

October 2011

ATTORNEY SELF-DISCLOSURE

Benjamin Cooper

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Benjamin Cooper, *ATTORNEY SELF-DISCLOSURE*, 79 U. Cin. L. Rev. (2011)
Available at: <https://scholarship.law.uc.edu/uclr/vol79/iss2/9>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

ATTORNEY SELF-DISCLOSURE

*Benjamin P. Cooper**

How do people with legal problems find an appropriate lawyer? For unsophisticated users of legal services—lower- and middle-income individuals and small businesses—it is a longstanding and vexing problem. Before hiring a lawyer, consumers want to know the answers to a variety of questions. Has the lawyer ever been disciplined? Has the lawyer ever been sued for malpractice? Does the lawyer carry malpractice insurance? Does the lawyer have the appropriate experience and expertise to handle this matter? In this information age, a “Google” search should yield answers to these questions, but, surprisingly, this critical information is difficult and sometimes impossible for consumers to find. Moreover, lawyers have no legal obligation to provide this information to prospective clients. As a result, many consumers settle for a lawyer who does not fit their needs or choose not to hire a lawyer at all.

This Article proposes a novel approach to solving this problem. It argues that the professional duty of communication that is applicable to the lawyer–client relationship should be extended to the lawyer–prospective client relationship. Thus, the lawyer should owe the prospective client a duty to provide sufficient information about himself—what I call “lawyer-specific information”—so that the consumer can make an informed decision about whether to hire the lawyer. At a minimum, this disclosure should answer the questions posed above.

Part I of this Article describes the lack of lawyer-specific information available to consumers. Part II explores the current legal obligations of lawyers to prospective clients. Although lawyers owe prospective

* Assistant Professor of Law, University of Mississippi School of Law. J.D. University of Chicago Law School, B.A. Amherst College. I would like to thank the Lamar Order of the University of Mississippi School of Law for its financial support. I am also grateful to the organizers of the New Scholars Panel at the 2009 meeting of the Southeastern Association of Law Schools for giving me an opportunity to present this paper and to those who attended my presentation and gave me very helpful feedback. I would also like to express my gratitude to Leslie Levin for giving me early guidance on this project. Kate Bogard and Brooke Bullard provided helpful research assistance.

698 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

clients a variety of quasi-fiduciary duties, they have no obligation to provide lawyer-specific information. Part III sets forth the theoretical, moral, and public policy justifications for requiring lawyers to disclose lawyer-specific information: (1) closing the information gap; (2) consumer protection; (3) the moral and philosophical concept of informed consent; (4) fulfilling prospective clients' expectations; and (5) improving public confidence in the legal profession. Part IV compares a doctor's obligation to disclose physician-specific information to consumers with the lawyer's obligation. Although it is easier for consumers to find out information about prospective doctors than prospective lawyers, some courts have nevertheless held doctors liable for failing to disclose such information. This comparison to doctors makes the case for attorney self-disclosure even stronger. Part V sets forth a proposed amendment to the rules of professional conduct that would require lawyers to disclose lawyer-specific information to prospective clients.

Introduction.....	699
I. The Information Gap	705
A. The Limited Availability of Information About Lawyers' Experience.....	706
1. The Limits of Traditional Methods	706
2. The Limits of Online Searches.....	707
B. The Limited Availability of Lawyers' Disciplinary History.....	709
C. The Limits of Other Publicly Available Information.....	711
1. Malpractice Payments	711
2. Malpractice Insurance	712
II. The Lawyer–Prospective Client Relationship Under Current Law .	713
A. Lawyers' Duties to Prospective Clients Under the Rules of Professional Conduct	713
B. Why Lawyer Silence is “Golden” Under the Law of Fraud .	716
1. Affirmative Misstatements/Outright Lies	717
2. Potentially Misleading Statements	717
3. Silence	719
III. The Case for Imposing an Affirmative Disclosure Obligation on Lawyers	721
A. Closing the Information Gap	721
B. Consumer Protection.....	722
C. Informed Consent.....	724
D. The Prospective Client's Expectations	726
E. Public Confidence	726

2010]	<i>ATTORNEY SELF-DISCLOSURE</i>	699
IV. Comparing Doctors and Lawyers		728
A. The Wide Availability of Physician-Specific Information ...		728
B. Doctors' Duty to Disclose Physician-Specific Information..		728
1. Physical or Mental Impairments		730
2. Conflicts of Interest.....		731
3. Lack of Experience		734
C. What Lawyers Can Learn from the Experience of Doctors..		736
V. Proposal for Disclosing Lawyer-Specific Information		738
A. An Amendment to the Model Rules of Professional Conduct		738
B. Categories of Mandatory Disclosure.....		740
1. Biographical, Licensing and Certification Information		740
2. Relevant Experience and Expertise.....		740
3. Disciplinary History		742
4. Information Regarding Malpractice Insurance		743
5. Malpractice Payments		743
C. Anticipating the Critics		743
Conclusion		746

INTRODUCTION

How do people with legal problems find a lawyer? Most do so through word-of-mouth.¹ For sophisticated users of legal services, such as large companies and wealthy individuals, a few phone calls to their “wide network of contacts” generally yield good results.² Moreover, once they have some leads, these sophisticated legal consumers know where to look to find additional information—for example on Westlaw or Lexis—about what kind of cases their prospective lawyers have handled and what results they have achieved.³ Their experience and

1. Michael S. Harris et al., *Local and Specialized Outside Counsel*, in 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 20:12 (Robert L. Haig ed., 2010) (“The most obvious, the most traditional, and (frequently) the most productive source of attorney referrals is word-of-mouth.”); Steven K. Berenson, *Is It Time For Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 648 (2001) (citing a Martindale-Hubbell survey).

2. Harris et al., *supra* note 1, § 20:12 (noting that sophisticated corporate counsel generally can contact: “(1) other attorneys within the company itself; (2) existing outside counsel for the company who has a vested interest in satisfying the company in hope of obtaining repeat business; and (3) personal friends who presumably do not want you to lose your job”).

3. *Id.* See also Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569, 581 (2007) (“[S]ophisticated clients are capable of determining each lawyer’s education and experience, requesting references . . . and comparing the fees of multiple lawyers they consult.”); Benjamin Barton, *Why do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 439–40 (2001).

background also give them the ability to understand the data that they uncover.

But for the rest of Americans without good contacts in the legal community—infrequent users of legal services such as small business owners and lower- and middle-income individuals—the problem of finding a good lawyer is a longstanding and vexing one.⁴ Some look in the phone book or rely on attorney advertising,⁵ which are “haphazard, shot-in-the-dark methods” for picking a lawyer.⁶ Others rely on “Google” searches, but these tend to yield relatively little information.⁷

Not surprisingly, consumers report that they seek highly skilled lawyers who have integrity.⁸ What kind of information would help consumers choose a lawyer possessing those qualities? Certainly, consumers want to know whether their prospective lawyers have ever been disciplined⁹ or sued for malpractice;¹⁰ yet, a lawyer has no legal obligation to disclose this information to prospective clients,¹¹ and, in many states, this information is difficult for the public to access or is not available at all.¹² Consumers also want to know if the lawyer carries malpractice insurance¹³ so that they will be able to recover if their

4. Berenson, *supra* note 1, at 648 (“The problem of how middle-income persons go about finding an appropriate lawyer for their legal needs has been much discussed. The consensus seems to be that there is no clear or easy way for a person to find an appropriate lawyer for his or her particular legal needs.”). See also Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After The Storm*, 70 *FORDHAM L. REV.* 915, 916 (2001) (“For over thirty years, the organized bar has studied, squabbled and lamented over how to address the unmet legal needs of the middle class.”); Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can’t Always Get What They Want and What the Legal Profession Should Do About It*, 25 *U.C. DAVIS L. REV.* 283 (1992).

5. Morton, *supra* note 4, at 284; CONSORTIUM ON LEGAL SERV. & THE PUB., AM. BAR ASS’N, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

6. Maute, *supra* note 4, at 936 (“As one reporter noted, “[L]eafing through the Yellow Pages and muttering “eeny meeny miney mo” is a haphazard and unreliable method of selecting a lawyer.” (quoting David Segal, *Legal HMOs: Defense Against High Fees; Consumers Embracing Prepaid Plans*, *WASH. POST*, Mar. 14, 1988, at D1)).

7. See *infra* Part I.A.2.

8. Morton, *supra* note 4, at 287.

9. Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and “Disclosure Advertising”*: *Towards A New Ethos*, 72 *N.C. L. REV.* 351, 376–77 (1994); Morton, *supra* note 4, at 288.

10. Berenson, *supra* note 1, at 684.

11. See *infra* Part I.B. In at least one state, a lawyer who is suspended must disclose this to current clients, though not to prospective clients. DeGraw & Burton, *supra* note 9, at 375 n.121 (citation omitted) (“The impetus for this amendment seems to come from lawyer abuses in which suspended attorneys would notify their clients in a manner suggesting that the attorney was merely going on a vacation or leave of absence rather than being disciplined for a breach of professional responsibility standards.”).

12. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 *GEO. J. LEGAL ETHICS* 1 (2007); DeGraw & Burton, *supra* note 9, at 379 (“Disciplinary information is largely not available in a form useful to the client–consumer.”).

13. Berenson, *supra* note 1, at 684–85.

2010]

ATTORNEY SELF-DISCLOSURE

701

lawyer commits malpractice, but in most states the lawyer has no duty to disclose this information.¹⁴ Finally, consumers want to know the lawyer's specific relevant expertise and experience in order to determine whether he is a good choice to handle their particular case,¹⁵ but again, this information is difficult to uncover, and the lawyer has no duty to disclose it.¹⁶

Thus, consumers—and unsophisticated users of legal services in particular—are generally unable to find out critical information about prospective lawyers even if they appreciate the need to seek out this information.¹⁷ As a result, some are forced to settle for a lawyer who does not fit their needs,¹⁸ while others choose not to obtain a lawyer's assistance at all.¹⁹ Ultimately, the inability of these individuals to find a

14. See SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD* 18–22 (2d ed. 2008). Only seven states require disclosure of malpractice insurance information to clients, while eighteen others require disclosure on their bar registration statements. See STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS'N, *STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE* (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/malprac_disc_chart.authcheckdam.pdf (last visited March 4, 2011).

15. Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 *GEO. J. LEG. ETH.* 155, 158 (2010) (“Our survey data further indicates that potential clients find a litigator's jury trial experience to be a material factor in a hiring decision, and, perhaps not surprisingly, they prefer to hire litigators with jury trial experience.”).

16. *Id.* at 171 (“Right now, lawyers are not required to disclose their lack of trial experience and there is no legal ramification for the failure to do so.”); Zacharias, *supra* note 3, at 569.

17. To make matters worse, even when they obtain information, unsophisticated consumers “might find it more difficult [than experienced legal consumers] to compare the competence and experience of competing lawyers.” *Id.* at 581–82 (“[I]t may be beyond the capacity of unsophisticated or inexperienced potential clients to investigate even relatively concrete factors because they may not realize they should, may be too dependent to shop around or probe, or may not know the questions to ask.”); Barton, *supra* note 3, at 440 (arguing that many clients now have better ability to find information out about their lawyers but acknowledging that “there may be pockets of the legal market where information asymmetry remains a problem”); Berenson, *supra* note 1, at 649 (“The recipients of professional services lack the specialized knowledge necessary to evaluate the quality of services they receive.”). Still, more information is better than less, particularly when that information is accompanied by an explanation from the lawyer of the relevance of, for example, that lawyer's particular experience and expertise.

18. Professor Berenson cited an unpublished 2000 survey conducted by Martindale-Hubbell that concluded that:

“[m]ore than one-fourth of Americans admit that the inability to compare information about different attorneys (28%) and being intimidated or confused by the whole process (27%) of choosing a lawyer would limit their ability to research their options.” Another fifth (20%) claim their ability to research options for choosing a lawyer is limited by lack of resources and information.

Berenson, *supra* note 1, at 648.

19. Maute, *supra* note 4, at 936 (“Even when middle-class consumers recognize that they might benefit from a lawyer's services, they are reluctant to seek out legal assistance because they are concerned about the cost of legal services and they lack the requisite knowledge to find a competent lawyer.”).

good lawyer limits their ability to access the legal system.²⁰

Further exacerbating the problem is the explosion of attorney advertising following the Supreme Court's decision in *Bates v. State Bar of Arizona*,²¹ which held that truthful advertising by attorneys is constitutionally protected speech,²² and advertising now takes many forms—both traditional (e.g., billboards, television, radio, and newsletters) and non-traditional (e.g., websites and blogs).²³ In their advertising, lawyers have the opportunity to present their best qualities.²⁴ Moreover, once the consumer is in the lawyer's office, speaking to the lawyer on the telephone, or sizing up the lawyer at a "beauty contest," the lawyer has additional opportunities to sell his positive attributes. The lawyer can discuss his recent successes, his firm's excellent personal service, or the quality of his associates. Thus, while consumers have difficulty finding neutral or negative information about prospective lawyers, they are also bombarded with information from lawyers about their positive qualities.²⁵ In other words, legal consumers have more than sufficient opportunity to hear why they should hire particular lawyers, but they do not get the chance to find out why they should not.²⁶

Commentators have made various suggestions for addressing this problem in whole or in part. Professor Leslie Levin recently documented the shameful secrecy surrounding the lawyer disciplinary system and made a persuasive case for "less secrecy in lawyer discipline."²⁷ Addressing this same issue in an earlier article, Professors Sandra DeGraw and Bruce Burton proposed mandatory "disclosure

20. See generally Deborah Rhode, *Access to Justice*, 17 GEO. J. LEGAL ETHICS 369, 418 (2004) (One "strategy for improving the market and enhancing the attractiveness of legal services involves increasing the information readily available about their quality.").

21. 433 U.S. 350 (1977).

22. DeGraw & Burton, *supra* note 9, at 379–80; Berenson, *supra* note 1, at 653.

23. For example, New York defines attorney advertising very broadly as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." N.Y. RULE OF PROF'L CONDUCT R. 1.0(a) (2009). Under this definition, a lawyer's website, blog, or newsletter—which are most likely written for the purpose of attracting clients—arguably qualify as advertising and are therefore subject to New York's rules on advertising. Regardless of whether they are subject to advertising regulations, firm websites, blogs, and newsletters are an increasingly common way for lawyers to promote themselves.

24. Harris et al., *supra* note 1, § 20:12 ("[N]o lawyer has ever understated his or her credential on a firm web site.").

25. DeGraw & Burton, *supra* note 9, at 383 ("In selecting a lawyer, the only data concerning quality that is functionally available to most prospective client-consumers comes from the self-serving advertising of lawyer-vendors and from the general practice of lawyer licensing by the courts.").

26. *Id.* at 379.

