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The Professional Prospectus: A Call for Effective Professional Disclosure

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The Professional Prospectus: A Call for Effective Professional Disclosure

Cover Page Footnote

Without easy access to relevant information, many consumers unwittingly trust serious decisions to professionals with histories of malpractice and negligence—leading to both individual and societal harms. This Article proposes to improve professional services markets with a tool that has already proven effective in the securities markets: a prospectus. A “Professional Prospectus” would reduce information asymmetries and improve the market for professional services through disclosure and consumer choice. A Professional Prospectus would alter the market for professional services by making professional reputation a more potent force. Economic theory often relies on “reputation effects” to ensure the efficient functioning of the market without providing for mechanisms to efficiently broadcast reputation. Tailored disclosures delivered through a Professional Prospectus would put existing public information into consumer hands, allowing the market to more efficiently price professional services. This would discipline and deter professional misconduct and reward higher-quality service providers. To showcase a feasible Professional Prospectus intervention, this Article presents an initial use case demonstrating how a mandatory disclosure intervention could improve the market for immigration law services. The principles developed in this Article may also improve private and social outcomes in other markets for professional services.

The Professional Prospectus: A Call for Effective Professional Disclosure

Benjamin P. Edwards*

Abstract

Without easy access to relevant information, many consumers unwittingly trust serious decisions to professionals with histories of malpractice and negligence—leading to both individual and societal harms. This Article proposes to improve professional services markets with a tool that has already proven effective in the securities markets: a prospectus. A “Professional Prospectus” would reduce information asymmetries and improve the market for professional services through disclosure and consumer choice.

A Professional Prospectus would alter the market for professional services by making professional reputation a more potent force. Economic theory often relies on “reputation effects” to ensure the efficient functioning of the market without providing for mechanisms to efficiently broadcast reputation. Tailored disclosures delivered through a Professional Prospectus would put existing public information into consumer hands, allowing the market to more efficiently price professional services. This would discipline and deter professional misconduct and reward higher-quality service providers.

To showcase a feasible Professional Prospectus intervention, this Article presents an initial use case demonstrating how a mandatory disclosure intervention could improve the market for immigration law services. The principles developed in this Article

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I. Introduction

THERE ARE IDIOTS. Look around.

—Lawrence H. Summers, Former Secretary of the Treasury¹

No doubt the same may be said of all professions. They are all conspiracies against the laity.

—George Bernard Shaw, Author²

Like many others before him, Celso Lima Mejia learned the hard way that a professional license does not guarantee basic competence.³ After Guatemalan rebels kidnapped Mr. Mejia

1. See Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES MAG., Sept. 2, 2009 (“Lawrence Summers once began a paper on finance by declaring: “THERE ARE IDIOTS. Look around.”).

2. GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA*, at xv (1906).

3. See Gary Rivlin, *Dollars and Dreams: Immigrants as Prey*, N.Y. TIMES,

during the country's civil war, he fled to the United States with his family.⁴ Mejia paid attorney Miguel Gadda thousands of dollars for assistance with an asylum claim.⁵ Although he had hoped for a green card, Mr. Mejia received a deportation order instead.⁶

Consumers often lack useful information about professionals before they hire them.⁷ When Mejia hired Gadda on a family friend's recommendation,⁸ he probably did not know that the California State Bar had previously suspended Gadda for misconduct in 1990.⁹ When it removed Gadda from practice for the second time, the California State Bar found that "at least six" courts had reviewed Gadda's work and declared that his clients had received "ineffective assistance of counsel."¹⁰ This is no small finding. The ineffective assistance of counsel standard requires that representation be "so poor that it affected the fundamental rights of the client and the client's right to due process."¹¹

Current markets for professional services often function poorly and fail to ensure competent services.¹² Backward-looking consumer protection through malpractice liability and public discipline often fails to protect consumers because professionals rarely internalize malpractice's true cost.¹³ The private

June 11, 2006, at BU1 [hereinafter *Dollars and Dreams*] (discussing unethical attorneys who take advantage of immigrants).

4. See *id.* (same).

5. See *id.* (same).

6. See *id.* (same). Another lawyer later obtained relief for Mr. Mejia even though Mr. Gadda had "made such a mess out of the asylum claim." See *id.* (quoting attorney Ilyce Shugall).

7. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 753 ("It may be impossible for clients to determine in advance which lawyers present the highest risks.").

8. See *Dollars and Dreams*, *supra* note 3 (discussing Mr. Mejia's case).

9. See *In re Miguel Gadda*, 4 Cal. State Bar Ct. Rptr. 416, 2002 WL 31012596, at *1 (Rev. Dep't State Bar Ct. of Cal. 2002) (explaining that Mr. Gadda was "previously disciplined . . . in 1990").

10. *Id.* at *32.

11. *Id.*

12. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1272 (1995) ("Many commentators have observed that the legal profession is not particularly effective at ensuring that lawyers provide honest or competent representation.").

13. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1695 (1994) (observing that the goals in responding

immigration bar serves as an example because it is notorious for its “uneven quality.”¹⁴ One immigration judge explained that “all too often the representation [in immigration court] is mediocre,” and that “many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it.”¹⁵ Immigration courts may see more substandard practice because ex-post liability feedback mechanisms rarely function.¹⁶ Consider the tremendous hurdles faced by Mr. Gadda’s deported clients. Their deportations frustrate their abilities to bring malpractice actions or file disciplinary complaints.¹⁷

The public frequently faces a lemon problem when seeking to hire a professional.¹⁸ While Mr. Mejia encountered a lemon lawyer, lemons also lurk in the markets for doctors, financial advisers, accountants, and other professionals.¹⁹ If customers struggle to locate high-quality services, the best professionals cannot reap rewards for providing premium quality—leading them to either exit the market or offer lower-quality services.²⁰

to malpractice—“protecting the public, deterring future misconduct, and rehabilitating offenders”—are admirable, but that the systems by which to achieve them are “highly ineffective”). In any event, overall malpractice claims continue to rise. See Melissa Mortazavi, *A No-Fault Remedy for Legal Malpractice?*, 44 HOFSTRA L. REV. 471, 471 (2015) (“The last forty years have seen a marked rise in legal malpractice lawsuits.”).

14. See Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 247 (2012) (“The uneven quality of the immigration bar has been long noted as the level of skill and knowledge of immigration law varies significantly.”).

15. Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 626 (2009).

16. For a discussion of substandard practice in immigration courts, see *infra* notes 221–239 and accompanying text.

17. For a discussion of immigration court problems, see *infra* Part II.

18. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) [hereinafter Akerlof, *Lemons*] (explaining that buyers possess imperfect information when purchasing a car because they do not know whether the car “will be good or a lemon”).

19. See *Professional Negligence Claims*, PAUL & PERKINS PA, <http://paulandperkins.com/medical-malpractice-attorneys/professional-negligence-claims/> (last visited Sept. 21, 2017) (listing professionals against whom malpractice claims may be filed) (on file with the Washington and Lee Law Review).

20. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1115–16 (2014) (“If consumers cannot distinguish between good and bad professional

Occupational licensing systems claim to mitigate these problems by requiring persons to meet minimum standards before joining a profession.²¹ The empirical evidence does not always support this claim.²² While some studies find a modest increase in quality from occupational licensing structures, others find that occupational licensing drives up costs for consumers while offering no increase in the quality of services (and in some cases results in lower-quality services).²³

Consumers also receive little protection on the other side of the licensing barrier to entry. Self-regulating professions and occupational licensing bodies often fail to protect consumers because they tend to act like cartels—behaving more in the interests of their members than of the public.²⁴ These bodies move ponderously when responding to complaints and allow problems to linger in lax enforcement cultures.²⁵

Much of the problem stems from information asymmetry between professional service providers and the public.²⁶

service, the high-quality, high-price providers will not be able to attract even those customers who both want and can pay for better quality service.”).

21. See Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191 (2000) (describing occupational licensing as a “process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency”).

22. See CAROLYN COX & SUSAN FOSTER, BUREAU OF ECONS. FED. TRADE COMM’N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21–27, 40 (1990), http://www.ramblemuse.com/articles/cox_foster.pdf (“The empirical findings indicate that mandatory entry requirements of licensing cannot necessarily be relied upon to raise the quality of service.”).

23. See Edlin & Haw, *supra* note 20, at 1116–17 (collecting research on professional licensing).

24. See William A. Birdthistle & M. Todd Henderson, *Becoming A Fifth Branch*, 99 CORNELL L. REV. 1, 11 (2013) (“Self-regulation is easily justified if it protects investors and maximizes social welfare but may not be if it is used merely to transfer wealth from investors to brokers. This ‘cartelization’ problem is present in almost every area of broker-dealer regulation.”).

25. See Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CINN. L. REV. (forthcoming 2017) (manuscript at 39) (“While traditional regulatory agencies may also be prone to inaction, self-regulatory bodies may be particularly lethargic protectors”); see also Robert W. Gordon, *Portrait of A Profession in Paralysis*, 54 STAN. L. REV. 1427, 1431 (2002) (“In most states [the bar] does not finance or staff more than a tiny fraction of the administrative machinery that would be needed to handle client complaints effectively or more pro-actively investigate systemic abuses and engage in rulemaking.”).

26. Cf. Ribstein, *supra* note 7, at 753 (“It is hard for clients to shop for the

Professionals know whether they carry insurance, have had disciplinary complaints or sanctions, and whether they have been sued for malpractice. While a sophisticated patient or client might uncover some of this information through due diligence processes, most people may not even know where to begin.²⁷

This problem has been solved before.²⁸ Under the federal securities laws, public companies must disclose information to the public at regular intervals.²⁹ This disclosure reduces the information asymmetry between investors and management, giving the more efficient securities markets an opportunity to fairly price securities. In the primary market, it also gives investors enough credible information to make decisions about whether to buy securities directly from the issuer.

A similar type of intervention could dramatically improve the market for professional services and help solve the professional lemon problem—leading to increased demand for professional services.³⁰ A “Professional Prospectus” regime—a disclosure system that pushed short, salient, and relevant information to consumers—would enable the market for professional services to function more efficiently. For the regime to function, it would require carefully designed, concise, and useful information to reach consumers.³¹ If a Professional Prospectus regime succeeded completely, it could allow market forces to separate the mediocre

most skilled and trustworthy lawyer because as non-experts they may not be able to accurately judge the quality of the lawyer’s services even long after they are rendered.”).

27. See *id.* (discussing the “asymmetry of information between lawyers and clients”).

28. See John C. Coffee, Jr., *Market Failure and the Economic Case for A Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984) (“[B]ecause information has many characteristics of a public good, securities research tends to be underprovided A mandatory disclosure system can . . . improve the allocative efficiency of the capital market—and this improvement in turn implies a more productive economy.”).

29. See JOHN C. COFFEE, JR., HILLARY A. SALE & M. TODD HENDERSON, *SECURITIES REGULATION: CASES AND MATERIALS* 7 (13th ed. 2015) (“In short, for the securities market to function efficiently, much more disclosure is required than in most other markets.”).

30. Cf. Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1284 (2013) (“The untapped market for legal services is potentially worth billions of dollars.”).

31. See *infra* Part II (discussing the design of a disclosure system).

from the masterful—allowing more competent professionals to reap appropriate rewards. At the least, it would bring market forces to bear and drive the most deficient out. A well-functioning disclosure regime would also give professionals real incentives to improve the services they provide. By increasing confidence in individual service providers, it would also likely expand markets for professional services.³²

Some members of the learned professions will surely object to a standardized disclosure structure's inherent commodification and airing of unflattering facts. A Professional Prospectus regime will make many current stakeholders uncomfortable. It will require real, dirt-dropping dossiers to make it into consumer hands. Professionals will be forced into countless awkward conversations to address consumer concerns. Because self-regulatory organizations and licensing bodies seemingly value protecting their members more than the public, they may balk at broadly liberating and disseminating information about professionals.³³

Mandatory disclosure systems can mitigate market failures driven by information asymmetry.³⁴ Securities regulation focused on creating efficient securities markets provides a rough model for a Professional Prospectus system.³⁵ A well-functioning system for the professional services markets, however, would look different than the disclosure regime for the public securities markets. It would focus on delivering small amounts of material information and not bury consumers in papers.³⁶

32. See Knake, *supra* note 30, at 1284 (discussing limitations on the legal market).

33. See Linda Morton, *Finding the Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 287 (1992) ("Unfortunately, a marked disparity exists between the type of information consumers want and the type the legal profession thinks they should have.").

34. See Coffee, *supra* note 28, at 722 (discussing the effect of mandatory disclosure systems on economic markets).

35. Cf. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 714 (2006) ("The main thesis of this Article posits that the role of securities regulation is to create and promote a competitive market for information traders.").

36. For example, it would make little sense to require all professionals to undergo annual audits. The high cost of producing that information would swamp the benefits. Besides, most consumers will not wade through voluminous piles of

A Professional Prospectus regime would embody a few key characteristics.³⁷ Instead of expecting uninformed members of the public to know how to perform rudimentary due diligence, it would push essential information, much of which is already available to those who already know where to look, out to consumers.³⁸ To reach consumers at a time when they may still be shopping around, a Professional Prospectus should, whenever possible, be delivered before any agreement to perform professional services can be made.³⁹ To increase the chance that the public reads and understands the information, it should be concise and delivered with relevant contextual information.⁴⁰

This Article is the first to call for a prospectus-type system to push information to consumers in the markets for professional services. The problem has been considered from different angles. Some have argued that lawyers should be allowed to advertise.⁴¹ Others have critiqued the current occupational licensing structure⁴² and considered the economic rationales for lawyer regulations.⁴³ This Article goes further and calls for a meaningful disclosure system for professionals in different professional services markets.

paper before hiring a professional. As discussed in Part II below, an effective Professional Prospectus will need to be brief. Public investors will only rarely crack open the voluminous prospectuses and annual reports released by public companies. See Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 18 (noting that “most public investors are unlikely to actually read and grasp the stylized prospectus”).

