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Effects of Reputation on the Legal Profession

Fred C. Zacharias*

Abstract

This Article considers how the reputation of lawyers and signaling between lawyers and clients affects the impact of legal ethics rules. Academics who have written about the relationships between lawyers and clients have not adequately considered the influence of reputational signaling on who clients hire and on lawyers' implementation of discretion. These empirical issues are key to a proper analysis of many professional rules and to the approach bar associations should take to matching lawyers and clients.

The Article will focus primarily on lawyers' reputations as a proxy for what clients want, or need, to know about their representatives. Part I offers a taxonomy of the ways in which lawyers' reputations are important. Part II discusses what we do, and do not, know about lawyers' reputations in today's real world. Part III identifies a series of questions about reputation that academics and the bar should consider more seriously than they have in the past.

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I. Introduction

Before entering academia and teaching Professional Responsibility, I practiced law as a criminal defense attorney representing indigent individuals and as a public interest litigator suing officials of government and other organizational entities. A faculty colleague who also teaches Professional Responsibility represented exclusively corporate clients through large, established law firms. Although we are good friends, we rarely see eye to eye on what legal ethics should require and how effective the legal ethics codes can be.

Lying at the core of many of our disagreements is the role that the reputation of lawyers and signaling between lawyers and clients have in determining the impact of the professional rules. In part, the divergence in our views has to do with our backgrounds. When writing about legal ethics, I typically am focusing on the relationship between individual unsophisticated clients who know little about lawyers, defer to them significantly, and depend on lawyer self-regulation and professional discipline to ensure appropriate representation.¹ My colleague envisions sophisticated corporate clients, who know what they want and actively shop for counsel, and corporate lawyers willing to provide the desired service in order to obtain large legal fees.²

The clients I am thinking of, at best, select their lawyers based on vague word of mouth from a limited number of peers who tell them the lawyers have done a good job in the past. When the potential clients visit a

1. The influence on legal ethics regulation of the paradigm of the unsophisticated, indigent criminal defendant is discussed in Fred C. Zacharias, *The Civil Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 167-78 (1996).

2. See Fred C. Zacharias, *The Images of Lawyers*, 20 GEO J. LEGAL ETHICS 73, 84-85 (2007) (discussing the paradigm of the lawyer as businessman).

lawyer for the first time, they are unlikely to leave the lawyer's office unrepresented, because the consumers do not have, or do not feel that they have, alternatives and do not fully comprehend the differences among lawyers and in how lawyers act. Once these clients retain counsel, they do not expect to exert significant control over her.³

My colleague's clients and lawyers live in a different world. His clients obtain references, study past results the lawyers have obtained, interview prospective counsel, and let them know what they want to achieve (and how).⁴ The lawyers, in return, let the clients know how much they want the representation by adjusting their fees (or not) and signaling to the clients how they will behave if certain eventualities arise. These clients will know the lawyers' reputations for aggressiveness, cutting corners, and willingness to oppose client demands.

The caricatures of clients and lawyers that my colleague and I conjure up, while stemming from our experiences, are not necessarily representative of the way all, or most, clients and lawyers act. To be honest, we do not know for a fact how much of a role reputation and signaling between lawyers and clients play in ordinary attorney relationships outside our paradigms. The empirical issues are key to a proper analysis of many professional rules.

This Article will focus primarily on one aspect of the equation: lawyers' reputations as a proxy for what clients want, or need, to know about their representatives. Part I offers a taxonomy of the ways in which lawyers' reputations are important. Part II discusses what we do, and do not, know about lawyers' reputations in today's real world. Part III identifies a series of questions about reputation that academics and the bar might do well to consider more seriously than they have in the past.

3. To avoid confusion, this Article will refer to lawyers as female and other actors as male.

4. Some of these clients are so sophisticated that they may use their investigations of and initial interviews with counsel as a tactic to create conflicts of interests when the clients' adversaries and competitors attempt to consult the same counsel in the future. *See, e.g.*, B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F. Supp. 1050, 1051-52 (S.D. Tex. 1986) (involving a corporation that had interviewed a list of "outside prominent trial lawyers who had experience in patent cases" and then moved to disqualify a lawyer not selected from representing its adversary); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (recognizing some prospective waivers of conflicts of interest designed to limit the effectiveness of intentional efforts to create conflicts); Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1075 (1981) (discussing the use of prospective conflict waivers as a potential antidote to tactical efforts to disqualify counsel).

II. *The Significance of Lawyers' Reputations*

Most obviously, lawyers' reputations are important for clients planning to hire an attorney. In the absence of mechanisms that publicly grade attorneys,⁵ clients' means of selecting lawyers are limited to reviewing the lawyers' objective qualifications (e.g., their educational background), interviewing candidates, contacting references, and word of mouth. The level of client sophistication ordinarily determines how a client selects counsel. A client who is uninformed about which qualifications are important and how to assess the qualifications cannot make good use of most of the options. When there are costs associated with interviewing and evaluating more than one attorney, that also may constrain a client's ability to perform a meaningful personal evaluation.⁶

Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have significant impact on the implementation of professional rules and other legal constraints on lawyer behavior. To the extent reputation is dependent on the way lawyers behave, or are likely to behave in particular contexts, that affects the manner in which lawyers comply with the constraints. Consider permissive professional rules that allow lawyers to take action against their clients' interests under some circumstances—for example, to disclose confidential information or report information to a governmental agency. A firm with a reputation for always exercising discretion so as to maximize the clients' interests (as opposed to third party or societal interests) obtains an advantage in attracting clients who are willing to pay for that behavior and are in a position to obtain accurate information about reputation.⁷

5. See Fred C. Zacharias, *The Pre-employment Ethical Role of Lawyers*, 49 WM. & MARY L. REV. 569, 631–34 (2007) (discussing the possibility of developing formal mechanisms for grading lawyers).

6. The costs may not only entail the expenditure of money and time investigating prospective counsel, but also the psychological and emotional cost to some individuals of discussing personal information with lawyers and reliving the negative experience that is the foundation of the visit. Scholars have routinely assumed that many prospective individual clients quickly become dependent on the first lawyer they meet and have difficulty treating the initial discussions concerning representation as an arms' length transaction. See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 129 (1974) (studying New York personal injury claimants suggesting that "[g]enerally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet"); John V. Tunney & Jane Lakes Frank, *Federal Roles in Lawyer Reform*, 27 STAN. L. REV. 333, 338 (1975) ("Once in a law office door, the average citizen is a captive audience.").

7. See Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeping Rules Work?*, 47 B.C. L. REV. 455, 466–69 (2006) (discussing corporate lawyers' economic incentives in implementing reporting and disclosure rules).

Reputation plays a unique role in clarifying a lawyer's proclivities. A lawyer or firm might not, for example, be willing to put into writing its willingness to surrender discretion accorded in the rules⁸ because doing so might be sanctionable⁹ or might put the firm in disfavor with governmental agencies administering the rules.¹⁰ For similar reasons, counsel is unlikely to express the willingness directly to the client, particularly a client with whom counsel has not previously dealt. Reputation is a method for signaling to prospective clients the lawyer's or law firm's flexibility without risk. Maintaining that reputation can be important to the lawyer's or firm's bottom line.

Lawyers' reputations may affect the impact of mandatory professional rules as well. Suppose, for example, lawyers compete for business among corporate clients potentially affected by obligatory "reporting up" requirements.¹¹ The rules and enforcement of the rules, however, are not the only incentives that influence lawyers,¹² and a range of alternate ways to remedy putative corporate misbehavior may be available.¹³ A lawyer's reputation for implementing the reporting-up rule, employing internal review

8. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 280 (2006) (discussing whether lawyers have an option to guarantee nondisclosure).

9. A disciplinary authority might take the position that the attorney has the obligation to exercise discretion in every possible disclosure situation. It might also conclude that this discretion must be exercised in light of the competing policy considerations underlying the confidentiality rule and the exception. Recognizing this possibility, the drafters of the recent California future crime exception included language that foreclosed discipline against an attorney for invoking or declining to invoke the exception. See CAL. RULES OF PROF'L CONDUCT R. 3-100(E) (2007) (providing that a lawyer "who does not reveal information permitted [under the exception] does not violate the rule"); *id.* at discussion (stating that lawyer is "not subject to discipline for revealing confidential information as permitted under this rule").

10. The SEC, for example, administers regulations governing lawyers pursuant to the Sarbanes-Oxley Act. Pub. L. No. 107-204, § 307 (2002).

11. See, e.g., Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205.3(b) (2007) (requiring corporate attorneys to report up the ladder in certain circumstances); MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2006) ("[U]nless the lawyer [who knows of potential misconduct] reasonably believes that it is not necessary in the best interest of the organization to do so the lawyer shall refer the matter to higher authority in the organization."); Zacharias, *supra* note 7, at 481-84 (discussing obligatory reporting-up requirements).

12. See generally David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825 (2004) (discussing, from a game-theoretic perspective, lawyers' incentives in complying or not complying with corporate disclosure obligations).

13. See Zacharias, *supra* note 7, at 464-66 (discussing options of different kinds of lawyers responding to corporate misconduct).

mechanisms instead of reporting to outside authorities, or routinely protecting the lawyer's own interests in compliance (e.g., by writing internal opinions that shift the burden of compliance but effectively require the client to take action) can lead clients to select her from among lawyers with different approaches to the rules.¹⁴ In situations in which clients uniformly, or mostly, prefer lawyers who will disobey the letter or spirit of mandatory rules, the availability of reputational signaling undermines the character of the rules.

There are, of course, different kinds of reputations. One important form, for purposes of the legal ethics codes, is a lawyer's or firm's reputation for responding to criticism, discipline, or sanction. As a practical matter, the resources of disciplinary agencies are relatively meager, with the result that the agencies tend to avoid imposing sanctions that will embroil the regulators in lengthy and costly litigation. Historically, disciplinary agencies have shied from implementing rules against prosecutors' offices¹⁵ and legal advertisers,¹⁶ in part because those rules are legally controversial and tend to prompt a vigorous defense.¹⁷ Discipline is imposed disproportionately on solo practitioners and small firms, again in part because these defendants are least likely to devote substantial resources to fighting sanctions.¹⁸ For the same

14. See Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 253 (1995) (noting that "clients can short circuit whistleblowing rules, and thus remove disincentives to engage in misconduct, by hiring lawyers who will not disclose").

15. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 760 (2001) (discussing possible reasons for the infrequency of discipline of prosecutors).

16. See Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 974-1002 (2002) (discussing reasons for underenforcement of legal advertising rules).

17. The Department of Justice, for example, recently announced a policy that it will defend its lawyers in disciplinary proceedings whenever the lawyers have made a "good faith effort to understand their ethical requirements." *DOJ Issues Rule Detailing Mission, Functions of Professional Responsibility Advisory Office*, 22 A.B.A./B.N.A. LAW. MANUAL ON PROF'L CONDUCT 21 (Jan. 11, 2006) (reporting the Department of Justice's adoption of a new rule that requires federal prosecutors to obey state laws and rules that govern ethical conduct in the state where the prosecutor practices).

18. See, e.g., *California Bar Report Finds Lack of Bias Against Small Practices in Discipline Matters*, 17 A.B.A./B.N.A. LAW. MANUAL ON PROF'L CONDUCT 43-35 (July 18, 2001) (reporting that "[a]lthough only 23 percent of California lawyers are in solo practice, 54 percent of inquiries about attorneys involved solo practitioners, 68.47 percent of investigations opened were for solo practitioners, and 78.37 percent of the completed disciplinary cases involved those practitioners"); Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 847-48 (2001) ("Lawyers who practice in [solo and small firm] settings tend to receive . . . substantially more discipline than their big firm colleagues."); *id.* at 848 n.3 (citing multiple authorities on the proposition).

reasons, a lawyer's or firm's reputation for litigiousness in its own interests may promote hesitant enforcement of the rules. This, in turn, may limit the effect of the rules in precisely the contexts in which they are intended to have their greatest impact.