27. See Levin, *supra* note 12.

2010]

ATTORNEY SELF-DISCLOSURE

703

advertising,” a system in which lawyers would be required to disclose disciplinary actions taken against them to clients, prospective clients, and the public.²⁸ Similarly, Professor Tracy McCormack and Christopher Bodnar recently argued that litigators be required to disclose their jury trial experience (or lack thereof) to potential clients.²⁹ While these commentators focused narrowly on one issue, Professor Steve Berenson targeted the more general unavailability of information about lawyers by suggesting that legislatures consider requiring lawyers to create and make public “lawyer profiles” containing a variety of information, including “demographic information,” “licensing and certification information,” “malpractice payments” made by the lawyer, “information regarding malpractice insurance,” “disciplinary information,” and “criminal convictions.”³⁰

While these arguments all have merit, this Article proposes a different approach. It argues that the professional duty of communication that is applicable during the lawyer–client relationship³¹ should also apply to the relationship between the lawyer and a prospective client. Thus, just as the lawyer must provide the client with sufficient information during the representation “to permit the client to make informed decisions regarding the representation,”³² the lawyer should be required to communicate to the prospective client sufficient information about himself—what I call “lawyer-specific information”—so that the prospective client can make an informed decision about whether to hire the lawyer. At a minimum, this disclosure should include five categories of information: (1) biographical, licensing, and certification information; (2) disciplinary history; (3) information about the lawyer’s malpractice insurance; (4) malpractice payments; and (5) the lawyer’s specific experience and expertise relevant to the prospective client’s matter along with an explanation of the relationship between the lawyer’s prior experience and the work that will be necessary in the proposed new matter.

This disclosure obligation addresses issues beyond just disciplinary history, which was the focus for Professors Levin, DeGraw, and Burton,

28. DeGraw & Burton, *supra* note 9, at 351. See also Sara Murray, Comment, *The Whole Truth and Nothing But the Truth? Should Attorneys Who Advertise Be Required to Disclose Prior Disciplinary Actions Taken Against Them?*, 21 ST. MARY’S L.J. 953 (1990).

29. McCormack & Bodnar, *supra* note 15.

30. Berenson, *supra* note 1, at 683–87. While Professor Berenson promoted the benefits of lawyer profiles, he concluded that “the underlying conditions that paved the way for physician profiles do not appear to be present to the same degree in the legal context [and therefore] it seems unlikely that publicly accessible lawyer profiles will become a reality in the near future.” *Id.* at 683.

31. See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2006).

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

and trial experience, which was the focus for Professors McCormack and Bodnar. It also differs from Professor Berenson's suggested "lawyer profiles" in several respects. First, the consumer will not have to look anywhere to find the information; instead, the lawyer will have to give the information to the consumer directly so that there will be no question whether the consumer actually received it. Second, and perhaps more importantly, this Article proposes greater disclosure than Professor Berenson's "lawyer profiles." Specifically, the lawyer should be required to disclose to the consumer the lawyer's specific experience and expertise relevant to the consumer's case and provide an explanation of the relationship between the lawyer's prior experience and the work that will be necessary in the proposed new matter. This information is critical to the consumer's ability to make an informed choice about what lawyer to hire, and the lawyer himself is the only person in a position to provide it.³³

Part I canvasses the information available—or not available—to prospective clients about how to find a lawyer. This Part also demonstrates that, even if consumers know what information to look for, it is generally unavailable to them. Part II explores how the law currently treats the attorney–prospective client relationship and explains that lawyers already owe prospective clients a variety of quasi-fiduciary duties, though the duty to communicate lawyer-specific information is not among them. Imposing on lawyers the duty to disclose lawyer-specific information would be consistent with the nature of the existing quasi-fiduciary relationship between lawyer and prospective client. Part III sets forth the theoretical, moral, and public policy justifications for requiring lawyers to disclose lawyer-specific information to prospective clients, specifically: (1) closing the information gap; (2) consumer protection; (3) the moral and philosophical notion of informed consent; (4) fulfilling prospective clients' expectations; and (5) improving public

33. The idea that a lawyer should have a duty to communicate with prospective clients has received surprisingly little attention. The late Fred Zacharias recently became the first to specifically address this issue. See Zacharias, *supra* note 3, at 569. This Article builds on that important work on this issue in several respects. First, it provides a variety of theoretical and public policy justifications that Professor Zacharias did not discuss for imposing this new duty on lawyers. Second, it answers a question that Professor Zacharias explicitly left open: what should be the precise scope of the lawyer's duty to communicate with prospective clients? See *id.* at 575 ("This Article argues that the professional regulatory scheme should clarify and facilitate enforcement of lawyers' pre-employment 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."); *id.* at 641 ("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.").

2010]

ATTORNEY SELF-DISCLOSURE

705

confidence in the legal profession. Part IV compares lawyers with doctors and describes how much easier it is for consumers to find a doctor. Despite this, some courts have held doctors liable for failing to disclose physician-specific information. This comparison bolsters the argument for lawyer disclosure of lawyer-specific information. Part V specifically sets forth this Article's proposal for implementing the lawyer's duty to disclose lawyer-specific information and addresses some potential criticisms of this proposal.

I. THE INFORMATION GAP

A young married couple wants to draft their wills; an individual suffers unforeseen complications from a botched surgery; a small business owner is being investigated by the Internal Revenue Service. These individuals are looking for an honest, high quality lawyer with the appropriate expertise to handle their case, but they typically are also inexperienced with the legal system and lack the personal contacts that can refer them to a suitable lawyer. How can they find the names of appropriate lawyers and information about those lawyers? A variety of bar associations, state courts, and consumer protection groups have produced guides to advise consumers on how to find a lawyer. These guides generally share the view that word-of-mouth referrals, attorney referral services, advertisements, phone books, and legal directories, such as Martindale-Hubbell, are the best way to find a lawyer.³⁴ Unfortunately, following this advice yields surprisingly little relevant information.³⁵ First, as set forth in subpart A, it is difficult for consumers to learn information about their prospective lawyers' experience and expertise using these sources. Second, as set forth in subpart B, even a lawyer's disciplinary history is surprisingly difficult to uncover. Third, subpart C describes the limited availability of other critical lawyer-specific information, particularly the lawyer's history of malpractice claims and information about the lawyer's malpractice insurance.

34. See, e.g., DC Bar Pamphlet, *How to Find and Work With a Lawyer*, www.dcb.org/for_the_public/working_with_lawyers/find.cfm (last visited Sept. 27, 2010); THE SUPREME COURT OF OHIO, *A CONSUMER'S PRACTICAL GUIDE TO MANAGING A RELATIONSHIP WITH A LAWYER* 4-5 (2009); Don Griesmann: *How to Find a Lawyer for Your Nonprofit Organization*, Feb. 5, 2009, www.stepbystepfundraising.com/how-to-find-a-lawyer-nonprofit/; Nolo, *How to Find an Excellent Lawyer*, <http://www.nolo.com/legal-encyclopedia/article-29868.html> (last visited Sept. 5, 2010); Better Bus. Bureau of N.Y., *How to Find a Lawyer in NYC*, <http://newyork.bbb.org/how-to-find-a-lawyer-in-nyc/> (last visited Sept. 5, 2010).

35. Of course, another problem with this advice is that some will not even read it.

A. The Limited Availability of Information About Lawyers' Experience

Once a consumer decides to hire a lawyer, he wants to find a suitable one. Generally, "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."³⁶ Unfortunately, consumers are unable to find this information on their own using traditional means or the Internet.

1. The Limits of Traditional Methods

Personal referrals, whether through friends, relatives, insurance companies, charitable organizations, or other professionals,³⁷ are uniformly considered the best resource for finding a lawyer.³⁸ But trying to find a lawyer by word of mouth is only effective if consumers know people who know good lawyers. Many individuals simply do not have the kind of connections that are going to help them find a good lawyer.³⁹ Thus, unsophisticated users of legal services must use other approaches.

But other suggested methods for finding a suitable lawyer have their own problems. Consumers relying on the phone book or attorney advertising are unlikely to find an appropriate attorney. Stating the obvious, one commentator has noted that these are "haphazard, shot-in-the-dark methods" for picking a lawyer.⁴⁰

Public interest organizations, the Bar, and some commentators tout attorney referral services as a promising method to help lower- and middle-income consumers find lawyers,⁴¹ but in their current incarnation they remain problematic. Typically, these referral services, often run on a not-for-profit basis by local bar associations, send consumers who contact them to the "next lawyer in line who has expressed a willingness to take cases in the problem area identified by the client."⁴² This approach suffers from several critical flaws. First, the referral services "rarely require the attorney to demonstrate any particular expertise or experience in a problem area in order to receive

36. Zacharias, *supra* note 3, at 579.

37. D.C. Bar Pamphlet, *supra* note 34.

38. *See supra* note 1 and accompanying text.

39. *See supra* notes 4–7 and accompanying text.

40. Maute, *supra* note 4, at 936; *supra* note 6 and accompanying text. *See also* Berenson, *supra* note 1, at 653 ("Of course, beyond areas of practice there is little substantive information in the yellow pages that would assist a person in selecting an appropriate attorney.").

41. Morton, *supra* note 4.

42. Berenson, *supra* note 1, at 654.

referrals in that area.”⁴³ Second, “no effort is made to match particular attorney competencies or characteristics to those of the potential client or case.”⁴⁴ Third, the customer receives very little information about the referred lawyer.⁴⁵

2. The Limits of Online Searches

In the age of Google, one would think that the Internet would be a good resource for consumers to find information about prospective lawyers, but the information available online is limited.⁴⁶ For example, if a customer types a particular lawyer’s name into Martindale-Hubbell’s website,⁴⁷ the customer learns where the lawyer went to college and law school⁴⁸ and the lawyer’s bar admissions and practice areas (as designated by the lawyer), but this is no better than what was available in the hard copy version of Martindale-Hubbell and is hardly the kind of lawyer-specific information that a consumer needs to choose a good lawyer for a particular case.

Martindale-Hubbell has a rating system based on peer review,⁴⁹ but the only ratings are “A,” “B,” and “C,” which tells a consumer very little about the relative merits of using the prospective lawyer for the consumer’s particular case. Moreover, many lawyers are not rated at all. Indeed, if a lawyer does not receive the rating that he wants, he can request that Martindale-Hubbell not rate him,⁵⁰ and Martindale-Hubbell explicitly states that the lack of a rating should not be held against a lawyer.⁵¹ This policy clearly undermines the legitimacy of Martindale-

43. *Id.*

44. *Id.*

45. *Id.* at 654–55.

46. A full discussion of all of the websites that list and rate lawyers is beyond the scope of this Article. This Article focuses on two of the most popular websites—www.martindale.com and www.avvo.com. Other ratings websites—for example, www.lawyerlistings.com, www.lawyerratinz.com, and www.lawyerreviewsonline.com—suffer from shortcomings similar to those discussed in connection with [martindale.com](http://www.martindale.com) and [avvo.com](http://www.avvo.com).

47. Martindale-Hubbell, www.martindalehubbell.com (last visited Sept. 5, 2010). Of course, for many years, consumers could use Martindale-Hubbell and other directories in book form, but these traditional resources have been largely supplanted by online resources.

48. This information is not always, accurate, however. Spot-checking the accuracy of the available information revealed that the listing for one of the most prominent lawyers in Philadelphia listed the incorrect law school.

49. See Martindale-Hubbell, Peer Review Ratings, http://www.martindale.com/xp/legal/About_Martindale/Products_and_Services/Peer_Review_Ratings/ratings.xml (last visited Sept. 5, 2010).

50. Martindale-Hubbell, Frequently Asked Questions About LexisNexis Martindale-Hubbell Peer Review Ratings, <http://law.lexisnexis.com/literature/LMH00074-0.pdf> (last visited Sept. 27, 2010) (“Some lawyers request not to have any rating published.”).

51. *Id.*

Hubbell's entire rating system.

A relatively new website, Avvo.com, appears to hold the potential to provide consumers with helpful information, but what the site currently provides is inadequate. Avvo collects information about lawyers and then attempts to put a rating on the lawyer. According to the website, Avvo collects publicly available information and, "using a mathematical model that considers the information shown in a lawyer's profile, including a lawyer's years in practice, disciplinary history, professional achievements and industry recognition—all factors that, in our opinion, are relevant to assessing a lawyer's qualifications," gives the lawyer a rating on a scale of one to ten.⁵²

Despite its stated goal, Avvo.com remains a work in progress and currently suffers from a number of inadequacies. First, while it collects publicly available information on lawyers, it also relies on the website's users—both the lawyers themselves and third-parties—to input additional information about the lawyers, and if the lawyer's profile contains only publicly available information, as is the case for many lawyers on the site, then there is no numerical rating for the lawyer. For these lawyers, the only rating that Avvo provides is "No Concerns" if the individual has no publicly available disciplinary history or "Attention" if the attorney has a disciplinary history.⁵³ As a result, as one commentator has stated, Avvo is less helpful in evaluating lawyers than Netflix.com is in evaluating movies because Avvo "lack[s] the large data sets that help keep Netflix ratings accurate."⁵⁴

Second, even if the lawyer has a numerical rating, it is unclear what that rating means. As an initial matter, it is hard to tell the specific basis for the numerical rating beyond the general information that Avvo discloses about its rating system: the rating system "considers the information shown in a lawyer's profile, including a lawyer's years in practice, disciplinary history, professional achievements and industry

52. See Avvo, http://www.avvo.com/support/avvo_rating (last visited Sept. 5, 2010).

53. Initially, Avvo.com gave all lawyers numerical ratings, but in response to concerns about the reliability of those ratings and that potential clients would focus too heavily on the numbers, Avvo changed its system so that lawyers who have not claimed their profiles and lawyers for whom Avvo has insufficient information do not have numerical ratings. See Lawrence M. Friedman, *Riding Circuits: Three From The Web*, CBA REC., Sept. 2007. One lawyer in Seattle actually filed suit against Avvo alleging that the ratings were "arbitrary and capricious" and that they therefore violated the Washington Consumer Protection Act. See Complaint, *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (No.CV7-920 RSL), available at http://blog.seattlepi.nwsource.com/venture/library/Avvo_Complaint_FINAL_secured1.pdf. The court granted the defendant's motion to dismiss. *Browne*, 525 F. Supp. 2d at 1249.

54. Lior J. Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1710 (2008).

2010]

ATTORNEY SELF-DISCLOSURE

709

recognition.”⁵⁵ When I searched for myself on Avvo, I initially had a “No Concerns” rating without a numerical rating because I have no history of bar discipline. I then “claimed my profile” and was immediately given a rating of 6.2 on the 10-point scale. After plugging in some very basic biographical information, specifically where I went to college and law school and my work experience, my rating rose to 7.5.⁵⁶ Other attorneys have reported receiving an increased rating based on a softball award.⁵⁷ Thus, consumers need to take these numerical ratings with a grain of salt.⁵⁸

Finally, even if a lawyer’s numerical rating means something, how does this rating really help the consumer find an appropriate lawyer for his particular case? Just because a lawyer is highly rated does not mean that the lawyer will be a good fit for the particular case.