37. See *infra* Part II (fleshing out the characteristics of a Professional Prospectus).

38. See *infra* Part II (same).

39. See *infra* Part II (same).

40. See *infra* Part II (same).

41. See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1087 (1983) (“The Article applies basic market and economic theory to the production and consumption of legal services and demonstrates that lawyer advertising offers important advantages to consumers of legal services.”).

42. See Edlin & Haw, *supra* note 20, at 1115–16 (noting the difficulty consumers face in evaluating the quality of professional services).

43. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 431–32 (2001) (“For example, no one has comprehensively addressed the underlying justifications for the regulations we have, and whether the regulations are satisfying those justifications.”).

This Article proceeds in three parts. Part I reviews the failed markets for professional services and considers the weaknesses in current occupational licensing structures and the limited role reputation currently plays in the markets for professional services.⁴⁴ Part II fleshes out the Professional Prospectus concept and describes key considerations for crafting useful disclosures.⁴⁵ To illustrate how a Professional Prospectus system might immediately improve markets, Part II also proposes implementing a Professional Prospectus system immediately for attorneys practicing in federal immigration courts.⁴⁶ Part III discusses possible objections and the outcomes likely to flow from an improved disclosure regime.⁴⁷

While this Article proposes near-term implementation for attorneys practicing in immigration court, the concept has broader applicability. The principles developed in this Article can be applied beyond the markets for doctors, lawyers, and financial advisers to help mitigate information asymmetry problems in other markets.

II. The Failed Markets for Professional Services

Academics often contend that policymakers should hesitate to intervene in otherwise well-functioning markets.⁴⁸ Market failures occur when something about the terms of the interaction prevents “market transactions from adequately serving the interests of all

44. *Infra* Part I.

45. *Infra* Part II.

46. *Infra* Part II.

47. *Infra* Part III.

48. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 745 (1999) (describing the widely-accepted belief that among classical economists that “[p]olicymakers should not attempt to regulate or otherwise ‘interfere’ with markets absent some evidence of a market failure”); see also Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1466 (1996) (“Although this ‘broken market’ paradigm may be useful analytically for studying some kinds of regulation, it rarely explains why Congress enacted protective statutes.”).

concerned.”⁴⁹ Markets fail in different ways.⁵⁰ In some instances, markets impose costs on others—giving rise to negative externalities.⁵¹ Negative externalities also arise when shoddy professional services generate costs for persons other than the client, such as a lawyer that files substandard briefs and drives judicial delays.

Information asymmetries also drive market failures. Ordinary clients may struggle to adequately evaluate professional services⁵² or to determine if they need professional assistance.⁵³ Almost by definition, professional services markets have high degrees of information asymmetry. Professionals often specialize in solving information asymmetry problems because, in many instances, if a

49. See Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 309 (2016) (discussing common market failures).

50. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 585 (2003) (“In particular, regulatory intervention may be appropriate where there is a market failure. Welfare economics classically recognizes four basic sources of market failures: (1) producer monopoly, (2) public goods, (3) information asymmetries, and (4) externalities.”).

51. For example, industrial polluters may not bear the costs created by their pollution. See Richard B. Stewart, *Regulation in A Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1546 (1983) (“In the environmental area, pollution and toxic waste spillovers became conspicuous examples of market failures that led to calls for regulation.”). Their consumers may even prefer pollution because it leads to lower costs. See Birdthistle & Henderson, *supra* note 24, at 9 (“Pollution may be profit maximizing for firms in the absence of regulation because costs (such as damage to the air, vegetation, or water) are imposed on others.”).

52. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 551 (1994) (“The linchpin of the arguments supporting the exclusive professional license is the claim that the lawyer-client relationship is an asymmetric one: Clients cannot adequately evaluate the quality of the service, and consequently they must trust those they consult.”). One commentator defined the legal profession as “[a]n occupation whose members have special privileges, such as exclusive licensing,” justified by several assumptions, including that “clients cannot adequately evaluate the quality of service.” AMERICAN BAR ASSOCIATION, *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 112 F.R.D. 243, 261 (1986) (quoting Professor Eliot Freidson of New York University).

53. See Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 2 (2012) (“[M]any do not even realize when a lawyer might be necessary or helpful.”).

client had the information necessary to evaluate a professional service, she would not need it. Consider financial advisers. If a potential client understood modern portfolio theory, she would not need a financial adviser's assistance when allocating an investment portfolio.

Information asymmetry concerns also justify professional self-regulation.⁵⁴ If laypersons without professional expertise, background, and public service commitments do not understand the complexities of a professional practice, they cannot credibly regulate the delivery of professional services.⁵⁵ This argument has supported claims that the public must trust professionals to regulate themselves.⁵⁶

Professionals differ from most other market participants because they often sell credence goods.⁵⁷ Without the ability to evaluate a credence good's quality, consumers must trust the professionals that provide it.⁵⁸ Even after the service has been performed, a consumer may lack any real ability to evaluate the quality of the service provided.⁵⁹ For example, a patient

54. See Gordon, *supra* note 25, at 1431 (describing the theory that “[o]nly professional peers have the necessary cognitive capacity and the appropriate ethical orientation to client and public service”).

55. *But see* Gerald C. Sternberg, *Regulating the Legal Profession Board of Attorneys Professional Responsibility Annual Report Fiscal Year July 1, 1995 to June 30, 1996*, 69 WIS. LAW. 26 (1996) (“Public confidence in the attorney grievance program has been enhanced by including non-attorney members on these district panels and on the board.”).

56. See, e.g., Gordon, *supra* note 25, at 1431 (discussing self-regulation in the legal field). While the argument has a ring of truth to it, it only goes so far. Even if consumers cannot make fine-grain distinctions between professionals, that does not mean that they should be denied ready access to information with substantial predictive value.

57. See Nathaniel G. Hilger, *Why Don't People Trust Experts?*, 59 J.L. & ECON. 293, 293 (2016) (“Doctors, lawyers, financial advisers, and auto mechanics all suffer from an apparent conflict of interest: these experts first diagnose the consumer's condition, and then they treat the condition they have diagnosed. This is known as the credence-good problem.”).

58. See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1712–13 (1998) (“Clients cannot reduce agency costs by shopping for lawyers who will faithfully serve their interests because they cannot be sure that lawyers will keep their promise of loyalty. Legal services are a kind of ‘credence’ good whose qualities non-expert clients must take on trust.”).

59. See *id.* at 1713 (“Even discrete tasks such as drafting wills may be credence goods because the quality may not be evident until long after the job is

experiencing a post-surgical infection lacks any ability to determine whether the infection arose because of substandard medical care or because infections may follow even excellent surgeries.

This dynamic also presents a classic agency cost problem where unaccountable agents should be expected to take advantage of their principals.⁶⁰ Economic theory assumes that both the client and the professional seek to maximize their profits.⁶¹ Principals must incur costs to monitor agents to make sure the agent does not take advantage of the relationship. Similarly, agents incur bonding costs to assure their fidelity. Still, theory expects additional opportunism will occur simply because it may be too costly to prevent.⁶² With consumers unable to assess professional quality services before retaining a professional or to easily discover the quality of the services performed afterward, the market tolerates an astounding amount of this opportunism.⁶³

At present, today's inefficient markets for professional services pose extraordinary threats to individuals and to society at large.⁶⁴ For every degree of inefficiency in these markets, tremendous, widespread private and social costs accumulate.

done.”).

60. See Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 319 (2015) (describing agency cost problems in the class action context).

61. See Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393, 400–01 (2007) (“For economists, the issue is how to motivate self-interested agents where information is asymmetric, behavioral and cognitive limitations exist, and monitoring is not feasible. Economists concern themselves with opportunism in all of its manifestations.”).

62. See Pearce, *supra* note 12, at 1232–33 (arguing that the taboo on profit-seeking behavior by lawyers should be discarded in favor of seeking business arrangements that promote the delivery of legal services and justice).

63. See *supra* note 52 and accompanying text (discussing the special obligations of the legal profession).

64. See Ben Barton, *A Comparison Between the American Markets for Medical and Legal Services*, 67 HASTINGS L.J. 1331, 1333–34 (2016) (explaining that American markets for legal and medical services often fail to serve large swaths of the public—particularly the working poor).

*A. Private and Public Concerns**1. Private Concerns*

On the private cost side, individuals face a range of dangers from substandard to exploitative professional services. While some of the costs driven by substandard professional advice may also be thought of as public concerns, the direct client often bears most of the cost in these instances.

a. Mortality Risk

Trusting a substandard professional may cost individuals their lives. In the medical context, the risks may be particularly acute and may be increasing. A recent study found that medical error ranks as the third leading cause of death in the United States with approximately 251,000 deaths attributable to medical error annually.⁶⁵ This study reports a higher number than prior studies which had found somewhat lower figures. One 2004 study found that 263,864 persons a year died because of medical error between 2000 and 2002.⁶⁶ In 1999, an Institute of Medicine study reported the lowest rate, finding that medical error caused between 44,000 and 98,000 U.S. deaths annually.⁶⁷

Medical professionals do not internalize most of the costs generated by medical errors.⁶⁸ For every six instances of medical

65. See *Medical error—the third leading cause of death in the US*, BMJ (May 3, 2016), <http://www.bmj.com/content/353/bmj.i2139> (last visited Sept. 21, 2017) (discussing the study) (on file with the Washington and Lee Law Review); see also Arriana Eunjung Cha, *Researchers: Medical Errors Now Third Leading Cause of Death in United States*, WASH. POST, May 3, 2016 (same).

66. HEALTH GRADES QUALITY STUDY: PATIENT SAFETY IN AMERICAN HOSPITALS 3 (2004), http://www.providersedge.com/ehdocs/ehr_articles/Patient_Safety_in_American_Hospitals-2004.pdf.

67. INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (1999), <http://www.nationalacademies.org/hmd/~media/Files/Report%20Files/1999/To-Err-is-Human/To%20Err%20is%20Human%201999%20%20report%20brief.pdf> [hereinafter IOM, TO ERR IS HUMAN]. But see Rodney A. Hayward & Timothy P. Hofer, *Estimating Hospital Deaths Due to Medical Errors: Preventability is in the Eye of the Reviewer*, 286 JAMA 415, 419 n.10 (2001) (arguing that the IOM figures are exaggerated).

68. See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1270 (2004) (“The rate of

error, patients only file one malpractice claim against a medical professional.⁶⁹ Even when a patient suffers significant damage, “tort reform” statutes often limit the amount of recoverable damages.⁷⁰ The Institute of Medicine’s study found that medical errors cost society between \$17–29 billion annually.⁷¹ At around the same time, medical professionals only paid approximately \$6.4 billion in medical malpractice insurance costs.⁷²

b. Diminished Health

Substandard medical care does not always lead to death.⁷³ In many instances, it may simply mean that a patient takes longer to recover than she would have had she received a more appropriate treatment or no treatment at all.⁷⁴ In others, a patient may live on with a permanent condition or disability. One study found a “fourfold difference” in complication rates between hospitals that perform common hip and knee surgeries.⁷⁵ Given how many hip

preventable medical error far exceeds the number of malpractice claims.”).

69. *See id.* (collecting research finding that “[s]everal research studies have estimated that for every six incidents of medical error, only one becomes a malpractice claim”).

70. *See, e.g.,* CAL. CIV. CODE § 3333.2(b) (West 2016) (“In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).”).

71. *See* IOM, TO ERR IS HUMAN, *supra* note 67, at 1 (reporting the estimated societal impact of medical errors).

72. *See* PUBLIC CITIZEN, MEDICAL MISDIAGNOSIS: CHALLENGING THE MALPRACTICE CLAIMS OF THE DOCTOR’S LOBBY 9 (2003) [hereinafter PUBLIC CITIZEN, MEDICAL MISDIAGNOSIS] (comparing the amount spent on medical malpractice insurance to the societal impact of medical errors).

73. *See What Patients Need to Know About Medical Malpractice*, MED. MALPRACTICE CTR. (Oct. 15, 2015), <http://www.malpracticecenter.com/news/10/15/15/what-patients-need-to-know-about-medical-malpractice> (last visited Sept. 21, 2017) (“[N]on-fatal claims cases filed annually in the US amount to billions of dollars in claims settlements or trial verdicts each year . . .”) (on file with the Washington and Lee Law Review).

74. *See, e.g.,* D’Abbraccio v. New Rochelle Hosp. Med. Ctr., 654 N.Y.S.2d 383, 384 (N.Y. App. Div. 1996) (“The plaintiff presented expert medical opinion evidence that the initial failure to diagnose her injury and properly treat it led to an exacerbation of her injuries and a prolonged hospital stay.”).

75. Kevin J. Bozic et al., *Variation in Hospital-Level Risk-Standardized Complication Rates Following Elective Primary Total Hip and Knee Arthroplasty*, 96 J. BONE & JOINT SURGERY 640, 646 (2014).

and knee replacements occur each year,⁷⁶ the different complication rates reveal real risks that consumers might seek to avoid. Even if the relatively higher rates may not be due to “error” so much as the superior skill at other institutions, patients and high-quality doctors would benefit from better dissemination of this information.