Just as there are various kinds of reputation, a single reputation can have multiple effects. A lawyer's desire to maintain a reputation for client-centered behavior may, for example, encourage the lawyer to downplay third-party and societal interests recognized in some professional rules, thus undermining these rules. But the desire to maintain the reputation for client-centeredness may also reinforce rules that forbid the lawyer to place her own interests ahead of a client's, such as conflict of interest and fair dealing requirements.¹⁹ Thus, when a lawyer operates in a field in which a reputation for client-centered behavior is imperative to her ability to attract clients, the need for professional rules against self-dealing (and even negligence) is diminished because the market will enforce similar standards.²⁰

Various targets other than potential clients rely upon reputations. Reputation is a mechanism for signaling to third parties the kind of approach a lawyer is likely to take to her role, which itself may affect the resolution of particular matters. The difference between an ultra-aggressive lawyer and a lawyer who acts with detachment and objectivity may be significant for the adversary or agency with whom the lawyer has regular dealings.²¹ For example, the IRS, SEC, prosecutors, and even judges may respond differently

19. See MODEL RULES OF PROF'L CONDUCT R. 1.7-1.8 (limiting lawyers' abilities to act in their own interests). The theory is that if sophisticated future clients will become aware of lawyer self-dealing, then engaging in it ordinarily will not be cost effective. But, in practice, the reputational concerns will not always dominate. If, for example, the client is unlikely, or unable, to gauge the lawyer's reputation for acting in a self-interested manner, the market will not serve as an effective deterrent. See Milton C. Regan, *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 559 (1998) ("The desire for financial gain may outweigh concern for reputation, for instance, when the client is relatively unsophisticated and engages in only lenient oversight of outside counsel."). In addition, in individual cases the size of the booty resulting from self-interested action may outweigh the lawyer's desire to maintain her reputation.

20. Cf. Regan, *supra* note 19, at 558 ("[D]evotion to the client . . . has the common function of constraining the operation of lawyer self-interest.").

21. See Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1402-03 (2000) (discussing the relationship between lawyers' reputation for disclosing information and regulators' likely response to the lawyers); Zacharias, *supra* note 7, at 483 ("Conversely, a law firm's overall marketability may depend on the reputation for independence that the firm establishes with regulators in the field in which the firm practices."); cf. Robert Bone, *Modeling Frivolous Lawsuits*, 145 U. PA. L. REV. 519, 572 (1997) (arguing that, by hiring a lawyer with a reputation for "always investigating and filing only meritorious suits, defendants can rely on that reputation to cure any informational asymmetry that blocks early settlement").

to positions taken by attorneys with reputations for exercising means or making arguments that are reasonable than to positions taken by lawyers known to stretch the law.²² Likewise, adversaries will respond differently to settlement offers and statements made in negotiations, depending on their opponents' reputations for candor and taking reasonable positions.²³ Rules that authorize varying approaches to making arguments,²⁴ settlement discussions,²⁵ and engaging in borderline deceit or misrepresentation²⁶ thus will be implemented differently by lawyers seeking to attract different kinds of clients.²⁷

Not surprisingly, lawyers' interests in maintaining more than one kind of reputation or in maintaining good reputations with a variety of targets can produce inconsistent incentives. For instance, in order to maintain a reputation for competence and professionalism with tribunals before whom a lawyer repeatedly appears, the lawyer may be tempted to blame questionable conduct

22. See Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *FORDHAM L. REV.* 149, 170 (1996) (arguing that attorneys who have proven to regulators that they screen their clients' positions and take their obligations to monitor client misconduct seriously may receive enhanced deference from the FCC).

23. See, e.g., Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 *IOWA L. REV.* 475, 485 (2005) (analyzing a potential "reputational solution" to a bargaining problem, under which parties can signal their willingness to cooperate by hiring an attorney with a reputation for collaboration); Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 *ARIZ. J. INT'L & COMP. LAW* 515, 563 (1998) (asserting that a reputation for integrity and trustworthiness strengthens a party's bargaining position over time); Robert B. Wilson, *Strategic and Informational Barriers to Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 108, 111 (Kenneth J. Arrow et al. eds., 1995) (discussing costs and benefits of a negotiator's reputation for truthfulness); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 *ARK. L. REV.* 207, 270 n.269 (2001) (arguing that a lawyer's reputation for truthfulness and fairness increases that lawyer's effectiveness as a negotiator in future negotiations).

24. See, e.g., *MODEL RULES OF PROF'L CONDUCT* R. 3.1 (forbidding arguments only when there is no "basis in law or fact . . . that is not frivolous" and allowing all claims when there is "a good faith argument for an extension, modification, or reversal of existing law").

25. See, e.g., *id.* at R. 4.1 cmt. (stating that "under generally accepted conventions in negotiation" certain types of statements are "ordinarily not taken as statements of material fact").

26. See, e.g., *id.* at R. 4.1 (excluding from regulation misrepresentations that do not involve statements of material fact, including "estimates of price or value" and "a party's intentions as to an acceptable settlement"); *id.* at R. 8.4 (forbidding all dishonesty and deceit by lawyers).

27. See, e.g., Regan, *supra* note 19, at 558 (discussing lawyers' different constituencies and the different reputations each constituency demands).

on a client.²⁸ This in turn, may injure the client's position and undermine the lawyer's separate reputation for client-centeredness among potential clients.

Likewise, it may be important for a firm to maintain a reputation for taking moderate and reasonable positions before regulating agencies, because that will produce more deference by the agencies.²⁹ A lawyer who practices before the IRS, for example, has an interest in convincing the IRS that his positions typically are justified by the legal merits and are not extreme. A defense attorney who can build a relationship with prosecutors based on the prosecutors' sense that the attorney will only seek assistance that is reasonable (based on the confidential information within the defense attorney's control) can develop an advantage in routine plea bargaining. But maintaining general reputations for these characteristics may cost the lawyer in terms of her reputation for pressing clients' interests in each case.

How lawyers implement the competing incentives depend in part on each lawyer's balance of (1) what kind of lawyer she wishes to be, and (2) which reputation is more important to her practice.³⁰ It also depends on the nature of the lawyer's clients. The hypothetical tax lawyer, for example, may confront a mix of sophisticated clients all of whom are aware of the lawyer's reputation, some of whom prefer a lawyer who will press their case to the limits, others of whom prefer a lawyer with a good reputation before the IRS and are willing to limit their positions to help the lawyer maintain that reputation, and yet other

28. See, e.g., *Louis Fennell v. TLB Kent Co.*, 865 F.2d 498, 500 (2d Cir. 1989) (reporting a client's attempt to undo a settlement agreement because of his dissatisfaction with the settlement amount and his lawyer's subsequent letter to the court requesting the "matter be restored to the calendar as the settlement which was authorized and accepted by the client is no longer acceptable to him").

29. See generally *Painter*, *supra* note 22.

30. Bradley Wendel has suggested that in joining an organization or law firm with a reputation for ethical behavior, a lawyer shows a willingness to bear the cost of acting consistently with that reputation because "it would result in greater long-run gains, as a result of the lawyer's ability to attract clients who are looking for high-commitment lawyers." W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to do with Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1614 (2003) (citing William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 *FLA. ST. U. L. REV.* 639 (2003)). Wendel states that:

Although lawyers sometimes assume that all clients are seeking attack-dog advocates, many clients do recognize the value of being represented by a lawyer who is known as a cooperater—namely, the additional credibility before courts and third parties that the lawyer enjoys, which results in less expense for the client and a greater likelihood of favorable judicial decisions where the judge has discretion in how to rule.

Id.; *cf. id.* at 1614–15 (noting "reasons why signaling mechanisms may not enable clients seeking high-commitment lawyers to retain only those lawyers").

(presumably lucrative) clients who expect lawyers with the favorable IRS reputation to trade on that reputation while taking extreme positions on the clients' behalf.³¹ The criminal defense attorney, in contrast, may represent unsophisticated clients who mostly are unaware of her reputation with prosecutors and thus do not rely upon it. In both situations, the lawyers presumably will adjust their decisionmaking in a way that will emphasize the reputation that has the most beneficial impact on their future businesses.

Existing (as well as prospective) clients may rely on reputation. Even after selecting an attorney, clients have many decisions to make about how to use that attorney. When, for example, a client is considering engaging in conduct of questionable legality, the client must decide whether to consult the lawyer (as opposed to forgoing advice, consulting in-house counsel, or engaging a separate attorney), whether to give the lawyer information, and whether to provide information in actual or hypothetical form.³² Because a lawyer potentially can exert control over the clients' decisions in a variety of ways—by providing a written opinion that particular conduct would be illegal or a violation of the officers' fiduciary duties, by reporting the proposed conduct up the ladder, by preventing a client from testifying or employing particular tactics, or by disclosing or threatening to disclose misconduct to outside authorities—the client must assess how important independence from the lawyer's influence is and how to assure that independence. If the client is not in a position, or is psychologically unable,³³ to ask the lawyer directly how she would respond to the situation, the lawyer's reputation for exerting control, or not, is the best proxy.

When rulemakers understand the processes discussed above, the existence of lawyer reputations and signaling of those reputations should influence not only who clients retain and the impact of particular rules but also how the rules are written in the first place. If different rule formulations are more susceptible to circumvention, or to circumvention within particular categories of lawyers

31. See Painter, *supra* note 14, at 224 (noting that some clients may prefer lawyers "who are recognized as whistleblowers by regulators, investors, and other third parties" because they "lend credibility to clients who need it"); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1739 (1998) ("[C]lients can use large firms as reputational intermediaries or signals of good behavior, by choosing firms that have a reputation for honesty and fair dealing.").

32. See Zacharias, *supra* note 7, at 467–68 (discussing clients' options in using lawyers who take differing postures toward reporting and disclosure rules); *cf.* Painter, *supra* note 14, at 253 (discussing possible reactions of clients to whistleblower obligations on the part of lawyers).

33. For example, because the client feels powerless before or dependent on the lawyer. See *supra* note 6 and accompanying text (explaining how clients choose a lawyer).

and clients, careful drafters must take those potential effects into account. Information about lawyers' reputations can shed light on the degree to which lawyers, or groups of lawyers, will care about and adhere to specific kinds of rules and how they will implement regulatory leeway.

III. Who Knows What About Which Lawyers?

Thus far, this Article has focused on the relevance of lawyers' reputations to various potential recipients of reputation information. It would be a mistake, however, to treat all types of reputation the same. Some are more accurate (and potentially deserving of respect) than others, some are accessible to only particular kinds of clients, and some can be more easily signaled to potential recipients. Because these differences can be significant for how regulations of lawyers should be formulated, it is important to spell out the differences.

Reputations are developed in two main ways. They can be earned, through performance that is reported in some relatively neutral way or observed and recounted by people (e.g., lawyers) qualified to judge the performance. Alternatively, reputations can be manufactured, either by a lawyer herself or by a third party (e.g., a legal magazine) that has a financial or other incentive to publicize particular perceptions about the lawyer.

The characterization of reputation as earned or manufactured does not automatically determine how accurate a reputation is, who can access it, and whether it should be meaningful. Nevertheless, understanding how reputation develops is a starting point for identifying its impact. The following subparts thus first identify the different sources for reputation and then consider how those sources affect the manner in which reputation is and should be emphasized.