In short, while consumers can get some information from Avvo.com and Martindale.com—and Avvo seems to hold significant promise⁵⁹—at this point in time, consumers cannot find the kind of critical lawyer-specific information through these websites that they need in order to make an informed decision about whether to hire a particular lawyer.⁶⁰

B. The Limited Availability of Lawyers’ Disciplinary History

Although consumers want to know whether their prospective lawyer has ever been disciplined,⁶¹ this information is surprisingly difficult for consumers to find. In the digital age, this information should be readily available for visitors to Avvo and the public in general to see. As set forth *supra*, however, although Avvo attempts to collect and report on lawyers’ disciplinary history,⁶² Avvo’s information is incomplete in a number of respects. The shortcoming in Avvo’s information has nothing to do with Avvo as it collects and reports on everything that is

55. Avvo, Avvo Rating Overview, http://www.avvo.com/support/avvo_rating (last visited Sept. 5, 2010).

56. Others have described similar experiences with Avvo. See Friedman, *supra* note 53.

57. *Id.*

58. Relatedly, I saw my rating increase without any apparent verification on Avvo’s part of the information that I submitted, and others have reported the same experience. *Id.*

59. The fact that Deborah Rhode, one of the top legal ethics scholars in the world, is on Avvo’s Legal Advisory Board, see Team: Management, http://www.avvo.com/about_avvo/boards_and_bios (last visited Sept. 27, 2010), lends the website significant credibility, but for now, the website remains a work in progress.

60. See also Zacharias, *supra* note 3, at 581 (“Few, if any, external tools exist to assist clients in investigating lawyers. No consumer reports on the subject exist, precisely because the assessment is imprecise and varies with the nature of each case.”).

61. DeGraw & Burton, *supra* note 9, at 376–77; Morton, *supra* note 4, at 288.

62. See *supra* Part I.A.2.

710 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

publicly available, but rather is the fault of the shamefully secret lawyer disciplinary process, which Professor Leslie Levin recently discussed in detail.⁶³

As Avvo points out, there are several situations where a lawyer might have a disciplinary sanction that will not show up on Avvo.⁶⁴ The first case is where the lawyer has received “private” sanctions.⁶⁵ According to Professor Levin, almost all jurisdictions impose private discipline as one form of punishment, and “in many jurisdictions, it is the type of discipline most often imposed.”⁶⁶ Typically, when an attorney receives private discipline, only the disciplined lawyer and the complaining party learn about the discipline, while the “punishment” is kept confidential from the public, including Avvo users.⁶⁷ Indeed, by rule in some jurisdictions, the complaining party cannot even publicize the private discipline.⁶⁸

A second significant problem is that the disciplinary data that some states make available, either to Avvo⁶⁹ or to anybody who inquires,⁷⁰ is incomplete. For example, in some states the available history only goes back to the mid-1990s.⁷¹ Moreover, in some cases, even “public” discipline will become unavailable to the public after a specified period of time.⁷² Finally, sometimes state bar websites do not reveal the basis for the attorney’s discipline.⁷³

Professor Levin further notes that even in this digital age, many jurisdictions do not make “public” disciplinary information available online.⁷⁴ Instead, in some states, the bar makes disciplinary information available only by publishing the information in newspapers or worse, the disciplinary agencies will only disclose the lawyer’s disciplinary history

63. See generally Levin, *supra* note 12.

64. See Avvo, *supra* note 55.

65. *Id.* (“Bar associations can discipline an attorney in private and that disciplinary sanction does not appear in the public record. If it is not in the public record, we will not know about it.”).

66. Levin, *supra* note 12, at 20.

67. *Id.*

68. *Id.*

69. See Avvo, *supra* note 55.

70. Levin, *supra* note 12, at 21.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 20–21. For example, the Mississippi Bar “does not have a computer database listing disciplinary action”—even serious disciplinary action such as disbarment or suspension. See Tim Doherty, *Doctor and Lawyer Records Not on Web*, HATTIESBURG AM., Mar. 17, 2009. As the General Counsel of the Mississippi Bar stated, “[t]here is nothing on our web site that would enable a member of the public to see where a particular attorney has been disciplined.” *Id.* (internal quotation marks omitted). The only way for the public to find out about disciplinary action taken against attorneys would be from the Mississippi Supreme Court’s online docket, but even that provides “scant detail.” *Id.*

2010]

ATTORNEY SELF-DISCLOSURE

711

if the consumer picks up the phone and calls the agency.⁷⁵

Professor Levin also points out that the disciplinary process itself lacks transparency in many states. The large majority of states keep complaints about lawyers private until there is a finding of probable cause by the disciplinary agency.⁷⁶ Moreover, in some jurisdictions, the public is prohibited from attending discipline hearings.⁷⁷

There is one final hurdle to a consumer's attempt to obtain disciplinary information about his prospective lawyer. Even if a consumer knows to request disciplinary history from the disciplinary authority in the consumer's home state, that request will not turn up disciplinary history in another state. Consumers can request this information from the American Bar Association, which maintains a National Lawyer Regulatory Data Bank, for a fee of ten dollars,⁷⁸ but many consumers do not know about this service. Further, even this service is not guaranteed to reveal an attorney's entire disciplinary history because, since, as the ABA explains, the reporting of this information to the ABA is "voluntary" and, therefore, "the Data Bank makes no claim that its records represent every public regulatory action taken and reinstatement/readmission issued."⁷⁹

C. The Limits of Other Publicly Available Information

Two other pieces of information that consumers want to know about their prospective lawyers—whether the lawyer has legal malpractice insurance and whether the lawyer has any malpractice judgments against him—are also difficult, if not impossible, for consumers to discover.

1. Malpractice Payments

Just as consumers want to know whether a prospective lawyer has ever been disciplined because it may make that lawyer more likely to engage in misconduct in the future, consumers want to know if their prospective lawyer has ever lost a malpractice case because that might indicate that the lawyer is more likely to commit malpractice again in

75. Levin, *supra* note 12, at 20.

76. *Id.* at 19 (noting that only four states—Florida, New Hampshire, Oregon and West Virginia—"treat all or most complaints about lawyers as a matter of public record").

77. *Id.* at 20 n.124 (noting that Alabama, Delaware, Hawaii, Idaho, Iowa, Maryland, Nevada, Utah, Wyoming, Missouri, New York and Texas prohibit the public from attending disciplinary hearings).

78. ABA Regulation Databank, <http://www.abanet.org/cpr/regulation/databank.html> (last visited Sept. 5, 2010).

79. *Id.*

712 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

the future.⁸⁰ This information is not readily available, however. If the lawyer made a payment as part of a settlement, that information is generally confidential, and the consumer will not have a way to find out about it. As for malpractice judgments, consumers might be able to find out about at least some of them through a careful search of court records and online sources, such as Westlaw or Lexis, but most consumers do not have the knowledge or skill to discover this information on their own.

2. Malpractice Insurance

Consumers want to know whether a prospective lawyer has malpractice insurance for a simple reason: “As in any other commercial transaction involving personal services, clients prefer attorneys who can reimburse them for damages resulting from inadequate legal services.”⁸¹ This information generally remains out of the reach of consumers, however. The ABA, apparently recognizing consumers’ interest in this information, has adopted a model court rule that would require lawyers to disclose whether they carry malpractice insurance to the state bar, though not directly to consumers,⁸² and eighteen states follow some form of this rule.⁸³ Only seven states require lawyers to disclose this information directly to consumers.⁸⁴ Thus, in half of the states, this information is not publicly available at all, and in forty-three states, consumers will not get this information unless they know to request it from the state bar.

80. Berenson, *supra* note 1, at 645.

81. John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio’s Struggles to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 103 (1999); Berenson, *supra* note 1, at 684–85 (recommending that information regarding malpractice insurance be included in his proposed lawyer profiles).

82. See ABA Insurance Disclosure, http://www.abanet.org/cpr/clientpro/Model_Rule_InsuranceDisclosure.pdf (last visited Feb. 15, 2010) (“Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; 3) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and 4) whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.”).

83. See *supra* note 14 and accompanying text.

84. See STANDING COMM. ON CLIENT PROTECTION, *supra* note 14.

2010]

ATTORNEY SELF-DISCLOSURE

713

II. THE LAWYER–PROSPECTIVE CLIENT RELATIONSHIP UNDER CURRENT LAW

Having reviewed the difficulties facing consumers in finding out information about prospective lawyers on their own, the next question is whether, under current law, those prospective lawyers have any affirmative duty to disclose that information to consumers. As set forth in this Part, the answer is no. Although lawyers cannot lie if a prospective client asks them a direct question, they have no affirmative obligation to disclose lawyer-specific information.

The duties owed by a lawyer to a prospective client fall into two categories: those imposed by the rules of professional conduct and those imposed by all other generally applicable law.⁸⁵ As set forth in subpart A, the rules of professional conduct impose a wide variety of quasi-fiduciary obligations on lawyers in dealing with prospective clients, but those obligations do not include the duty to disclose lawyer-specific information. Moreover, as set forth in subpart B, under the law of fraud, which applies to lawyers just as it applies to everybody else – a lawyer cannot make an affirmative misrepresentation to a prospective client, but he can remain silent about his qualifications. In other words, the lawyer has no affirmative duty to disclose lawyer-specific information under the law of fraud, just as he has no duty to disclose that information under the rules of professional conduct.

A. Lawyers' Duties to Prospective Clients Under the Rules of Professional Conduct

When a person “discusses with a lawyer the possibility of forming a client–lawyer relationship with respect to a matter,” the rules of professional conduct define that person as a “prospective client.”⁸⁶ Although there is some disagreement as to how to characterize the lawyer’s relationship with a prospective client—courts and commentators disagree on whether to characterize it as a fiduciary relationship or an arms-length relationship⁸⁷—it is clear that the rules of

85. MARTYN & FOX, *supra* note 14, at 18–20.

86. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2006). A lawyer–client relationship does not exist until the prospective client has “manifest[ed] to a lawyer [his] intent that the lawyer provides legal services . . . and either (a) the lawyer manifests to the person consent to do so; or (2) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

87. See 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

professional conduct impose certain important “fiduciary-like” duties on lawyers in their relationship with prospective clients.⁸⁸ As set forth in this subpart, these “fiduciary-like” duties impose significant obligations on the lawyer far beyond those of the typical party to a negotiation.

First, although it would appear that “lawyers are free to bargain with [prospective] clients at arms length before they enter into a client–lawyer relationship,” the rules of professional conduct actually impose significant restraints on lawyers “in the context of contractual fee negotiations.”⁸⁹ Thus, the rules protect prospective clients by requiring lawyers to be forthcoming during fee negotiations and communicate the “basis or rate of the fee [and expenses for which the client will be responsible] preferably in writing, before or within a reasonable time after commencing the representation.”⁹⁰ As one commentator explained, in the context of the negotiating process with prospective clients, the rules:

require that a lawyer present the client with information regarding the fee arrangement that approximates what the client would obtain if the client consulted a second lawyer for assistance in negotiating the fee arrangement with the primary lawyer. Fairness is to be determined according to a heightened fiduciary standard rather than the arms-length marketplace standard.⁹¹

In addition to this obligation to communicate information about their fees, the rules impose limits on what lawyers can charge clients. Lawyers may not charge anything they want to; rather, the rules protect

attorney regarding the attorney’s possible retention.”); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (“The 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.”); Zacharias, *supra* note 3, at 573 n.4–5 (collecting authorities); see also Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 55 (1989) (arguing 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”). But see *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 558 (Cal. Ct. App. 1994) (noting that “in general, the negotiation of a fee agreement is an arm’s-length transaction”) (citation omitted).

88. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. b (2000) (noting that “prospective clients should receive some but not all of the protection afforded clients”); see also Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 545 (2004) (“[T]he lawyer does not owe a prospective client the full range of fiduciary duties that are owed to clients.”).

89. MARTYN & FOX, *supra* note 14, at 400.

90. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2006). See also *id.* R. 1.5(c) (requiring contingent fee agreements to be in writing). Some states require written retainer agreements in all or nearly all cases. CAL. BUS. & PROF. CODE § 6148 (West 2009). Model Rules of Prof’l Conduct R. 1.5(b) also suggests that the “scope of the representation” be in writing.

91. 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. 1182, 1182.

2010]

ATTORNEY SELF-DISCLOSURE

715

prospective clients by requiring that all fee arrangements be reasonable.⁹² As one court stated: “[L]awyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer’s contract demands.”⁹³

In addition to this general prohibition on unreasonable fees, lawyers are forbidden from entering into a wide variety of specific fee arrangements with prospective clients. For example,

- a lawyer may not charge a contingent fee for a domestic relations matter or a criminal case;⁹⁴
- lawyers from different firms may only share fees under limited circumstances;⁹⁵
- a lawyer may not accept literary or media rights to the client’s case;⁹⁶
- a lawyer may not “provide financial assistance,” such as living expenses, to a client, even an indigent one;⁹⁷
- a lawyer may not acquire a proprietary interest in the client’s cause of action.⁹⁸

Thus, the rules provide prospective clients with a broad array of protections with regard to fee negotiations and arrangements.⁹⁹

Second, the professional rules require the lawyer to inform the prospective client if the lawyer has a conflict of interest and, assuming that the conflict is consentable, the lawyer must obtain the prospective client’s consent to the lawyer’s representation despite the conflict.¹⁰⁰ As part of the process of obtaining consent, the lawyer must inform the prospective client about the advantages and disadvantages of waiving

92. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2006); 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.”).

93. *In re Sinnott*, 845 A.2d 373, 379 (Vt. 2004).

94. MODEL RULES OF PROF’L CONDUCT R. 1.5(d) (2006).

95. *Id.* R. 1.5(e), 7.2(b).

96. *Id.* R. 1.8(d).

97. *Id.* R. 1.8(e).

98. *Id.* R. 1.8(i).

99. *See* *Walton v. Hoover, Bax & Slovacek, L.L.P.*, 149 S.W.3d 834, 847 (Tex. App. 2004) (noting that even an informed client cannot ratify a fee agreement that “violates public policy”), *vacated*, *Walton/Hoover, Bax & Slovacek, L.L.P. v. Hoover, Bax & Slovacek, L.L.P./Walton*, No. 08-03-00366-CV, 2007 WL 416694 (Tex. App. Feb. 8, 2007). *But see* *King v. Fox*, 851 N.E.2d 1184, 1190 (N.Y. 2006); Zacharias, *supra* note 3, at 610, n.137 (collecting authorities).

100. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2006).

the conflict.¹⁰¹

Third, lawyers have an obligation to keep the confidences of prospective clients.¹⁰² This is essentially the same duty of confidentiality that lawyers owe current and former clients.¹⁰³ Thus, when a lawyer meets with a prospective client to talk about taking on a case, the lawyer must keep the conversation confidential even though the lawyer is usually not being paid for the initial consultation.

Fourth, lawyers owe prospective clients a limited duty of loyalty and must in some circumstances avoid taking on clients whose interests conflict with those of prospective clients.¹⁰⁴ Even if the lawyer does not take the prospective client's case, the information that he has learned can prevent him from taking on a "client with interests materially adverse to those of a prospective client in the same or a substantially related matter."¹⁰⁵

Finally, lawyers owe the same duty of competence to prospective clients that they owe to clients.¹⁰⁶ If the lawyer provides the prospective client with any legal advice, the lawyer must use the same level of "legal knowledge, skill, thoroughness and preparation" that a lawyer employs for a client.¹⁰⁷

As this discussion demonstrates, lawyers already owe prospective clients many of the same duties that they owe to clients. The only significant duty that they owe to clients but not to prospective clients is the duty to communicate.¹⁰⁸

B. Why Lawyer Silence is "Golden" Under the Law of Fraud

In addition to the applicable rules of professional conduct, lawyers are subject to a vast array of statutory and common law,¹⁰⁹ including the law of fraud.¹¹⁰ In a 2004 article, Vincent Johnson and Shawn Lovorn

101. *Id.* R. 7; Zacharias, *supra* note 3, at 580.

102. MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2006).

103. *See id.* R. 6, 1.9.

104. *Id.* R. 18(b), (c).

105. *Id.* R. 18(c).

106. *Id.* R. 1.18 cmt. 9 ("For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1.")

107. *See id.* R. 1.1. Arguably, the very act of giving legal advice converts the prospective client into a client. *See* *Togstad v. Vesley, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

108. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006). Rule 7.1 does impose a general obligation on lawyers not to "make a false or misleading communication about the lawyer or the lawyer's service," *see id.* R. 7.1, but this rule does not impose any affirmative obligation on the lawyer to communicate lawyer-specific information.

109. *See* MARTYN & FOX, *supra* note 14.

110. *Id.* at 139-44. *See also* *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal. Rptr. 3d 26, 31 (Cal.

2010]

ATTORNEY SELF-DISCLOSURE

717

analyzed whether lawyers commit fraud when they make misleading assertions about their own credentials or fail to disclose unfavorable information concerning their credentials.¹¹¹ Johnson and Lovorn considered three distinct types of conduct: (1) outright lies; (2) “potentially misleading statements, such as half-truths and statements of opinion;” and (3) silence.¹¹² As set forth in this subpart, they concluded that, as a general matter, a lawyer cannot lie to his prospective client, but he has no affirmative duty to disclose lawyer-specific information.

1. Affirmative Misstatements/Outright Lies

The easy case involving fraud is one in which a lawyer tells an outright lie. For example, a lawyer commits fraud by stating that he is an experienced criminal defense lawyer when in fact he has never handled any criminal cases. Lawyers may not lie about their experience and academic credentials, and courts have found them liable for fraud in such circumstances.¹¹³

2. Potentially Misleading Statements

A slightly more complicated situation occurs when a lawyer makes potentially misleading statements, although those statements may not constitute outright lies. For example, if a lawyer with solid civil litigation experience but no criminal experience tries to retain a prospective criminal client by saying: “I have extensive experience and am sure that I can do an excellent job for you,” but does not tell the prospective client that he has no criminal experience, the attorney has not told the client an outright lie, but the statement is potentially misleading. A lawyer is unlikely to face liability for fraud based on this particular kind of “half-truth,” particularly given the protection that courts traditionally give to statements of opinion.

Ct. App. 2004) (“A fraud claim against a lawyer is no different than a fraud claim against anyone else.”).

111. Johnson & Lovorn, *supra* note 88, at 529.

112. Although fraud generally requires an intentional, knowing, or reckless misstatement, attorneys and other professionals have also been held liable for making negligent misrepresentations. See RESTATEMENT (SECOND) OF TORTS § 552 (1977) (emphasis added) (“One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, *if he fails to exercise reasonable care or competence in obtaining or communicating the information.*” (emphasis added)); see also Johnson & Lovorn, *supra* note 88, at 564–68.

113. Baker v. Dorfman, 239 F.3d 415, 423–24 (2d Cir. 2000) (Lawyer claimed experience that he did not have.); Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691 (D.N.J. 1994) (Lawyer claimed academic credentials that he did not have.).

Courts have, on occasion, imposed liability for half-truths. Although an individual is generally safe saying nothing, once a person “voluntarily elects to make a partial disclosure, [he] is deemed to have assumed a duty to tell the whole truth.”¹¹⁴ As the Restatement of Torts provides: a person makes a fraudulent misrepresentation when he “stat[es] the truth so far as it goes,” but the speaker “knows or believes” the statement as a whole to be “materially misleading” because the speaker has omitted “additional or qualifying matter.”¹¹⁵ In one case, a lawyer who had taken inactive status was disciplined for describing himself as an “attorney” on a form submitted to a state agency in connection with his campaign for public office.¹¹⁶

Although half-truths can be actionable, lawyers, like other professionals, are generally entitled to engage in “puffing”—what one court called “a healthy self-estimation.”¹¹⁷ Courts generally consider puffing to be “a nonactionable assertion of opinion”¹¹⁸ as long as the lawyer does not make a “false or grossly misleading statement” that demonstrates “an intent to create a false impression of expertise or experience.”¹¹⁹

In light of this high standard, the lawyer with good civil experience but no criminal experience, who tells his prospective criminal client, “I have extensive experience and am sure that I can do an excellent job for you,” is unlikely to face liability. His statement that he has “extensive experience” is somewhat deceptive, but probably not “grossly misleading,” and, moreover, the lawyer’s extensive civil experience is somewhat relevant to his ability to ably handle the client’s case.

114. *Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 584 (5th Cir. 2001).

115. RESTATEMENT (SECOND) OF TORTS § 529 (1977). *See also* *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1222 (9th Cir. 1999) (“[O]ne who makes a representation that is misleading because it is in the nature of a half-truth assumes the obligation to make a full and fair disclosure of the whole truth.” (quoting *Gregory v. Novak*, 855 P.2d 1142, 1144 (Or. Ct. App. 1993))); *Morales v. Morales*, 98 S.W.3d 343, 347 (Tex. App. 2003) (“[W]hen one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression.” (citation and internal quotation marks omitted)).

116. *In re Conduct of Kumley*, 75 P.3d 432, 435 (Or. 2003).

117. *Baker*, 239 F.3d at 423.

118. *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 7 (Ill. App. Ct. 2001); W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS 757 (5th ed. 1984) (“[S]ales talk, or puffing . . . is considered to be offered and understood as an expression of the seller’s opinion only . . . on which no reasonable man would rely.”).

119. *Griffin v. Fowler*, 579 S.E.2d 848, 853 (Ga. Ct. App. 2003); *Johnson & Lovorn*, *supra* note 88, at 552 (“[S]tatements that extend beyond expressing a favorable opinion, and instead assert false facts, are actionable.”). *Johnson and Lovorn* further note that puffing is also actionable if (1) the speaker does not actually have confidence in the opinion he is expressing about his talents; (2) the speaker has no factual basis for stating the view he expressed; or (3) the “facts known to the speaker are . . . wholly inconsistent with the opinion voiced.” *Id.*

2010]

ATTORNEY SELF-DISCLOSURE

719

Moreover, his belief that he “can do an excellent job” for the client is probably nothing more than nonactionable puffing.

3. Silence

To state a cause of action for fraud, a plaintiff generally must point to an affirmative misstatement,¹²⁰ so a lawyer who says nothing to a prospective client about the lawyer’s credentials or the lawyer’s prior discipline, usually cannot be sued for fraud.¹²¹ In other words, “silence is golden.”¹²²

As Johnson and Lovorn note, however, there are three exceptions to this basic rule,¹²³ though none of these exceptions apply to the typical lawyer–prospective client relationship. First, an individual must disclose “facts basic to the transaction” to the opposing party if he knows that the opposing party is about to enter into the transaction operating under a mistake as to those basic facts, and that the opposing party, “because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.”¹²⁴ Although this exception sounds like it might fit the lawyer–prospective client relationship, the comments to the Restatement make clear that this exception is narrow and applies only when the party’s conduct is “so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware.”¹²⁵ Consistent with this standard, this exception applies to the attorney–prospective client situation “only in the rarest of cases . . . such as where a lawyer fails to disclose that he is presently suspended from the practice of law [or] under indictment.”¹²⁶ Thus, under this exception, the lawyer does not have to disclose lawyer-specific information such as prior discipline,

120. RESTATEMENT (SECOND) OF TORTS § 551 (1977).

121. Johnson & Lovorn, *supra* note 88, at 536 (“It has long been said that ‘silence is golden.’ This rule applies in the legal arena, as in other contexts. In general, there is no duty to disclose information merely because another person would find that information useful, interesting, or beneficial.”).

122. *Id.*

123. *Id.* at 536–37.

124. RESTATEMENT (SECOND) OF TORTS § 551 (1977) (emphasis added); Johnson & Lovorn, *supra* note 88, at 537–38.

125. RESTATEMENT (SECOND) OF TORTS, § 551 cmt. 1 (1977).

126. Johnson & Lovorn, *supra* note 88, at 538 (collecting cases). Johnson and Lovorn also state that this exception would apply to an attorney’s failure to disclose that he is “addicted to illegal drugs,” but they cite to cases involving doctors not lawyers. *Id.* Research for this Article did not reveal any cases in which lawyers were found liable for failing to disclose their addiction to illegal drugs.

prior malpractice judgments, a lack of malpractice insurance, or relevant experience.

The second exception to the general rule that “silence is golden” occurs when a person fails to disclose material facts that are not reasonably discoverable.¹²⁷ Normally, each party to a transaction has the burden of acting diligently to discover all relevant facts before entering into the transaction.¹²⁸ This makes sense as a policy matter because otherwise there would be no incentive for parties “to actively protect their own interests.”¹²⁹ But if the facts are not discoverable, it would be “futile to place the burden of discovery” on the party who does not have the information.¹³⁰

Because publicly available information about lawyers can be difficult or even impossible to obtain, as previously discussed,¹³¹ perhaps this exception should apply to the attorney–prospective client relationship, but again courts have applied this exception narrowly and have not applied it to attorneys.¹³² Furthermore, it is unlikely that courts will apply it to the lawyer–prospective client relationship in the future.¹³³ Instead, courts are likely to conclude that lawyer-specific information is reasonably discoverable “through inquiry and disclosure” for purposes of this exception.¹³⁴ After all, at least some lawyer-specific information is available to consumers who perform a diligent search for that information, and, moreover, consumers can obtain other lawyer-specific information by asking the lawyer.¹³⁵

The final exception to the “silence is golden” rule is the obligation of a fiduciary “to disclose relevant information to a beneficiary because the fiduciary relationship of trust and confidence imposes a duty to speak.”¹³⁶ Although lawyers certainly owe many quasi-fiduciary duties

127. *Id.* at 539 (collecting cases). *See also* Wolf v. Burngardt, 524 P.2d 726, 734 (Kan. 1974) (“Where one party to a contract . . . has . . . knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence . . . he is under a legal obligation to speak, and his silence constitutes fraud.” (citation omitted)).

128. Johnson & Lovorn, *supra* note 88, at 536 n.21 (“Just as D is under no obligation to rescue a stranger from peril, so too D need not disclose to P any information that might help P to make a firm decision.”) (quoting RICHARD A. EPSTEIN, TORTS 553 (1999)).

129. *Id.*

130. *Id.*

131. *See supra* Part I.

132. Johnson & Lovorn, *supra* note 88, at 541–42 (The primary application of this exception is to real estate transactions.).

133. *See id.* at 542.

134. *Id.*

135. *Id.* at 542–43.

136. *Id.* at 543.

2010] *ATTORNEY SELF-DISCLOSURE* 721

to prospective clients,¹³⁷ the attorney does not have an established fiduciary relationship with the prospective client under current law; therefore, this exception does not apply.¹³⁸

In short, silence is golden for attorneys. Neither the professional rules of conduct nor the law of fraud compels them to disclose lawyer-specific information to prospective clients.

III. THE CASE FOR IMPOSING AN AFFIRMATIVE DISCLOSURE OBLIGATION ON LAWYERS

This Part presents the theoretical, moral, and public policy arguments that justify imposing a duty on lawyers to disclose lawyer-specific information to prospective clients: (1) closing the information gap; (2) consumer protection; (3) the moral and philosophical concept of informed consent; (4) fulfilling prospective clients' expectations; and (5) improving public confidence in the legal profession.

A. Closing the Information Gap

A common justification for regulating professionals, including lawyers, is to rectify a market failure known as information asymmetry.¹³⁹ One commentator described the concept as it relates to the market for professional services in the following way:

The theory of information asymmetries posits that wide information disparities exist in professional services markets (which includes . . . legal services) between providers and purchasers. The theory's premise is that professional services are highly specialized and highly skilled, and that very little specific information about the quality of professional services is available to the public. Because of the sophisticated and often technical nature of these services, consumers typically lack the knowledge needed to understand and evaluate the little information they might have; to compare the value of services offered by competing professionals; or to judge the quality of their work during or after services are rendered. In contrast, professionals in the field have the expertise and competence to make these judgments.¹⁴⁰

A regulation that provides consumers with information about the professional services that they are seeking can help fill this information

137. *See supra* Part II.

138. Johnson & Lovorn, *supra* note 88, at 545–46.

139. Barton, *supra* note 3, at 437 n.26 (2001) (collecting sources).

140. Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1079 (2001).

gap.¹⁴¹

The current state of the legal services market fits this model. As previously noted,¹⁴² while regular users of legal services have access to information about their prospective lawyers through a network of contacts, less sophisticated users of legal services have difficulty finding critical information about their prospective lawyers and, even if they find it, they have difficulty evaluating that information.¹⁴³ To make matters worse, although consumers are unable to find out negative information about prospective lawyers, they are bombarded by positive information about prospective lawyers through billboards, television and radio advertisements, lawyer websites, blogs, and newsletters.¹⁴⁴

Regulation is therefore needed not only to fill the information gap but to balance the marketplace.¹⁴⁵ The best way to address this problem is to create a regulation that provides information to legal consumers.¹⁴⁶ The proposal set forth in this Article requires lawyers to provide lawyer-specific information to their prospective clients, which would help fill this cavernous information gap.

B. Consumer Protection

Related to the theoretical justification aimed at correcting the information asymmetry in the legal services market is the public policy justification of protecting consumers.

Imposing an obligation on lawyers to disclose lawyer-specific

141. *Id.* at 1080 (“Given the relative paucity of reliable information on professional services, professional self-regulation . . . generally benefits consumers because it fills the information gap and helps consumers select and evaluate a professional without incurring high search costs.”).

142. *See supra* Part I.

143. Barton, *supra* note 3, at 437 (noting that legal “consumers lack sufficient information to gauge the quality” of the lawyer).

144. *See supra* notes 21–26 and accompanying text.

145. DeGraw & Burton, *supra* note 9, at 381 (“Since *Bates*, no significant marketplace realignments have been developed to offer client–consumers advantages complementing those gained by lawyers during this period. In sum, disclosure advertising would help to bring about that balance of rights that each client–consumer requires in order to make a more economically efficient choice in the marketplace.”).

146. *See* Barton, *supra* note 3, at 485–86 (“[L]awyer disciplinary systems should be altered to allow the greatest possible flow of information to the public. . . . Disciplinary bodies should make all client complaints a matter of public record. . . . Lawyers who have been disciplined should be required to disclose the discipline to any new customers.”); DeGraw & Burton, *supra* note 9, at 362 (Creating a “more fully informed marketplace will be more economically efficient. In an increasingly information-driven era, such a change seems consistent with cultural and marketplace forces of considerable vitality.”). *But see* Johnson & Lovorn, *supra* note 88, at 533 (“For example, a lawyer presumably does not have to disclose to a client a disciplinary sanction in the nature of a private reprimand. In that situation, there has already been a judicial or quasi-judicial determination that the public interest is best served by the reprimand being private, rather than public.”).

