled to procedural due process which includes notice and an opportunity to be heard in disbarment proceedings,’ we have only rarely gone farther.” (internal citations omitted)); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972) (“All that is requisite ... is that ... notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.” (quoting *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 540 (1868)) (emphasis omitted)). *See generally* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 39 n.231 (2005) (discussing due process requirements in the context of attorney discipline).

173. The argument that the rules initially provide insufficient notice would be strengthened by the reality that judicial decisions treating retainer agreements as arm's-length transactions seem to instruct lawyers that they have no obligations to potential clients. *See supra* note 4 and accompanying text.

Would aggrieved prospective-turned-actual clients be able to sue for breach of fiduciary duty? This Article's analysis suggests that courts have recognized at least some fiduciary duty of lawyers at the retainer stage.¹⁷⁴ The damage calculus, however, is complicated in breach of fiduciary cases.¹⁷⁵ Fiduciary law forbids the fiduciary to benefit himself at the client's expense and requires the violator to disgorge his profits.¹⁷⁶ Assuming that the client can establish that she would not have hired the lawyer had he not committed a breach of his duty, the client must quantify the lawyer's benefit. Because the lawyer in our hypothetical has provided competent representation—and expended his time—it would be difficult to argue that all of the lawyer's fees are subject to forfeiture.¹⁷⁷ Even if the fees are

174. See *supra* text accompanying notes 129-30.

175. See, e.g., *Burrow v. Arce*, 997 S.W.2d 229, 241, 244 (Tex. 1999) (noting that “the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies” plus “the public interest in maintaining the integrity of attorney-client relationships” must be taken into consideration when determining whether fee forfeiture is appropriate); Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. Rev. 235, 255-56 (1994) (“[When] an attorney ... profits through a breach of his fiduciary obligation [e]xtraordinary equitable remedies such as constructive trust, equitable lien, and rules of tracing are available to the client to disgorge the profit from the hands of the attorney.”); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1160-61 (1999) (noting that clients sometimes may “disgorge part or all of any fees earned by the attorney, even where the client has suffered no actual harm ... [and] where the attorney's performance resulted in a favorable result”).

176. See *United States v. Carter*, 217 U.S. 286, 306 (1910) (“If [a fiduciary] takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.”); RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003) (“[T]he fiduciary is under a duty not to profit at the expense of the other and not to enter into competition with the other without the latter's consent.”); RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (discussing fiduciary duty of agents); RESTATEMENT OF RESTITUTION § 190 cmt. a (1937) (“A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation.”); RADFORD ET AL., *supra* note 60, §§ 2, 541, 543 (discussing fiduciary duty between trustee and beneficiary).

177. In a few egregious cases, however, courts have determined that a total forfeiture of fees is appropriate. See, e.g., *Jackson v. Griffith*, 421 So. 2d 677, 678 (Fla. Dist. Ct. App. 1982) (noting that an attorney who coerced a client into signing a fee agreement “[displayed] conduct sufficient to void an agreement in law [and] should not be allowed to profit from his blatantly unprofessional conduct in equity”); *In re Estate of McCool*, 553 A.2d 761, 769 (N.H. 1988) (“[A]n attorney who violates our rules of professional conduct by engaging in clear conflicts of interest, of whose existence he either knew or should have known, may receive neither

forfeit, absent an egregious violation, the lawyer probably is entitled to *quantum meruit* for his services.¹⁷⁸ Consequently, the client's potential recovery would be limited.

Because the lawyer performed competently, the client also would have difficulty recovering damages under a malpractice, fraud, or misrepresentation cause of action.¹⁷⁹ At best, the client may be able to prove that she would have received cheaper or better representation elsewhere, or that she would have pursued a different course altogether. Except in an extreme case, however, the client would be unable to prove a legal injury because she did receive adequate representation at a "reasonable fee."¹⁸⁰

A similar analysis negates any claim based on the lawyer's misleading advertising. The lawyer's preemployment assertions may have improperly induced the potential client to enter the lawyer's office and engage the representation. But once engaged, the hypothetical lawyer performed in a legally acceptable manner. Proving the speculation that a different lawyer would have performed better and produced a superior result for the client would be an extraordinarily difficult task.

The inadequacy of the legal remedies for the ethical violations might not be disturbing if one could be satisfied that market factors,

executor's nor legal fees for services he renders an estate."); *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (holding that an attorney not licensed to practice law in the state is not entitled to compensation for his services in a divorce proceeding); *Pessoni v. Rabkin*, 633 N.Y.S.2d 338, 338 (App. Div. 1995) (holding that an attorney representing multiple parties was not entitled to compensation).

178. See *Somuah v. Flachs*, 721 A.2d 680, 691 (Md. 1998) (holding that where an attorney is discharged because the client has a good faith basis to no longer wish to be represented by the attorney and where the attorney has not engaged in serious misconduct, the attorney may recover compensation from the client for the reasonable value of the services rendered by the attorney prior to his discharge); *Int'l Materials Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. 1992) ("Complete forfeiture, however, is warranted only when a lawyer's clear and serious violation of a duty to a client is found to have destroyed the client-lawyer relationship and thereby the justification for the lawyer's claim to compensation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. d (2000) ("A lawyer's violation of duty to a client warrants fee forfeiture only if the lawyer's violation was clear.... To warrant fee forfeiture a lawyer's violation must also be serious.").