Substandard professional services may also create ongoing, significant stress that leads to other health consequences.⁷⁷ Even non-medical professionals may impact their clients’ health in significant ways. Losing a significant amount of money because of a financial adviser’s fraud can drive a range of health problems.⁷⁸ One study found that more than a third of fraud victims became depressed afterward and an even higher percentage reported difficulty sleeping afterward.⁷⁹ A significant body of research has found that ongoing stress may drive negative health consequences.⁸⁰

76. See generally Hilal Maradit Kremers et al., *Prevalence of Total Hip and Knee Replacement in the United States*, 97 J. BONE & JOINT SURGERY 1386 (2015) (counting the number of hip and knee replacements in the United States).

77. Cf. Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 449 (2005) (“Ongoing stress imposed by lengthy divorce and child-custody proceedings, hostile corporate takeovers, or fear about meeting year-end production quotas, for example, can contribute to serious, life-threatening medical conditions.”); see also Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1173 (2001) (arguing that humans evolved in an environment where “most severe but survivable stresses passed more quickly than multi-district litigations, lengthy divorce proceedings, or corporate takeovers”).

78. See Susan Antilla, *How Bad Financial Advice Can Literally Make You Sick*, STREET (June 19, 2016, 2:20 PM), <https://www.thestreet.com/story/13607594/1/how-bad-financial-advice-can-literally-make-you-sick.html> (last visited Sept. 21, 2017) (“[T]he stress of a serious financial loss can trigger a whole new wave of costs for clients.”) (on file with the Washington and Lee Law Review).

79. See APPLIED RESEARCH & CONSULTING LLC, *NON-TRADITIONAL COSTS OF FINANCIAL FRAUD* 5 (2015) (reporting survey results).

80. See Elizabeth Agnvall, *Stress! Don’t Let it Make You Sick: New research reveals the links between stress and disease*, AARP (Nov. 2014), <http://www.aarp.org/health/healthy-living/info-2014/stress-and-disease.html> (last visited Sept. 21, 2017) (collecting research on the negative health effects caused by stress) (on file with the Washington and Lee Law Review).

c. Lost Profits & Increased Expenses

Even if professional services do not result in death or diminished health, they often impose significant costs. Consider the healthcare costs in McAllen, Texas—which recently ranked as one of the “most expensive health-care markets in the country.”⁸¹ One surgeon explained the problem as “overutilization . . . pure and simple” and that for doctors the practice had become about “[h]ow much will you benefit?”⁸² Doctors in McAllen gave patients “two to three times as many pacemakers, implantable defibrillators, cardiac-bypass operations, carotid endarterectomies, and coronary-artery stents” as in other jurisdictions.⁸³ Although patients received invasive and high cost procedures, they were “less likely to receive low-cost preventive services, such as flu and pneumonia vaccines.”⁸⁴

Patients often have no reasonable means of assessing the quality of medical advice or of an advice-giver. If a doctor tells a patient that a heart surgery will significantly reduce the risks she faces in the future, she may have no ready means of determining whether the medical advice provided is good. On the other hand, if she had ready access to information indicating that a doctor recommends heart surgeries at triple the national rate, she might pause. This information could make the investment in obtaining additional opinions seem more reasonable.

But doctors are not the only professionals needlessly generating expenses for patients. Low-quality, conflict-ridden financial advice now causes many persons to pay excessive fees and experience suboptimal retirements. In February of 2015, the White House Council of Economic Advisers released a report on conflicted investment advice, conservatively estimating that “the aggregate annual cost of conflicted advice is about \$17 billion each year” for

81. Atul Gawande, *The Cost Conundrum: What a Texas Town Can Teach Us About Health Care*, NEW YORKER (June 1, 2009), <http://www.newyorker.com/magazine/2009/06/01/the-cost-conundrum> (last visited Sept. 21, 2017) [hereinafter Gawande, *Cost Conundrum*] (on file with the Washington and Lee Law Review).

82. *Id.*

83. *Id.*

84. *Id.*

retirement savers.⁸⁵ For the average retiree, low-quality advice will result in running out of money five years sooner than if the advice had been unbiased and in the client's interest.⁸⁶

2. Public Concerns

In addition to significant individual harms, poor professional advice also generates negative externalities and drives significant social harms that affect more than the parties to the relationship.⁸⁷ Put differently, engaging a substandard professional may harm more than the client—it may drive harms to society as well. Improving professional services markets would reduce public costs.

a. Substandard Professionals Generate Negative Externalities

Markets that sustain substandard professionals may drive public costs.⁸⁸ Consider the social costs created by incompetent attorneys. Judges and attorneys may spend excessive amounts of time addressing frivolous or plainly meritless arguments, generating crowded dockets, and slowing the delivery of justice generally.⁸⁹

85. Jason Furman & Betsey Stevenson, *The Effects of Conflicted Investment Advice on Retirement Savings*, WHITE HOUSE (Feb. 23, 2015, 9:45 AM), <https://obamawhitehouse.archives.gov/blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings> (last visited Sept. 21, 2017) [hereinafter CEA, CONFLICTED ADVICE] (on file with Washington and Lee Law Review).

86. *See id.* (noting the effects of conflicts of interest on advice).

87. *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705 (1977) (“[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties—the social costs involved are borne by society as a whole.”).

88. *See* Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 273 (1995) (“[S]ome of the costs of relative incompetence are borne, not by the consumer, but by the rest of us, in the form of delays, docket crowding, or additional judges.”).

89. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 163–64 (2000) (“[I]t is clear that many of the civil justice system’s primary players and spectators are deeply concerned about the persistence of frivolous suits, both because frivolous suits are ‘bad’ and because the courts cannot adequately process nonfrivolous suits as long as frivolous suits clog the system.”).

Frivolous litigation launched by low-quality lawyers may impose costs outside the legal system as well.⁹⁰ Consider the choices faced by multinational business entities. When deciding whether to build production facilities in a particular jurisdiction, the business will consider additional uncertainty, cost, and risk posed by the litigation environment.⁹¹ If the jurisdiction carries an excessive amount of litigation risk or inflated legal costs from frivolous suits, the business will likely allocate its investment elsewhere.

Still, quantifying the size of the purported frivolous litigation problem may be difficult. Some evidence indicates that extended medical malpractice litigation, at the least, rarely involves the assertion of truly frivolous claims.⁹² Plaintiffs may file some actions simply to get access to the information needed to evaluate the claim—in many instances plaintiffs voluntarily dismiss their cases after reviewing information.⁹³

b. Suppressed Demand for Professional Services

Integrity plays a vital economic role in facilitating transactions.⁹⁴ It allows transaction partners to rely on each other and complete value-increasing projects. Without integrity, many otherwise socially useful transactions will not occur.⁹⁵

90. Cf. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003) ("Critics maintain that excessive and frivolous litigation . . . hinders America's competitive position in the global economy.").

91. See John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 595 (2010) ("The uncertainty and cost associated with frivolous lawsuits dissuade foreign companies from doing business in America, depriving the U.S. economy of a much-needed source of jobs and investment.").

92. See PUBLIC CITIZEN, MEDICAL MISDIAGNOSIS, *supra* note 72, at 3 (reporting that plaintiffs only pursue one out of ten claims filed).

93. See *id.* (hypothesizing about why plaintiffs pursue a low rate of filed claims).

94. See ANNA BERNASEK, THE ECONOMICS OF INTEGRITY 11 (2010) (describing integrity as "the underpinning for all our commercial relationships").

95. See *id.* at 11–12 ("For without integrity, the economy would not function. There would be no trading, no credit, no buying or selling.").

A poorly functioning market for professional services may lead to underproduction and underemployment of professionals.⁹⁶ Consider how a similar dynamic occurs in financial markets—if investors distrust an issuer, they will discount the amount they are willing to invest in a promising project to offset the risk that they are being scammed.⁹⁷ In a low-trust environment, investors should be expected to invest less than they would in a higher-trust environment.⁹⁸

The same dynamics affect other markets. A person will behave differently when she suspects a professional may assert the need for useless services.⁹⁹ Medical patients rationally fear that doctors will prescribe unnecessary treatments. If a patient has a potential medical issue, she might wait until she can be certain she needs medical assistance before consulting with a doctor.

Public distrust of legal professionals may drive significant underutilization of legal services. Many surveys and anecdotal reports indicate that the public generally distrusts lawyers.¹⁰⁰ Recent studies have found that while 18% of respondents thought lawyers had “high” or “very high” honesty or ethical standards, 37% believed that lawyers had “low” or “very low” honesty or

96. See Ribstein, *supra* note 58, at 1713 (“Clients’ difficulty in evaluating the potential agency costs inherent in legal representation may reduce their willingness to entrust work to lawyers and therefore lessen both lawyers’ revenues and clients’ potential gains from hiring lawyers.”).

97. See Ziven Scott Birdwell, *The Key Elements for Developing a Securities Market to Drive Economic Growth: A Roadmap for Emerging Markets*, 39 GA. J. INT’L & COMP. L. 535, 545 (2011) (arguing that abuses “eat away at capital markets, destroy investor confidence, and increase the cost of capital”).

98. Cf. Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928, 967 (2014) (“If investors come to see the securities markets as a rigged game—one that seems by design to systematically disadvantage ordinary investors—they could respond by discounting the amount that they are willing to pay for all securities, thereby raising the cost of capital.”); see also Richard A. Booth, *Index Funds and Securities Fraud Litigation*, 64 S.C. L. REV. 265, 272 (2012) (“[A]n increase in cost of capital may come from two sources: a market perception of more risk inherent in the business of the subject company or harm to the reputation of the subject company—a loss of trust.”).

99. See Gawande, *Cost Conundrum*, *supra* note 81 (describing how “heart operations and catheter procedures and pacemakers were being performed in McAllen at double the usual rate”).

100. See Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1010–11 nn.206–07 (2003) (explaining that “the public holds lawyers in particularly low esteem”).

ethical standards.¹⁰¹ In contrast, medical doctors received substantially higher ratings, with 65% responding that medical doctors were highly or very highly ethical.¹⁰²

Despite the widespread distrust, the public strongly values lawyer integrity. One study found that when consumers were asked to rank eighteen different factors relevant to selecting a lawyer, integrity rose to the top of the list—outranking experience and cost.¹⁰³ Consumers may value integrity because it allows them to trust their service provider to act in their interest in areas where they cannot effectively monitor the attorney's performance.

Concern with lawyer integrity likely impedes the engagement of legal services. To be sure, substantial evidence indicates that the current market frequently fails to match attorneys with unmet service needs.¹⁰⁴ Economist and law professor Gillian Hadfield calculated the unmet need for professional legal services as “roughly \$20 billion to ‘tens if not hundreds of billions of dollars.’”¹⁰⁵

Improved tools allowing the public to better assess professional service providers might also mitigate the lawyer underemployment problem by making it easier for the public to identify higher quality lawyers. As confidence increases that attorneys will deliver valuable services, public demand for legal services should also rise.

An expansion of legal services markets would benefit lawyers. In 2011, only a little more than half of freshly-minted lawyers found employment within nine months.¹⁰⁶ While law schools have

101. See *Honesty/Ethics in Professions*, GALLUP (Dec. 11, 2016), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited Sept. 21, 2017) (publishing survey results) (on file with the Washington and Lee Law Review).

102. See *id.* (same). Doctors may enjoy their higher ratings because they do not work within an adversarial system.

103. See Robert E. Smith & Tiffany S. Meyer, *Attorney Advertising: A Consumer Perspective*, 44 J. MARKETING 56, 60 (1980) (relating consumers' top considerations when selecting an attorney).

104. See Knake, *supra* note 30, at 1283–84 (discussing demand for legal services compared with attorney employment).

105. *Id.* at 1287 (quoting Gillian Hadfield, *Lawyers, Make Room for Nonlawyers*, CNN (Nov. 25, 2012, 12:25 PM), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/index.html> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review)).

106. See Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June

contracted and reduced production of new lawyers, many lawyers remain underemployed.¹⁰⁷

c. Overspending on Other Categories of Professional Services

Interestingly, an inefficient market for professional services may also drive overproduction. If consumers cannot identify professionals that cause them to expend excessive sums on professional services, the inefficient market structure may sometimes also drive overutilization of professional services.

(1) Healthcare

Overproduction and cost problems appear particularly pronounced in the health care context.¹⁰⁸ In 2012, the United States spent approximately \$2.6 trillion on health care.¹⁰⁹ By 2015, the annual expenditure had grown to \$3.1 trillion.¹¹⁰ In a report released in 2012, the Institute of Medicine found that about one-third of overall spending may be unnecessary.¹¹¹ Worse,

25, 2012, at A1 (reporting on job prospects for law school graduates).

107. See Andrew Soergel, *Hiring Outlook Bleak for New Law Grads*, U.S. NEWS AND WORLD REP. (Aug. 18, 2016), <https://www.usnews.com/news/articles/2016-08-18/hiring-outlook-bleak-for-new-law-grads> (last visited Sept. 21, 2017) (reporting on more recent employment data for recent law school graduates) (on file with the Washington and Lee Law Review).