2010]

ATTORNEY SELF-DISCLOSURE

723

information will protect consumers, particularly those who are not regular users of legal services and are therefore unfamiliar with the legal system. These individuals rarely consult lawyers, and, when they do, it is typically under stressful circumstances such as a “divorce or criminal prosecution.”¹⁴⁷

Moreover, regardless of how stressful their situations are, these unsophisticated users of legal services tend to know little about lawyers and do not know how to select an appropriate one for their case.¹⁴⁸ Compelling disclosure of lawyer-specific information will give them information that they may not be able to find on their own and help them make a better decision about which lawyer to hire.

Consumer protection is particularly important given the professional rules governing lawyer competency, which “free lawyers to compete for all types of legal work, regardless of how experienced or qualified they are.”¹⁴⁹ The comment to the lawyer competency rule¹⁵⁰ provides that the lawyer “need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar” and states further that lawyers can gain the required level of competence “through necessary study.”¹⁵¹ In other words, the rules governing lawyer competence provide that a tax lawyer can take on a divorce case as long as the lawyer takes the time to teach himself how to handle the divorce case. Because the rules of professional conduct do not protect the consumer from hiring a lawyer without any relevant experience, it would seem particularly important for the consumer to know about a prospective lawyer’s experience in order to decide whether to hire such a lawyer; yet, under current law, the tax lawyer has no affirmative obligation to disclose to his prospective divorce client that he has never handled a divorce case.

Perhaps most importantly, imposing a disclosure obligation would help protect legal consumers from dishonest lawyers. Although the precise rate is unknown, “the limited data suggest that the rate of recidivism among lawyers who receive public sanctions is fairly high.”¹⁵² In light of the fact that a lawyer who has committed

147. Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & POL’Y. 525, 538 (2003) (arguing that legal practice should be subjected to consumer protection laws). See also Berenson, *supra* note 1, at 648–49.

148. Harkness, *supra* note 147, at 538 (citing Morton, *supra* note 4, at 284).

149. Zacharias, *supra* note 3, at 569.

150. Model Rule 1.1 requires that the lawyer have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.1 (2006).

151. *Id.* R. 1.1 cmt. 2.

152. Levin, *supra* note 12, at 3.

misconduct in the past is more likely to commit future misconduct, legal consumers are entitled to know whether the prospective lawyer has been disciplined in the past so that they can protect themselves.

Imposing a disclosure obligation would have one more significant benefit for consumers—it would serve as a significant deterrent to lawyer misconduct. If lawyers know that they are going to have to disclose misconduct to all prospective clients, it should cause them to be more careful about avoiding misconduct in the first place.¹⁵³

C. Informed Consent

There is also a moral and philosophical justification for requiring lawyers to provide prospective clients with additional information about themselves: the concept of informed consent, which is “deeply ingrained in American culture.”¹⁵⁴

Inspired by the informed consent doctrine in the medical field, legal ethics commentators in the 1970s and 1980s began advocating for a version of the informed consent doctrine in the law governing lawyers.¹⁵⁵ The central goal of these commentators was to continue the movement away from the traditional paradigm of the lawyer–client relationship, in which lawyers controlled and directed the representation,¹⁵⁶ to a situation where “clients, not lawyers, [would]

153. DeGraw & Burton, *supra* note 9, at 377 (“Such information could decisively affect the client’s selection of an attorney or a referring counsel’s choice of an attorney. Viewed in this light, disclosure advertising of such sanctions could potentially pose a significant threat to some of the future business sought by the sanctioned attorney. Thus, visibility in the marketplace should enhance sanction avoidance and act as a deterrent against inappropriate lawyer conduct.”); Levin, *supra* note 12, at 29 (arguing that increasing the openness of disciplinary proceedings would deter lawyer misconduct).

154. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle For Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 781 (1999). This moral and philosophical principal also underlies a lawyer’s duty to inform a current client that the lawyer has committed malpractice during the course of the representation. Benjamin P. Cooper, *The Lawyer’s Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174 (2009).

155. See, e.g., Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989, 1004 (2007); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1979); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Gary A. Munneke, *The Lawyer’s Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391 (1989); Marcy Strauss, *Toward a Revised Model of Attorney–Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).

156. Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1053 (1984) (noting that traditionally, lawyers held “decisionmaking power far beyond that of an ordinary agent”). The first set of ethical rules—David Hoffman’s *Fifty Resolutions in Regard to Professional Deportment*—described lawyers as “fatherly guardians of a system laden with moral questions beyond their clients’ authority.” *Id.*

2010]

ATTORNEY SELF-DISCLOSURE

725

make the most significant decisions in their cases.”¹⁵⁷ The philosophical premises of the doctrine of informed consent—again borrowed from the medical field—are: (1) to support clients’ individual autonomy by giving them information concerning their rights so that they can “effectively exercise those rights,”¹⁵⁸ and (2) to respect clients’ human dignity by treating them as equals in the lawyer–client relationship.¹⁵⁹

The legal doctrine of informed consent has now achieved “doctrinal status”¹⁶⁰ and has been enshrined in the Model Rules of Professional Conduct; the Rules now require informed consent in approximately a dozen situations,¹⁶¹ and the term “informed consent” is itself defined along with numerous other concepts critical to the law governing lawyers in Rule 1.0. The Rules define “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”¹⁶²

As a moral and philosophical norm, the doctrine has continued to gain support,¹⁶³ and the duty to disclose lawyer-specific information to the prospective client is rooted in this norm. Informing the prospective client about the lawyer’s disciplinary history—or lack thereof—and the lawyer’s relevant experience respects the prospective client’s autonomous right to make the critical choice of whether to hire one lawyer or another.¹⁶⁴ In addition, giving the prospective client full information upon which to make an informed choice about which lawyer to hire puts the prospective client on an equal footing with the lawyer and demonstrates respect for the client’s human dignity.¹⁶⁵

157. Elder, *supra* note 155, at 1005.

158. Martyn, *supra* note 155, at 307.

159. *Id.* at 313.

160. Elder, *supra* note 155, at 1004. *See also* Maute, *supra* note 156, at 1052 (“[T]he regulatory and ethical framework created by the Model Rules supports a new joint venture model for allocation of authority between client and lawyer. Under this new model, the client is principal with presumptive authority over the objectives of the representation, and the lawyer is principal with presumptive authority over the means by which those objectives are pursued.”).

161. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(a), 1.8(b), 1.18, 1.7(b)(4), 1.8(a)(3), 1.8(f)(1), 1.9(a)(b), 1.11(a)(2), 1.11(d)(2), 1.12(a), 1.5(c), 1.5(e) (2006); *see also* Eli Wald, *Taking Attorney–Client Communications (And Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 760 (2008).

162. MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2006).

163. *See* Elder, *supra* note 155, at 1003.

164. Professor Berenson made a similar argument in favor of lawyer profiles: “The consumer sovereignty and autonomy arguments in favor of publicly accessible professional profiles are similar in the legal context to those in the medical context. As consumers of legal services, potential clients will better be able to find appropriate legal representation the more they know about potential providers of such services.” Berenson, *supra* note 1, at 680.

165. Martyn, *supra* note 155, at 313.

D. The Prospective Client's Expectations

Another reason to impose a duty on lawyers to disclose lawyer-specific information is to meet the prospective client's expectations. The prospective client approaches a meeting with his prospective lawyer much differently than he approaches a meeting with, for example, a plumber. "Unlike the sale of cabbages, pick-up trucks, or insurance annuities, the usual marketplace ethos does not control" the attorney-prospective client relationship.¹⁶⁶ Lawyers promote themselves as "professionals," not "profit-maximizing businessmen," and use the cover of the professional code "to induce clients to use and trust" them.¹⁶⁷ While people might question the qualifications of the general contractor renovating their house or expect their auto mechanic to try to rip them off, prospective clients see their prospective lawyers as zealous advocates—"aggressive and relentless in pursuing each client's goals"—and trusted confidants even before the representation has begun.¹⁶⁸

This expectation is reinforced by the fact that lawyers already owe prospective clients a wide variety of quasi-fiduciary duties as previously discussed.¹⁶⁹ These duties, particularly the strict duty of confidentiality owed to prospective clients,¹⁷⁰ strengthen the notion that the lawyer is someone whom the prospective client can trust and someone who will be forthcoming with the prospective client. Given all of this, prospective clients likely expect that lawyers, unlike typical service providers like plumbers, will be concerned with more than just their own bottom line and therefore will disclose relevant information about themselves.¹⁷¹ Thus, imposing a duty on lawyers to disclose lawyer-specific information will meet consumers' expectations.

E. Public Confidence

Finally, imposing a disclosure obligation on lawyers might help boost the public's lagging confidence in the legal profession, which is one of

166. DeGraw & Burton, *supra* note 9, at 396 n.222.

167. Zacharias, *supra* note 3, at 585–86.

168. *Id.*

169. *See supra* Part II.A.

170. Zacharias, *supra* note 3, at 591.

171. *But see* Johnson & Lovorn, *supra* note 88, at 547 ("Beyond this duty of reasonable care, courts should not blindly impose a duty of absolute and perfect candor on attorneys to relate information about credentials or experience. A client who hires an attorney has no legitimate expectation that the attorney will divulge every unfavorable fact relating to the attorney's credentials or experience. Rather, one expects an attorney to disclose what is important, to overlook what is not, and to exercise reasonable judgment in between.").

2010]

ATTORNEY SELF-DISCLOSURE

727

the stated goals of the Model Rules of Professional Conduct.¹⁷²

The public's lack of confidence in the legal profession is a longstanding problem,¹⁷³ and, if anything, the image of lawyers is getting worse.¹⁷⁴ A report from the American Bar Association's Litigation Section recently concluded that this lack of confidence stems from "the profession's poor handling of basic client relationships and **absence of attention to communication.**"¹⁷⁵

Although creating the disclosure obligation might result in an initial flood of information about complaints against lawyers, which could have a negative impact on the legal profession's image, in the long run, the public will appreciate lawyers' willingness to "come clean."¹⁷⁶ The self-disclosure proposed by this Article is certainly not a cure-all, but a regime in which lawyers set themselves apart from other service providers by imposing on themselves an affirmative duty to prospective clients to disclose lawyer-specific information, including negative information, might help boost the damaged image of the profession.¹⁷⁷ Indeed, this regime of transparency might help restore the legal profession to its traditional leadership role.¹⁷⁸

172. MODEL RULES OF PROF'L CONDUCT, PREAMBLE ¶ 6 (2006) ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

173. See DeGraw & Burton, *supra* note 9, at 353.

174. See, e.g., Harkness, *supra* note 147, at 541; Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (upholding Florida's thirty day ban on lawyer solicitation of accident victims as a legitimate "effort to protect the flagging reputations of Florida lawyers"); Judge Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 DEN. U. L. REV. 865, 866-67 (2009) ("American society is experiencing a Cycle of Cynicism that threatens public confidence in the law and legal institutions. If we do not find ways to reverse this Cycle of Cynicism and restore public confidence, the cohesiveness of American society and our individual rights and freedoms will be in jeopardy. Lawyers have the ability to combat this Cycle of Cynicism, but only if they are willing, as a profession, to explore, articulate and adopt a common commitment to a value greater than their self interest—to the Rule of Law.").

175. See ABA Litigation Lawyers, <http://www.abanet.org/litigation/lawyers/> (last visited Sept. 27, 2010) (emphasis added).

176. Morton, *supra* note 4, at 292-93.

177. DeGraw & Burton, *supra* note 9, at 395 ("The suggestion of a new tradition espousing disclosure advertising . . . is designed to assist the profession in stemming the crisis of confidence by introducing true visibility to the system.").

178. See *id.* at 397 ("If the bar becomes the first of our core institutions to commit itself seriously to such disciplinary visibility, its leadership mantle may be restored. Visibility might become an energizing principle. As such, it may aid not only in rebuilding the professional credibility of our legal institutions, but it might also help to mold a new tradition that other actors could come to emulate in a re-ordering and information-driven marketplace.").

IV. COMPARING DOCTORS AND LAWYERS

In determining an appropriate self-disclosure rule for lawyers, it seems natural to examine the regime governing doctors. A comparison between disclosure requirements for doctors and those presently required of attorneys yields two important differences. First, as set forth in subpart A, more information is publicly available about doctors than about lawyers making it much easier for consumers to find out physician-specific information than to find out lawyer-specific information. Second, as set forth in subpart B, despite the general availability of significant physician-specific information, some courts have nevertheless found doctors liable for failing to reveal physician-specific information to their patients. As subpart C argues, this makes the case for the disclosure of lawyer-specific information even stronger.

A. The Wide Availability of Physician-Specific Information

It is much easier for a consumer to find an appropriate physician than it is for a consumer to find an appropriate lawyer.¹⁷⁹ The main reason is that more information is publicly available about doctors. All fifty states now have state laws requiring doctors to create physician profiles.¹⁸⁰ Although state requirements vary, the information in these profiles generally includes the kind of physician-specific information that patients seek: demographic and educational background, licenses, certifications, malpractice suits, disciplinary history, and criminal convictions.¹⁸¹ Thus, with a simple Google search, a patient can generally find out critical information about his prospective doctor.¹⁸²

B. Doctors' Duty to Disclose Physician-Specific Information

In addition to disclosing physician-specific information in publicly available physician profiles, in some situations physicians have had to

179. Berenson, *supra* note 1, at 648–56.

180. See Matthew E. Brown, *Redefining The Physician Selection Process and Rewriting Medical Malpractice Settlement Disclosure Webpages*, 31 AM. J.L. & MED. 479, 483 (2005). For links to each state's physician profile webpage, see http://www.fsmb.org/directory_smb.html.

181. Berenson, *supra* note 1, at 657; Brown, *supra* note 180, at 483 n.31.

182. Moreover, doctor rating systems seem to be more widespread than lawyer rating systems. For example, two popular rating organizations—Angie's List and Zagat—rate doctors but not lawyers. See Angie's List, <http://www.angieslist.com/AngiesList/Visitor/PressDetail.aspx?i=818> (last visited Sept. 27, 2010); Milt Freudenheim, *Noted Rater of Restaurants Brings Its Touch to Medicine*, N.Y. TIMES, Feb. 16, 2009, at B8. At this time, the Zagat ratings are being compiled and edited by WellPoint, an insurance company, and the reviews are only available to WellPoint's two million BlueCross plan members. *Id.*

divulge this information directly to their patients. Although most courts have not imposed this requirement on physicians, in the last two decades, some courts have held that doctors must disclose this information under the doctrine of informed consent.