179. See *supra* Part II.D.

180. In those cases in which the lawyer charged an outlandish fee relative to his competition, a court or disciplinary agency might find the fee arrangement to have been unconscionable or to have violated rules against unreasonable fees. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2006).

including the operation of reputation and competition, will sufficiently encourage lawyers to fulfill their preemployment responsibility to refer clients elsewhere when appropriate. As noted, however, failing to discuss and explain alternatives with clients is unlikely to undermine a lawyer's reputation in the circles in which the reputation for preemployment fairness matters.¹⁸¹ In other words, the clients most likely to delve into lawyers' reputations are the sophisticated clients who already have considered, or plan to consider, alternatives on their own. Moreover, clients who rely on lawyers' reputations typically are most likely to be interested in a reputation for aggressiveness. Only a limited group of potential clients will be attracted to a lawyer because of his reputation for helping the clients identify the "right" representative. A lawyer considering developing this sort of reputation is likely to balance its benefits in attracting clients against the loss of business it might entail when the lawyer sends clients away.

B. How Might Legal Standards Be Changed To Support Lawyers' Preemployment Duties?

This Article has already noted that the legal ethics codes send mixed signals about the role of lawyers.¹⁸² One aspect of the Article's concerns would be ameliorated were the drafters to introduce the professional codes with a clear statement of the potentially conflicting paradigms regarding lawyers upon which the codes rely.¹⁸³ Were clients alerted up front to the reality that lawyers have their own financial interests in some transactions with clients, including retainer agreements, clients would at least be forewarned to protect themselves and to take a lawyer's assertions with a grain of salt.

This Article's analysis suggests that it would also make sense for the code drafters to add specific provisions governing the retainer stage that list lawyers' specific obligations to potential clients. These obligations might include:

181. See *supra* text accompanying notes 62-63.

182. See *supra* Parts II.B-C; see also Zacharias, *Images of Lawyers*, *supra* note 151, at 75-85 (discussing eight different paradigms of lawyers employed in the professional codes).

183. Zacharias, *Images of Lawyers*, *supra* note 151, at 94 (arguing that "the drafters have failed in not directly addressing the issue of multiple roles, or images, of the bar").

1. Advising potential clients objectively regarding the wisdom of pursuing the type of representation being discussed;
2. Describing accurately the lawyer's (relative) expertise in the type of representation being discussed;
3. Advising potential clients regarding the likely availability of free or low-cost representation and the availability of specialists in the field; and
4. Discussing the range of fees and alternative fee arrangements that other qualified lawyers are likely to offer.

Whether such rules are added or not, however, the codes should at a minimum clarify the meaning of providing advice that leads to informed consent. The rules governing conflict of interest waivers, limitations on the scope of representation, and transactions with clients all currently require lawyers to tell clients about advantages and risks of their decisions.¹⁸⁴ Yet these rules do not explicitly require lawyers to advise clients—when appropriate—not to make decisions that would benefit the lawyer.¹⁸⁵ Accordingly, prospective lawyers in whom clients repose trust at the retainer stage may feel justified (or legally immunized) when they lead or induce clients to decide in their favor after providing the requisite information. Lawyers ought to be expected to support clients' interests more directly.

One should not overstate the likely effects of these proposed changes. As a practical matter, existing rules and law prohibiting unreasonable fees and misrepresentation by lawyers already signal to lawyers that they have some obligations at the retainer stage.¹⁸⁶ Were an attorney to accept a case and then charge fees far in excess

184. See *supra* notes 73-74, 83-86 and accompanying text.

185. See Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 946 (1998) (suggesting a "proactive approach ... requir[ing] lawyers to assess limited performance contracts ... from the clients' perspectives" and arguing that "[t]he codes can protect prospective clients by requiring lawyers to determine that the client be better off for agreeing to limited representation, as compared to forgoing the opportunity to make the retainer agreement"); Zacharias, *Waiving Conflicts*, *supra* note 5, at 426-29 (discussing the failure of the conflict rules to require lawyers to act in the clients' best interests). *But cf.* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 607-08 (Ct. App. 1993) (suggesting possible malpractice liability for a lawyer who fails to advise a client that additional representation is necessary).

186. See *supra* notes 83-86, 91 and accompanying text.

of what other lawyers would charge or overstate his qualifications compared to those of other attorneys, the courts probably would side with the client in litigation against the attorney. The fee and misrepresentation standards, however, are rarely enforced in these contexts,¹⁸⁷ so it is unclear whether lawyers think about them more expansively than as a limited prohibition against egregious fees or direct fraud. Moreover, lawyers correctly anticipate that the only remedy for charging unconscionable fees is likely to be a reduction in the amount collectable. Clarifying lawyers' obligations to give suitable, objective advice in a broader range of situations therefore would serve a useful purpose.

Suppose that the drafters make these changes to the codes. Would identifying preemployment duties actually bring about significant protection for prospective clients? The amendments would provide guidance to well-meaning lawyers. They would eliminate doubt about the existence and nature of lawyers' fiduciary obligations at the retainer stage. Alone, however, they would do little to counteract lawyers' self-interest in procuring engagements and fixing terms most favorable to themselves. It may be especially unrealistic to expect lawyers to give advice about competitors in a way that might encourage clients to go elsewhere for representation, particularly in circumstances in which the advising lawyer can find some justification to withhold the advice.