108. Cf. Jessica L. Roberts & Elizabeth Weeks Leonard, *What is (and isn't) Healthism?*, 50 GA. L. REV. 833, 897 (2016) ("Health care is very expensive in the United States . . ."); see also David Orentlicher, *Paying Physicians More to Do Less: Financial Incentives to Limit Care*, 30 U. RICH. L. REV. 155, 155 (1996) ("With health care costs continuing to rise, it has become increasingly clear that we cannot afford all medically beneficial care.").

109. See Sarah Kliff, *We Spend \$750 Billion on Unnecessary Health Care. Two Charts Explain Why*, WASH. POST (Sept. 7, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/09/07/we-spend-750-billion-on-unnecessary-health-care-two-charts-explain-why/?utm_term=.882e2e882940 (last visited Sept. 21, 2017) (reporting on unnecessary healthcare spending) (on file with the Washington and Lee Law Review).

110. See Tami Luhby, *Health Care Spending Expected to Grow Faster*, CNN MONEY (July 28, 2015, 7:36 PM), <http://money.cnn.com/2015/07/28/news/economy/health-care-spending/> (last visited Sept. 21, 2017) (reporting on healthcare spending levels) (on file with the Washington and Lee Law Review).

111. See Kliff, *supra* note 109 (reporting on unnecessary healthcare

despite the high cost, the actual quality of health care in the United States appears middling, at best.¹¹²

The compensation structure for many physicians may drive some overutilization of health care services.¹¹³ At present, many medical professionals receive compensation tied to how many procedures they perform.¹¹⁴ When certain procedures pay more than others, those procedures may become even more likely to be performed. Combined, these incentives may drive significant overutilization of health services.

Adding to the difficulty, the market for health services generally fails to provide consumers with information before they commit to purchasing decisions.¹¹⁵ Consumers generally lack

spending).

112. See Isaac D. Buck, *Caring Too Much: Misapplying the False Claims Act to Target Overtreatment*, 74 OHIO ST. L.J. 463, 470 (2013) (“Nevertheless, not only are the federal health-care programs speeding toward bankruptcy, but the quality of U.S. health care is mediocre, the headlines say.”); see also John B. Kirkwood, *Buyer Power and Healthcare Prices*, 91 WASH. L. REV. 253, 254 (2016) (“Many studies have found that the United States spends nearly twice as much per capita on healthcare as other developed countries, while achieving inferior results on such important public health measures as life expectancy and infant mortality.”); Sarah Kliff, *Sebelius: Repeal a Bad Deal for U.S.*, POLITICO (Mar. 31, 2011, 4:47 PM), <http://www.politico.com/news/stories/0311/52339.html> (last visited Sept. 21, 2017) (“We pay 2 1/2 times what anybody else pays in the world, and our care outcomes look like we’re in a developing country.”) (on file with the Washington and Lee Law Review).

113. See Barbara A. Noah & Neal R. Feigenson, *Avoiding Overtreatment at the End of Life: Physician-Patient Communication and Truly Informed Consent*, 36 PACE L. REV. 736, 751 (2016)

All of these problems are made worse by the fact that the system of reimbursement for health care in the United States often deforms the goals of care by paying physicians who provide more treatments and tests while failing to reimburse physicians for the more time-consuming and emotionally onerous task of discussing with patients the option of doing less.

Alan M. Garber & Jonathan Skinner, *Is American Health Care Uniquely Inefficient?*, 22 J. ECON. PERSPS. 27, 28 (2008) (“The fundamental cause is a combination of high prices for inputs, poorly restrained incentives for overutilization, and a tendency to adopt expensive medical innovations rapidly, even when evidence of effectiveness is weak or absent.”).

114. See Jennifer Brougham, *Physician-Owned Distributorships*, 30 NOTRE DAME J.L. ETHICS & PUB. POL’Y 369, 370 (2016) (“For decades, the U.S. health care system predominantly used a fee-for-service model, in which physicians and hospitals were compensated for each service performed and had full discretion over treatment decisions, incentivizing overutilization and increased costs.”).

115. See William M. Sage, *Regulating Through Information: Disclosure Laws*

information about both cost and quality—forcing them to commit to services with little information about a professional’s actual skill.¹¹⁶ This may mean that lower-quality medical professions and institutions may drive high costs while delivering subpar results for their patients without any significant market force pushing for higher quality.

(2) *Financial Intermediation*

Overproduction problems also plague the market for financial services—overall costs have remained puzzlingly high. One study found that “the unit cost of intermediation is about as high today as it was at the turn of the 20th century.”¹¹⁷ Bafflingly high costs persist even though improvements in information technology “should lower the physical transaction costs of buying, pooling and holding financial assets.”¹¹⁸

The high overall costs may be explained by examining the incentives for financial professionals. Financial advisers, often commission-compensated salespeople, face significant incentives to steer customers toward higher priced and less useful products.¹¹⁹ Often, financial advisers steer clients toward investing in higher-fee funds simply because those funds pay a portion of

and American Health Care, 99 COLUM. L. REV. 1701, 1716 (1999) (“Moreover, purchasers’ lack of information stands out as the biggest obstacle to competitive care management.”).

116. *See id.* (“Information deficits in health care relate to each of the three dimensions along which American health care is typically measured: cost, access to services, and quality of care.”).

117. Thomas Philippon, *Has the U.S. Finance Industry Become Less Efficient? On the Theory and Measurement of Financial Intermediation* 5 (NBER, Working Paper No. 18077, 2014) [hereinafter Philippon, *Less Efficient*].

118. *See id.* at 25–26 (“A potential explanation is oligopolistic competition but the link between market power and the unit cost of intermediation is not easy to establish.”).

119. *See* Donald C. Langevoort, *Brokers As Fiduciaries*, 71 U. PITT. L. REV. 439, 449 (2010) (discussing the compensation incentives for stockbrokers to steer clients toward higher-priced products); *see also* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will a Uniform Fiduciary Duty Make A Material Difference?*, 14 J. BUS. & SEC. L. 105, 121 (2014) (“Broker commissions vary by financial product sold and not simply by the amount of the transaction. These distorting incentives have long been recognized as creating material conflicts between the Broker’s interests and the client’s interests.”).

their fees to the financial adviser—not because they will generate the best returns for the investor.¹²⁰ In many instances, this means that financial advisers steer clients toward purchasing actively-managed funds even though low-cost, passively-managed funds significantly outperform actively-managed funds.¹²¹ Financial advisers even steer clients toward higher-cost passively-managed funds—causing their clients to buy guaranteed underperformance.¹²² An index fund with fees of 1.25% will always lose to an index fund tracking the same index with fees of 0.09%.

For asset management services, higher cost does not translate into higher returns. It has been well-established for decades that lower fees offer the best prediction of superior performance.¹²³ The same notion has been encapsulated in “Brown’s Law of Brokerage Product Compensation,” instructing that “[t]he higher the commission or selling concession a broker is paid to sell a product, the worse that product will be for his or her clients.”¹²⁴ Despite this, about two-thirds of mutual fund assets now reside with actively-managed funds.¹²⁵

Investors continue to work with financial advisers after receiving bad advice—such as the advice to buy a high-fee actively-managed mutual fund—for a variety of reasons. Many

120. See SECS. AND EXCH. COMM’N, REPORT OF THE COMMITTEE ON COMPENSATION PRACTICES 7–8 (1995) (questioning whether a Broker rendered “objective advice or simply maximiz[ed] commission income”).

121. See Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 59 n.102 (2015) (likening the debate over active versus passive investing to the debate over climate change because the debate persists even though the relative underperformance of active management has been conclusively established for decades).

122. See Edwards, *Dark Side*, *supra* note 25, at 29 (describing high-fee index funds).

123. See John C. Bogle, *A New Order of Things: Bringing Mutuality to the “Mutual” Fund*, 43 WAKE FOREST L. REV. 1089, 1110 (2008) (collecting research).

124. JOSHUA M. BROWN, BACKSTAGE WALL STREET: AN INSIDER’S GUIDE TO KNOWING WHO TO TRUST, WHO TO RUN FROM, AND HOW TO MAXIMIZE YOUR INVESTMENTS 217–18 (2012).

125. Anne Tergesen & Jason Zweig, *The Dying Business of Picking Stocks*, WALL ST. J. (Oct. 17, 2016, 12:12 PM), <https://www.wsj.com/articles/the-dying-business-of-picking-stocks-1476714749> (last visited Sept. 21, 2017) (explaining that although investors now move significantly toward passive strategies, “66% of mutual-fund and exchange-traded-fund assets are still actively invested”) (on file with the Washington and Lee Law Review).

Americans lack even rudimentary financial literacy.¹²⁶ This means that they often never realize that they received bad advice. Adding to the difficulty, many persons use financial advisers for assistance during periods of their lives where they suffer significant cognitive declines—further inhibiting their ability to effectively monitor a financial adviser’s exploitative advice.¹²⁷

Much like how frivolous litigation increases costs within the judicial system, overproduction of financial intermediation may drive significant harm to the economy by creating a bloated financial intermediation sector.¹²⁸ Research indicates that the size of a nation’s financial intermediation sector roughly correlates with its growth rates—a nation with too little financial intermediation struggles to pair investor resources with business opportunities, while an overly large financial sector also slows growth by causing assets to recirculate within the financial system.¹²⁹

126. See OFFICE OF INVESTOR EDUC. & ADVOCACY, SECS. AND EXCH. COMM’N, STAFF STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS viii (2012) (explaining that “many investors do not understand other key financial concepts, such as diversification or the differences between stocks and bonds”).

127. See ALZHEIMER’S ASS’N, 2012 ALZHEIMER’S DISEASE FACTS AND FIGURES, REPORT, at 14 (2012) (explaining that 13% of persons over sixty-five, and 45% of persons over eighty-five, suffer from dementia).

128. Cf. Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 575 (2015) (“[R]ecent studies suggest that the relationship between the size of a country’s financial sector and the rate of its development is an inverted ‘U’—having a robust financial system is critical for economic growth, but too much finance impedes development.”); see, e.g., Siong Hook Law & Nirvikar Singh, *Does Too Much Finance Harm Economic Growth?*, 41 J. BANKING & FIN. 36 (2014) (noting that in the relationship between finance and economic growth, more finance is only beneficial to a certain point); see also Jean-Louis Arcand, Enrico Berkes & Ugo Panizza, *Too Much Finance?*, at 3 (Int’l Monetary Fund, Working Paper No. 12/161, 2012) (observing “the standard result that, at intermediate levels of financial depth, there is a positive relationship between the size of the financial system and economic growth, but it also shows that, at high levels of financial depth, more finance is associated with less growth”); Stephen G. Cecchetti & Enisse Kharroubi, *Reassessing the Impact of Finance on Growth* 1 (Bank for Int’l Settlements, Working Papers No. 381, 2012) (“[A]s is the case with many things in life, with finance you can have too much of a good thing.”).

129. See RANA FOROOHAR, MAKERS AND TAKERS: THE RISE OF FINANCE AND THE FALL OF AMERICAN BUSINESS 13 (2016) (“[S]tudies show that countries with large and quickly growing financial systems tend to exhibit weaker productivity growth.”).

An overly large financial sector may also create drag on economic growth through inefficient capital allocation.¹³⁰ This happens because commission-compensated financial advisers now steer capital with a preference for issuers offering larger commissions to financial advisers. When issuers compete not only based on the merits and the risks of their offerings, but also on how effectively they bias capital-steering intermediaries, the likelihood that the best opportunities secure funding diminishes.¹³¹

Inefficient financial services may drive other, less obvious costs. For example, conflicts of interest drive approximately \$17 billion in annual fees from consumers.¹³² This means that retirement savers receiving conflicted advice may ultimately receive 12% less in retirement and run out of retirement savings years before they would have if they had received non-conflicted advice.¹³³ This also imposes significant costs on an investor's extended family—meaning that subsequent generations may not be able to take risks and found businesses if they need to hold on to employment to fund medical expenses for aging parents. Social support systems—such as Medicare—may even experience increased utilization because of the drain on resources created by conflicted financial advice. An overlarge financial sector may even distort human capital flows—causing the most talented to go into finance instead of pursuing careers in business.

B. Current Tools Function Poorly

It has been apparent for some time that the market failures in professional services markets impose tremendous costs on individuals and the public. Much of our current regulatory infrastructure exists to improve these markets and to protect the public from the worst possible abuses. This subpart considers why current markets and the occupational-licensing model often fail to protect the public.

130. See Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L. J. 181, 184 (2017) (examining the economic effects of financial regulations).

131. See *id.* (same).

132. See CEA, CONFLICTED ADVICE, *supra* note 85 (examining the effects of conflicting advice).

133. See *id.* (same).

1. Reputation's Current Limited Force

Reputation only plays a limited role in the current markets for professional services. To be sure, reputational pressures may increase when professionals practice together in significant groups. If professionals operate under the same brand, bad acts from one member of the group may create a stigma attributable to all group members. This shared reputation may create an incentive to self-police and to protect the brand because a reputation for quality allows members of a professional firm to charge higher prices.¹³⁴

Judging a professional by her associations may be a reasonable strategy. In the financial context, researchers found that when troubled financial advisers cluster in a firm, their colleagues tend to absorb the cultural norms.¹³⁵ One study found that financial advisers with unblemished records were more likely to have misconduct in the future if they associated with financial advisers that had misconduct markers on their records.¹³⁶ Remarkably on similar findings, two economists recently theorized that a heightened concentration of brokers with misconduct disclosures might provide information about “compliance culture” at a particular firm.¹³⁷

The limited incentive for professional firms to police their own ranks will not protect most consumers because many professionals

134. See Ribstein, *supra* note 7, at 754 (“Clients are willing to pay extra to buy legal services from a big firm because they know that a cheating firm incurs a penalty in the form of a diminished reputation and a lower price for its services.”).