In the relationship between physician and patient, the doctrine of informed consent developed primarily as a protection for the patient against “unpermitted medical intrusion.”¹⁸³ A patient who does not give informed consent to a specific medical procedure should be able to obtain damages under tort law—traditionally under a battery theory (i.e. unwanted touching),¹⁸⁴ and for negligence under modern law.¹⁸⁵ In other words, the “current doctrine compels physicians to disclose information sufficient to allow patients to make voluntary, knowledgeable choices about their care,”¹⁸⁶ and if the doctor obtains informed consent from the patient the doctor will not be liable.¹⁸⁷ All fifty states recognize the informed consent doctrine.¹⁸⁸

Generally, a patient’s cause of action for informed consent is based on a physician’s failure to adequately inform the patient about the risks associated with a medical procedure,¹⁸⁹ but in a pair of articles in the 1990s,¹⁹⁰ Professors Aaron Twerski and Neil Cohen forecasted “a

183. Dayna B. Matthew, *Race Religion, and Informed Consent—Lessons from Social Science*, 36 J.L. MED. & ETHICS 150, 152 (2008); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 44–48 (1979). Justice Cardozo provided the classic formulation of this justification: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.” *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *superseded by statute*, N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1975), *as recognized in Retkwa v. Orentreich*, 584 N.Y.S.2d 710 (N.Y. Sup. Ct. 1992).

184. Martyn, *supra* note 155, at 311; Matthew, *supra* note 183, at 152.

185. Nolan-Haley, *supra* note 154, at 782 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 190 (5th ed. 1984)).

186. Matthew, *supra* note 183, at 152; Nolan-Haley, *supra* note 154, at 781 (“In those transactions where informed consent is required, the legal doctrine requires that individuals who give consent be competent, informed about the particular intervention, and consent voluntarily.”).

187. Matthew, *supra* note 183, at 152. *See also* Joseph H. King, *The Standard of Care for Residents and Other Medical School Graduates in Training*, 55 AM. U. L. REV. 683, 718 (2006) (“This new kid on the block is the doctrine of informed consent. This doctrine requires that a treating physician disclose the material risks of the contemplated medical procedure to his or her patient in order that the patient’s consent to the treatment be ‘informed.’ Failing that, liability may be imposed on a non-disclosing doctor for the material risks of the medical procedure that eventuate.”).

188. King, *supra* note 187, at 718 n.154.

189. *See DeGennaro v. Tandon*, 873 A.2d 191, 196 (Conn. App. Ct. 2005) (“Traditionally, our review of this duty to inform has been confined to the actual procedure and has not included provider specific information.”).

190. Aaron D. Twerski & Neil B. Cohen, *Comparing Medical Providers: A First Look at the New Era of Medical Statistics*, 58 BROOK. L. REV. 5 (1992) [hereinafter Twerski & Cohen, *Medical Statistics*]; Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1 (1999) [hereinafter Twerski & Cohen, *Informed Consent*].

second revolution in informed consent.”¹⁹¹ Professors Twerski and Cohen predicted that “[w]ith the advent of more extensive gathering and comparison of data” concerning physicians, patients would soon argue that they had the right to be informed not only of the “risks associated with the *procedures*” to be performed “but also about the relative risks associated with the *medical providers* who would perform these procedures.”¹⁹² In other words, patients who are injured in medical procedures would argue that they would “not have agreed to undergo a procedure with a ‘riskier’ physician had they been aware that a physician with a better track record was available.”¹⁹³

Although “revolution” may be too strong a word to describe what has transpired, Twerski and Cohen accurately predicted a significant increase in lawsuits alleging that physicians violated a duty to their patients by failing to disclose risks peculiar to the physician. Plaintiffs have brought claims that fall into three categories: (1) situations in which the physician allegedly suffered from a physical or mental impairment; (2) cases in which the physician allegedly had a conflicting financial or research interest; and (3) cases in which patients claimed that they lacked adequate information about the physician’s level of experience.¹⁹⁴ Although courts have rejected a majority of these lawsuits, enough have succeeded that Twerski and Cohen’s predicted “revolution” may still come about.

1. Physical or Mental Impairments

Some patients have alleged that the physician should have to disclose a physical or mental condition that might affect the physician’s ability to treat patients or pose a particular threat to the patient.¹⁹⁵ Courts that

191. Twerski & Cohen, *Informed Consent*, *supra* note 190 (emphasis added).

192. Twerski & Cohen, *Informed Consent*, *supra* note 190, at 3; Twerski & Cohen, *Medical Statistics*, *supra* note 190, at 28–29 (“[D]oes a provider have a duty to disclose information that identifies the provider as an independent risk factor? The answer, we believe, is yes. This information relates directly to the results likely to flow from a decision to have this provider perform this procedure. It is not difficult to conclude that a reasonable doctor should provide this potentially outcome determinative information to the patient and that a reasonable patient would want this information as part of the decision-making process.”). See also Jennifer Wolfberg, *Two Kinds of Statistics, the Kind You Look Up and the Kind You Make Up: A Critical Analysis of Comparative Provider Statistics and the Doctrine of Informed Consent*, 29 PEPP. L. REV. 585, 585 (2002) (“[I]t is just a matter of time before the rest of the country eventually follows suit with Wisconsin and broadens the doctrine of informed consent to include provisions of provider statistics.”).

193. Twerski & Cohen, *Informed Consent*, *supra* note 190, at 5.

194. See King, *supra* note 187, at 720–24.

195. *Id.* at 720 (collecting cases). Emmanuel O. Iheukwumere, *Doctor, Are You Experienced? The Relevance of Disclosure of Physician Experience to a Valid Informed Consent*, 18 J. CONTEMP. HEALTH L. & POL’Y 373, 396–400 (2002).

2010]

ATTORNEY SELF-DISCLOSURE

731

have considered such cases have come to widely different conclusions. For instance, in *Faya v. Almaraz*,¹⁹⁶ the Maryland Supreme Court found that the jury should have been able to consider whether the physician's failure to disclose that he was HIV-positive was a breach of the physician's duty to obtain informed consent.¹⁹⁷ Similarly, in *Hidding v. Williams*,¹⁹⁸ the Louisiana Court of Appeals found that a physician had breached his duty to his patient by failing to disclose his history of alcohol abuse.¹⁹⁹

But several courts have rejected similar claims. For example, in *Albany Urology Clinic, P.C. v. Cleveland*,²⁰⁰ the Georgia Supreme Court held that the physician had no duty to disclose his prior cocaine usage.²⁰¹ The court was concerned about the slippery slope that a contrary holding would create because it would be impossible to define "which of a professional's life factors would be subject to such a disclosure requirement."²⁰² Similarly, a Pennsylvania appellate court held that a doctor had no duty to disclose that he suffered from alcoholism.²⁰³

2. Conflicts of Interest

Like lawyers and other professionals, health care providers often face "a set of conditions in which professional judgment concerning a primary interest . . . tends to be unduly influenced by a secondary

196. 620 A.2d 327 (Md. 1993).

197. *Id.* at 339. *See also* Estate of Behringer v. Med. Ctr. at Princeton, 592 A.2d 1251, 1278–83 (N.J. Super. Ct. Law Div. 1991); Doe v. Noe, 690 N.E.2d 1012 (Ill. App. Ct. 1997) (imposing an absolute duty on physicians to disclose HIV status when seeking a patient's consent to perform an invasive medical procedure which exposes the patient to the risk of HIV transmission). Michelle Wilcox DeBarge, Note, *The Performance of Invasive Procedures by HIV-Infected Doctors: The Duty To Disclose Under The Informed Consent Doctrine*, 25 CONN. L. REV. 991, 992–93 (1993) (collecting cases and arguing that courts should require HIV-positive doctors to disclose their status whenever they perform "surgical or invasive procedures").

198. 578 So. 2d. 1192 (La. Ct. App. 1991).

199. *Id.* at 1197. *See also* Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 35 (Tenn. Ct. App. 2000) (concluding that the surgeon's failure to disclose that he suffered from a condition called Raynaud's Syndrome that affected the use of his hands was relevant to patient's informed consent claim).

200. 528 S.E. 2d 777 (Ga. 2000).

201. *Id.* at 782.

202. *Id.* *See also* Prince v. Esposito, 628 S.E. 2d. 601, 604 (Ga. Ct. App. 2006) (holding that a chiropractor had no duty to disclose a prior battery allegation to his patients).

203. Kaskie v. Wright, 589 A.2d 213, 216–17 (Pa. Super. Ct. 1990) ("[M]atters such as personal weaknesses and professional credentials of those who provide health care are the responsibility of the hospitals employing them, the professional corporations who offer their services, or the associations which are charged with oversight.").

interest.”²⁰⁴ In other words, in some situations, doctors’ primary responsibility—patient care—can be compromised by financial or research interests. Such potential conflicts arise in a number of different contexts.²⁰⁵ For example, in the context of managed health care:

The most fundamental source of conflicts of interest for the physician is the use of financial incentives in physician compensation schemes to reduce costs. Whereas the traditional fee-for-service system encouraged physicians to *over*-utilize medical services, thereby increasing health care costs, the modern compensation system provides incentives to physicians in various ways to *under*-utilize medical services, thereby decreasing health care costs, with a resulting increase in the HMOs’ bottom line.²⁰⁶

Should physicians have to reveal that they are subject to potentially conflicting financial or research interests? Again, courts are split, though the majority position is that doctors do not have to disclose such interests.

The seminal case holding that physicians have a duty to disclose such interests is *Moore v. Regents of the University of California*.²⁰⁷ In *Moore*, the patient sought treatment for his hairy-cell leukemia at UCLA Medical Center, and his doctors recommended removing his spleen.²⁰⁸ Without informing the patient, his doctors also made arrangements to conduct research on the patient’s spleen to develop valuable commercial products.²⁰⁹ After the surgery, the patient was asked to return repeatedly for follow-up care, during which his doctors took blood, bone, skin,

204. Dennis F. Thompson, *Understanding Financial Conflicts of Interest*, 329 NEW ENG. J. MED. 573, 576 (1993).

205. See Robert Gatter, *Walking the Talk of Trust in Human Subjects Research: The Challenge of Regulating Financial Conflicts of Interest*, 52 EMORY L.J. 327 (2003) (addressing conflicts of interest raised when health care providers engage in human subjects research); Margaret Z. Johns, *Informed Consent: Requiring Doctors to Disclose Off-Label Prescriptions and Conflicts of Interest*, 58 HASTINGS L.J. 967, 1012 (2007) (arguing that physicians should have to “disclose off-label prescriptions and conflicts of interest resulting from drug-company marketing”); Thomas L. Hafemeister & Sarah P. Bryan, *Beware Those Bearing Gifts: Physicians’ Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. KAN. L. REV. 491 (2009) (discussing conflicts of interest created by the marketing efforts of pharmaceutical companies); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 826–28 (2001) (discussing the financial incentives created by managed care contracts).

206. Harris & Foran, *supra* note 205, at 819. See also Council on Ethical and Judicial Affairs, AMA, *Ethical Issues in Managed Care*, 273 JAMA 330, 331 (1995), available at http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_13a94.pdf (“[M]anaged care can place the needs of patients in conflict with the financial interests of their physicians. Managed care plans use bonuses and fee withholds to make physicians cost conscious. As a result, when physicians are deciding whether to order a test, they will recognize that it may have an adverse impact on their income.”).

207. 793 P.2d 479 (Cal. 1990).

208. *Id.* at 480–81.

209. *Id.* at 481.

2010]

ATTORNEY SELF-DISCLOSURE

733

marrow, and sperm samples from him that were used to develop a valuable patented cell line without any disclosure to the patient of the doctors' financial interests.²¹⁰ The California Supreme Court concluded that Moore's doctors had an obligation to disclose their financial and research interests to him: "[A] reasonable patient would want to know whether the physician ha[d] an economic interest that might affect the physician's professional judgment."²¹¹ In other words, although the doctor might have delivered the exact same treatment regardless of his financial interests, "the possibility that an interest extraneous to the patient's health has affected the physician's judgment is something that a reasonable patient would want to know in deciding whether to consent to a proposed course of treatment."²¹²

Several courts have followed *Moore*, holding that a health care provider has a duty to disclose potentially conflicting financial or research interests. For example, in *D.A.B. v. Brown*,²¹³ the Minnesota Court of Appeals held that physicians who had prescribed a synthetic growth hormone drug were obligated, under the auspices of informed consent theory, to disclose that the drug distributor made payments to the physician to induce him to prescribe the hormone: "The doctor's duty to disclose the kickback scheme presents a classic informed consent issue."²¹⁴

Despite an increasing number of conflicting personal and financial interests, most courts have rejected *Moore*, particularly where the claim is that the doctor failed to disclose his financial arrangement with an HMO.²¹⁵

210. *Id.*

211. *Id.* at 483.

212. *Id.* at 484.

213. 570 N.W.2d 168 (Minn. Ct. App. 1997).

214. *Id.* at 171. See also *Heinrich v. Sweet*, 308 F.3d 48, 69 (1st Cir. 2002) ("[A] doctor who proposes an experimental course of treatment must not only tell the patient about the treatment and its consequences but must also inform the patient that he is conducting an experimental treatment and that the patient is part of a study."):

215. *Neade v. Portes*, 739 N.E.2d 496, 504–05 (Ill. 2000) (concluding that a physician does not have a duty to disclose financial incentives to withhold necessary medical treatment that arise out of the physician's contract with the patient's managed care organization); *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F.Supp.2d 1064, 1070–71 (S.D. Fla. 2003) (rejecting claim that physician had duty to disclose researcher's financial interests). See also *Harris & Foran*, *supra* note 205, at 827 ("[C]ourts have been reluctant . . . to apply [the informed consent] doctrine to require disclosure of financial incentives in managed care contracts."); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1750 (1999) ("With respect to informed consent, managed care has raised new questions about the extent to which physicians' existing disclosure responsibilities should be modified to reflect the changed economic environment of clinical practice and the resultant threat to the integrity of agency relationships. Specifically, courts must determine whether the scope of required disclosure should extend beyond the physical risks of treatment to other matters that shape patients' access to treatment, course of care, and clinical outcomes.

3. Lack of Experience

The third type of claim asserted by patients—and the claim that Twerski and Cohen were most focused on in their prediction of a “revolution”²¹⁶—is that physicians have a duty to disclose to their patients their level of experience and training. Several courts, beginning with the landmark Wisconsin Supreme Court case, *Johnson by Adler v. Kokemoor*,²¹⁷ now recognize such a claim, though most courts continue to reject this theory of liability.

In *Johnson*, the plaintiff–patient, who suffered from an aneurysm, alleged that his surgeon did not provide sufficient information about his experience with the particular type of challenging surgery involved.²¹⁸ The Supreme Court of Wisconsin held that the patient was entitled to know about the defendant’s lack of experience with this surgery, the difficulty of the proposed surgery, and the fact that different physicians have “substantially different success rates” with the same medical procedures.²¹⁹ Following *Johnson*, a Wisconsin appellate court held that a doctor must disclose: “1. The extent of his experience in performing the type of operation; 2. A comparison of the morbidity and mortality statistics for the type of surgery with other physicians; and 3. Referral to a tertiary care center staffed by more experienced physicians.”²²⁰

Outside of Wisconsin, a few courts have chosen to follow *Johnson* and have held that a physician has a duty to disclose information about his experience and training in at least some circumstances.²²¹ In a slightly different context, the Connecticut Court of Appeals concluded that:

Candidates for disclosure include information about physicians’ individual biases, skills, expertise, and incentives, as well as external constraints on their ability to pursue their patients’ medical interests. For example, informed consent law is beginning to consider the relevance to patients of physician compensation arrangements and other financial interests. To date, most courts have resisted requiring so-called ‘physician-specific’ disclosure.”).