On the other hand, the proposed rules might have several positive enforcement effects. Because obligations at the retainer stage would become clearer, discipline for failure to provide the required advice becomes possible. To the extent a professional rule requires that preemployment information and advice be provided in writing, the possibility of disciplinary enforcement would also be enhanced.¹⁸⁸ Unlike most of the common law remedies, professional discipline would not require a showing of harm to the client, but merely a failure to inform.¹⁸⁹

187. See *supra* Part II.B.

188. See Zacharias, *Reconciling Professionalism*, *supra* note 24, at 1367 (discussing the relationship between written advice and disciplinary enforcement).

189. Of course, because the imposition of discipline will not bring a direct benefit to the aggrieved potential client, she is unlikely to initiate and fund proceedings against the lawyer. The enforcement benefits of a clear rule, therefore, would likely be evident only in disciplinary proceedings initiated by the board when it learns of the lawyer's improprieties independently.

Presumably, the identification of the lawyer's obligations also would facilitate a client's civil claim for a breach of fiduciary duty, which is not predicated on a showing of personal harm.¹⁹⁰ The code standards are not controlling in civil litigation, but they have become relevant.¹⁹¹ Code changes thus might ease a plaintiff's burden of establishing a breach of fiduciary duty. Nevertheless, as a practical matter they would do little to help a plaintiff prove recoverable damages.

One might therefore argue that for any changes in the professional codes to be effective, they must be accompanied by legislation that allows the recovery of statutory damages for violations of retainer ethics. A statutory scheme governing only the retainer stage, however, would be peculiar. Although violations of retainer ethics may be frequent, they arguably are not among the most harmful ethical violations that recur—particularly if we assume that in most instances the retained attorney ultimately provides competent representation. States have adopted statutory damage remedies only rarely,¹⁹² so one would expect that these should be confined to the most serious, frequent, or otherwise unenforceable situations.

One additional consequence of revising the professional standards to include objective advice at the retainer stage bears mentioning. In a sense, emphasizing candor on the lawyer's part may be inconsistent with the proposition that it is important for clients to trust counsel.¹⁹³ Suppose a lawyer, immediately upon meeting a prospective client, provides his realistic evaluation of the case—

190. See authorities cited *supra* notes 175-76.

191. See, e.g., *Avianca, Inc. v. Harrison*, No. 94-7053, 1995 U.S. App. LEXIS 30863, at *5 (D.C. Cir. Oct. 24, 1995) ("Viewing evidence of a [Disciplinary Rule] violation as creating a rebuttable presumption of a violation of an attorney's fiduciary duty to his or her client is in accord with the law in the District of Columbia."); *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. 1994) ("[A] violation of the Code of Professional Responsibility or of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client.").

192. See, e.g., CAL. BUS. & PROF. CODE § 6128 (West 2003) (rendering a lawyer's participation in deceit or collusion a misdemeanor, subject to a \$2500 fine); *id.* § 6153 (subjecting lawyers who engage in unlawful solicitation to criminal punishment, including fines).

193. Cf. Zacharias, *Rethinking Confidentiality*, *supra* note 36, at 386 (noting the tension among candor, trust, and client autonomy in considering whether lawyers should inform clients of exceptions to attorney-client confidentiality).

warts included—even though the prospective client is not yet prepared to receive a disappointing evaluation. Instead of simply accepting the information and using it in her calculus regarding her options, the client may react in two undesirable ways: the client may choose to engage a different, less objective and candid lawyer; or, she may retain this counsel, but mistrust his willingness to pursue her interests.

These are somewhat realistic risks. Nevertheless, lawyers should be able to couch negative information in terms that will not alienate the prospective client. Honesty at the start of the representation can be used to build a trust relationship, rather than destroy it. Conversely, the practice of postponing negative information until after the client commits to the case may negatively affect the trust relationship—doubly so because the client may feel that she was induced into hiring the lawyer. On balance, the danger that candor at the outset will undermine trust relationships seems outweighed by the benefits for client autonomy and improved decision making.

C. Ramifications of Changing the Law

Let us assume that a state amends its professional code and common law to clarify a lawyer's fiduciary obligations at the retainer stage. Let us also make the realistic assumption that well-meaning lawyers will attempt to satisfy the duties identified in the codes and that others will ignore the guidance in the rules to the extent that they can. How would the changes in the law ultimately affect the provision of legal services? The effects may be felt in three general areas: (1) the quality of services provided to clients; (2) the availability of lawyers to provide particular services; and (3) the structure and focus of the bar.

One direct impact of the proposed changes would be that potential clients would come to place a higher premium on hiring lawyers who are specialists and that lawyers would have a greater incentive to develop and publicize their expertise. By definition, the codes would require lawyers to refer more matters to specialists, or at least to identify their existence. The level of deception by non-specialists in order to attract business should remain constant. Although the benefits of falsely claiming expertise may rise somewhat, the potential costs of doing so would increase concurrently.

Globally, the emphasis on specialization should enhance the quality of services clients receive. There is simply no basis for assuming that non-specialists who teach themselves the law in a particular area in order to handle a specific matter provide equal or better service than those who are experienced and trained in the field. Moreover, to the extent lawyers fulfill their duty of candor at the retainer stage, their relationships with clients whom they ultimately enlist should improve. The necessity of acting overtly in the clients' interests even before receiving a fee will help establish trust, which in turn can ameliorate the quality of the subsequent representation.