135. See Stephen G. Dimmock, William C. Gerken & Nathaniel P. Graham, *Is Fraud Contagious? Co-Worker Influence on Misconduct by Financial Advisors* 4 (Apr. 7, 2016) (unpublished manuscript) (“Controlling for merger-firm fixed effects, and using changes to a financial advisor’s peers due to a merger, we show that an advisor is 37% more likely to commit misconduct if his [new] co-workers have a history of misconduct.”) (on file with the Washington and Lee Law Review).

136. See *id.* (noting also an asymmetry in this effect, such that while learning bad behavior from peers is easy, unlearning it from peers is not).

137. See Hammad Qureshi & Jonathan S. Sokobin, *Do Investors Have Valuable Information About Brokers?* 19 (FINRA, Working Paper Aug. 20, 2015) (“[Harm Associated with Colleagues] has a statistically significant positive coefficient Overall, these results show that including information about [Harm Associated with Colleagues] on BrokerCheck would increase the predictability of investor harm.”).

do not practice within large firms. In the legal services market, most attorneys practice either alone or in relatively small firms.¹³⁸ Medium to large law firms with more than fifty lawyers account for only twenty percent of the legal services market.¹³⁹ Given the market's general fragmentation, firm reputation may only rarely play a role.

For market forces to function effectively, reputation must play a significant role. Yet reputation only plays a weak role in the current markets for professional services because public consumers both struggle to recognize and broadcast information about low quality professionals. Two things must happen for reputation to function effectively: (i) a consumer must recognize that they received substandard services; and (ii) the consumer must somehow broadcast that discovery to other consumers.¹⁴⁰

a. Discovery Problems

Consumers often struggle to recognize low-quality professional services because professionals sell credence goods.¹⁴¹ The surgical context provides a vivid illustration. The consumer may not even be conscious while the professional performs the service—effectively removing the consumer's ability to monitor performance directly.

Still, some interventions might increase the likelihood of discovery. For example, information about average fees and outcomes might put consumers on alert. Even though three percent might seem a small percentage, most mutual funds charge significantly lower ongoing fees. Simply giving consumers this

138. See LAWYER DEMOGRAPHICS, AMERICAN BAR ASSOCIATION 1 (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf (noting that 49% of attorneys practiced on their own and another 14% practiced in firms with between two and five attorneys).

139. See *id.* (same).

140. See Kathryn Judge, *Fee Effects*, 98 IOWA L. REV. 1517, 1550 (2013) (describing the two reputation feedback channels in general terms).

141. See Ribstein, *supra* note 58, at 1712–13 (“Even discrete tasks such as drafting wills may be credence goods because the quality may not be evident until long after the job is done.”).

information may cause them to more critically consider services falling outside the norm.

b. Broadcast Problems

Because professional misconduct may only be discovered in rare instances, the broadcast channel remains the critical avenue for reputational pressure. Despite this, our current systems fail to broadcast information about professionals effectively. Even when reliable data identifies higher quality professionals, the public fails to receive the information.¹⁴² For example, Pennsylvania collected and analyzed information on heart surgeries and other treatments.¹⁴³ Despite public availability, few patients knew about the information or took it into account when making decisions.¹⁴⁴ Without ready access to more useful information, most persons simply rely on the recommendations of their friends and relatives.¹⁴⁵

Simply getting the information out may be a challenge. Ordinary consumers now face a significant incentive problem. If a consumer discovers substandard professional services, she will likely gain little by broadcasting that information publicly. In contrast, she may receive some compensation if she agrees to keep quiet about substandard service.

Amplifying the broadcast problems, professional organizations now seemingly facilitate the suppression of useful

142. For example, the State of Pennsylvania has spent millions of dollars to gather relatively sophisticated evidence on outcomes from cardiac interventions, including cardiac surgery. See Eric C. Schneider & Arnold M. Epstein, *Use of Public Performance Reports: A Survey of Patients Undergoing Cardiac Surgery*, 279 JAMA 1638, 1638 (1998) (explaining that a publicly available study was not frequently used by the public).

143. See Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1597 (2002) (describing Pennsylvania program and explaining that patients “still seem to pick their hospitals and physicians as a matter of individual recommendation or convenience” and not based on data).

144. See *id.* (“[A] recent study found that very few cardiac surgery patients in Pennsylvania are aware of or use this information in any significant fashion.”).

145. See, e.g., Elise C. Becher & Mark R. Chassin, *Improving the Quality of Health Care: Who Will Lead?*, 20 HEALTH AFF. 164, 170 (2001) (stating that “the large majority [of patients] rely on [recommendations of] friends and family” when choosing doctors or hospitals).

information. For example, the Financial Industry Regulatory Authority (FINRA) manages the Central Registration Depository (CRD), which centralizes information about stockbrokers.¹⁴⁶ FINRA and the North American Securities Administrators Association (NASAA) partnered to create the database because of their belief that it is “critical that information about these individuals and firms be readily accessible to the investing public.”¹⁴⁷ To make the information accessible, FINRA provides a “BrokerCheck” website that allows the public to access information contained in the CRD database.¹⁴⁸

Unfortunately, the BrokerCheck website does not disclose information in a form that allows investors to assess risk effectively.¹⁴⁹ One review of the BrokerCheck website found that “BrokerCheck data in its current form is virtually useless to investors trying to protect themselves from bad brokers.”¹⁵⁰

146. Order Approving A Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, Exchange Act Release No. 34-58886, 94 SEC Docket 1445, at 2 (Oct. 30, 2008) (“FINRA operates the Central Registration Depository (“CRD”) pursuant to policies developed jointly with the North American Securities Administrators Association.” (citation omitted)).

147. *CRD & IARD*, N. AM. SEC. ADM’RS ASS’N, <http://www.nasaa.org/industry-resources/investment-advisers/crd-iard/> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

148. *BrokerCheck by FINRA*, FIN. INDUS. REG. AUTH., <https://brokercheck.finra.org/> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

149. See HUGH D. BERKSON & MARNIE C. LAMBERT, *BROKERCHECK—THE INEQUALITY OF INVESTOR ACCESS TO INFORMATION REMAINS UNABATED—AN UPDATE TO PIABA’S MARCH 2014 REPORT* 24 (Oct. 19, 2016), [https://piaba.org/system/files/pdfs/Broker%20Check%20Update%20\(October%2020,%202016\).pdf](https://piaba.org/system/files/pdfs/Broker%20Check%20Update%20(October%2020,%202016).pdf) (“[I]t has become increasingly apparent that the data contained in the national CRD system, and thus BrokerCheck reports, is incomplete, unreliable or even false.”); see also Mark Schoeff, *FINRA Targets Firms Hiring Brokers With Checkered Pasts*, INVESTMENTNEWS (Jan. 6, 2017, 1:05 PM), <http://www.investmentnews.com/article/20170106/FREE/170109956/finra-targets-firms-hiring-brokers-with-checkered-pasts> (last visited Sept. 21, 2017) (“Finra has recognized that these brokers pose a risk, but its BrokerCheck disclosures and data do not adequately warn the public about the actual risk created by brokers with regulatory disclosures . . .” (quoting Ben Edwards)) (on file with the Washington and Lee Law Review).

150. CRAIG McCANN, CHUAN QIN & MIKE YAN, *HOW WIDESPREAD AND PREDICTABLE IS STOCK BROKER MISCONDUCT?* 3 (2016), <http://www.slcg.com/pdf/workingpapers/McCann%20Qin%20and%20Yan%20on%20BrokerCheck.pdf>.

FINRA's website only allows the public to access tiny slivers of information at a time and makes it available without useful context.¹⁵¹

Making diligence less effective, FINRA's BrokerCheck website only presents a limited subset of the information available within the CRD database.¹⁵² A *Wall Street Journal* investigation found that "38,400 brokers have regulatory or financial red flags that appear only on state records" that do not appear on BrokerCheck.¹⁵³ The investigation found that 19,000 brokers with complaints on their regulatory records appeared as though they had clean records on BrokerCheck.¹⁵⁴

The information suppression extends beyond BrokerCheck and to the CRD database itself. FINRA oversees a process through which brokers frequently expunge information from the CRD database.¹⁵⁵ Although FINRA characterizes expungement as an "extraordinary" remedy,¹⁵⁶ one study found that in 2013, arbitrators granted motions to expunge complaints 93.66% of the

151. See *id.* at 28 ("Investors querying BrokerCheck only see information on one broker at a time and so do not know whether a broker's reported characteristics are unusual . . .").

152. See Benjamin P. Edwards, *Exam Scores and Failures Belong on BrokerCheck*, INVESTMENTNEWS (June 1, 2014, 12:01 AM), <http://www.investmentnews.com/article/20140601/REG/140539987/exam-scores-and-failures-belong-on-brokercheck> (last visited Sept. 21, 2017) ("A fierce struggle continues . . . over whether . . . BrokerCheck website should give investors a full view or a sanitized and less salient version of a broker's background.") (on file with the Washington and Lee Law Review).

153. Jean Eaglesham & Rob Barry, *Wall Street's Watchdog Doesn't Disclose All Regulatory Red Flags: Finra Doesn't Make Public All Its Information About Brokers*, WALL ST. J. (Dec. 26, 2014, 9:47 PM), <http://www.wsj.com/articles/wall-streets-watchdog-doesnt-disclose-all-regulatory-red-flags-1419645494> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

154. See *id.* (reporting the investigation's findings).

155. See Christine Lazaro, *Has Expungement Broken Brokercheck?*, 14 J. BUS. & SEC. L. 125, 131–32 (2014) ("[A] broker may also seek to expunge customer dispute information from the CRD system through court or the arbitration process." (citation omitted)).

156. See *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA, <http://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance> (last updated Sept. 2017) (last visited Sept. 21, 2017) ("Expungement is an extraordinary remedy that should be recommended only under appropriate circumstances.") (on file with the Washington and Lee Law Review).

time when a party requested expungement after settling a complaint.¹⁵⁷

These expungements make it possible for troubled brokers to cause significant harm to consumers. For example, one broker, Carl Martellaro, operated his own broker-dealer firm.¹⁵⁸ After two investors filed arbitrations seeking to recover for \$1.75 million in losses, Mr. Martellaro settled the cases—with the condition that the investors not oppose Mr. Martellaro’s request to expunge the record of the action.¹⁵⁹ The investors’ attorney, Scott Bernstein, explained that although his clients “cut a deal, . . . the public got cut out.”¹⁶⁰ With information about the prior action suppressed, Mr. Martellaro went on to bilk investors out of \$125 million in another Ponzi scheme.¹⁶¹

2. *The Flawed Occupational Licensing Model*

Self-regulating professions often defend occupational licensing by arguing that it protects the public from abuse and exploitation when market forces fail.¹⁶² Under this line of thinking, the public cannot protect itself or regulate the profession because only appropriately qualified members of the profession have the capacity to understand or regulate it.¹⁶³ More skeptical voices raise

157. See Seth E. Lipner, *The Expungement of Customer Complaint CRD Information Following the Settlement of A FINRA Arbitration*, 19 FORDHAM J. CORP. & FIN. L. 57, 92 (2013) (“[T]he expungement rate was 93.66%.”).

158. Michael Freedman, *The X-ed Out Files*, FORBES (Dec. 25, 2000, 12:00 AM), <http://www.forbes.com/forbes/2000/1225/6616280a.html> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

159. See *id.* (“The awards stipulated that all references to the arbitration be expunged.”).

160. *Id.*

161. *Id.*

162. Licensing laws make it illegal to engage in a form of work without the appropriate governmental or quasi-governmental authorization. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL’Y 209, 210–11 (2016) (“Licensing laws make it unlawful, and sometimes illegal, to practice in a particular field without first receiving the government’s approval.”).

163. See Gordon, *supra* note 25, at 1430 (“The theory behind self-regulation is that the quality of professional services, requiring as they do complex technical knowledge and discretionary judgment, cannot be reliably evaluated by clients or by lay auditors or regulators.”).

concerns about whether the current structures for professional self-regulation truly serve the public's interests. In many instances, occupational licensing devolves into economic protectionism and fails to deliver promised public protections. In many instances, self-regulation may offer mixed benefits and burdens. Carefully crafted disclosure regimes may mitigate the dark sides of self-regulation.

a. Cartelization Risks

Professional self-regulation creates an inherent and ever-present risk of cartelization.¹⁶⁴ This occurs when a profession acts more in its own interest than in the interest of the public.¹⁶⁵ Law, medicine, and finance may all be prone to cartel-like behaviors.¹⁶⁶

Consider the ways attorney self-regulation exhibits a tendency toward self-interested over public-minded behavior.¹⁶⁷ Professional barriers to entry apply before anyone may provide even a limited amount of legal services. To obtain a law license a person must complete a college degree, a law degree, and pass a multi-day bar examination.¹⁶⁸ While this may increase the likelihood of competent practice, this also insulates the practicing bar from competition.

Many bar association rules seem more designed to restrain competition between lawyers than to protect the public.¹⁶⁹ For example, Alabama requires attorneys to include the following disclaimer when advertising: “No representation is made that the quality of the legal services to be performed is greater than the

164. See Edlin & Haw, *supra* note 20, at 1107 (“But while some professions may require restrictions to ensure quality and public safety, a close examination of restrictions in those professions suggests that those boards, too, have abused their ability to self-regulate.”).