216. Twerski & Cohen, *Informed Consent*, *supra* note 190, at 1.

217. 545 N.W.2d 495 (Wis. 1996).

218. *Id.* at 507.

219. *Id.* at 507–08.

220. *Prissel v. Physicians Ins. Co. of Wis.*, No. 02-1729, 2003 WL 22998133, at *7 (Wis. Ct. App. Dec. 23, 2003).

221. *See Barriocanal v. Gibbs*, 697 A.2d 1169, 1172 (Del. 1997) (holding that the trial court erred in excluding expert testimony about defendant–physician’s “failure to inform his patient of his lack of recent aneurysm surgery”); *Dingle v. Belin*, 749 A.2d 157, 165–66 (Md. 2000) (given the “expanding era of more complex medical procedures, group practices, and collaborative efforts among health care providers . . . the identity of the persons who will be performing aspects of the surgery” and “who, precisely, will be conducting or superintending the procedure or therapy” must be discussed and resolved, “at least if raised by the patient”); *see also King*, *supra* note 187, at 722 n.169 (collecting and analyzing cases).

2010]

ATTORNEY SELF-DISCLOSURE

735

the duty to inform encompasses provider specific information where the facts and circumstances of the particular situation suggest that such information would be found material by a reasonable patient in making the decision to embark on a particular course of treatment, regardless of whether the patient has sought to elicit the information from the provider.²²²

In that case, a dentist had failed to inform his new patient, who was injured during the procedure, that he “was understaffed, was using equipment with which she was unfamiliar and was using an office that was not ready for business.”²²³

The rationale of *Johnson* and its progeny—the more experienced the doctor, the better the medical case—makes sense and is supported by empirical data.²²⁴ Thus, “[a]ny contention that a reasonable patient would consider his or her physician’s level of experience immaterial to a procedure, particularly an invasive procedure, is clearly contradicted by real life experiences.”²²⁵

But *Johnson* and its progeny have been criticized for, among other things, imposing a potentially unworkable regime on physicians. As one commentator has written: “Would the *Johnson* holding mean that virtually any surgeon within ninety miles of the Mayo Clinic must essentially apprise his patients of the option of going to the Mayo Clinic? In other words, where is the stopping point once we start down that informed consent road?”²²⁶

In part recognizing this criticism, several courts have rejected *Johnson*-like claims. For example, in *Whiteside v. Lukson*,²²⁷ the defendant–surgeon failed to disclose to the patient that, although he had trained for the particular surgery by performing it on pigs, he had never

222. DeGennaro v. Tandon, 873 A.2d 191, 196 (Conn. App. Ct. 2005).

223. *Id.* at 197.

224. Twerski & Cohen, *Informed Consent*, *supra* note 190, at 13 n.30. See also Brad M. Rostolsky, Comment, *Practice Makes Perfect: Experience-Related Information Should Fall Within The Purview of Pennsylvania’s Doctrine of Informed Consent*, 40 DUQ. L. REV. 543 (2002) (arguing that Pennsylvania should follow Wisconsin).

225. Iheukwumere, *supra* note 195, at 413–14. A recent incident at a Veterans Administration hospital in Philadelphia drives home the danger to patients when a physician—even a well-credentialed one—lacks experience in performing a particular medical procedure. In that case, the doctor, who has a medical degree from Johns Hopkins and a Ph.D. from the University of Pennsylvania, had only limited experience with a relatively routine procedure called brachytherapy in which radioactive seeds are supposed to be implanted into the prostate to treat prostate cancer. In multiple instances, the doctor allegedly botched the procedure by implanting them in the patients’ healthy bladder rather than the prostate. See Walt Bogdanich, *At V.A. Hospital, a Rogue Cancer Unit*, N.Y. TIMES, June 21, 2009, at A1.

226. King, *supra* note 187, at 724. But see Twerski & Cohen, *Medical Statistics*, *supra* note 190, at 27–28 (disputing the slippery slope argument).

227. 947 P.2d 1263. (Wash. 1997).

736 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

done the procedure on a human.²²⁸ Even though the physician botched the procedure, the court held that “a surgeon’s lack of experience in performing a particular surgical procedure is not a material fact for the purposes of . . . informed consent.”²²⁹ Several other courts have reached similar conclusions.²³⁰

C. What Lawyers Can Learn from the Experience of Doctors

Why are doctors’ disclosure obligations relevant to lawyers? First, there is no reason why it should be easier for a consumer to find out information about a prospective doctor than about a prospective lawyer. To be sure, there are differences between doctors and lawyers. For example, it is easier to objectively determine a doctor’s success rate through statistics like survival rates than it is to determine a lawyer’s track record. When the defense lawyer settled his client’s case for \$100,000, was that a “success?” Such a settlement is perhaps a success if a trial would have yielded a \$200,000 judgment against the client, but we can never know this for sure.

But from the consumer’s standpoint, the similarities between doctors and lawyers are greater than the differences. Doctors deal directly with their patients’ health, but lawyers are often asked to help patients with equally critical issues involving their clients’ life, liberty, and property. Moreover, just like the attorney–client relationship, the doctor–patient relationship is perceived differently than the typical relationship between buyer and seller. “Unlike the sale of cabbages, pick-up trucks, or insurance annuities, the usual marketplace ethos does not control” a consumer’s relationship with his lawyer or his doctor.²³¹ In medicine, as in law, patients do not know what questions to ask their doctors, and

228. *Id.* at 1264.

229. *Id.* at 1265.

230. See *Mitchell v. Kayem*, 54 S.W.3d 775, 781 (Tenn. Ct. App. 2001) (Physician was not required to inform patient of more experienced surgeon or a different hospital.); *Duttry v. Patterson*, 771 A.2d 1255, 1259 (Pa. 2001) (“[E]vidence of a physician’s personal characteristics and experience is irrelevant to an informed consent claim[.]”); *Ditto v. McCurdy*, 947 P.2d 952, 958 (Haw. 1997) (declining “to hold that a physician has a duty to affirmatively disclose his or her qualifications or the lack thereof to a patient”); *Foard v. Jarman*, 387 S.E.2d 162, 167 (1990) (No affirmative duty for health care provider to discuss his experience with patient); *Abram v. Children’s Hosp. of Buffalo*, 542 N.Y.S.2d 418, 419 (N.Y. App. Div. 1989) (rejecting argument that informed consent required disclosure of qualifications of staff participating in plaintiff’s surgery); *Thomas v. Wilfac, Inc.*, 828 P.2d 597, 601 (Wash. Ct. App. 1992) (Informed consent “requires disclosure of material facts relating to treatment, not disclosure of a physician’s qualifications.”); see also Barry R. Furrow, *Doctors’ Dirty Little Secrets: The Dark Side of Medical Privacy*, 37 WASHBURN L.J. 283, 289–90 (1998) (stating that the law has consistently avoided a rule of informed consent that requires disclosure of physician risk).

231. DeGraw & Burton, *supra* note 9, at 396 n.222.

2010]

ATTORNEY SELF-DISCLOSURE

737

society does not expect them to know.²³² As one court stated: “We discard the thought that the patient should ask for information before the physician is required to disclose. Caveat emptor is not the norm for the consumer of medical services.”²³³ This is also true with respect to lawyers and questions about legal services. Given these similarities, there is no reason that consumers of legal services should not have the same information available to them as consumers of medical services. “If information about experience and success rate is material to selecting a doctor, then it is also at least arguably relevant to selecting an attorney.”²³⁴

If anything, legal consumers need even more information about their prospective lawyers than medical consumers need about their doctors. Doctors are encouraged to specialize, and receive special training and certification in their field. Although a consumer probably will not know whether a doctor has experience with a particular procedure, he will at least know that if he has a heart problem he should see a cardiologist, and he can be confident that the cardiologist has significant expertise in treating heart problems.

By contrast, the professional regulation of lawyers encourages generalization, not specialization. As noted earlier, the lawyer competency rules provide that a lawyer “need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”²³⁵ As a result, “lawyers often are willing to perform a spectrum of services without specialized training even when true specialists in the field exist.”²³⁶ To make matters worse, the organized bar has made it nearly impossible for consumers to identify appropriate specialists. In most jurisdictions, lawyers cannot claim specialization unless they obtain very specific accreditation.²³⁷ In some states, the opposite problem exists—those states either do not regulate claims of specialization at all or they impose insufficiently rigorous training on lawyers who want to claim specialization.²³⁸ This is just as problematic for the consumer because he cannot rely on a lawyer’s specialization claim. This makes it even more difficult for a consumer to hire an appropriate lawyer, and as a result, the legal

232. King, *supra* note 187, at 740 (citations omitted).

233. *Canterbury v. Spence*, 464 F.2d 772, 783 n.36 (D.C. Cir. 1972).

234. Johnson & Lovorn, *supra* note 88, at 574.

235. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (2006).

236. Zacharias, *supra* note 3, at 583.

237. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 7.4 (2006) (limiting claims of specialization to lawyers who have obtained very specific accreditation); *see also* Zacharias, *supra* note 3, at 583, 583 n.32.

238. Zacharias, *supra* note 3, at 584–85.

738 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

consumer is more likely than the medical consumer to hire a professional who lacks the appropriate expertise. Imposing an obligation on lawyers to disclose lawyer-specific information would help solve this problem.

The other lesson that lawyers can learn from the experience of doctors is that, despite the fact that consumers can learn more about their prospective doctors than about their prospective lawyers, there is a growing trend of patients suing doctors for their failure to disclose physician-specific information. Although the majority of courts have ruled against patients who have brought these claims, the decisions that have come out in favor of patients are a cautionary tale for lawyers. While this Article does not predict a “revolution” in legal malpractice claims, it is certainly possible that creative plaintiffs’ lawyers will make these kinds of claims in the near future. Lawyers can avoid any potential liability simply by disclosing lawyer-specific information.

V. PROPOSAL FOR DISCLOSING LAWYER-SPECIFIC INFORMATION

Having demonstrated the need for self-disclosure of lawyer-specific information, the next issue is what form that disclosure should take. This Part proposes an amendment to the rules of professional conduct that would require lawyers to disclose lawyer-specific information to prospective clients, describes the content of the proposed disclosure, and anticipates some of the potential criticisms of the self-disclosure requirement.

A. *An Amendment to the Model Rules of Professional Conduct*

Model Rule of Professional Conduct 1.18, which sets forth the lawyers’ duties to Prospective Clients, should be amended to impose a duty on lawyers to communicate with prospective clients that is similar to the duty to communicate with current clients.²³⁹ The amendment, modeled on Rule 1.4 about communication with current clients, should read: “A lawyer shall disclose *lawyer-specific information* to the prospective client to the extent reasonably necessary to permit the prospective client to make an informed decision regarding whether to form an attorney–client relationship with the lawyer.” This language echoes current Rule 1.4(b), which requires a lawyer to “explain a matter” to a current client “to the extent reasonably necessary to permit

239. See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2006).

2010]

ATTORNEY SELF-DISCLOSURE

739

the client to make informed decisions regarding the representation,”²⁴⁰ and therefore should be familiar to lawyers.

This language should not stand on its own, however; rather, the rules should more specifically define the lawyer’s self-disclosure duty. Adding more detail to the regulation will help ensure that it delivers its intended consumer protection and will also let lawyers know what they can do to make sure that they are complying with the regulation. In order to clarify the lawyer’s new duty, the amendment to Rule 1.18 should define the “*lawyer-specific information*” that must be disclosed as “specific information about the lawyer that a reasonable person would find material to his or her selection of a lawyer.”²⁴¹ Moreover, the comments to the amended Rule 1.18 should provide that the lawyer will generally satisfy his duty to communicate “lawyer-specific information” by disclosing the following categories of information to the prospective client: (1) Biographical, Licensing and Certification Information; (2) Relevant Experience and Expertise, including an explanation of why the lawyer’s prior experience is relevant to the prospective client’s case; (3) Disciplinary History; (4) Information Regarding Malpractice Insurance; and (5) Malpractice Payments.

While the definition of “lawyer-specific information” and the accompanying comment will provide important guidance for lawyers and prospective clients, the overall regulation is flexible enough to account for unforeseen situations that call for disclosure of information yet do not fall within these specific categories.

The rules should not require lawyers to make these self-disclosures in any particular form, but instead allow lawyers to make the disclosures in whatever way they feel most comfortable. Lawyers might decide that the best way to make the disclosures is to incorporate them into their sales pitch and, in that way, provide appropriate context. For instance, they can preface any negative information that they have to disclose by informing consumers that these disclosures are required by the rules of professional conduct. Moreover, lawyers can provide truthful and appropriate disclaimers along with their disclosures: they can provide clients with additional information, such as, “I have not handled any cases just like that, but I do not know if you will find anybody in town who has and I have a lot of trial experience;” “It was a one-time mistake that will not happen again;” “I only settled that malpractice case because my insurance company wanted to.” Thus, the lawyer can integrate any negative information from required disclosures into all of the positive

240. *See id.* R. 1.4(b).

241. This definition should be included in Model Rule 1.0, which defines the terminology used in the rules.

information typically used to attract clients.

B. Categories of Mandatory Disclosure

1. Biographical, Licensing and Certification Information²⁴²

Lawyers should inform prospective clients of the colleges and law schools that they attended, the dates of graduation, and the degrees that they received.²⁴³ In addition, lawyers should disclose where they are admitted to practice law, the dates of admission, and any specialty certifications.²⁴⁴ Even though all of this information is generally available elsewhere, it would be better for the consumer to have it all in one place. Furthermore, it is easy for the lawyer to provide, and the requirement that lawyers provide this information should prove “relatively unobjectionable.”²⁴⁵

2. Relevant Experience and Expertise

As previously discussed,²⁴⁶ consumers, specifically unsophisticated users of legal services, need specific information about a prospective lawyer’s experience and “expertise in matters like the client’s matter”²⁴⁷ so that the consumer can make an informed choice about whether to hire the lawyer.²⁴⁸ A simple list of the lawyer’s relevant past matters is a starting point, but it is insufficient because consumers who are unfamiliar with the legal system might have difficulty understanding the relevance of the lawyer’s past experience to their case. Therefore, the lawyer must also carefully explain why the lawyer’s experience is relevant and why his experience makes him a suitable or unsuitable choice for this matter.²⁴⁹ It may seem odd to impose this burden on the

242. See Berenson, *supra* note 1, at 683 (recommending that this information be included in the lawyer’s profile).

243. *Id.*

244. *Id.*

245. *Id.*

246. See *supra* Part I.

247. Zacharias, *supra* note 3, at 592–93.

248. For more sophisticated consumers, such as large corporations and wealthy individuals, the disclosure need not be as extensive because they have a better understanding of the relative merits of hiring the lawyer, and moreover, they know what questions to ask to find out what they want to know about the lawyer. See *id.* at 605 (“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.”).