The impact on the availability of legal services is less certain. At least initially, the emphasis on specialization will result in more potential clients demanding the services of fewer attorneys who fit the bill. Specialists will increase fees accordingly. The corresponding fees of generalists willing to take on the representation may need to decrease in order for the generalists to compete. Some generalists who were willing to provide representation at previous fee levels may not be equally available under the new regime.

Over time, two effects on the availability of services are possible: more generalists may come to disregard the rules governing retainer ethics and more lawyers may seek to develop and publicize special expertise. Side effects also are likely. One would certainly expect an increase in advertising by specialists directed to other lawyers. The market may develop methods for increasing the transparency of fees, either through voluntary reporting to the bar or external mechanisms developed by consumer groups. The number of pure generalists—lawyers who simply hang up their shingle and expect to handle whatever business walks through the door—is likely to decrease.

Of course, the bar itself would need to respond. If regulators expect lawyers to discuss their own expertise with potential clients and to become aware of the expertise of others, the profession must develop a better vocabulary and attitude governing the circulation of specialization information. Rather than simply adopting rules designed to limit false claims by lawyers,¹⁹⁴ more attention would

194. This goal is the thrust of the typical advertising and solicitation prohibitions. *See, e.g.*, CAL. BUS. & PROF. CODE § 6157.1 (West 2003) (providing that advertisements may not contain

need to be paid to legitimate methods for lawyers to establish and disseminate the fact of their expertise. Rigorous specialty licensing and specialty bar examinations might become more common.¹⁹⁵ Reexamination may become necessary to establish different levels of expertise for practitioners of varying levels of experience. Bar referrals according to specialty would probably need to focus more on specific training and experience that lawyers would have to establish to the referring agencies' satisfaction. And the practicing bar may come to call upon disciplinary agencies to enforce rules that address misleading specialty claims.¹⁹⁶ If bar associations do not develop methods for distinguishing among lawyers, private organizations may fill the void.¹⁹⁷

false, misleading, or deceptive statements).

195. See, e.g., Harry J. Haynsworth, *Post-Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403, 404-05 (2002) (noting the proliferation of formal specialization programs that require peer review and testing); Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 868-69 (2005) (noting the increasing barriers facing lawyers seeking specialization in specific practice areas during the latter part of the twentieth century, including competency examinations); John A. Sexton, "Out of the Box": *Thinking About the Training of Lawyers in the Next Millenium*, 43 S. TEX. L. REV. 623, 624-25 (2002) (predicting an increasingly stratified profession with a variety of specialty certification processes similar to bar exams); Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 WIDENER L.J. 253, 261 (2006) (predicting increased use of specialization examinations); cf. Evans & Cunningham, *supra* note 32, at 991 (noting that "[c]ertification in [l]egal specialties [h]as [b]een [s]lower to [c]atch on than [e]xpected," [and] ... that there are still very few private organizations that certify lawyers as specialists" (quoting Lisa L. Granite, *In No Hurry to Specialize*, THE PENN. LAWYER, May-June 2001, at 24)); Kilpatrick, *supra* note 32, at 298 (stating that most states that established certifying organizations by 1997 did require some form of examination for certification as a specialist); Certified Specialists, http://www.azbar.org/LegalResources/findspecialist_text.cfm (last visited Oct. 13, 2007) (mandating the passage of a written examination for certification in Arizona); Exam Information, The State Bar of California, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11584&id=9188 (last visited Oct. 13, 2007) (describing one day specialist examinations required of lawyers wishing to be certified as specialists in California).

196. Cf. Zacharias, *What Lawyers Do*, *supra* note 11, at 980-82 (demonstrating the current underenforcement of rules prohibiting specialization claims).

197. One might expect organizations such as the Consumers Union to produce reports evaluating lawyers, as the Consumers Union attempted to do in the days before lawyer advertising was permitted. See *Consumers Union v. Am. Bar Ass'n*, 427 F. Supp. 506, 506-07 (E.D. Va. 1976), *vacated*, 433 U.S. 917 (1977) (upholding Consumer Union's challenge to Virginia's legal advertising rules).

D. Alternatives

The practical consequences of changing the law suggests that it behooves society to consider alternative methods for improving prospective clients' abilities to select lawyers. On one hand, society would like consumers of legal services to have better information available about the quality or experience of particular lawyers. On the other hand, it may be important not to construct a system under which lawyers either are driven from practice or have inordinate incentives to mislead potential clients. A few options are discussed below—tentatively, and only for purposes of opening debate.¹⁹⁸

1. Grading Lawyers

One option is to develop a mechanism for grading lawyers. The concept is not entirely new. For decades, Martindale-Hubbell has assigned some lawyers "able very" ratings and withheld the rating from others.¹⁹⁹ Although its system for ranking lawyers has improved over time, it remains subjective—based on surveys and references submitted by the lawyers being evaluated.²⁰⁰ The ratings benefit older attorneys²⁰¹ and are assigned to law firms based on the

198. This Article does not purport to analyze these alternatives fully, but merely offers them as suggestions that merit further investigation. The option of improving clients' access to reputation information is discussed in more detail in Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, WASH. & LEE L. REV. (forthcoming 2007).