165. Birdthistle & Henderson, *supra* note 24.

166. Edlin & Haw, *supra* note 20, at 1107.

167. See Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 *FORDHAM L. REV.* 1079, 1096 (2005) (“Legal self-regulation displays the typical self-interested behavior of a cartel without any of the concomitant benefits . . .”).

168. *Id.*

169. Edlin & Haw, *supra* note 20, at 1108–09.

quality of legal services performed by other lawyers.”¹⁷⁰ These restrictions make it difficult for lawyers to differentiate themselves.

b. Limited Review of Ongoing Competence

Professional regulatory bodies may man the gates, but they often avert their gaze from activities beyond licensing’s wall. After lawyers pass through a state’s bar exam and character and fitness requirements, they rarely face any further competency review. In many instances, state bars do not allocate substantial resources to their enforcement staff to investigate complaints.¹⁷¹

Similarly, many financial advisers operate with limited regulatory oversight. For example, registered investment advisers (RIA)¹⁷² under the Investment Advisers Act of 1940 (Advisers Act) rarely face ongoing reviews of their practices.¹⁷³ Although the SEC remains responsible for RIA examinations, its limited resources allow it to review an RIA’s operations about once every eleven years.¹⁷⁴

Failing to adequately oversee RIAs may generate substantial risk. While the SEC’s examinations of RIA practices have declined, the assets managed by RIAs have swelled—as of 2012, RIAs managed \$38.3 trillion in assets.¹⁷⁵ Despite the infrequent examinations, misconduct rates may be rising—the SEC has

170. ALA. R. OF PROF’L CONDUCT 7.2(e).

171. See Gordon, *supra* note 25, at 1431 (“[T]he bar has spectacularly failed to do its job. In most states it does not finance or staff more than a tiny fraction of the administrative machinery that would be needed to handle client complaints effectively” (footnote omitted)).

172. The statute defines a registered investment adviser as “any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.” 15 U.S.C. § 80b-2(a)(11) (2012).

173. DIV. OF INV. MGMT. OF THE U.S. SEC. AND EXCH. COMM’N, STUDY ON ENHANCING INVESTMENT ADVISER EXAMINATIONS 14 (2011).

174. See *id.* (explaining that with the SEC’s limited resources, “the average registered adviser could expect to be examined less than once every 11 years”).

175. *Id.* at 9.

begun to bring more and more enforcement actions against RIAs.¹⁷⁶

These failures show that licensing bodies often fail to monitor professional practice in any meaningful way. They may respond to complaints, but they will only rarely proactively seek to identify incompetent or substandard professionals. A Professional Prospectus regime would amplify market forces and supplement self-regulatory enforcement.

III. A Professional Prospectus

Disclosure-based solutions often improve market functioning by reducing transaction costs for market participants. Still, disclosures must be carefully designed, appropriately tailored and delivered to aid consumer choice.¹⁷⁷ While the appropriate disclosure regime will vary depending on the professional services market, some essential attributes may increase the likelihood that the information will be used effectively.

A well-crafted disclosure system would supplement professional self-regulation by allowing market forces to vigorously police professional ranks. More informed selection decisions could shift demand away from the less competent—giving them an economic incentive to improve their client or patient outcomes.

176. See Roberta S. Karmel, *The Challenge of Fiduciary Regulation: The Investment Advisers Act After Seventy-Five Years*, 10 BROOK. J. CORP. FIN. & COM. L. 405, 433 (2016) (“SEC enforcement actions against advisers became even more widespread.”).

177. Cf. Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 977 (“[T]he focus should be on how to communicate forward-looking information and future risks to unsophisticated investors in a meaningful way, perhaps some of the previous insights gleaned from the psychological research regarding the effective design of warnings in the consumer products market may be helpful.”).

*A. Key Considerations for a Professional Prospectus Regime**1. Moving from Posting to Pushing*

For a Professional Prospectus system to alter market function, consumers will need to receive the information before they make a firm commitment to a professional.¹⁷⁸ Achieving this requires advancing beyond posting public information in accessible locations to pushing the information to consumers.

a. Today's Posting

At present, many professional organizations do significant good by posting information about their members to their websites. In the legal profession, state bars allow the public to retrieve information about individual attorneys through the state bar's website. For example, the Florida Bar makes basic information about attorneys available.¹⁷⁹ It tells the public that a person should "[m]ake a careful search for [a] lawyer; it's an important decision."¹⁸⁰ The Florida Bar's guidance also explains how a consumer can check a lawyer's disciplinary history—presumably because the disciplinary history provides a meaningful signal to the public.¹⁸¹

State bars may improve consumer decisions by publishing information about attorney discipline because previously disciplined attorneys may be more likely to have future misconduct.¹⁸² While lawyer recidivism has not been extensively studied, the available evidence indicates that lawyers with public

178. Cf. Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016) (pointing out that voters need information on corporate political spending before an election to take it into account).

179. *How To Find A Lawyer in Florida Pamphlet*, FLORIDA BAR, <https://www.floridabar.org/public/consumer/pamphlet018/> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

180. *Id.*

181. *Id.*

182. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 2 (2007) ("It is no secret that some lawyers who have been sanctioned continue to engage in misconduct . . .").

discipline appear more likely to have future discipline than other lawyers.¹⁸³

Financial regulators also post information about financial advisers on the theory that the public should take the information into account.¹⁸⁴ For example, FINRA explains that the public should use its BrokerCheck website because it helps consumers “make informed choices about brokers and brokerage firms and provides easy access to investment adviser information.”¹⁸⁵

In the financial advice context, evidence indicates that advisers with past complaints pose greater threats to the public than advisers without past complaints. In one recent study, economists found that a financial adviser with past misconduct was “five times as likely to engage in new misconduct as the average financial adviser.”¹⁸⁶ Given the heightened risks posed by brokers with misconduct histories, publicly posting this information does significant good.

b. The Power of Pushing

Professional licensing bodies have accepted the premise that consumers should use information about professional service providers to make decisions. In public guidance materials, they explain that consumers should consider disclosed information when selecting a professional service provider.¹⁸⁷ Presumably, professional regulatory bodies would not go to the trouble of collecting and posting information if they did not believe that consumers could benefit from the information.

183. *See id.* (same).

184. While the current disclosure system for financial advisers has significant flaws as discussed above, it does make some information available to the public.

185. *BrokerCheck by FINRA*, FINRA, <https://brokercheck.finra.org/> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

186. Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739170 (last visited Sept. 21, 2017) [hereinafter Egan, Matvos & Seru] (on file with the Washington and Lee Law Review).

187. *See, e.g., supra* note 179 and accompanying text (encouraging consumers to carefully evaluate their prospective attorneys).

Unfortunately, many consumers lack awareness of these resources or do not think to consult them when selecting a professional.¹⁸⁸ Professional bodies have even created advertising campaigns to increase awareness. Speaking about one campaign, former FINRA Chairman Richard Ketchum explained that “[p]eople immediately go online to check out a new restaurant where they might spend \$25 for a meal, but don’t think to use BrokerCheck when they’re handing over \$2,500—or \$25,000 That has to change.”¹⁸⁹

Pushing information to consumers may improve market functioning by amplifying the broadcast channel created by posting information.¹⁹⁰ Instead of assuming that consumers know enough to perform their own rudimentary due diligence, a Professional Prospectus regime would require professional service providers to deliver partial disclosures on first contact and at regular intervals. Ensuring that consumers receive information increases the likelihood that they will be able to take it into account.

A well-designed Professional Prospectus regime would put useful information into consumer hands. Whenever possible clients should receive disclosures about a professional before beginning any engagement and at regular intervals for prolonged engagements.¹⁹¹ Ideally, the public should be given an opportunity

188. For a discussion of underutilization of information resources in the health context, see Mello & Brennan, *supra* notes 143–44 and accompanying text.

189. *FINRA Launches National Ad Campaign Promoting Brokercheck*, FINRA (June 1, 2015), <http://www.finra.org/newsroom/2015/finra-launches-national-ad-campaign-promoting-brokercheck> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

190. In discussing the limited utility of posting information on BrokerCheck, one consumer advocate argued that it would make more sense to simply “provide the information . . . directly in the form of a plain English pre-engagement disclosure document so that investors don’t have to go searching for such critically important information.” Ted Knutson, *Finra Kicking Off \$3.5 Million BrokerCheck Ad Campaign*, FA MAG. (June 1, 2015), <http://www.fa-mag.com/news/finra-kicking-off-3-5-million-brokercheck-ad-campaign-21973.html> (last visited Sept. 21, 2017) (quoting Barbara Roper) (on file with the Washington and Lee Law Review).

191. After the initial decision and an investment in a relationship, consumers may be much less likely to change from this initial state. *Cf.* Jill Fraley, *The Meaning of Dispossession* 12–13 (Wash. & Lee Pub. Legal Studies, Working Paper No. 2017–1, Jan. 25, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905798 (describing human unwillingness to change after an

to read and review the disclosures before proceeding. This could be accomplished by requiring that a professional first provide a copy of the disclosures whenever a new client meets with the professional.

Pushing should be preferred over posting for high-stakes professional services because it puts useful information directly into the consumer's hands.¹⁹² The current "posting" model relies on weak assumptions that consumers: (i) know that useful, public information about professionals has been posted to a professional self-regulatory website; and (ii) that they will remember to review the information.

Adopting a preference for pushing over only posting information will do significant good. While not every consumer will closely review the information, enough will likely change behavior to increase overall market efficiency. This will also increase reputation's force in shaping the professional services markets by significantly amplifying the broadcast channel for relevant information.

2. *Short, Standardized, & Clear*

Designing a Professional Prospectus regime requires informed choices about how to present useful information. The most benefits seem likely to emerge from presenting the information in a short, standardized, and clear format.

a. Short

It would be a mistake to assume that if some immediate disclosure does good, more would be better.¹⁹³ For some time, it has been accepted that flooding consumers with tangentially relevant

investment) (on file with the Washington and Lee Law Review).

192. The costs associated with this proposal are discussed in Part III, *infra*.

193. See Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 419 (2003) (explaining that "[s]tudies show that at some point, people become overloaded with information and make worse decisions than if less information were made available to them").

information does not improve decision-making.¹⁹⁴ Giving consumers too much information may distract them with irrelevant information and lead to poorer decisions.¹⁹⁵

An effective prospectus regime will strike an optimal balance between volume and utilization. As documents grow longer, the task of reading them both appears and grows more burdensome. If research reveals that most consumers will not review more than a single page disclosure, the disclosure distributed at the point of contact should be limited to a single page.

Of course, the introduction of a Professional Prospectus regime does not mean that professional bodies should post less information on their websites. Information that cannot be included in a Professional Prospectus should remain readily available. The shorter disclosure would communicate key facts and notify the recipient about the availability of additional information.

In some respects, the wisest structure may partially resemble the disclosure structure used for mutual funds.¹⁹⁶ A mutual fund's "summary prospectus" provides "information that the SEC views as most important" including, among other things, information about cost, investment strategies, risks, and information about compensation paid to financial intermediaries.¹⁹⁷ The full prospectus provides additional information.

b. Standardized

Standard disclosure requirements may improve market functioning by increasing the ability of consumers to compare one professional against another. Without a standardized disclosure

194. See Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward A More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 146–47 (2006) ("[D]isclosure that is too long or complex to be comprehensible to the average person floods the individual with too much nonessential data and overloads the person with information that inhibits optimal decision-making.").

195. See *id.* at 160–61 (summarizing research).

196. See Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1968–69 (2010) (describing mutual fund prospectuses).

197. Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Securities Act Release No. 8998, Investment Company Act Release No. 28,584, 74 Fed. Reg. 4546, 4552 (Jan. 26, 2009) (codified at scattered parts of 17 C.F.R.).

format, consumers struggle to use the information to compare one professional to another.¹⁹⁸ Consider the comparison difficulties created if health professionals were permitted to define “complication” in different ways. One might only include shock and hemorrhage while another might include a broader array of complications. Different definitions would make it difficult for consumers to understand actual differences in complication rates.

c. Clear

An effective Professional Prospectus regime will also convey information clearly and plainly. Unlike securities disclosure, which may be designed more for a professional audience, there should be no doubt that a Professional Prospectus regime seeks to deliver information directly to public consumers.¹⁹⁹ Given the need to reach the public, disclosures should be written in clear and simple language.

3. Benchmark Information

A Professional Prospectus should provide information as well as any useful context that will allow consumers to evaluate the information. Consider the difficulty of assessing the relative danger posed by a broker with two customer complaints on her record. Without context, a consumer may have no way to know whether most brokers have two or more complaints.

Mutual fund disclosures suffer from a similar problem.²⁰⁰ While a mutual fund prospectus provides fee disclosure, it does not

198. A similar dynamic exists in the securities markets. See STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES & ANALYSIS* 25 (4th ed. 2015) (“Comparisons are more difficult if disclosures are not consistent.”).

199. See David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 716 (2002) (“The advisability of insisting on plain English depends upon the type of document at issue. If the function of the document requires quick apprehension, plain English is important.”).

200. See Jeff Schwartz, *Reconceptualizing Investment Management Regulation*, 16 GEO. MASON L. REV. 521, 546–47 (2009)

[W]hile settling on a uniform presentation of fee information is useful because it facilitates comparison, the rules do not help investors with

provide critical context. While a 2% fee might seem small for a mutual fund, it falls on the pricier end of the scale. Many funds charge substantially less for their asset management services. A consumer reviewing a single prospectus lacks critical context that may only come from benchmark information or from reviewing a sizeable sample of prospectuses.