249. See MODEL RULES OF PROF’L CONDUCT R. 1.0 (2006) (defining “informed consent” to mean “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate

2010]

ATTORNEY SELF-DISCLOSURE

741

prospective lawyer, particularly if it requires the lawyer to give the consumer information that might cause the consumer not to hire the lawyer, but it is critical. Unless the consumer hires another lawyer to help him choose a lawyer, the only person in a position to help a prospective client determine whether a prospective lawyer is suitable for the client's particular case is the prospective lawyer himself.²⁵⁰

How will this work? It is not enough for the lawyer to tell the client simply that he is a litigator or even that he is a plaintiff's side litigator or even that he is a plaintiff's side medical malpractice litigator. Rather, the lawyer needs to disclose exactly what kind of experience and expertise he has and how that is relevant to the prospective client's case. Significantly, this disclosure does not need to be a death knell for the lawyer's chances of winning the business. Indeed, in many cases, the lawyer's relevant experience and expertise will be a selling point. Even in the event that the lawyer has never handled a case exactly like the prospective client's case, that does not mean that the lawyer cannot or should not handle the prospective client's case²⁵¹ or that the lawyer cannot successfully earn the prospective client's business.

For example, assume the prospective client comes to the lawyer's office for a consultation on a claim that her baby died during delivery as a result of the obstetrician's malpractice. Assume further that the lawyer has never handled a case with those allegations but has successfully handled a number of medical malpractice claims involving allegations of botched plastic surgery. Under a self-disclosure regime, the lawyer must disclose that he has not handled a case involving alleged malpractice during delivery, but the lawyer can explain how his own experience is relevant and beneficial. The lawyer can explain that all medical malpractice claims are similar in some respects, that he is well-versed in the state's medical malpractice law, that he has vast trial experience, that he has had great success both at trial and with obtaining pre-trial settlements, and that he has had success suing this particular hospital. In other words, nothing in this proposal prevents the lawyer from making the same pitch he normally would to the prospective client. The pitch just needs to include appropriate disclaimers.²⁵²

information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct").

250. See Zacharias, *supra* note 3, at 587–88 ("Unless one can assume that prospective clients are fully capable of negotiating for their representation or that they can understand the need for independent advice before signing retainers, the prospective lawyers seem to be in the sole position to guide the clients.").

251. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

252. There are limits on what the attorney has to disclose. For instance, the attorney's disclosure need not go so far as to inform the prospective client that there is a cheaper alternative, *see* Posting of

3. Disciplinary History

In deciding whether to hire a lawyer, consumers place great importance on whether the lawyer has ever been disciplined.²⁵³ Consumers use this information to help them decide whether a prospective lawyer is honest and trustworthy. Given the importance of this information to consumers and their inability to discover it on their own, attorneys should be required to disclose all public disciplinary actions taken against them.²⁵⁴

In addition to public disciplinary actions, almost all jurisdictions impose private discipline as a form of punishment, and “in many jurisdictions, it is the type of discipline most often imposed.”²⁵⁵ There is no principled basis for not requiring lawyers to disclose any private disciplinary action taken against them. In cases of private discipline, “a lawyer has been found to have engaged in misconduct, but his reputation is protected on the theory that the lawyer is not someone from whom the public needs protection.”²⁵⁶ As Professor Levin points out, “there is no evidence . . . that disciplinary counsel or hearing boards—which typically impose private sanctions—are capable of determining whether the lawyer is likely to engage in similar misconduct in the future.”²⁵⁷ To the contrary, there is some evidence that lawyers who committed misconduct in the past are more likely to commit misconduct in the future.²⁵⁸ Accordingly, the lawyer should have to disclose private discipline because the interest of the consumer outweighs the lawyer’s interest in privacy.²⁵⁹

Andrew Perlman to Legal Ethics Blog, www.legalethicsforum.com/blog/2009/03/an-ethical-obligation-to-tell-your-client-about-a-cheaper-alternative.html#comments (Mar. 5, 2009, 09:59 PM) (concluding that lawyer probably does not have a duty to disclose to his client the existence of a cheaper option, whether that option is a lower biller inside the firm or a cheaper lawyer outside the firm) or to offer the name of another lawyer who could handle the case. See Zacharias, *supra* note 3, at 580 (“Imposing upon lawyers a referral obligation would require them to conduct an inquiry into the market that they otherwise might never undertake.”). One California case held that an attorney had a duty to refer the client to a specialist, but there the attorney–client relationship had already been established and the referral was necessary in order for the lawyer, who lacked expertise in tax matters, to meet his duty of care. See *Horne v. Peckham*, 158 Cal. Rptr. 714, 720 (Ca. Ct. App. 1979).

253. Morton, *supra* note 4, at 287–88; DeGraw & Burton, *supra* note 9, at 376–77.

254. Berenson, *supra* note 1, at 685.

255. Levin, *supra* note 12, at 20.

256. *Id.* at 24.

257. *Id.*

258. *Id.* at 29.

259. Again, the lawyer’s disclosure of prior discipline does not need to ruin his chances of winning the client’s business. In making the disclosure, the lawyer can include appropriate explanations—I was young; it was a one-time problem; I used to be an alcoholic, *etc.*

2010]

ATTORNEY SELF-DISCLOSURE

743

4. Information Regarding Malpractice Insurance

As previously discussed,²⁶⁰ consumers naturally want to know “whether or not the attorney who they are considering retaining carries malpractice insurance,”²⁶¹ so that the consumer will be able to recover if his lawyer commits malpractice. Despite the ABA’s recognition of this issue’s importance—via its model rule on the subject²⁶²—most states currently do not require lawyers to disclose this information.²⁶³ If plumbers advertise that they are “insured and bonded”—presumably because customers want to know this information before they hire them in case something goes wrong—surely legal consumers are entitled to know the same information about their lawyer.

5. Malpractice Payments

Just as consumers want to know whether a prospective lawyer has ever been disciplined because it may make that lawyer more likely to engage in misconduct in the future, consumers also want to know if a prospective lawyer has ever made a malpractice payment because that might indicate that the lawyer is more likely to commit malpractice in the future.²⁶⁴ Professor Berenson wisely suggests that disclosure of malpractice payments be limited to those above a “nuisance value” of \$5,000.²⁶⁵ To be sure, malpractice payments are not necessarily proof of anything—in some cases the lawyer decides to settle because it is easier and less expensive than fighting—but the lawyer is entitled to provide the appropriate context to the consumer when he makes the disclosure. For example, if appropriate, the lawyer can explain that the lawyer’s practice involves “cases that generate [a high] proportion of malpractice claims.”²⁶⁶

C. Anticipating the Critics

Imposing a requirement on lawyers to disclose lawyer-specific information is not a perfect solution. It is also not likely to be a popular idea among lawyers, who will resist a rule that requires them to reveal

260. *See supra* Part I.C.2.

261. Berenson, *supra* note 1, at 684–85.

262. *See supra* note 83 and accompanying text.

263. *See supra* note 14 and accompanying text.

264. *See supra* Part I.C.1.

265. Berenson, *supra* note 1, at 684.

266. *Id.*

negative information about themselves.²⁶⁷ But will it really hurt lawyers?

As an initial matter, the context in which this information will be disclosed is important. The proposed rule would allow a lawyer to make the required disclosures in whatever way he wants. If, for example, the lawyer discloses a limited amount of negative information in the context of a sales pitch in which the lawyer is touting his many positive qualities, it is hard to see how the lawyer will be particularly damaged.

Further, a self-disclosure regime might hurt lawyers who have damaging information to reveal, but a regime of self-disclosure will actually help those attorneys who have no negative information to reveal. They can even tout this by telling prospective clients, for example: “the rules of professional conduct require lawyers to reveal whether they have ever been disciplined, and I am proud to tell you that I have never had a single complaint filed against me.”

A self-disclosure regime will hurt lawyers who try to take on cases that they are not equipped to handle because they will be compelled to disclose their lack of relevant experience and expertise. But again, to the extent that self-disclosure drives consumers to lawyers with more relevant experience and expertise, this is a reason to praise the rule, not condemn it.²⁶⁸

Certainly, at the beginning of a self-disclosure regime, the legal profession’s reputation as a whole might take a hit as the market is flooded with negative information about lawyers that was previously kept private. But, in the long run, a self-disclosure regime might actually have a positive economic benefit for lawyers and the legal profession: “Even the most cynical, business-driven lawyer . . . should recognize that restoring consumer confidence in our legal institutions also has positive long-term business benefits.”²⁶⁹

Another likely criticism is that this issue should be left to the free market. In other words, some will argue that the burden should be on the consumer to investigate prospective lawyers and discover this

267. DeGraw & Burton, *supra* note 9, at 362 (“A move toward requiring greater visibility of lawyer discipline or trial court sanctions would be controversial, however, because it might be seen as a threatening departure from the status quo.”). *Id.* at 380 (“The long history of invisible discipline suggests that attorneys, as business-generating professionals, resist the publication of negative information.”).

268. One relevant concern is that a self-disclosure regime will have a disproportionately negative effect on junior lawyers who are trying to get a foothold in a competitive market. Junior lawyers can, however, tout other desirable qualities: “I will work harder;” “I will be more communicative;” “My rates are lower;” *etc.* Moreover, to the extent that a self-disclosure regime moves the legal profession even a little bit toward the kind of apprenticeships we see in the medical profession, it may be beneficial.

269. DeGraw & Burton, *supra* note 9, at 397.

2010]

ATTORNEY SELF-DISCLOSURE

745

information themselves. After all, there are a number of helpful guides produced by bar associations and consumer protection groups,²⁷⁰ and at least some information is publicly available on the Internet and through other means. Perhaps most importantly, the client can simply ask the prospective lawyer for information, and the lawyer must provide truthful answers.²⁷¹ There are several strong counter-arguments. This Article already addressed the shortcomings of consumer guides. Even if consumers find them and follow them, they do not provide the kind of information necessary for consumers to make an informed decision because not all of the necessary information is publicly available.²⁷²

Moreover, relying on consumers to ask questions is a heavy burden for consumers to bear for a variety of reasons. First, consumers, particularly unsophisticated consumers, may not know what questions to ask. Second, “the usual marketplace ethos does not control” the attorney–prospective client relationship.²⁷³ Lawyers promote themselves as “professionals,” not “profit-maximizing businessmen,” and use the cover of the professional code “to induce clients to use and trust” them.²⁷⁴ While people might question the qualifications of the general contractor renovating their house or expect their auto mechanic to try to rip them off, prospective clients see their prospective lawyers as zealous advocates—“aggressive and relentless in pursuing each client’s goals”—and trusted confidants even before the representation has begun.²⁷⁵ Indeed, “only the most sophisticated and experienced clients, such as corporations represented by in-house counsel, are likely to undertake [the] form of investigation”²⁷⁶ that would yield the lawyer-specific information that prospective clients need to make an informed choice about the selection of a lawyer. Third, in the absence of regulation, lawyers have no incentive to provide this information to prospective clients and might not be completely forthcoming even when asked direct questions.²⁷⁷ Thus, although lawyers must answer prospective clients’ questions truthfully, they do not necessarily have to answer them fully. Without a disclosure requirement, the lawyer might answer questions truthfully but not provide the full information that the

270. See *supra* Part I.

271. See *supra* Part II.B.

272. See *supra* Part I.

273. DeGraw & Burton, *supra* note 9, at 396 n.222.

274. Zacharias, *supra* note 3, at 585–86.

275. *Id.*

276. *Id.* at 595.

277. *Id.* at 577 (“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.”).

client needs to make an informed decision.²⁷⁸

Another argument that will be raised against this proposal is that it constitutes a violation of lawyers' privacy.²⁷⁹ While some of the required disclosures proposed in this Article might prove embarrassing to lawyers, it is difficult to see how the disclosures compromise their privacy. First, much of the information is already publicly available (albeit difficult for consumers to find). For example, most state bars will disclose disciplinary information to those who ask.²⁸⁰ Likewise, malpractice judgments are public records accessible to those who know where to look.²⁸¹ Similarly, state bars are increasingly requiring lawyers to provide them (but not prospective clients) with information regarding their malpractice insurance.²⁸² Moreover, because the information that lawyers would disclose relates to their professional lives as opposed to their personal lives, it is difficult to see how they have a significant expectation of privacy. That expectation of privacy is reduced to the extent that the information is already public. In short, because much of this information is publicly available already and lawyers have little or no expectation of privacy in the information, any "marginal reduction in lawyer privacy that would result . . . is greatly outweighed by the benefit that would be provided to consumers."²⁸³

CONCLUSION

This Article attempted to describe and ameliorate a longstanding and vexing problem: the inability of consumers to learn critical information about prospective lawyers. This lawyer-specific information is surprisingly difficult to find even with a diligent search, and lawyers have no obligation under current law to reveal this information to consumers. This scarcity of information makes it difficult for consumers to find an appropriate lawyer to handle their case.

This Article proposed a novel approach to solving this problem. The rules of professional conduct should be amended to require a lawyer to disclose sufficient "lawyer-specific information" to enable prospective clients to make an informed decision about which lawyer to hire. At a minimum, this disclosure should include: (1) basic biographical,

278. See Brigid McMenamin, *10 Things Your Lawyer Won't Tell You*, SMART MONEY, Sept. 18, 2003, <http://www.smartmoney.com/spending/deals/10-things-your-lawyer-wont-tell-you-14764/>.

279. Johnson & Lovorn, *supra* note 88, at 560–61 (arguing for privacy rights).

280. See *supra* Part I.B.

281. See *supra* Part I.C.1.

282. See *supra* Part I.C.2.

283. Berenson, *supra* note 1, at 682.

2010]

ATTORNEY SELF-DISCLOSURE

747

licensing and certification information; (2) disciplinary history; (3) information about the lawyer's malpractice insurance; (4) malpractice payments; and (5) the lawyer's specific experience and expertise relevant to this matter as well as an explanation of the relationship between the lawyer's prior experience and the work that will be necessary in the proposed new matter.

Several arguments support this proposed amendment. First, lawyers already owe prospective clients a variety of quasi-fiduciary duties. Indeed, the only significant duty that they do not owe prospective clients is the duty to communicate, which is arguably the most important duty. Imposing this duty on lawyers would be consistent with the quasi-fiduciary nature of the lawyer-prospective client relationship.

Second, this Article identified five theoretical, moral, and public policy justifications supporting this proposed amendment. This requirement would help solve the problem of information asymmetry that plagues the market for legal services. Additionally, a self-disclosure requirement would provide important protection for consumers. Disclosing lawyer-specific information to the prospective clients so that they can make an informed decision is also consistent with the moral and philosophical notion of informed consent, which serves the twin goals of supporting clients' individual autonomy by giving them information concerning their rights so that they can "effectively exercise those rights" and respecting clients' human dignity by treating them as equals in the lawyer-client relationship. Further, an affirmative disclosure requirement is consistent with what consumers expect from prospective lawyers. Finally, this self-disclosure requirement would improve public confidence in the legal profession.

A comparison with doctors and their disclosure obligations provides a further argument in favor of requiring lawyers to disclose lawyer-specific information. There is no reason that it should be easier for consumers to find information about prospective doctors than prospective lawyers. Moreover, by voluntarily disclosing lawyer-specific information, lawyers can avoid the kinds of claims that doctors are now facing for failing to disclose physician-specific information.