199. See LexisNexis Martindale-Hubbell, Peer Review Ratings—Explanation, http://www.martindale.com/xp/Martindale/Peer_Review_Rankings/ratings_explanation.xml (last visited Oct. 13, 2007) (explaining Martindale-Hubbell's two-letter rating system, including an A, B, or C to denote legal ability, followed by an ethical standards rating).

200. See LexisNexis Martindale-Hubbell, Peer Review Ratings—The Process, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_process.xml (last visited Oct. 13, 2007) (describing the ratings process). In recent years, other private entities have attempted to market competing ratings sources. See, e.g., Best lawyers in America, <http://www.bestlawyers.com/aboutus/selectionprocess.aspx> (last visited Aug. 16, 2007); Super Lawyers, <http://www.superlawyers.com/index.html> (last visited Oct. 13, 2007); The Chambers USA Guide, <http://www.chambersandpartners.com/usa/research-ranking.aspx> (last visited Oct. 13, 2007).

201. See LexisNexis Martindale-Hubbell, Peer Review Ratings—Frequently Asked Questions, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_faqs.xml (last visited Oct. 13, 2007) ("A lawyer must be admitted to the bar for 10 years or more to receive an AV rating"); see also LexisNexis Martindale-Hubbell, Peer Review Ratings—

firm's "highest rated active partner."²⁰² Lawyers who receive a poor rating may "request not to have any rating published."²⁰³ For marketing reasons, Martindale-Hubbell's "Peer Review Rating Specialists work closely with Martindale-Hubbell's larger law firm clients to educate, engage and assist their lawyers in the Peer Review Process and the marketing opportunities surrounding the Peer Review Ratings."²⁰⁴ The publication's rankings also are available only to potential clients who subscribe, or otherwise have access, to the publication.²⁰⁵

Two alternative types of rating institutions spring to mind. Local bar associations might evaluate lawyers based on information submitted by attorneys and collected independently by the bar. Alternatively, after each case, the courts might assign a grade corresponding to the performance of each lawyer. Such grades could be assembled mechanically and made available to the public.²⁰⁶

Both mechanisms have obvious drawbacks. The bar may not have the resources to evaluate lawyers. To the extent that it does, the bar is likely to emphasize factors that may be subjective or irrelevant to

Explanation, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_explanation.xml (last visited Oct. 13, 2007) (describing maximum possible ratings achievable by lawyers with 5-9 years of experience and 3-4 years of experience. Lawyers with less than three years of experience are not rated).

202. LexisNexis Martindale-Hubbell, Peer Review Ratings—Frequently Asked Questions, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_faqs.xml (last visited Oct. 13, 2007).

203. *Id.*

204. *Id.*

205. *Id.*

206. In 1989, the ABA recommended that judges appointing lawyers in capital cases limit appointments to lawyers satisfying particular criteria, including five years of litigation experience in the field of criminal defense; prior experience as lead counsel in at least nine jury trials that have been tried to conclusion; experience as lead or co-counsel in at least one death penalty case; and completion of a training program on criminal advocacy in cases in which the death penalty is sought within one year of their appointment as counsel. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 5.1 (1)(A) (1989). Co-counsel in capital cases were expected to satisfy the following criteria: three years active litigation experience in the field of criminal defense; prior experience as lead or co-counsel in at least three serious and complex jury trials of which at least two involved murder or aggravated murder charges, or one involved murder or aggravated murder trial and one felony trial; and completion of a training program on criminal advocacy in cases in which the death penalty is sought within one year of their appointment as counsel. *Id.* guideline 5.1 (1)(B). In effect, this called upon courts to grade lawyers, though on an objective basis.

performance, such as participation in bar activities, connections with bar officials, or years in practice. Courts assigning grades could only do so with respect to litigated matters, and what judges see may not correspond neatly with a lawyer's out of court performance. Consequently, courts would need to scrutinize the rating methodology and criteria carefully before implementing any grading mechanism.

Assuming that one could limit a grading procedure to appropriate contexts and that the bar or courts would implement the procedure carefully, the question remains: what factors would be relevant to the grading of lawyers? One possibility is to limit the evaluations to purely objective factors, including experience, specialty training, results of specialization examinations, and (if available) a composite of grades assigned by the judges at the conclusion of each litigated case. The problem with such criteria is that they provide limited information. Except in one regard, experience is a neutral factor;²⁰⁷ it does not reveal how well a lawyer has performed in previous cases. Similarly, participating in continuing legal education courses and expertise in taking exams may not translate well into practical performance in representing clients. Judicial evaluations are skewed, both in the types of practice they evaluate and in their inherent dependence on what qualities judges value in lawyers.

A second alternative is to extend the assessment process to include semi-objective factors, including training (e.g., the quality of the law school each lawyer attended), references, and disciplinary history. These criteria are partly subjective; for example, the evaluating body must assign a value to each law school and references may vary based on each lawyer's circle of friends. Nevertheless, evaluations based on such criteria do provide information that might not otherwise be available to potential clients.

The final alternative offers the best hope for meaningful or tailored grading but, at the same time, has the most potential for misuse, or even abuse. The bar could evaluate each lawyer on a subjective basis, based on a periodic (for example, five year) review that takes into account a series of factors developed by the rating

207. Extensive experience, however, does suggest that the lawyer has represented clients well enough that he is able to remain in the field; in other words, it is some indication of how the market views his performance.

agency—perhaps even including observations of the lawyer's performance.²⁰⁸ Of course, such a grading system would be labor intensive, as it contemplates that the bar will evaluate lawyers more personally and directly than it examines new applicants for admission. On the other hand, it would provide an element sorely lacking in the administration of lawyer licensing, namely, post-admission review that enables the bar to maintain some oversight over the performance of lawyers.