A. Earned Reputations

The sources for earned reputations typically are previous clients, other lawyers, and (sometimes) evaluating institutions that collect information from third parties, including solicited and unsolicited references. These sources are of varying reliability. Only some former clients are capable of understanding what comprises good performance. Prior clients may not be able to translate the relevance of performance in one kind of case to the demands of a different kind of representation.³⁴ The more legally sophisticated and experienced a

34. Thus, for example, a previous client who is satisfied by the result in his case may

client is, the greater the likelihood that he will produce an accurate and meaningful evaluation of the lawyer's performance.

In contrast, lawyer-evaluators usually have the ability to assess the performance and quality of other lawyers, at least when they have had sufficient opportunity to observe performance. Several factors can undermine the usefulness of lawyer evaluation, however. First, as discussed below, there are various attributes of representation that lawyers value differently. Some lawyers may determine quality of representation based on a track record of loyalty, others on a track record of results, and yet others on a track record of professionalism or civility. Any lawyer evaluation therefore must be probed in order to be useful. Second, lawyer references may be biased, in either direction. When an evaluating lawyer knows the evaluated lawyer and has had legal experiences with her, personal reactions often will color the assessment. Third, if the evaluating lawyer is a competitor, his evaluation may be influenced by the desire to steal the business. In the corporate context, where the client typically depends on house counsel as evaluator, economic incentives also may affect the evaluation;³⁵ house counsel often refer business to their

incorrectly attribute the result to his lawyer's performance or may attach more significance to the lawyer's bedside manner than to his advocacy. The client also may have no basis for determining whether the good performance of the lawyer in his matter (say, a real estate closing) reflects a likelihood that the lawyer will perform well in the subsequent different matter (for example, litigation). The client nonetheless may recommend the lawyer on the general sense that the lawyer did a good job for him. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.2(e) (2005) (prohibiting the use of clients or former clients from being used in any manner in legal advertising); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b)(1)(E) (2007) (prohibiting the use of testimonials in legal advertising); *id.* cmt. (noting that testimonials and endorsements are "inherently misleading"); IND. RULES OF PROF'L CONDUCT R. 7.2(d)(3) (2007) (prohibiting the use of testimonials); William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 65 (2002) (noting that the *ABA Model Rules of Professional Conduct* limit client testimonials because of the fear that such testimonials create "unjustified expectation[s]"); William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 277-78 (2005) (describing criticism by the Antitrust Division of the Department of Justice of advertising rules which prohibit client testimonials); Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 620-21 (1986) (noting that the bar's reluctance to allow testimonials stems from a fear of potential clients' naiveté regarding advertising).

35. See Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 188-89 (2005) (discussing approaches of general counsel in reducing fees charged by outside firms); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 382 (1985) ("General counsel and other top corporate executives are becoming much more sophisticated about the process of buying legal services."); Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or Is it the Past?*, 44 ARIZ. L. REV. 621, 632 (2002) ("As law firms lose more and

former firms based on a tacit continuing relationship between the referring lawyer and the firm.³⁶

There are several kinds of purportedly independent or objective evaluating institutions that can contribute to a lawyer's or firm's reputation. Lawyer referral agencies, for example, sometimes collect information about the competence of lawyers they include in their service—including experience information and letters of recommendations from other lawyers and judges.³⁷ By qualifying a lawyer as a specialist in a field, the referral agency to some extent vouches for the lawyer's competence. Sophisticated consumers will understand that the agency's evaluation is limited and that it speaks mainly to the fields in which a lawyer practices rather than to the quality of representation she provides. Less sophisticated consumers, however, may read more into the referrals.

Other "rating" organizations exist. Martindale-Hubbell, for example, evaluates lawyers and assigns them grades based on experience and references.³⁸

more partners to senior roles in the corporate legal department . . . it will place a greater number of individuals who know the dirty little secrets of law firm billing in the hands of the clients.").

36. See Abraham Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985) (contrasting modern entrepreneurial house counsel with old form of general counsel whose "responsibilities . . . were confined to corporate housekeeping and other routine matters and to acting as liaison (perhaps a euphemism for channeling business) to his former firm"); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 970–71 (2005) (discussing the increasing independence of general counsel in shopping for representation); cf. Eric Herman, *Perelman Wins \$604.3 Mil. From Morgan Stanley*, CHI. SUN-TIMES, May 17, 2005, at 61 (detailing a case in which Morgan, Stanley & Co. lost a big verdict when represented by a law firm engaged by general counsel who was a former partner in the firm).

37. See, e.g., Chi. Bar Ass'n, General Panel Application, <http://www.chicagobar.org/public/attorney/referral/applgen.asp> (last visited Oct. 3, 2007) (requiring three letters of reference from other lawyers to register with Chicago's lawyer referral service general panel) (on file with the Washington and Lee Law Review); Houston Lawyer Referral Serv., Inc., Application for Panel Membership, <http://www.hlrs.org/signupform.asp> (last visited Oct. 3, 2007) (requiring two recommendations from attorneys for registration with Houston's Lawyer Referral Service) (on file with the Washington and Lee Law Review); L.A. County Bar Ass'n, Lawyer Referral and Information Service, <http://www.smartlaw.org/vlris/Irisqual/index.cfm?fuseaction=ViewLRISApplication> (last visited Oct. 3, 2007) (requiring three letters of recommendation from attorneys or judges, Martindale-Hubbell rating, or membership on a section of the Los Angeles County Bar to register with Los Angeles' Lawyer Referral and Information Service) (on file with the Washington and Lee Law Review).

38. See Martindale.com, Peer Review Ratings—The Process, http://www.martindale.com/xp/legal/About_Martindale/Products_and_Services/Peer_Review_Ratings/ratings.xml (follow "Process" hyperlink) (last visited Feb. 26, 2008) (describing the ratings process) (on file with the Washington and Lee Law Review); see also Zacharias, *supra* note 5, at 631–32 (discussing the usefulness of rating publications like Martindale-Hubbell). A lawyer listed with Martindale-Hubbell is either unranked or ranked *CV*, *BV*, or *AV*. Martindale.com, Peer Review Ratings—Explanation, *supra* (follow "Explanation" hyperlink). If a lawyer is unranked, it is because that lawyer is newly admitted to the bar, requested to not have any ratings published, failed to meet

Although these services may be accurate to a point,³⁹ liability and other concerns limit their objectivity. Lawyers who are unsatisfied with their ratings may opt out.⁴⁰ Objective criteria that do not necessarily reflect quality of performance, such as length of membership in the bar, are emphasized.⁴¹ Primary sources—the references that are used to produce the evaluations—are not available to the consumer.

B. Manufactured Reputations

Earned reputation may exist but never be available or sought by clients. Wealthy, experienced, and sophisticated clients often will understand how to identify earned reputation and will make the effort to identify the reputations of potential counsel. Inexperienced or untutored consumers, in contrast, may not know where to look or what information is important. If these potential clients seek earned reputation information, they are likely to rely on word of mouth from friends, colleagues, and other individuals who have had limited experience in evaluating lawyers.

Lawyers therefore have an opportunity to capitalize on the vacuum in information by publicizing themselves, in an effort to create a favorable reputation. The most common mechanism is legal advertising designed to present the lawyer's experience and qualifications in the best light and as established fact. Yellow page and media advertisements, for example,

either or both of the requirements, or was disbarred or suspended. *Id.* The *V* designation indicates a lawyer has met the requirements for the General Ethical Standards rating, which must be satisfied before a lawyer may be otherwise rated. *Id.* The Legal Abilities rating range from *C* to *A*, with *C* being the lowest satisfactory rating. *Id.* The ratings depend heavily on when a lawyer was admitted to the bar. *Id.* A lawyer admitted for three to four years can obtain up to a *CV*, a lawyer admitted for five-to-nine years can obtain up to a *BV*. An *AV* rating is only achievable by a lawyer admitted for ten years or more. *Id.*

39. Even purportedly independent rating publications may build in inaccuracies by assigning ratings based on insufficient information. *See, e.g.,* Complaint, *Browne v. AVVO, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (No. CV7-920) (alleging that an online rating service allows lawyers cooperating with the service to boost their ratings while penalizing lawyers who do not wish to participate or do not cooperate), available at <http://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2007cv00920/144356/1/> (last visited Dec. 11, 2007) (on file with the Washington and Lee Law Review); *see also* *Browne v. AVVO, Inc.*, 525 F. Supp. 2d 1249, 2007 WL 4510312 at *3 (W.D. Wash. 2007) (dismissing the complaint on first amendment grounds but stating: "To the extent that [plaintiff's] lawsuit has focused a spotlight on how ludicrous the rating of attorneys (and judges) has become, more power to them").

40. *See* Martindale.com, Peer Review Ratings, *supra* note 38 (follow "FAQs" hyperlink) (stating that lawyers may request not to have any rating published).

41. *See supra* note 38 and accompanying text (describing the rankings system).

frequently characterize lawyers' characteristics (e.g., "aggressive," "pit bull," "heavy hitter"),⁴² bolster lawyers' reputations with unsolicited or purchased testimonials,⁴³ and refer to past successes (real or imagined)⁴⁴ as a means of establishing the lawyers' competence and quality.⁴⁵

In recent years, electronic matching services have offered themselves as middlemen, purporting to help consumers identify lawyers with qualifications, experience, and quality as a substitute for personal client investigation of earned reputations.⁴⁶ Some of these services may perform meaningful

42. See, e.g., Carl Jones, *Pit Bull Lawyers Reprimanded by Fla. Bar*, DAILY BUS. REV., Apr. 10, 2006, available at <http://www.law.com/jsp/article.jsp?id=1144414533046> (reporting discipline of lawyers who advertised themselves as "pit bulls"); Glenn Puit, *"Heavy Hitter" Will Sue*, LAS VEGAS REV.-J., Mar. 2, 2006, at 1A (reporting a dispute between the Nevada Bar and a lawyer over his use of the term "heavy hitter" in his advertising).

43. See, e.g., Zacharias, *supra* note 16, at 983 (describing lawyer advertisements using testimonials in the San Diego yellow pages).

44. See *id.* at 982–83 (describing lawyer advertisements referring to past successes in the San Diego yellow pages).

45. A controversial modern phenomenon has been the rise of publications that purport to compare lawyers and designate some as superior—using such labels as "Super Lawyer" or "Best Lawyers in America." See *Advertising May Tout "Super Lawyer" Listing and Other Ratings that Meet Certain Criteria*, 23 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 407 (Aug. 8, 2007) (discussing ethics opinions addressing whether lawyers may cite their own designations in these publications in the lawyers' own advertising.).