Still, selecting the relevant benchmark may be challenging. Consider the difficulty of selecting a relevant benchmark for criminal defense attorneys. Criminal defense lawyers tend to receive substantially more complaints about their services than other lawyers. Benchmarking their disclosures against statistics for attorneys generally may mislead clients about their attorney. To deal with the problem, a Professional Prospectus regime should benchmark by relevant specialty whenever possible.

Without the context provided by benchmark information, a Professional Prospectus may fail to alert many consumers of situations where they should grow wary. The alert provided by a benchmark may nudge consumers into more closely monitoring a professional service provider.

4. Information with Predictive Value

While the precise disclosures should vary depending on market, an effective Professional Prospectus regime will prominently feature information with some predictive value. Featuring information with known predictive value may aid consumers and reduce the likelihood that they will base decisions on irrelevant information.

Information that has predictive value in one context may not have predictive value in others. For example, information about customer complaints and past misconduct has proven to contain predictive value for financial advisers.²⁰¹ Because complaint information provides a meaningful signal about outcomes, it

the crucial next step—they never give investors an idea of how a fund's fees compare to other funds. Instead, investors are left to fend for themselves in this regard.

201. See generally Egan, Matvos & Seru, *supra* note 186 (finding that stockbrokers with misconduct histories are five times more likely to have future complaints).

should be featured in a Professional Prospectus for financial advisers. Complaints may fall along a continuum for different professions. For financial advisers, the mere filing of a complaint seemingly provides statistically significant information about risk. Similarly, a small percentage of physicians “account for a disproportionate share of malpractice claims, settlements, and judgments.”²⁰² When complaint information provides a meaningful signal about outcomes, it should be disclosed to consumers.

This does not mean that all complaint information about all professionals should be featured on a Professional Prospectus. Without evidence that complaint information provides a meaningful signal, there may be no reason to believe that the inclusion of the information would improve overall market function.

Nonetheless, identifying predictive information may require additional analysis and research.²⁰³ In the market for attorney services, research now indicates that information collected through the legal profession’s character and fitness process provides only marginal predictive value, at best.²⁰⁴ Practice setting may offer some predictive value because bar authorities discipline solo practitioners at higher rates than attorneys that practice within larger firms.²⁰⁵ Assembling effective disclosures may require more research to identify factors that indicate poorer outcomes.

Predictive information may be most readily accessible in the medical context.²⁰⁶ When medical professionals specialize and

202. See David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 990 (2005) (citing statistical research).

203. Cf. David Orentlicher, *Health Care Reform and Efforts to Encourage Healthy Choices by Individuals*, 92 N.C. L. REV. 1637, 1658 (2014) (“Governments need to do a better job at making sure their interventions reflect current scientific understanding, and they need to ensure that more research is conducted to improve our understanding.”).

204. See Leslie C. Levin et al., *The Questionable Character of the Bar’s Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51, 52 (2015) (“Surprisingly, however, it is unclear whether the data gathered during the character inquiry actually predict lawyer misconduct.”).

205. See Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312 (2004) (“Solo and small firm lawyers are disciplined at a far greater rate than other lawyers.”).

206. See Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in*

perform the same or similar procedures repeatedly, statistical information about patient outcomes emerges. If a doctor lacks experience in a procedure or has abnormally poor outcomes, a patient may not actually give informed consent without receiving information about the doctor's lack of experience and outcomes.²⁰⁷

5. Insurance Information

Many states already require professionals to disclose information about whether they carry malpractice insurance. Giving consumers ready access to this information may improve market functioning in key ways. If consumers shift toward professionals with insurance, it increases the likelihood that they will be able to recoup a portion of their losses if they receive substandard services. If the disclosure regime causes more professionals to obtain insurance, the insurance company's rates may force professionals to internalize malpractice risks.

B. An Immigration Use Case

Immigration court practice provides an initial use case to test the efficacy of a Professional Prospectus regime. While self-regulating professions may hesitate to impose disclosure regimes on their members, a federal agency might more readily move to impose disclosure requirements on persons practicing within its administrative courts. Improving the legal services market for immigration lawyers could unlock significant gains for immigrant families, lawyers, and society.

Informed Consent: Comparing Physicians to Each Other, 94 NW. U. L. REV. 1, 3 (1999) ("With the advent of more extensive gathering and comparison of data, it has become possible to provide information to patients not only about the risks associated with the procedures for which consent was sought, but also about the relative risks associated with the medical providers [performing] those procedures.").

207. See *Johnson ex rel. Adler v. Kokemoor*, 199 Wis. 2d 615, 644 (1996) ("Had a reasonable person in the plaintiff's position been made aware that being operated upon by the defendant significantly increased the risk one would have faced in the hands of another surgeon . . . that person might well have elected to forego surgery with the defendant.").

1. *The State of Representation*

Representation significantly influences outcomes in immigration courts. At present, the market for immigration lawyers fails to deliver in terms of quantity and quality.²⁰⁸

a. Insufficient Representation Rates

In many instances, persons facing immigration removal proceedings go forward without the assistance of a representative.²⁰⁹ While the figures vary from year to year, only a limited portion of those in removal proceedings had the assistance of an attorney.²¹⁰ Between 2007 and 2012, only 37% of persons in removal proceedings had representation.²¹¹

Representation strongly correlates with improved outcomes in immigration court proceedings.²¹² One recent nationwide study found that respondents with representation were five and a half times more likely to obtain relief than respondents without representation.²¹³ This recent figure coheres with other analyses that have found significant differences in outcomes for represented versus unrepresented parties. In asylum cases, one study found that “[r]epresented asylum seekers were granted asylum at a rate

208. See Robert A. Katzmann, *Foreword*, 33 CARDOZO L. REV. 331, 332 (2011) (“The representation problem, nationally, is two-fold: (1) the fact that only forty percent of noncitizens have representation nationwide; and (2) the substandard quality of counsel in all too many cases, which all but dooms the immigrant’s chances even in the cases of those who do have nominal representation.”).

209. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGR. REV., FY 2014 STATISTICS YEARBOOK F1 fig.10 (Mar. 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf>.

210. *Id.*

211. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015).

212. See *id.* at 57 (“In short, at every stage in immigration court proceedings, representation was associated with dramatically more successful case outcomes for immigrant respondents.”).

213. See *id.* at 76 (“Our regression analysis, which controlled for numerous case- and respondent-specific characteristics, reported this result most dramatically: the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, and five-and-a-half times greater that they obtained relief.”).

of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel.”²¹⁴

Of course, factors other than representation quality may account for some of the outcome differences between represented and unrepresented respondents.²¹⁵ Perhaps only the most motivated may seek representation, indicating a client’s will to fight removal—a will that may be forged by fear of returning to a country where she will face persecution.²¹⁶ Some differences in outcomes may also reflect attorneys and nonprofits picking the best cases and only representing persons with reasonable probabilities of success.²¹⁷

Even if other factors partially account for the differences, the different outcomes for represented and unrepresented respondents show the need for counsel in immigration court removal proceedings.²¹⁸ Despite this, federal law forbids appointing counsel at the government’s expense.²¹⁹ In the current environment, a right to appointed counsel for immigration matters does not appear likely to emerge from court decisions or Congress soon.²²⁰

b. Low Lawyer Quality

In addition to an overall shortage of representations, immigration court representation also suffers from quality problems.²²¹ One study of immigration practice in New York found

214. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) [hereinafter *Refugee Roulette*].

215. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2188–96 (2012) (discussing selection effects).

216. See *id.* (same).

217. See *id.* (same).

218. See Eagly & Shafer, *supra* note 211, at 3 (illustrating the scope of underrepresentation in immigration court).

219. 8 U.S.C. § 1229a(b)(4)(a) (2012) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings . . .”).

220. Cf. Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 547 (2011) (arguing that a *Padilla*-based rationale for immigration counsel “does not appear imminent”).

221. See Elinor R. Jordan, *What We Know and Need to Know About*

that immigration judges rated nearly half of immigration lawyers as substandard, with 33% of practitioners rated as inadequate and another 14% as grossly inadequate.²²² These findings cohere with other reports which have characterized many immigration counsel as “barely adequate” at their jobs.²²³ A survey of judges found that “immigration was the area in which the quality of representation was lowest.”²²⁴

The quality of service provided by immigration lawyers varies widely. The private immigration bar accounts for 91% of all representation and provides significantly lower quality than other representatives.²²⁵ In contrast, nonprofits and law school clinics generally provide higher quality representation.²²⁶ In one study, larger law firms providing pro bono services won an astounding 96% of their cases.²²⁷

Immigrant Access to Justice, 67 S.C. L. REV. 295, 299–300 (2016) (“Elsewhere, scholars have similarly found that nearly half of removal-case representation is inadequate.”).

222. See Symposium, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 364 (2011) [hereinafter *Accessing Justice*] (“New York immigration judges rated nearly half of all legal representatives as less than adequate in terms of overall performance; 33% were rated as inadequate and an additional 14% were rated as grossly inadequate.”).

223. FELINDA MOTTINO, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN NEW YORK CITY IMMIGRATION COURTS 38 (2000), https://storage.googleapis.com/vera-web-assets/downloads/Publications/moving-forward-the-role-of-legal-counsel-in-new-york-city-immigration-courts/legacy_downloads/353.409747_MF.pdf; see also Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 9 (2008) (“Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different.”).

224. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011).

225. See *Accessing Justice*, *supra* note 222, at 364 (“The epicenter of the quality problem is in the private bar, which accounts for 91% of all representation and, according to the immigration judges surveyed, is of significantly lower quality than pro bono, nonprofit, and law school-clinic providers.”).

226. See *id.* (same).

227. See *Refugee Roulette*, *supra* note 214, at 341 (“[A]sylum applicants represented pro bono by large law firms cooperating with Human Rights First (formerly the Lawyers Committee for Human Rights) had a success rate of about 96% in the 479 cases they handled to conclusion in that same period.”).

One recent, peer-reviewed study examined the differences in outcomes for immigration clients represented by attorneys with different track records before certain judges and found striking differences in outcomes.²²⁸ The study broke attorneys into three categories by win rates: (i) poor attorneys in the bottom 10th percentile with less than 4% win rates; (ii) average attorneys at the 50th percentile winning about 24% before a particular judge; and (iii) good attorneys at the 90th percentile that won 60% or better before a particular judge.²²⁹ Startlingly, the study found that “having no attorney is consistently more beneficial than having a low quality attorney.”²³⁰ Average attorneys provide some benefit and increase odds to “about 9 percentage points better than no attorney.”²³¹ Representation quality makes a significant difference with good attorneys performing on “average 32 percentage points better than an average one and about 40 percentage points better than no representation.”²³²

2. *The Lemon Problem Limits Market Solutions*

The private immigration bar’s low quality drives a lemon problem. A lemon problem can arise when sellers of goods or services have more information than buyers.²³³ If buyers cannot tell whether they are purchasing a higher quality good or service, they will only pay for an average-priced good or service. This means that the producers of higher-quality goods or services will not be compensated fairly. High-quality providers will either reduce the quality of their offerings or compete in a different

228. See Banks Miller, Linda Camp Keith & Jennifer S. Holmes, *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC’Y REV. 209, 210 (2015) [hereinafter *Leveling the Odds*] (“[V]ariation in attorney capability is a primary driver of the disparity in asylum outcomes in U.S. immigration courts.”).

229. *Id.* at 229.

230. *Id.* at 230.

231. *Id.* at 229.

232. *Id.*

233. See Akerloff, *Lemons*, *supra* note 18, at 489–90 and accompanying text (noting the less-informed buyer’s disadvantage).

market.²³⁴ A lemon problem can both degrade the average quality of services and the amount of services available.²³⁵

In the market for immigration lawyers, a significant information asymmetry exists—the lowest quality immigration lawyers know that they do not win their cases but their clients do not.²³⁶ In many instances, “immigrants are simply in a terrible position to evaluate the claims made by lawyers and are often naïve about what lawyers can and cannot do for them.”²³⁷ Immigrants may also hesitate to express concerns because of status differences between them and their attorneys.

This lemon problem may be especially pronounced in immigration courts because ordinary reputational feedback mechanisms may function with less force in immigration cases. When a client loses a case because of low-quality lawyering, the client does not remain in the community to spread word about the attorney’s behavior. It may be particularly difficult to file complaints and grievances after deportation.

Importantly, this lemon problem makes it more difficult to keep higher quality lawyers in immigration court practice. Consider the difficulty faced by a highly competent immigration lawyer. If clients cannot tell the difference between good lawyering and bad, they will not be more likely to hire the good lawyer. This means that the good lawyer will face an ever-present incentive to either shirk her responsibilities because hard work does little for her career or to shift her practice to other areas.²³⁸ As this cycle repeats, the current, private immigration law bar develops and the

234. *Id.*

235. *See id.* at 495 (explaining that “dishonest dealings tend to drive honest dealings out of the market” and that “[t]he cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost must also include the loss incurred from driving legitimate business out of existence”).

236. The best available evidence indicates that persons in removal proceedings struggle to identify higher quality lawyers. If the market could effectively price immigration law services, it seems unlikely that respondents would hire lawyers that reduced their chances below their expected outcome of proceeding without representation. For further discussion, see *Leveling the Odds*, *supra* note 228, at 229.

237. *Id.* at 213.