2. Publishing Information About Lawyer Reputations

It is perhaps surprising that, given the current vacuum in information about lawyers, consumer-oriented publications have not filled the void. In part, the absence of periodicals evaluating lawyers simply reflects the fact that the information is difficult to compile and may change quickly. A similar absence of attention from rating services is evident with respect to many other professions as well, specifically medicine and psychology.

There is, however, a second explanation for the scarcity of publications assessing lawyers. The bar, and bar regulation, has interposed obstacles to the gathering of information, particularly comparative information.²⁰⁹ Advertising rules seem to forbid lawyer

208. The argument that such an evaluation would be impossible or too subjective is belied by the practice of bar associations that evaluate the qualifications of judicial nominees. Although evaluating a portion of the entire bar each year would require more resources, it can be done.

209. For example, N.J. Rules of Prof'l Conduct R. 7.1(a)(3) (2007) provides that, "A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it ... compares the lawyer's services with other lawyers' services" The New Jersey bar relied on this rule to prevent lawyers from participating in and advertising peer review media surveys that result in the identification of some lawyers as "Super Lawyers," on the basis that that designation is "inherently comparative." N.J. Comm. on Attorney Advertising, Op. 39 (2006). The Virginia bar likewise issued an opinion that lawyers could not advertise their inclusion in a publication listing "Best Lawyers in America," but withdrew its opinion and revised its disciplinary rule as a result of a settlement of litigation contesting the action. See *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614 (E.D. Va. 2003) (issuing a preliminary injunction in the Virginia case); *RE: APRL 1st amendment yields to atty regulation*, Website posting of Jim McCauley (July 20, 2006) (describing the history of the Virginia matter) (on file with author). Some states apparently are more tolerant of comparative advertising. See William W. Yavinsky, *A Comparative Look at Comparative Advertising: Why Efforts to Prohibit Evaluative Rankings Spark Debate from Buffalo to Buenos Aires*, 20 GEO. J. LEGAL ETHICS 969, 986-87 (2007) (comparing states'

participation in providing information to evaluators.²¹⁰ If lawyers dare provide any information, they must be particularly careful to avoid describing their fees, because any publication of fee information that is attributable to them may become binding.²¹¹ Indeed, when Consumer Reports attempted to produce a test periodical in the 1970s, the ABA opposed the publication in court.²¹²

Nevertheless, society's and courts' negative attitudes toward publicizing information concerning lawyers' practices has softened over time. The best alternative to regulating the information that individual lawyers must provide potential clients is to facilitate the provision of information regarding all lawyers in the local bar through an independent mechanism. The bar arguably has an interest not only in allowing the publication of information regarding the specialties, fees, and areas of competence of lawyers, but also in facilitating the collection and dissemination of such information.

approaches).

210. Rules like Model Rule 7.2 forbid lawyers to make certain advertisements, MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006), while Model Rule 8.4(a) forbids them to violate the rules of professional conduct "through the acts of another." *Id.* R. 8.4(a). More specific state prohibitions forbid the use of "testimonials" from third persons and the like. *See, e.g.*, ARK. RULES OF PROF'L CONDUCT R. 7.1 (2007) (treating a lawyer's communication as false or misleading if it contains a testimonial); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1)(E) (2003) (prohibiting testimonials); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02 cmt. 4 (2007) (prohibiting testimonials from past clients); WYO. RULES OF PROF'L CONDUCT R. 7.1(d) (2006) (treating a communication containing a testimonial or endorsement as false or misleading); *cf.* CAL. RULES OF PROF'L CONDUCT R. 1-400 Standard (2) (2005) (presumptively forbidding testimonials).

211. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 7.2(f) (2006) (requiring lawyers to honor advertised fees for at least sixty days); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(c)(5) (2003) (requiring fees advertised in annual publications to be honored for one year and fees advertised in other advertisements to be honored for ninety days); PA. RULES OF PROF'L CONDUCT R. 7.2(h)(2) (2007) (binding lawyers to advertised fees for a period between ninety days and one year).

212. *See Consumers Union v. Am. Bar Ass'n*, 427 F. Supp. 506, 507 (E.D. Va. 1976), *vacated*, 433 U.S. 917 (1977) (finding Virginia's anti-advertising rules unconstitutionally overbroad in restricting Consumers Union's ability to gather information on attorneys' initial consultation fees and other consumer information). In a recent example of the same phenomenon, the Texas State Bar forbade lawyers to participate in an Internet "matching service" in which they described their practices and qualifications for the purpose of enabling the service to match clients with suitable lawyers. The bar concluded that this service constituted an impermissible referral service. *See FTC Urges, supra* note 107, at 284. The FTC urged the Texas Bar to reconsider on the basis that the Texas Bar's view deprived consumers of valuable information. *Id.* at 285.

The bar could gather and make this information available on its own, using surveys distributed with annual bar dues invoices. It could support bar-related or independent publications committed to conducting surveys. At a minimum, bar regulators might create express exceptions to professional rules, such as advertising rules, that appear to foreclose lawyer cooperation with independent publications seeking to provide objective information regarding lawyer practices. The bar might go so far as to certify those publications whose methodologies qualify as sufficiently scientific to guarantee neutrality.