46. See, e.g., Tex. Sup. Ct. Professionalism Comm., Ethics Op. 561 (2005), reprinted in 68 TEX. BAR J. 1037 (2005) (finding attorney participation in online matching services to be impermissible advertising and solicitation in violation of TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 7.03(b) (2005)). Cf. *Texas Committee Gives Qualified Approval For Participation in Online Matching Service*, 22 A.B.A./B.N.A. LAWYERS' MANUAL ON PROF'L CONDUCT 455 (Sept. 20, 2006) (reporting Texas's modification of Op. 561 so as to allow some internet matching services). The regulators have had some difficulty deciding whether to characterize these services as potentially unlawful lawyer referral services or as legal advertising, because they have elements of both. See, e.g., Letter from Federal Trade Commission to W. John Glaney, Chairman, Professional Ethics Committee for the State Bar of Texas (May 26, 2006), <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf> (last visited Oct. 4, 2007) (asking the Texas Professionalism Committee to clarify its ruling on matching services and advocating allowing internet matching services because they are useful to consumers and foster economically healthy competition); Geri Dreiling, *Surfing for Lawyers: FTC endorses Online Legal Matchmaking*, 5 No. 29 A.B.A. J. EREPORT 4 (July 21, 2006) (discussing the conflict between the FTC's concerns about competition and the Texas disciplinary agency's concerns about legal ethics). The regulators also have had to come to grips with whether particular web sites and publications provide a valuable service in finding lawyers suitable for their particular cases or merely serve as advertising vehicles for the benefit of the lawyers. See David L. Hudson, Jr., *Ratings War: New Jersey Opinion Against 'Super' and 'Best' Listings Riles Publishers*, 5 No. 31 A.B.A. J. EREPORT 1 (Aug. 4, 2006) (discussing N.J. Comm. on Attorney Advertising, Op. 39 (2006), which prohibits lawyers from advertising their standing as "super lawyers" in a published lawyer ratings survey); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 294–95 (2004) (discussing state regulatory bodies that have wrestled with the ethical issues that arise when attorneys use online lawyer

evaluations of the lawyers they list and, in fact, reflect earned reputations.⁴⁷ Others simply list self-identifying lawyers and limit the number of lawyers listed, based on their willingness to pay for the service.⁴⁸ For the most part, the matching services are designed to identify the qualifications of lawyers to handle particular types of cases rather than to identify how those lawyers will approach the cases or the professional rules.

It is important to note that most forms of manufactured reputation target particular categories of potential clients, mainly potential clients who have limited resources for identifying the characteristics of prospective lawyers on their own. Large law firms rarely advertise—at least not in the traditional sense⁴⁹—because their clients are likely to seek firsthand information. Because lawyers need to instigate or participate in the development of the manufactured reputation, the universe of lawyers about whom manufactured reputation information is available will be limited.

Manufactured reputation evidence ordinarily will be self-serving. Both because of its goals and the legal limitations on what may be included, legal advertising typically is short on facts.⁵⁰ It attempts to create a feeling about the

matching services). *Cf.* Karen Donovan, *Street Scene: Some Lawyers Ranked 'Super' Are Not the Least Bit Flattered*, N.Y. TIMES, Sept. 15, 2006, at C6 (discussing publication that lists "super lawyers" in twenty-one states).

As discussed in Zacharias, *supra* note 5, at 638–40, some states allow lawyers to obtain contingent referral fees simply for helping clients find a suitable lawyer. In these jurisdictions, the referring lawyers can be viewed as serving a function as informed middlemen evaluating prospective lawyers on the behalf of clients.

47. See *supra* note 38–40 and accompanying text (describing the Martindale Hubbell rating system).

48. Prompted by new advertising rules adopted by the New York courts, the New York State Bar Association's Committee on Standards of Attorney Conduct recently adopted a new standard stating that "a professional rating is not 'bona fide' unless it is 'unbiased and non-discriminatory,'" and requiring the use of "objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests." *New York State Bar Parts Ways with ABA on Disclosure of Fraud, Screening*, 23 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 581, 582 (Nov. 14, 2007).

49. Elite law firms do advertise, but through less traditional vehicles, such as newsletters, brochures, seminars, and personalized presentations to clients. See Zacharias, *supra* note 16, at 1007 n.160 (discussing advertising by large firms).

50. Legal advertising rules often prevent references to past successes or the use of terminology that suggests the quality of the lawyer, on the basis that such advertising is inherently misleading. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.1 (d) (2006) (describing testimonials or endorsements as false or misleading); CAL. BUS. & PROF. CODE § 6158.1 (2006) (presuming any message as to the result of past cases to be false, misleading, or deceptive); CAL. RULES OF PROF'L CONDUCT 1–400 Standard 1 (2005) (presuming any guarantee or prediction of results of representation to be misleading); FLA. RULES OF PROF'L CONDUCT 4–7.2 (b) (1) (B) (2006) (prohibiting any reference to past successes or results obtained); IND. RULES OF PROF'L CONDUCT 7.2(d) (2) (2005) (prohibiting legal advertising from containing information based on

lawyer in question and to create name-recognition, rather than to provide information. Counter-advertising by competitors is rare.

For purposes of illustration, consider the significance of a lawyer's past achievements in the various forms of reputation. How a lawyer has acted in previous cases of a similar type and the results the lawyer has achieved (and under what circumstances) probably should be important to a potential client. Yet those are fact-sensitive issues. Unless a client is in a position to inquire specifically about prior results, and knows the questions to ask, result information may be meaningless: Large recoveries may have resulted from default judgments, easy fact patterns, or the ineffectiveness of opposing counsel; a high percentage of victories or settlements may reflect a lawyer's practice of demanding too little. Manufactured reputation ordinarily skirts those issues, hoping that the consumer will be persuaded by the surface facts. A consumer can follow up with questions about the results if those are important to him, but only a client who recognizes the issues will do so. Even an intelligent consumer may have difficulty interpreting the data about past success.⁵¹

C. Kinds of Reputations

Suppose a potential client asks for help: "I need a *good* lawyer to handle my matter. Whom do you recommend?" David Luban, long ago, illustrated the existence of many perspectives regarding the meaning of "good lawyer" for purposes of legal ethics.⁵² For purposes of reputation, however, the term has an altogether different universe of possible interpretations. Each will be of significance to different targets of reputation.

One meaning may simply be "competent"—qualified by training and experience to handle a particular matter. This probably is the meaning

past performances).

51. Compare, for example, the real estate context. A realtor may develop a reputation for success in selling houses, but in reality be achieving that reputation by systematically listing housings at too low a price. See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 5–7 (2005) (discussing the economic realities of real estate sales). A sophisticated real estate consumer (or evaluating agency) might be able to identify the inadequate listings by matching them against comparable listings and sales. *Id.* at 7. In the legal context, however, the consumer ordinarily has no "comps" against which to match the lawyer's past successes, because even routine cases often turn on idiosyncratic facts and circumstances.

52. See generally *THE GOOD LAWYER* (David Luban ed., 1984) (presenting an anthology of different perspectives on the lawyer's ethical roles and what it means for a lawyer to be good).

emphasized by lawyer referral organizations and independent publications evaluating lawyers. It reflects an attempt to match clients and lawyers in a superficial sense, identifying a group of practitioners who have some knowledge about the field.

When the potential client asks the question, however, he probably wants more tailored information. Yet it is clear that different clients will consider varying attributes important in qualifying a recommendation as good. Thus, for example, the shy and unsophisticated client who fears the prospect of dealing with a lawyer but has only a limited sense of how lawyers differ in the product they provide most likely will equate quality with service orientation. Is the lawyer likeable? Does she have a good bedside manner? Will she return phone calls and treat the client with respect?

At the other extreme, corporate and other sophisticated clients are less likely to be persuaded by personality. As rational actors, they may consider potential lawyers' reputation for cost. But sophisticated clients ordinarily are prepared to negotiate the cost issue, based on market considerations. Their quest for the "good lawyer" probably will focus primarily on the lawyers' reputation for other specific characteristics important to them.

Particularly if their search for representation is conducted by in-house counsel, sophisticated clients will have some idea of the kind of service they need. Sometimes good service will consist of highly aggressive representation, other times it will require a soft negotiating touch or an aura of respect that regulators or particular judges admire. In advice contexts, the client may simply want the smartest and best-qualified lawyer who will provide the best possible objective counsel—including advice that the client is wrong and should give up its position⁵³—or, in contrast, the client may desire a client-oriented lawyer who will find a way to accomplish

53. See generally Fred C. Zacharias, *Lawyers As Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004) (discussing ways lawyers prevent clients from engaging in misconduct or taking self-destructive positions). It is important to note that sophisticated clients, for psychological reasons (including ego), may or may not be receptive to lawyers who disagree with them or tell them off. When Elihu Root made his famous observation that "half of the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop," he was reflecting on his experience with sophisticated clients. 1 PHILLIP C. JESSUP, ELIHU ROOT 133 (1938); see also RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION 18 (Oscar Handlin ed., 1954) (discussing Root's "business" clientele).

In contrast, unsophisticated, individual clients are more likely to value a friendly bedside manner and an advocate who seems to take the client's side as an ally and friend. See *supra* note 34 and accompanying text (describing the lawyer's role); see also Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065-76 (1976) (describing the lawyer's role in terms of friendship).

management's desires, regardless of the wisdom or legality of the result. The key for these sophisticated clients is that they know what they want, know what questions to ask about lawyers they might hire, and have the resources to obtain and evaluate the information.

Judges, regulators, and bar-related evaluators may attribute yet another meaning to goodness. Certainly in evaluating judicial candidates, most evaluating committees are heavily influenced by candidates' history of "professionalism." Lawyers might be evaluated similarly. Are they respectful of others, civil in dealings with the bar, involved in professional activities, mindful of the rules that govern lawyers, and free of the taint of disciplinary sanctions? Indeed, regulators might consider the good lawyer to be the opposite of the person some clients would consider good. A judicial or quasi-judicial officer, for example, may deem the best lawyers to be those who take only reasonable positions, screen their clients' desires, and incorporate the decisionmakers' needs.⁵⁴ The client, in contrast, might expect the good lawyer to press every possible claim to the hilt.

What is clear is that targets of reputation may seek a variety of attributes, and the characterization of a lawyer as qualified or good will not always deliver the information the client wants or needs. In Milton Regan's terms, "the ideal of the good lawyer contains elements in potential tension, whose salience may differ depending on the specific practice setting in question."⁵⁵ Clients are not all the same in their capacity to (1) identify what characteristics are important; (2) assess a lawyer's possession of the characteristics; (3) assess reputation information; and (4) search for and find pertinent information. The least capable clients are both handicapped in ascertaining facts and the most likely to be misled by any reputation information they obtain. Sophisticated clients will be able to ask the questions that help them accurately identify lawyers with reputations for the specific characteristics they desire.

D. The Accuracy of Reputations

This Article has already noted that not all reputation information is equally accurate. Manufactured reputation tends to be less objective than earned reputation, but the quality of earned reputation can be uneven as well. Because

54. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) (identifying a lawyer's function as including screening the positions the client desires to take); see also Painter, *supra* note 21, at 1399 (discussing expectations regulators may have of lawyers before them).

55. Regan, *supra* note 19, at 550.

manufactured reputation is tailored by the lawyer herself or the institutional manufacturer for the purpose of encouraging clients to hire the lawyer, it is inherently suspect. Manufactured reputation often encompasses self-reporting by or self-evaluation of the attorney. The factual premises underlying manufactured reputations ordinarily will not be available for testing.

In the case of both manufactured and earned reputations, the accuracy of the reports given to the potential client (or other target) will depend significantly on the evaluation abilities of the person making the recommendation or on whom the recommender relies. Reputations stemming from lawyer or judicial evaluators may be more accurate than reputations developed by lay consumers of legal services. But that is true only to the extent that the recipient can understand the significance of the reputation—whether the reputation reflects qualifications, quality of service previously delivered, personality, or professionalism.

E. Signaling and Its Effects

At one level, the mere existence and maintenance of a particular reputation represents a signal about the lawyer. The lawyer may not need to do more in order to convey to the client how she will act or respond to ethical constraints in particular circumstances.