238. This, of course, assumes that the lawyer has some interest in making money.

overall size of the market diminishes because clients become less willing to pay.²³⁹

This dynamic may also explain why law school clinics and pro bono lawyers achieve relatively higher success rates. Their service quality does not depend on the market's ability to support their practice.

3. A Professional Prospectus Intervention

There are different mechanisms for addressing information asymmetry and lemon problems.²⁴⁰ For example, licensing has been used to “reduce quality uncertainty” in the markets for professional services.²⁴¹ Given the private immigration bar's low quality, it appears that the licensing model may either need to impose a higher standard or embrace additional solutions.²⁴²

Mandatory disclosure through a Professional Prospectus for regular immigration court practitioners would improve market functioning.²⁴³ The disclosure enables immigration lawyers to make more credible statements about their relative skill to potential clients.²⁴⁴ It also gives the least sophisticated consumers of legal services a tool for assessing the relative competency of their representatives. Ready access to this information would likely make clients more sophisticated consumers of legal services.

239. Of course, respondents in removal proceedings face more barriers than an unwillingness to pay for uncertain services. They may simply not have the money. In many instances, the breakdown of trust in immigration attorneys may undercut the ability of respondents to borrow funds from friends, families, and financial intermediaries.

240. For a discussion on the different mechanisms, see Akerloff, *Lemons*, *supra* note 18, at 499–500.

241. *Id.*

242. Cf. Shubha Ghosh, *Decentering the Consuming Self: Personalized Medicine, Science, and the Market for Lemons*, 5 WAKE FOREST J.L. & POL'Y 299, 302 (2015) (“What should be emphasized is that there are several solutions to the lemons problem.”).

243. It would be reasonable to implement a Professional Prospectus requirement only for attorneys with a statistically significant sample of cases.

244. See Ghosh, *supra* note 242, at 302 (“[S]uppliers need to be able to make credible statements about product quality so that consumers will be able to identify the level of quality they seek for the product.”).

Adding a Professional Prospectus requirement for immigration court practice would be feasible. Immigration courts already require attorneys to complete a form with each notice of appearance.²⁴⁵ The Department of Justice can aggregate information about attorneys regularly practicing in its courts and generate Professional Prospectuses at lower cost than other potential solutions.²⁴⁶ Much of the information and relevant statistical models for a Professional Prospectus may already be available from academic research.²⁴⁷

Certifying that an attorney provided the disclosures would not be overly difficult. The Department of Justice could require an attorney to certify that the client received the disclosure at the outset of the representation when filing a notice of appearance, and immigration court judges could verify that the client had received it when accepting the representative's appearance.

Significant social benefits should also emerge from improving the market for immigration law services. It costs approximately \$158 per day to detain immigrants in removal proceedings.²⁴⁸ If improved representation makes it possible to detain fewer immigrants or to detain them for shorter periods of time, the change could result in significant social savings.²⁴⁹

245. See U.S. DEP'T OF JUSTICE, NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE BEFORE THE IMMIGRATION COURT 1–2 (2015) (showing the Agency's "Form EOIR – 28").

246. While a right to counsel in immigration court would do significant good, a Professional Prospectus intervention requires less resources to implement and may not require Congressional action because the Department of Justice has the ability to regulate the conduct of attorneys practicing within its courts. Moreover, testing the concept would not require nationwide implementation—the Department of Justice could experiment with it in a few regions before determining whether it offered benefits outweighing the costs.

247. See generally *Leveling the Odds*, *supra* note 228.

248. U.S. GOV'T ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSIS NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 18–19 (2014).

249. Immigrants would also benefit significantly from better advice. When a substandard attorney creates false hope and files a meritless asylum claim, the immigrant may lose months of their life to detention in order to pursue a doomed asylum claim.

IV. Implications of a Professional Prospectus Regime

Moving toward a disclosure-incorporating regime for professional services may alter the way market participants behave. This Part discusses some of the objections to, and implications of, a Professional Prospectus regime.

*A. Potential Objections**1. Disclosure Costs*

One objection to any mandatory disclosure regime is that mandated disclosures impose costs on the persons required to make the disclosures. A Professional Prospectus regime may require professionals to gather, produce, and maintain records about their practices. These burdensome requirements may increase the cost of professional services because professionals will be forced to charge higher prices to comply with these requirements.

While any disclosure-based regime should keep a close eye on the costs imposed, mandatory disclosure may reduce overall social costs. If the disclosure requirements simply mandate that the professional present otherwise public information, forcing disclosure reduces public search costs and the need for many different members of the public to perform costly and duplicative research. Instead of having one person gather the information, every client that conducts rudimentary due diligence will expend time and effort to gather the information.

In most instances, a professional may also be the lowest-cost producer of information about themselves.²⁵⁰ Unlike members of the public with little information about what information may be available, professionals already know the types of information available. Unlike professionals, members of the public incur two sets of costs when performing due diligence—the cost of first determining the kinds of information that should be reviewed, and the additional cost of gathering that information about a professional. If a member of the public cannot pay these costs when

250. For immigration attorneys, the lowest cost producer may be the Department of Justice.

selecting a professional, they accept additional risk and pay a cost in outcomes and quality.

The cost may also be justified to the extent that it generates incremental improvements in the markets for professional services. As discussed above, these markets now fail to function effectively and impose tremendous costs on society. Even though a move to embrace effective disclosure structures will impose costs on some professionals, it offers a substantial improvement over the status quo.²⁵¹

2. *Pandering*

A disclosure system may change behavior. Some may fear that a Professional Prospectus regime might cause professionals to pander to avoid complaints instead of delivering hard news. If professionals fear the economic impact of a complaint on their reputational capital, they may alter their practices to avoid complaints in ways that diminish client or patient outcomes.

A well-designed disclosure system may significantly mitigate this risk by focusing disclosure on relevant information with predictive value. In the medical context, patients would likely prefer to work with a doctor with strong outcomes in a procedure even if a few other patients had filed complaints.²⁵²

Despite pandering's pejorative connotation, changing communication style and responsiveness may do significant good for clients. Attorney ethics rules generally require attorneys to communicate with clients and "promptly inform" them of "any decision or circumstance relevant to the client's informed consent" and to "promptly comply with reasonable requests for information."²⁵³ Poor communication does not only generate attorney complaints—it also violates the profession's ethical rules.²⁵⁴

251. *Supra* Part I.

252. These predictive disclosures may also be required to obtain meaningful informed consent. *See supra* notes 206–207 and accompanying text (discussing informed consent in the medical context).

253. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

254. *See* Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1109 (2013) ("By perusing bar disciplinary records one would also learn about a myriad of less newsworthy but nonetheless

3. Strategic Client Selection

Professionals may behave strategically in response to a disclosure system and refuse to do business with certain types of clients or patients. For example, physicians measured by patient outcomes, may decline to perform medical procedures on certain groups of patients if they may be more likely to experience complications that would mar a physician's disclosure record. If many physicians behaved strategically, the best outcome rates could reflect a wealthy and relatively healthy patient population more than skill. Similarly, lawyers might opt against serving disfavored communities or out of practice areas to avoid complaints.

An effective benchmarking system would mitigate the dangers posed by strategic client and patient selection. In the medical context, effective benchmarking means that the relevant benchmark would need to consider the physician's patient population. Outcome statistics for physicians treating different populations should not be presented as fair comparisons. While generating more appropriate benchmarks would increase costs, the cost of information aggregation and analysis continues to decline rapidly, making effective benchmarking more feasible.

Some behavioral changes might improve healthcare overall. At present, some physicians may reap financial rewards if a patient experiences complications because they will be required to perform additional medical procedures.²⁵⁵

In the legal context, more strategic case selection might check frivolous litigation.²⁵⁶ Attorneys that file low-probability lawsuits

important ethical violations—failure to communicate with clients, neglect of client matters, failure to provide competent representation, and misuse of client trust funds.”); *see also* Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 259–60 (2012) (reporting that the most common disciplinary complaints made against attorneys involve neglect and lack of communication).

255. Cf. Jonathan Baert Wiener, *Managing the Iatrogenic Risks of Risk Management*, 9 RISK 39, 49 (1998)

To a provider paid on a fee-for-service basis, the iatrogenic side effects of initial treatment might constitute an unintentional source of additional revenues (up to the point that the iatrogenesis drives the patient to choose a different provider, or to expire), and such a provider would therefore have less financial incentive to prevent iatrogenesis.

256. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological*

may not always internalize the costs their suits place on the public.²⁵⁷ Their clients may also not realistically assess the merits of their case and may assume that an attorney's willingness to go forward indicates a reasonable probability of success.

4. *Statistical Barriers to Entry*

Freshly-minted professionals might object to this type of disclosure system because it may reduce the ability of newer professionals to attract initial clients. New professionals lack a record of outcomes that can be used. Here, it would be most appropriate to simply disclose that the professional is newly licensed.

This does not mean that young professionals would not benefit. With a well-designed system, some populations of new professionals would rely on a firm's reputation. These firm-specific disclosures would offer the most useful information to potential clients because the more senior professionals at that firm will be able to provide additional guidance and mentor the new professional.

Of course, a new professional without any history and without a firm's reputation to rely on might face some disadvantage because they are an unknown. This could create some market pressure for new professionals to affiliate with high-quality firms in their early years. On balance, that seems to be a good thing.

Importantly, a disclosure regime would not lock new professionals out of the market. Even new solo practitioners without any information to disclose would likely benefit from improved disclosures in two ways. First, if a client knows that the new professionals want good outcomes to build their reputation, they may be willing to give new professionals a chance. The other benefit emerges from improved market function. If the disclosure system raises the level of practice and mitigates the lemon

Theory, 67 U. CHI. L. REV. 163, 185–86 (2000) (“For most litigants and attorneys in the trenches of the civil justice system, however, a frivolous case is simply a case in which the plaintiff has a low probability of prevailing at trial.”).

257. See *supra* Part I (discussing the negative externalities created by frivolous litigation).

problem, overall demand for legal services and the rational price to pay for an unknown goes up.

B. Additional Implications

Other considerations may also motivate the adoption of a Professional Prospectus system.

1. Mitigating Implicit Bias

Implicit bias plays a substantial role in how persons evaluate others.²⁵⁸ A well-meaning person that unknowingly associates professional competence with an image of an older white male may make suboptimal choices when selecting professional service providers by avoiding highly competent professionals that happen to be members of minority groups.²⁵⁹

A Professional Prospectus system may counteract implicit bias by giving consumers more useful information about past outcomes. For example, a person with highly negative views toward minority racial groups might nonetheless elect to retain the services of a minority surgeon with 20% better outcomes than the average surgeon. When it comes to picking the person to perform a sensitive, high-stakes procedure, clients will likely seek the professional that offers a better probability.

2. Facilitating Information Intermediaries

A Professional Prospectus system would likely lower costs for information intermediaries to gather and analyze data. At present, a variety of private, for-profit firms provide lawyer rating

258. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006) (“[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their action.”).

259. Cf. Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 485 (2007) (“Whatever it reflects, implicit bias can result in behaviors and evaluations that limit the opportunities of minority group members.”).

services.²⁶⁰ By standardizing disclosures and making information more public, these organizations will likely face lower costs for compiling and creating recommendations.

These intermediaries may play a vital role in amplifying the benefits of a Professional Prospectus regime by providing regularly updated rankings and indicia of quality. Consumers entering a market may use these services to select professionals—significantly mitigating the lemon problem and allowing higher quality professionals to earn returns.

3. Best Practices

A Professional Prospectus system may cause professionals to more quickly adopt best practices. In a competitive market, professionals winning the highest marks on disclosure forms will become model practitioners. Once the most effective practices are identified, many other practitioners will likely alter their practices to obtain the same results. Broad release of the information may also affect human capital flows because ambitious young professionals will prefer to join professional firms with superior scores.

This knowledge transfer might happen through different mechanisms. Professionals with poorer outcomes might now lack comparative information that could show that they could achieve gains by changing their practices. A disclosure system could provide useful information to them and nudge them toward improving outcomes. In group practice settings, shared accountability would likely increase mentoring and knowledge transfer within firms.

V. Conclusion

Although occupational licensing and professional self-regulation provide one solution for regulating professional services markets, this Article calls for a blended approach that amplifies reputational forces. While consumers may not be able to

260. See Renee Newman Knake, *The Commercialization of Legal Ethics*, 29 GEO. J. LEGAL ETHICS 715, 719 (2016) (discussing lawyer rating services).

evaluate professional services directly, relevant information does emerge over time. In many instances, relevant information is already public and either available on a webpage or with a routine request for access to information.

The public often struggles to perform even basic due diligence on professionals because they are often one-shot players in the system. Almost by definition, one-shot players face staggering search and analysis costs for information because they do not know the range of information available or how to identify the most valuable information.

Pushing appropriately tailored information out to consumers at initial points of contact should improve overall market functioning in multiple ways. It will make it easier for consumers to avoid the least competent professionals and increase the business flowing to more competent professionals. If the system functions well, underserved market segments may see significantly more activity. If the system makes only modest improvements, it may still generate public benefits worth the cost. Relatively minor efficiency gains in massive markets generate sizeable benefits.

Ultimately, the concept has broad applicability. While this Article suggests that immigration court practice could provide an initial use case, other administrative courts might also be able to implement similar schemes. As statistical information about outcomes associated with individual professionals becomes more readily available, a move to increased disclosure seems likely to happen. The best professionals will push for disclosure because of the economic rewards for their skills. The least competent may face increasing litigation alleging a lack of informed consent.