In the modern era, Internet technology provides alternative methods for the dissemination of evaluations of lawyers. Many clients select lawyers after consulting their websites. Those sites therefore seem to be an appropriate repository for rating information concerning the listed lawyers.

Here again, bar associations have become part of the problem rather than part of the solution. Law firms attempting to provide testimonials or references from former clients have confronted disapproval by regulators. Florida and other states forbid the posting of references, on the theory that former clients cannot reasonably evaluate the performance their lawyers provided and that matters vary so much in their nature that any evaluation in a previous case would be irrelevant to the selection of a lawyer in a subsequent matter.²¹³ Accordingly, regulators have concluded that potential clients are better served by receiving less information, rather than more.

This attitude seems short-sighted. Although references from former clients are sometimes of limited utility, it is far too paternalistic to assume that clients perceive nothing about their representation accurately. The key for the bar is not to forbid the use of references and testimonials, but rather to regulate them

213. See FLA. RULES OF PROF'L CONDUCT R. 4-7.2 cmt. (2003) (stating that testimonials are prohibited because the public is likely to draw the incorrect conclusion that the advertising lawyer will get the same results in future cases); see also ARK. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2007) (prohibiting endorsements on the basis that an attorney's work for previous clients should not be compared without reference to specific factual and legal circumstances); COLO. RULES OF PROF'L CONDUCT R. 7.1 cmt. (2000) (stating that unsubstantiated results obtained for previous clients are likely to mislead prospective clients); D.C. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (1999) (stating that client endorsements are likely to create unjustifiable expectations).

wisely—perhaps even collecting references for all lawyers on a single bar-monitored site and requiring lawyers to advise all past clients that they can submit evaluations.²¹⁴ Requiring disclaimers or warning labels makes sense, as in the regulation of advertising of other products. Some rules governing how references are collected and selected for publication might also be appropriate. But overall, potential clients can benefit from what prior clients have to say. To the extent that it is possible to ease the potential client's burden in obtaining references, the bar should facilitate, rather than hinder, that process.

3. Cataloguing Success Information on a Scientific Basis

Bar regulators have shown similar antipathy toward publication by lawyers of information regarding their past success in a category of representation.²¹⁵ Of course, past success in one case is not a strong predictor of success in a subsequent unrelated matter. Unsophisticated recipients of such information may form inaccurate impressions from it.²¹⁶ Nevertheless, realistically, how well a lawyer has done in the past is important information that all potential clients should wish to know.

Again, the bar is in a position to facilitate the collection of such information and present it in the least misleading form. The bar could obtain and catalogue success information on a relatively scientific basis—including categorizing like matters, comparing results across the bar, and identifying the range of average results.

214. This procedure was recently suggested in David McGowan's legal ethics blog. See Posting of David McGowan to Legal Ethics Forum, State Bar Websites and Reputational Feedback, http://legalethicsforum.typepad.com/blog/2006/06/state_bar_websi.html (June. 4, 2006) (encouraging "state bars [to] provide forums for clients to provide feedback on their lawyers.... [A]ttorneys could be required to link to the forum from firm pages, or individual lawyer pages, and to provide a URL on soliciting materials and retention letters ...").

215. See, e.g., CAL. BUS. & PROF. CODE § 6158.1 (2003) (establishing a rebuttable presumption that statements of past success are false, misleading, or deceptive); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1)(B) (2003) (prohibiting references to past results); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02 cmt. 4 (2007) (prohibiting advertising of past results in ordinary circumstances); WYO. RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2006) (noting that statements describing past results may be precluded by the rule forbidding misleading or false communications).

216. In other words, potential clients may believe the lawyer can reproduce the success in their cases, even though the prior cases may have been substantially different.

Success information seems most useful if it represents the totality of each lawyer's cases within a category. It also is pertinent only to the extent that it can be compared to the results other lawyers obtain. Such information will not be available, however, unless all lawyers are required to collect and provide it.²¹⁷

Consequently, it may be useful for the bar to fulfill the function of generating and analyzing data regarding lawyer success. To that end, the bar would need to develop forms for the collection of information and to educate lawyers regarding their use. Of course, not all fields of practice lend themselves to objective measures of success (e.g., results of litigation in a particular type of case). But to the extent the bar can centralize this data, present it in a user-friendly format, and educate consumers regarding its importance (and sometimes lack thereof), the bar would obviate consumers' desire or need to identify the information on their own.

4. Making Use of Fee-sharing Practices

In California, a jurisdiction with idiosyncratic rules, a confluence of unusual circumstances creates a de facto mechanism for matching some clients with suitable lawyers. California allows lawyers to accept cases, refer the clients to specialized (or better) attorneys, and then share in the fees even without personally performing in the matter.²¹⁸ The referring lawyers have incentives to send clients to the best lawyer for their case, because the referral fees typically are based on success in the matter.²¹⁹ Moreover, the referring lawyers have access to information that unsophisticated clients ordinarily do not know or use regarding the experience of lawyers to whom they make referrals; namely, published information regarding past results in litigation and settlements.²²⁰ In effect, the

217. In some jurisdictions, result information for litigated matters is published, but typically in a form usable only by lawyers and sophisticated clients with access to legal search engines. See *infra* note 219 and accompanying text.