Let us suppose, however, that additional information is required—either because a client wants it or because the general reputation is insufficient to enable firm predictions about behavior. It is here that the differences among clients will be most significant. Sophisticated clients will know what is important for their representation. They will know what questions to ask (both of the lawyer and her references). And they will often be in a position to interpret the information they receive. Individual and inexperienced clients may know little more than that they desire good representation.

A lawyer's desire, or willingness, to provide signals about her approach to legal matters may depend on the client's ability to impose consequences for the lawyer's failure to live up to her reputation. Clients can impose consequences in a variety of ways. Repeat clients with fee-generating cases can withdraw future business. Some clients can damage their lawyers' future reputations among potential clients who are members of their community. Clients in visible cases can send their own signals of satisfaction or dissatisfaction.⁵⁶

56. See *infra* note 110 and accompanying text (noting that it may be possible for the profession to develop mechanisms that facilitate signaling through information supplied by former clients).

The most obvious distinction is between the power of a large corporate client, at one extreme, and the power of a beleaguered individual criminal defendant, at the other. A lawyer's ability to obtain future business ordinarily will depend upon her satisfying the first client, but not the latter.⁵⁷ This calculus changes in highly publicized cases, however; a lawyer may aggressively pursue the client's interests in a publicized matter (e.g., an O.J. Simpson case) even if the client is indigent and unsophisticated because the client's dissatisfaction may become known to prospective clients through the media.

Consider a situation in which the professional rules grant lawyers discretion, the exercise of which may be important for the client's future. Most codes, for example, allow lawyers to disclose certain confidential information and, in the organizational context, allow lawyers to report information up the ladder instead of pursuing other remedies for potential misconduct.⁵⁸ Let us further suppose that the client (corporate or individual) possesses, or will possess, confidences that the lawyer might be able to disclose or report under these permissive rules. The general reputation of the lawyer is insufficient to allow a firm prediction that the lawyer will keep the information secret.

The sophisticated client will understand that this may become an issue and ask the lawyer what she would do, perhaps in a hypothetical scenario. The lawyer who is both concerned with obtaining the business and keeping the client happy will know that the issue may be of significance to the client, so she may steer the initial discussion to the subject of permissive disclosure. Although the lawyer may not be able or willing to promise secrecy or nonreporting, she can point the client to previous cases in which she has been aggressive on the client's behalf. She may even provide references.

If the client is unsophisticated, however, the lawyer usually has an incentive to keep the client in the dark. Keeping the disclosure option open will give the lawyer power over the client later on, should an issue arise.⁵⁹ Especially if the client is unlikely to be a recurring client and is not in a position to spread negative information about the lawyer's practices among the lawyer's future client population, the lawyer may place less of an emphasis on pleasing the client *ab initio*.

57. The practices of many criminal defense attorneys, for example, depend largely on court appointments that do not depend on client satisfaction.

58. See *supra* note 11 and accompanying text (describing the up-the-ladder reporting model).

59. See Zacharias, *supra* note 7, at 499 (noting that individual clients will be "most prone" to coercion by lawyers to act in particular ways).

It is important to notice what these scenarios suggest for the permissive professional rules. It is unlikely that the drafters intended the discretionary provisions to be used as a means for some lawyers to attract business in exchange for bartering away discretion. More likely, the rulemakers had in mind an introspective process under which, in each situation covered by a permissive rule, a lawyer would weigh the factors underlying the rule and the exception; in other words, balance the factors militating in favor of disclosure against the valid systemic and client-centered concerns that favor maintaining confidentiality.⁶⁰ The ability of lawyers and clients to negotiate about the matter, using reputation and other methods of signaling, undercuts the effectiveness of most permissive rules in protecting societal interests that the client does not share.⁶¹

Reputational signaling to adversaries and third parties often is more difficult, except at the extremes. How is an administrative agency, for example, able to discern a lawyer's reasonableness? Typically, this reputation must be developed through experience with the agency. It cannot be manufactured.

Sometimes, however, a lawyer can signal her approach to an adversary directly. She might say, for example, "I will negotiate within the range of reasonable results, so long as you do the same. But if you take an unreasonable position, I will litigate this case to the hilt."⁶² This, of course, is a threat, not a signaled reputation. But the threat has relatively little value if the adversary does not perceive it to be real. A lawyer's ability to point to past cases in which the threat has been honored can be significant.

60. See Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 59 (2005) (suggesting that confidentiality exceptions require a balancing based on "professional conscience" that incorporates the spirit of the rules). There may be some permissive provisions, however, in which the code drafters really do intend to accord lawyers unfettered discretion because those rules implicate mainly lawyers' own interests, rather than those of the clients, third parties, or the legal system. See Green & Zacharias, *supra* note 8, at 298–99 (discussing various justifications for different permissive rules).

61. See Regan, *supra* note 19, at 550 (noting that "concern for reputation provides more protection against lawyer misconduct for clients than it does for third parties").

62. Cf. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984) (suggesting that a sequential strategy in which a bargainer adopts his opponent's bargaining approach tit-for-tat can ultimately lead to a cooperative strategy by negotiators); 1 KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT: PLAYING FAIR* 194–203 (1994) (analyzing the Axelrod conclusions); Peppet, *supra* note 23, at 516 ("[I]t is not at all clear that tit-for-tat dominates other strategies, nor, by analogy, that problem-solving will, over time, do better than hard-bargaining. . . . [M]uch depends on the initial distribution of strategies across a population [of lawyers].").

IV. Learning About Reputation

Not everyone will be sanguine about the various uses of reputation. Certainly, the implementation of reputation as a mechanism for circumvention of professional constraints on lawyers is troubling. Nevertheless, the various effects of reputation information cannot be wished away. For society to make a reasoned decision about its capacity to respond to these effects, it must first assess the nature and magnitude of reputation's impact and then identify the quarters in which the impact comes into significant play.

A. What We Should Know for Writing and Enforcing the Professional Rules

For a variety of practical and psychological reasons, ethics code drafters typically rely on fictions.⁶³ The drafters may be experienced in the realities of practice but they write the codes, in part, to put a good public face on the bar.⁶⁴ The codes, and discussions of reforms, tend to assume that most lawyers act professionally, desire to serve the public, and obey code mandates—both strict and the hortatory mandates. The cynical view that lawyers' actions often are driven by competition and personal, financial, or even venal considerations, while understood, is rarely discussed openly or made a foundation of ethics rules. Thus, when the code drafters accord lawyers discretion to serve moral or societal interests,⁶⁵ to protect client interests over their own,⁶⁶ and to screen client activities,⁶⁷ the drafters often posit a fictitious world in which lawyers

63. See generally Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2003) (discussing fictions employed in legal ethics regulation).

64. There are many reasons for this perspective. Conceptualizing lawyers as professionals makes the drafters feel good about themselves. It may engender trust among clients. Most importantly, perhaps, it may help forestall external regulation of the profession, a goal the code-drafting bar has long pursued. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 10 (2001) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.").

65. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (providing permissive exceptions to attorney-client confidentiality); *id.* at R. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

66. See, e.g., *id.* at R. 1.7(a)(2) (ordinarily prohibiting representation when "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer").

67. See, e.g., *id.* at R. 3.3(a)(3) ("A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.").

honor the drafters' expectations of honest introspection and independent judgment, clients do not influence lawyers' objectivity, and lawyers do not care about the effect of implementing discretion on their ability to compete for business.

In practice, this Article's analysis of the interaction between rules and reputational signaling suggests the following. If analyzed on a purely economic (or "rational actor") basis, the likely effect of promulgating permissive professional rules is to create "strategy space" in which competitive lawyers can play "reputation games."⁶⁸ In other words, permissive rules enable lawyers to decide whether to signal consumers their intention to obey or disregard discretion granted in the rules. Conversely, in the abstract, promulgating mandatory requirements or prohibitions eliminates the strategy space because lawyers must concede that they, like their competitors, are bound to a particular course of conduct. The degree to which mandatory rules have this effect, however, may depend both on whether the rules contain implicit discretion that actually allows different responses to the rules (e.g., prosecutors must serve justice)⁶⁹ and whether the rules are enforced sufficiently to inform lawyers that the requirements or prohibitions are meaningful.⁷⁰

Here is a thought experiment. Suppose the code drafters decided to address the real world. What would they need to learn about lawyers and the role of reputation in order to write meaningful rules and set the stage for enforcement?

We have already noted that reputation is used in several different ways. To the extent reputation information is the only mechanism through which some clients can learn about potential lawyers, the drafters should want to ensure the accuracy of reputation evidence. In part, that is what they seek to do

68. This phraseology is that of my colleague, Professor David McGowan.

69. Many of the professional rules, while technically not permissive, acknowledge a range of choice. See Green & Zacharias, *supra* note 8, at 277 n.55 (arguing that some rules grant discretion implicitly "by allocating authority to lawyers to make a category of decisions without specifying the limits on that authority"). These include rules that say nothing about a subject, rules that require lawyers to act in a certain way "unless" certain factors are present, rules that grant general authority to lawyers to act without specifying how, and rules that are simply too vague to identify particular courses of conduct.

70. Rules governing advertising for legal services, for example, are clear and mandatory. Yet because they are rarely enforced, many lawyers are willing to disobey these rules. See Zacharias, *supra* note 16, at 995–96 (discussing lawyers' willingness to violate the legal advertising rules). Lawyers have a history of circumventing other rules that are underenforced, such as the rules requiring reporting of lawyer misconduct, prohibiting the assumption of clients' costs in class action cases, and calling for the expedition of litigation, as well as unenforceable rules, such as the requirement that prosecutors serve justice. See *id.* at 997–1001 (discussing underenforced and unenforceable rules).

by imposing constraints on manufactured reputations, particularly reputations manufactured through legal advertising. Bar limitations on manufactured reputations, however, should be developed in light of real facts about clients' alternatives for obtaining information about prospective representation. If particular types of clients have no access to other forms of reputation, code limitations on manufactured reputations may worsen the problem of insufficient information. The absence of accurate information might justify loosening advertising rules and hoping the market (including counter-advertising) will produce better results.⁷¹ Alternatively, the absence of information might provide a compelling reason for the bar to get into the business of educating potential consumers, gathering and disseminating accurate reputation information on its own,⁷² or focusing disciplinary resources on attorneys who misstate their qualifications.

Suppose, after collecting data, the bar determines that individual consumers selecting lawyers rely too much on inaccurate manufactured reputation information because they have no easy access to earned reputation information. One scholar has suggested that the bar could fill the vacuum by hosting a website dedicated to each lawyer in which clients could post feedback and discuss their experiences with that lawyer.⁷³ Some bar associations actually have done the opposite—prohibiting attorneys from posting testimonials by prior clients on their websites⁷⁴—a policy that derives from a realistic fear that lawyers will select from among client comments and post only the favorable. If, however, lawyers were required to identify the bar-hosted website in *all* retainer agreements (i.e., telling clients that they can post feedback after the

71. See Colleen Petroni, Comment, *Third-Party Ratings as Modern Reputational Information: How Rules of Professional Conduct Could Better Serve Lower-Income Legal Consumers*, 156 U. PA. L. REV. 197, 226 (2007) (arguing that because "many people do not have access to firsthand referrals to assist them in finding lawyers . . . rules of professional conduct should be revised in order to allow states to better evaluate and promote legitimate third-party rating systems").

72. See Zacharias, *supra* note 5, at 631–40 (outlining possible mechanisms for bar involvement in providing consumers with information about lawyers).

73. David McGowan, Legal Ethics Forum: State Bar Websites and Reputational Feedback (June 4, 2006), http://legalethicsforum.typepad.com/blog/2006/06/state_bar_websi.html (last visited October 15, 2007) (on file with the Washington and Lee Law Review).

74. ARK. RULES OF PROF'L CONDUCT R. 7.1(d) (2005) (treating a lawyer's communication as false or misleading if it contains a testimonial); OHIO CODE OF PROF'L RESP. DISCIPLINARY RULE 2-101(A) (3) (2003) (prohibiting the use of client testimonials in any public communication); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02 cmt. 4 (2005) (prohibiting testimonials from past clients); cf. Joan C. Rogers, *New York Proposes Sweeping New Limits on Lawyer Advertising, Including Internet Ads*, 22 A.B.A./B.N.A. LAWYER MANUAL ON PROF'L CONDUCT 318 (June 28, 2006) (reporting New York's proposal to forbid the use of all testimonials).

representation is concluded), the danger of self-selected testimonials would be minimized. Surprisingly, perhaps because of a fear of defamation liability, no jurisdiction has implemented this or any other informational forum that focuses seriously on lawyers' reputations.⁷⁵ Typically, bar associations limit themselves to developing referral services that rely on objective qualifications alone.⁷⁶

Before pursuing any course, the bar truly needs to understand how particular communities of clients find counsel. At a minimum, collecting information about the use of manufactured reputations can inform the bar about which communities need assistance in obtaining meaningful reputation information. Such data would enable code drafters to understand when idealistic restrictions on advertising help and when they conflict with clients' abilities to identify and choose appropriate representation.

The drafters also ought to become more interested in reputations that affect lawyer's responses to the professional rules. Before adopting permissive ethics provisions, for example, code drafters should want to assess the extent to which lawyers exercise discretion based on personal incentives, rather than based on the spirit of the rules. In other words, the drafters should be concerned with the extent to which the rules actually have an impact other than creating the competition games discussed above.⁷⁷ That is not an easy analysis, however. If the bar surveyed lawyers directly, they all would claim good faith in implementing the professional standards. In fairness, it might be difficult for

75. Issues relating to the risk of liability, however, appear to have been worked out reasonably well by nonlawyer internet sites that depend on feedback to protect consumers, such as e-Bay.

76. There are, of course, practical issues that would need to be worked out. For example, competitors may be tempted to supply negative comments, a problem that might demand some editorial oversight and control. Clients may risk waiving attorney client privilege through their commentary, an issue that might necessitate the provision of appropriate disclaimers and advice.

More serious may be the objection that client observations and reports are inherently misleading and inaccurate, because clients do not understand what good performance by lawyers really is. Especially if the lawyers discussed on the site have a right to respond, consumers reading the reviews may have difficulty gauging whether a lawyer or former client is writing accurately. See Eric Goldsmith, Comment to State Bar Websites and Reputational Feedback Posting (June 4, 2006), http://legaethicsforum.typepad.com/blog/2006/06/state_bar_websi.html (last visited Oct. 15, 2007) (questioning the practical viability of the feedback option) (on file with the Washington and Lee Law Review). My intuition is that, while single clients may assess their reputation inaccurately, on average a group of former clients will gauge performance fairly well. The feedback mechanism also will have the side benefit of encouraging lawyers to discuss with disappointed clients the reasons for the disappointing results. If, however, bar regulators are convinced that clients truly are unable to assess their lawyers' performance, that is more reason for the bar to develop alternatives to the market for delivering meaningful reputation information to consumers.

77. See *supra* notes 60–67 and accompanying text (discussing the formulation of permissive rules and their likely effect of creating "reputation games" among lawyers).

lawyers to even answer the question of how they balance competing considerations in the abstract, in the absence of the pressures imposed by the existence of actual clients and concrete consequences of the lawyers' actions.

Nevertheless, it should be possible to gather evidence regarding lawyers', or categories of lawyers', *reputations* for exercising discretion objectively because reputation evidence would come from third parties and be based on past conduct. The results might not be uniform throughout the bar. As this Article has suggested, different categories of attorneys probably respond to grants of discretionary authority in a variety of ways. While one might speculate that large-firm corporate attorneys and criminal defense counsel emphasize client-orientation most, that currently remains an unresolved empirical question—one to which the code drafters should know the answer before formulating rules. Only with a firmer grasp of the facts regarding various lawyers' reputations for ceding or selling objectivity can the drafters make informed choices about whether to avoid particular permissive provisions, narrow the range of discretion, or accord different options for lawyers practicing particular kinds of law or with particular kinds of clientele. More importantly, empirical evidence would inform the regulators regarding any need to *enforce* the rules rigorously within specific categories of practice, which may in turn call for the formulation of rules lending themselves to enforcement in those categories.⁷⁸

Mandatory code provisions present a different conundrum. Depending on how they are drafted and enforced, professional mandates can deter misconduct. They also can incorporate messages that serve as valuable public relations tools; for example, prosecutors *must* serve justice and lawyers *may not* accept cases in which their personal interests conflict with client interests. The presence of strict ethics rules help fend off external regulation.⁷⁹ It enables the bar to attribute lawyer malfeasance to the occasional bad actor who disregards the profession's standards.

78. See Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 251–55 (1993) [hereinafter *Specificity*] (discussing the relationship between the phrasing of professional rules and their enforceability); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1367 (1995) [hereinafter *Reconciling Professionalism*] (discussing mechanisms for making particular rules more enforceable).

79. See *supra* note 65 and accompanying text (asserting that evidence supporting the claim that having rules of ethics helps avoid government regulation lies in the preamble of the *Model Rules of Professional Conduct*). Indeed, in some contexts, the U.S. Supreme Court has explicitly relied on the potential for discipline as a grounds for avoiding further regulation of lawyers. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (declining to hold prosecutors subject to civil legal action partly on the basis that prosecutorial misconduct is deterred by the potential for professional discipline).

Yet, if such rules are to be meaningful deterrents, the drafters again need information. To what extent do lawyers really fear mandatory rules? Lawyers will not, and perhaps cannot, respond to that question in a meaningful way when asked directly. Their actions and their reputations, however, can provide clues to the answer. Some empirical evidence already suggests that lawyers' desire to attract clients often trumps their willingness to follow mandatory legal advertising rules.⁸⁰ Similarly we have seen in the corporate context that reputational signaling between clients and lawyers can undermine the requirement that lawyers remedy potential corporate misconduct.⁸¹ Rather than promulgate rules based on abstract images of how lawyers respond to professional constraints,⁸² the drafters would do well to collect concrete information about whether particular kinds of mandatory rules produce, or are likely to produce, compliance and the degree to which the level of the rules' enforcement affects the rules' influence on lawyer behavior.⁸³

How do these conclusions translate into actual regulation? Milton Regan has suggested that reputational concerns sometimes serve as a disciplinary force.⁸⁴ To carry his analysis one step further, code drafters should consider the possibility that the existence of reputational concerns obviates the need for some traditional rules that target categories of lawyers already concerned with maintaining reputations consistent with the rules.⁸⁵ Thus, for example, lawyers

80. See generally Zacharias, *supra* note 16 (analyzing lawyer responses to legal advertising rules on an empirical basis).

81. See Zacharias, *supra* note 7, at 474–86 (analyzing the practical impact of lawyer reporting rules in the corporate context); *cf.* Zacharias, *Specificity*, *supra* note 78, at 256 (noting that, in the prosecutorial context, the requirement that prosecutors serve justice is mandatory but written so vaguely as to limit the impact of the codes).

82. In the past, the code drafters have relied on a variety of images of lawyers, ranging from lawyers as businessmen to lawyers as self-sacrificing, introspective professionals. See Zacharias, *supra* note 2, at 75–85 (cataloguing and discussing the various images of lawyers).

83. It has already been demonstrated empirically that lawyers fail to obey even mandatory legal advertising rules and that this has negative effects on professional regulation as a whole. See Zacharias, *supra* note 16, at 1005–12 (discussing the ramifications of not enforcing ethical rules). Likewise, it would not be surprising to find as an empirical reality that, despite the existence of rules in some jurisdictions allowing corporate lawyers to disclose or report corporate misconduct to regulating authorities, few have ever actually disclosed a company's confidences.

84. Regan, *supra* note 19, at 559.

85. *Cf.* Ribstein, *supra* note 31, at 1714–15 (noting that a lawyer's desire to maintain a reputation for trustworthiness among clients may be prompted by economic demands as well as by the existence of professional rules); Wendel, *supra* note 30, at 1568 ("[T]here are non-legal, generally informal mechanisms available by which lawyers control one another, from within the profession, rather than relying on formal, legal, externally imposed systems of rules."). *But see id.* at 1590–91 (noting reasons why reputation might not be as effective in controlling lawyers as other persons, including the fact that what is considered honorable on the part of lawyers in one

of sophisticated clients arguably will keep client confidences regardless of whether the rules require it, so long as the clients who can assess lawyers' reputations desire it and the lawyers will not be penalized for keeping secrets.⁸⁶ The lawyers also will naturally satisfy other client-centered principles—such as avoiding conflicts of interest, communicating with clients, and deferring to clients' choices regarding objectives and important means—because failing to do so would negatively affect their reputations among potential clients who can inform themselves about reputations. In contrast, lawyers who deal with clients who are not repeat players or clients who cannot readily obtain information about lawyers' propensities for client-orientation have incentives to decide whether to maintain confidences or other client interests on a case-by-case basis.⁸⁷ These lawyers may even seek to adjust the existing decision-making authority in their own favor.⁸⁸

The existence of reputational signaling in some circles, therefore, might cause the drafters to downplay the importance of client-centered behavior in those circles, but not in others. In other words, there may be less need to fortify confidentiality principles in the corporate context—indeed, society's true interest may lie in creating incentives for lawyers operating in that context to exercise discretion in the direction of disclosure.⁸⁹ In contrast, in the representation of the unsophisticated individual client, the opposite may be true. The dichotomy can justify varying approaches in the basic confidentiality

jurisdiction may be considered dishonorable in another).

86. See McGowan, *supra* note 12, at 1833–37 (analyzing the ways in which lawyers' competing incentives will determine when and whether they implement a confidentiality exception).

87. See *supra* note 19 and accompanying text (discussing the incentive for lawyers to keep the disclosure option open when dealing with unsophisticated clients).

88. Thus, for example, lawyers for unsophisticated clients may include provisions in their retainer agreements that grant the lawyers authority to make certain decisions ordinarily vested in clients or to settle a case at certain levels in the lawyers' discretion. In the corporate context, in contrast, lawyers often will not even want decision making authority because that will have effects on when and how their sophisticated client will use their services. See Zacharias, *supra* note 7, at 466–74 (discussing when lawyers would want the authority to coerce corporate clients to act in a particular way).

89. Indeed, Professor William Simon has suggested that modern developments effectively have already eliminated corporate attorney-client confidentiality. William H. Simon, *After Confidentiality: Rethinking The Professional Responsibilities of the Business Lawyer 1* (Columbia Law Sch. Pub. & Legal Theory Working Paper Group, Paper No. 119, 2006), available at <http://ssrn.com/abstract=924409> ("The bar's claims about corporate confidentiality are at best unsubstantiated and at worst fraudulent Corporate confidentiality is dead"); see also Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 159 (1993) (arguing in favor of abolishing attorney-client privilege for corporations).

rules and rules governing organizational lawyers. It may justify distinctions in other areas of regulation as well.