218. See CAL. RULES OF PROF'L CONDUCT R. 2-200(A) (2005) (permitting referral fees so long as the client gives consent and the total fee does not exceed what would otherwise be charged).

219. See *id.* R. 2-200(A)(2).

220. This data is available in such publications as California Trial Digest and can be organized by type of case and result through Westlaw and, perhaps, other search engines. Other states may have similar publications, but they become significant for our purposes only

combination of the availability of this data and the state's lax professional regulation regarding referral fees enables (or causes) clients to pay for good reputation information by hiring the intermediary.

Most jurisdictions do not allow such referral arrangements, for good reason.²²¹ They inflate the cost of representation, because the cost of paying the referred to or referred from lawyer can be built into the original fee proposal *sub rosa*. In the absence of strong rate competition, the California rules effectively enable referring lawyers to charge substantially for little work. Clients often do not know precisely what they are paying for.

Nevertheless, the California mechanism is intriguing on several fronts. It suggests an alternative mode of regulation: limiting lawyer referral fees, but specifically allowing lawyers to act as intermediaries. As in California, to maintain referring lawyers' incentives to refer clients to highly qualified lawyers, the level of allowable referral fees would need to be based on successful results in the underlying representation. Referral fee limits therefore could not take the form of absolute caps. Instead, the rules might define appropriate contingent recoveries for referring attorneys, confining those to an amount clients reasonably might pay for the pleasure of obtaining a good referral.²²²

The California experience also highlights the availability of useful data that can be the basis for selecting attorneys, similar to the catalogued verdict and settlement information described previously.²²³ If referring attorneys in California can employ such

if they are combined with lawyers' ability to profit from using the data in making referrals.

221. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2006) ("A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation"); MODEL CODE OF PROF'L RESPONSIBILITY, DR 2-107(A)(2) (1976) (permitting division of fees only to the extent "[t]he division is made in proportion to the services performed and responsibility assumed by each").

222. Many referrals involve plaintiffs' contingency work, so the referring and receiving lawyer can simply agree to divide the contingency. In cases in which the work will be performed according to an hourly rate, the rules would need to limit referral fees to successful cases and identify some formula or mechanism for determining success (for example, upon a settlement or verdict that both sides can claim as a victory). The rulemakers may find it more difficult to prescribe appropriate referral fees when the matter is not designed to generate a pool of money that can be divided into contingencies.

223. See *supra* note 220 and accompanying text.

data, there is no reason why bar associations could not gather and publish it in a consumer-friendly form. The bar could even consider using the data—combined, perhaps, with supplemental information regarding rates collected from the subject practitioners—to create its own referral list.

If the bar does not wish to interpret the data directly, a potentially controversial alternative might be to require referring lawyers to inform the bar of each referral and the nature of the case in which it is made. By collecting *this* data and making it available to consumers, the bar would enable prospective clients to learn which lawyers are most trusted by their peers in particular types of cases. Of course, this approach would open the door to cooperative games by referring and receiving lawyers that ultimately might corrupt the data. It nevertheless is an approach that has promise for improving the state of knowledge that consumers of legal services currently have.

E. An Observation About the Proposed Alternatives

The above alternatives, or possible supplements, to clarifying lawyers' retainer obligations all focus on the goal of providing consumers with information and additional avenues for evaluating possible representatives. Each approach has some attraction, but also presents potential practical difficulties that require careful analysis before implementation. The practical concerns may prove fatal to some or all of the options. This Article has presented the options merely as food for thought.

The same is not true, however, for this Article's principal conclusion—that lawyers have ethical obligations at the retainer stage and it is important for these to be highlighted through interpretation or clarification of the professional rules and common law. The main danger of implementing this conclusion is that an approach focusing on lawyers' ethical obligations will prove ineffective, or only marginally effective. This Article has suggested, however, that there would nonetheless be benefits to pursuing that course. If alternatives such as those discussed above ultimately are deemed preferable, implementing them would make little sense without initial recognition by the profession both that consumers'

interests are at risk and that the bar has a role to play in assuring that prospective clients are well served.

CONCLUSION

Laypersons who visit lawyers for the first time have, in different settings, been conceptualized as independent unrelated parties, prospective clients, clients for limited purposes, and actual clients. The characterizations of their relationships with the attorneys whom they consult have been equally diverse, ranging from arm's length to fiduciary in nature. Often, the labels assume the answer to the question of what, or how much, the lawyers owe the consulting person. At a minimum, however, it is fair to say that virtually everyone who has considered any aspect of the question has agreed that lawyers *sometimes* have *some* responsibilities in dealing with potential clients that a stranger or non-lawyer service provider might not have.

This Article does not resolve the issue of what lawyers' ethical and legal obligations to potential clients are. Nor does it offer a firm vision of how lawyers' responsibilities, if any, should be implemented or enforced. The cost-benefit analysis of whether particular forms of enhanced regulation can be effective and worth the costs is for another day.

The Article has, however, brought the issues to light, identified their complexity, and offered preliminary insights regarding the approaches courts and bar associations might take to them. In opening the debate, the Article lays a foundation that should cause future decision makers and commentators on lawyers' obligations to prospective clients to take seriously the reasons why lawyers might have special responsibilities in the preemployment setting. Hopefully, those decision makers and commentators will forgo simple labeling and instead address, in a practical and realistic way, both clients' needs and that which society can reasonably expect of the bar.