It is important not to overstate these conclusions. Even lawyers for sophisticated clients sometimes have incentives to preserve reputations for independent, objective behavior. Ronald Gilson has suggested that transactional lawyers in large firms create value for both their clients and themselves by serving as intermediates between opposing clients⁹⁰ and, in effect, providing a reputational bond for the warranties their clients make.⁹¹ Lawyers cannot charge a premium for providing this service if they are perceived as a shill for their clients.⁹² Likewise, lawyers who appear before the same judges and regulators may depend upon their reputations for honesty or fair dealing in order to obtain good results.⁹³ These lawyers might act aggressively for clients but would not lie to third parties or regulators even if the rules did not forbid representation. The same is likely to be true for most lawyers who practice in a regime in which they must deal with repeat players.

The importance of identifying the hard facts about reputations is highlighted by a conundrum Gilson poses. Let us assume that lawyers, or at least some lawyers, value the opportunity to act as gatekeepers of client misconduct. In a competitive world, Gilson asks why clients ever would allow lawyers to serve the public interest over their own.⁹⁴ Gilson responds that "perfect socialization is one answer";⁹⁵ if all lawyers automatically declined to consent to client control, lawyers would have the upper hand. Alternatively, Gilson posits that some mechanism might prevent clients from "finding those

90. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 872 (1990) (noting that "important elements of professional standards serve to cast lawyers in the role of enforcers of agreements among clients").

91. See generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984) (discussing the value of business lawyers in reducing transaction costs in negotiations); Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15 (1995) (refining Gilson's hypotheses).

92. Okamoto, *supra* note 91, at 23 ("By joining in the client's assurances, [lawyer] intermediaries stake their reputations on behalf of the client. The client in turn pays for this service in the form of premium billing rates or commissions charged by the higher reputation firms.").

93. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 565 (1994) ("Litigators are profoundly concerned about their reputation with judges and are typically very hesitant about doing anything to damage their reputation with a judge before whom counsel is likely to appear many times in the future.").

94. Gilson, *supra* note 90, at 888.

95. *Id.* at 889.

lawyers who will provide the desired service"⁹⁶ or that uncertainty about the quality of lawyers might prevent clients from unduly emphasizing the gatekeeping issue in the selection process.⁹⁷ Gilson, however, concludes that, over time, "information asymmetries" have decreased because, among other reasons, sophisticated clients have learned to use in-house counsel to select representation and these in-house counsel are in a position to assess both quality and reputation.⁹⁸ This, essentially, has shifted the power in the relationship to the demand side of the equation.

Gilson's analysis, however, focuses only upon corporate practice,⁹⁹ and it reaches speculative (though highly plausible) conclusions about the lawyer selection processes.¹⁰⁰ Even under Gilson's analysis, reputation is a significant element in the process. The nature of the selection process among clients who do not have the resources of the in-house counsel is unclear.

It therefore remains important for purposes of regulating sophisticated and unsophisticated clients alike for the code drafters to know, or at least to develop an accurate intuition about, when reputations matter to lawyers and what the desired reputations are. Even in the absence of empirical evidence, it is clear that some lawyers value a reputation for extreme loyalty to clients, others value a reputation for objectivity, and yet others emphasize a reputation for fair dealing or the willingness to acknowledge third party or regulatory concerns. Moreover, because lawyers value multiple reputations, which reputation they will emphasize may depend on context—with the nature of the case, the nature of the client, and the extent of the short and long-term rewards for making a particular selection. The existence of these variances suggests that code drafters cannot realistically predict the impact of their regulatory efforts without a refined understanding of how and when reputations come into play.

Providing an empirical basis for regulating with a view to lawyers' practical incentives rather than ideals to which the drafters assume the bar aspires can be especially valuable because code drafters themselves often come from a segment of the bar that is interested, in an academic sense, with

96. *Id.*

97. *Id.* at 899.

98. *Id.* at 902–03.

99. Other academic works that address the effects of reputation on client behavior on client and lawyer decision-making similarly focus on the corporate context. *E.g.*, McGowan, *supra* note 12; Painter, *supra* note 14; Ribstein, *supra* note 31.

100. Interestingly, Gilson points to the use of sophisticated house counsel for selecting external representation as a key reason why clients are able to select lawyers on their terms. There are, however, some agency risks in relying on house counsel, including their natural inclinations to select lawyers with whom they have dealt in the past or with whom they maintain an implicit, mutually beneficial understanding (e.g., mutual praise to the nonlawyer officers).

professional responsibility issues. These drafters tend to expect that other lawyers share their interest and thus write the rules with their own concerns in mind. When, for example, code drafters adopt a discretionary future harm exception to confidentiality, they typically assume that the rest of the bar shares their concern with third party and societal interests and that lawyers sometimes are willing to forfeit competitive benefits to safeguard those interests. Empirical information about lawyers' reputations, however, might show the contrary—that many lawyers do not care about external interests at all.¹⁰¹ Such information is a prerequisite to a reasoned decision on whether lawyer self-regulation, or particular aspects of self-regulation, makes sense.

B. What We Should Know in Order to Assist Clients in Obtaining Valid Reputation Information

This Article has already noted the important ways in which clients (particularly potential clients), adversaries, and regulators rely upon reputation information. Yet that information is not equally available to all participants in the legal system, nor can different types of clients receive equally accurate information. In some ways, the legal ethics codes interpose roadblocks to the dissemination of reputation information.¹⁰²

If we are willing to accept a world in which reputation information serves important functions in the selection and use of counsel, the information arguably should be made as accurate and available as possible.¹⁰³ To the extent the professional codes depend upon lawyers adhering to the professional rules and assume that clients sometimes seek lawyers who adhere, the bar has yet

101. Regan, *supra* note 19, at 555 ("[T]he commitment to preserve a certain kind of reputation is not determined by individual character. It also will be shaped in important ways by . . . the pressures, incentives, and rewards that attend upon being known as a certain kind of person.").

102. The codes, for example, limit legal advertising, communications in the context of client solicitation, and the ability of lawyers to communicate with represented parties about their attorneys.

103. In discussing the ways lawyers' reputations affect the ability of adversaries and the legal system as a whole to react appropriately to frivolous lawsuits, Robert Bone notes:

[A] reputation mechanism is viable . . . only when conditions are favorable to the formation of a reputation market. . . . An effective reputation market also requires clients who know the reputations of different law firms and can shop around. Large corporate clients are likely to fit this profile, but individuals are not. The desire to attract corporate business might be enough inducement for some firms to compete over reputation, but not firms, such as the plaintiff's tort bar, that specialize in representing individuals.

Bone, *supra* note 21, at 573.

another interest in facilitating the development of reputation information.¹⁰⁴ Before the bar can support the dissemination of such information, however, it needs to gather empirical evidence regarding clients' methods of obtaining and using reputations.

This Article, for example, has only been able to speculate about how clients receive information about lawyers. It would be useful for regulators to know not only which clients seek background information about potential representatives but also where clients look. To what extent do potential clients—and which potential clients—consult publications about lawyers and rely on references, news reports, or word of mouth? More importantly, how do they consult the sources? Do they consult only friends or also other objective, knowledgeable sources?

Equally important in designing a mechanism for the development of useful information about lawyers is identifying the attributes that potential clients, of differing types, deem important in hiring and using attorneys. Are clients actually seeking information about relevant characteristics? To the extent the evidence shows that categories of clients desire particular kinds of useful information but have difficulty obtaining it, the bar might initiate or support information-delivery services;¹⁰⁵ how easy the development of such services will be may depend on the characteristics that the clients consider significant.

In contrast, if the evidence demonstrates that particular kinds of clients do not understand what qualifications of lawyers are important, that would suggest a need to at least require lawyers to discuss their qualifications and possible alternative representation at the retainer stage.¹⁰⁶ Alternatively, the bar itself could respond by developing mechanisms that identify and explain the significance of lawyers' training and experiential qualifications—through bar referral or information services or by supporting the work of independent publications in gathering the pertinent information. Providing information about the quality of lawyers' past performance would be more difficult, but it is conceivable that courts and bar associations might get into the business of grading attorneys.¹⁰⁷

104. There is a variety of possible mechanisms. This Article has already mentioned the development of a bar-hosted feedback site for all lawyers. McGowan, *supra* note 73. Elsewhere, I have discussed such alternatives as bar grading of lawyers or cooperation with publications that produce neutral lawyer evaluations. Zacharias, *supra* note 5, at 631–40.

105. See, e.g., Zacharias, *supra* note 5, at 634–37 (discussing ways in which the bar might assist potential clients in comparing the qualifications of lawyers at the retainer stage of representation).

106. See *id.* at 624–30 (analyzing the obligations of lawyers to prospective clients).

107. See *id.* at 631–34 (discussing possible grading mechanisms).

If, however, clients are most concerned with obtaining information about lawyers attitudes, approaches, aggressiveness, and willingness to circumvent professional constraints, that presents normative issues for the bar to resolve. As a practical matter, collecting objective information about these characteristics for lawyers across the board can be difficult. More importantly, the bar may not want clients to emphasize, or even know about, some or all of these characteristics. If some clients have access to reputations that provide the information but other clients do not, the bar may need to consider creating counter-incentives to developing particular types of reputations—either by increasing rule enforcement against certain categories of lawyers or by reformulating rules that allow such reputations to develop.

The bar may, alternatively, simply wish to downplay the importance of reputations regarding lawyer approaches for fear that highlighting the issues will undermine ideals of objectivity contained in the professional codes. At one level, the bar might prefer to accept the existence of reputations for nonobjective behavior among communities of sophisticated clients, but to remain silent where other communities of clients are affected. An empirical investigation might, however, suggest that unsophisticated clients also are influenced by reputations for extreme client-centered lawyering, yet rely mostly on inaccurate manufactured reputations that lead such clients not to the best lawyers (in any sense), but rather to lawyers who advertise in ways that appeal. Under this scenario, the bar arguably should strike the balance in favor of supporting alternative accurate information sources rather than hoping the problem confines itself.

To the extent the bar is able to educate clients about the significance of client-centered behavior and facilitate clients' ability to identify lawyers' reputations for this behavior, code drafters reasonably might consider deregulation or justify limited enforcement of the rules. In other words, when lawyers have incentives to act in a client-centered fashion even without the rules, then the importance of client-centered rules is diminished.

The above analysis suggests, again, that before pursuing any course, the bar needs information about how reputation information is provided and used. How much do the mechanisms vary among categories of clients and from case to case? Would the information particular categories of clients desire change if the clients themselves were educated better (by the bar or by lawyers required to provide particular information at the outset)? Would what clients want and what lawyers are willing to offer in order to compete for business change if the rules were reoriented?

C. Obtaining Reputation Evidence

This Article has noted four areas of information about lawyers that may be relevant to clients and regulators: qualifications (including training and experience), competence, professionalism, and aggressiveness. The first consists of objective information that bar organizations and other evaluators (e.g., publications about lawyers) can easily obtain.

Competence is a more subjective factor. Any rating of, or reputation for, competence should refer not only to innate ability—which may be determined in part by a lawyer's qualifications—but also to past performance. It also must place a lawyer within a group of competing lawyers that practice in the particular field of law. Gauging and reporting on past performance can be tricky, in part because the professional rules limit lawyers' ability to identify their own specialties¹⁰⁸ and to draw conclusions from results in previous cases.¹⁰⁹

Nevertheless, it would be possible for the bar, with the help of the courts, to develop a rating system, if only for some areas of practice.¹¹⁰ At least for litigators, results in past cases can be measured statistically.¹¹¹ Admittedly, results in individual cases do not necessarily translate to future results. It may be difficult to code the nature of cases and define which results represent true victories. Yet, even averaged results probably would be more reliable than the

108. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.4 (limiting claims of specialization to lawyers admitted to practice before the United States Patent and Trademark Office, admiralty lawyers, and those certified by a state authority or an organization accredited by the American Bar Association); CAL. RULES OF PROF'L CONDUCT R. 1-400(D) (6) (1997) (forbidding a lawyer from claiming that he or she is a "certified specialist" unless the lawyer has been certified by the State Board of Legal Specialization); N.C. RULES OF PROF'L CONDUCT R. 7.4 (2003) (allowing lawyers to communicate fields of practice, but limiting claims of specialization to lawyers who have received certification from the North Carolina State Bar, state bar-approved organizations, or organizations accredited by the American Bar Association).

109. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4-7.2 (b) (1) (B) (2006) (prohibiting any reference to past successes or results obtained); IND. RULES OF PROF'L CONDUCT R. 7.2(d) (2) (2005) (prohibiting legal advertising from containing information based on past performances); James P. George, *Civil Law, Procedure, and Private International Law: Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 311 n.57 (Supp. 2006) (citing the ABA Model Rules limiting claims of past successes as an example of good legal advertising regulation); Moss, *supra* note 34, at 611 (describing Texas' prohibition on using information about past performances); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 415 (2004) (describing the traditional bias against allowing advertising of past performance by attorneys).

110. See, e.g., Zacharias, *supra* note 5, at 637–38 (discussing possible rating systems).

111. See generally LexisNexis, California, Jury Verdicts and Settlements Combined Database, www.lexis.com; Westlaw, California, Jury Verdict and Settlement Summaries Database, www.westlaw.com (search directory for LRPCA-JV database).

results lawyers themselves refer to when manufacturing reputation—particularly if the categories of cases from which the averaged results are culled are carefully delimited.¹¹² Additionally, evaluations by adversaries and presiding judges could be collected and factored into lawyer ratings. A state bar willing to recognize specializations also could administer periodic examinations that might prove relevant.

Professionalism, because it is an elusive term,¹¹³ would need to be well-defined before a bar could attempt to collect information about it. At one level, the notion of professionalism may refer only to each lawyer's record of prior discipline and malpractice verdicts—objective information that some bar associations already collect¹¹⁴ and can easily make public. If an evaluating body deems it important to collect information regarding lawyers'—or particular categories of lawyers'—reputation for civility or cooperation among regulators (e.g., the SEC) and courts, the regulators and courts would first need to be willing to develop an unbiased rating methodology.

Lawyer aggressiveness or client-centeredness, of course, is the most subjective factor—and the hardest to rate. Lawyers would not be willing to rate themselves objectively. If the information is to be published, lawyers also would have personal competitive interests in the way they evaluate other attorneys. Manufactured reputation evidence—what lawyers say publicly about themselves—is equally likely to be useless. An evaluating body attempting to identify lawyers' earned reputations thus would need to solicit opinions of past clients on how their lawyers behaved, together with the opinions of judges and regulatory adversaries who dealt with those attorneys, and attempt a composite evaluation—similar to the evaluation of judicial candidates by bar committees. Identifying neutral references would prove especially problematic with respect to nonlitigating lawyers; the process probably would of necessity depend on information about client identities provided by the lawyers themselves. In any

112. Thus, for example, it is important both to explain past results in terms of how they came about (e.g., through trials, quick settlements, protracted settlements, or default judgments) and in terms of the nature and complexity of the merits.

113. See Zacharias, *Reconciling Professionalism*, *supra* note 78, at 1307 (describing the various conceptualizations of professionalism and authorities).

114. See, e.g., CAL. BUS. & PROF. CODE § 6086.1 (Westlaw 2006) (mandating that hearings and records of disciplinary proceedings before the State Bar Court be made public); FLORIDA'S BAR STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.2 (1986) (mandating that "ultimate disposition of lawyer discipline should be public"); PA. RULES OF DISCIPLINARY ENFORCEMENT R. 402(I) (2006) (requiring communication of public discipline of attorneys to the National Lawyer Regulatory Data Bank of the American Bar Association); *cf.* Lexis Nexis, California Jury Verdicts and Settlements, Combined Database, www.lexis.com (search for "legal malpractice") (displaying California's legal malpractice jury verdicts and settlements).

event, soliciting and assessing references for all lawyers would be a resource-intensive process, akin to the evaluation of applications for admission to the bar.

D. Publicizing Reputation Information

Suppose that the bar has undertaken an empirical inquiry and determined that certain kinds of information about lawyers—about their qualifications, quality, aggressiveness, or professionalism—plays a significant role in the hiring and use of particular categories of lawyers. Gathering such information and rating lawyers on these bases would have significant effects on the demographics of the bar. Lawyers rated highly on the qualification and competence scales could charge a premium, while lesser lawyers might be driven out of business. That seems appropriate. Potential clients should know what they are paying for.

Moreover, rating lawyers on the basis of their history of compliance with professional and judicial mandates may provide some meaningful information for the regulators of lawyers. Lawyers' history of skirting the rules might attract some customers but at a cost of regulatory and judicial trust. This, in turn, might cause lawyers to hesitate to develop the reputations for aggressiveness that they might be happy to develop if only sophisticated clients could access the reputations.

Nevertheless, it is quite possible that publicizing information regarding aggressiveness and professionalism would further a race to the bottom, in which lawyers hoping to compete for business among clients in the know would have significant incentives to assume the most client-centered approaches. Our analysis suggests that that is nothing new in fields of law in which clients already have access to reputation information. Bar involvement in disseminating reputation evidence might, however, introduce the same phenomenon into areas of law in which client ignorance served to promote the more objective lawyering anticipated by the professional rules.

On the assumption that it is somehow inequitable to hide information from some clients and deprive them of useful reputation information that wealthier or more sophisticated clients can obtain, how might society respond to the negative effects of widely available reputation information? We have already noted that some rules—particularly permissive rules and those that place control of choices in lawyers' hands—might need to be rewritten to take more realistic account of lawyers' incentives. More broadly, however, the reality regarding reputation information suggests that professional rules—or some

professional rules—are archaic because they are too easily circumvented and do not impose sufficient sanctions to provide real deterrence. Rather than using professional regulation to limit external regulation, it may be time for the bar to acknowledge that enforceable external regulation is necessary to produce the behavior that society wants of lawyers.¹¹⁵ Thus, for example, one might justify the recent SEC Sarbanes-Oxley regulations not on the basis that they make more theoretical sense than existing ethics provisions governing organizational lawyers, but rather on the basis that only overbroad, prophylactic, and enforceable requirements can counteract lawyers' competitive instincts.

In considering possible regulatory reactions to the effects of reputation information, it is always important to separate those effects that generally might be deemed positive from those that are destructive. It is good for clients and society for individuals to hire the best available lawyers—those of the highest qualifications and competence at a given price—because that helps the legal system work in its intended fashion. Legal ethics regulators have never been ashamed to acknowledge that the concepts of loyalty to clients and the recognition of systemic and third party interests both are important and often in tension. Lawyers' desires for varying kinds of reputation thus are not surprising. It is only lawyers' willingness to cede some of their gatekeeping responsibilities¹¹⁶ and to use reputation as a signal to clients of that willingness that society might wish to counteract.

Unfortunately, the possible methods of counteracting the negative effects in this context are limited. They include removing lawyers' options (i.e., rewriting the rules), providing counter-incentives (i.e., enforcing existing prohibitions, adopting or turning to other enforceable prohibitions, or increasing sanctions), providing rewards for lawyers who act appropriately, and educating persons who can counteract the conduct (e.g., adversaries and regulators). So long as the codes support a range of professional conduct, one can expect market forces to provide lawyers with reasons to act in the best interests of those who pay for their services.

Moreover, because lawyers operate in a variety of fields and interact with a variety of participants in the legal system, it is a mistake to act as if all lawyers are alike.¹¹⁷ To be effective, professional regulation must be

115. Cf. Christian Seibert, *Rethinking Professional Regulation*, 2007 ECON. AFF. 77, 79 (2007) (arguing for "removing the monopoly status of professional regulators [including the bar] and introducing competitive regulation").

116. See Zacharias, *supra* note 53, at 1390–98 (cataloguing lawyers' various gatekeeping functions).

117. Cf. Zacharias, *supra* note 63, at 838–40 (discussing examples of ways in which professional regulation assumes lawyers to be fungible).

contextual—acknowledge that different categories of lawyers may "feature their own distinctive structures, incentives, pressures, and dilemmas."¹¹⁸ A focus on learning more about reputations and their significance can help code drafters contextualize regulation better.¹¹⁹ At the same time, it may highlight the limits of regulation itself—demonstrating that the enforcement of generalized ideals is beyond the capacity of the self-regulatory regime.¹²⁰

V. Conclusion

This Article began with a reference to the differences between my perspective and that of a colleague regarding the effectiveness of professional rules. In economic terms, my colleague is correct: When lawyers in a competitive situation must choose between implementing (maybe even obeying) professional ideals and satisfying a client, there is good chance that the ideals will be set aside. In the converse situation, in which client interests coincide with the import of the rules, the rules may not be necessary at all. To the extent clients know what they want and lawyers can signal to clients their willingness to provide the desired service, the influence of professional rules—particularly hortatory rules—is minimized.

This Article's analysis, however, has attempted to cast doubt on the universality of these conclusions. The conclusions are based on a number of factual premises typical of economic analysis: Clients know what they want, clients will insist upon receiving what they want, and lawyers and clients communicate about those desires on a routine basis. The Article has suggested that many individual clients are unable to identify their own needs or lawyers who will cater to them. The Article also has suggested a number of reasons why the assumed communication simply does not occur directly, among sophisticated or unsophisticated clients. The phenomena to which my colleague refers can proceed only when reputation about lawyers serves as an effective proxy for direct communication about lawyers' willingness to follow the rules.

How routinely reputation serves as that proxy is an empirical issue, one which both my colleague and I can agree is significant. Whether society can or

118. Regan, *supra* note 19, at 564.

119. See generally Zacharias & Green, *supra* note 60 (discussing different conceptualizations of lawyers' roles, based on distinctions in lawyers' practices).

120. See Gilson, *supra* note 90, at 872 (discussing ways in which demand-side (i.e., client-focused) economic analysis of legal professionalism highlights the fact that "there may be very real limits on what the profession alone can do to arrest the decline of legal professionalism").

should rely on professional rules to shape lawyers behavior, especially outward-regarding behavior, depends on whether access to the key types of reputation information are readily available to clients. One can speculate that different kinds of clients are in better positions to obtain information and exert control, but it is not obvious that this will always be true. Identifying the evidence should inform rulemakers about the value of particular regulations, disciplinary authorities about where resources should be focused, and external lawmakers about whether it makes sense to rely on or defer to the professional rules. It also can help the bar decide whether it should take steps to facilitate the dissemination of reputation information or take steps to counteract it.

This Article's focus on reputation and its call for empirical inquiry, of course, is only a preliminary step. That step, however, is an important one. Although a few scholars have addressed the impact of reputation, they have confined themselves to very limited spheres of representation—typically areas of corporate law.¹²¹ These scholars' insights are valuable, yet it would be a mistake for regulation to develop on the assumption that the insights are applicable across the board. Like the perspectives my colleague and I have developed, the insights are informed by speculations borne of personal, potentially idiosyncratic, experience. Only by equipping itself to assess the underlying assumptions of the economic analysis—by undertaking a rigorous look at how lawyers and clients actually behave, or are likely to behave—can the bar hope to produce realistic rules.

121. For discussions of the effect of reputation in corporate law, see generally Gilson, *supra* note 91; Okomato, *supra* note 91; and Zacharias, *supra* note 7.

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