Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience, Part II

By Tracy Walters McCormack and Christopher Bodnar

Editor's Note: The following article is excerpted from "Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience," originally published in the Georgetown Journal of Legal Ethics, Vol. XXIII, No. 1, Winter 2010. This excerpt is an extensively edited version of Part 1 of the article's two-parts, i.e. "The Implications of Litigators" Lack of Trial Experience appeared in the Summer 2011 issue of **Voir Dire**. Special thanks to David G. Halpern for his editorial assistance.

A. What Makes Information "Material"?

Information is material when "if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct. Materiality of information can be a function of objectivity (whether a reasonable person would find the information important to a decision-making process), and subjectivity (would it be an important factor to a prospective client's hiring decision).

Unfortunately, there are no databases or other efficient means for identifying who is a *potential* client — *i.e.* actively looking to hire a litigator. Therefore, we surveyed three different sets of potential clients: ***(1)*** laypersons over the age of 18 who could potentially hire a litigator to represent them; ***(2)*** in-house counsel who could potentially hire a litigator on behalf of his or her company; and, ***(3)*** other attorneys (both litigation and transactional) who could potentially hire a litigator for the same purpose as a layperson. Based on these surveys, the respondents resoundingly affirmed that information about a litigator's lack of jury trial experience would be an important factor in their hiring decision, therefore making the information material.

B. Jury Trial Experience is Material to Potential Clients

We further distinguished between what we called individual clients and institutional clients. Individual clients can be defined as any person who hires a lawyer to litigate on *his or her* behalf, while institutional clients can be defined as an entity, such as a corporation, that hires a lawyer to litigate on *its* behalf or entities like insurers who hire lawyers on a regular basis. When the potential client is an individual, he or she is likely the person who makes the decision regarding whether to hire a particular litigator. For institutional clients, we are assuming that the hiring decision is generally made with input from the entity's in-house counsel or those who frequently hire counsel.

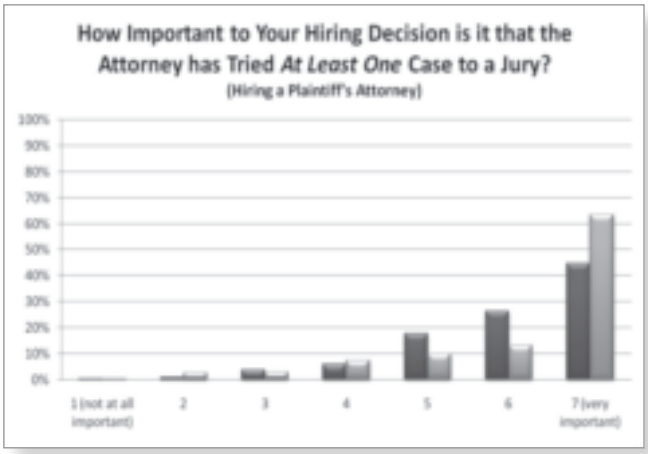
From television and movies to media reports and jury duty, the "jury trial" is the legal system's focal point for most laypersons. Therefore, our initial hypothesis was that a potential individual client would likely believe that lack of jury trial experience meant a litigator was somehow deficient, and would find such information very important when making a hiring decision. However, our initial hypothesis regarding potential institutional clients was that they would give less value to information about a litigator's lack of jury trial experience when making a hiring decision. Our reasoning behind this was that since in-house counsel — *i.e.* other attorneys—have input into the hiring decisions for potential institutional clients, they would know that most civil matters are rarely tried to a jury. In addition, we suspected that potential institutional clients would also realize that fewer and fewer litigators have jury trial experience.

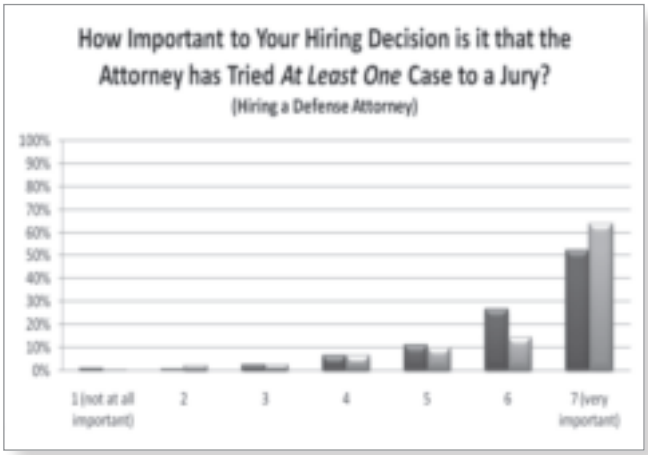
Our survey data suggests that our initial hypothesis regarding potential individual clients was correct, but that our assumption about potential institutional clients was wrong. As the graphs *(A Charts)* show, potential individual client respondents (black bars) and potential institutional client respondents (gray bars) *both overwhelmingly* indicate that jury trial experience would be an important factor in deciding whether to hire a particular litigator.

In addition, as the B Chart illustrates, both sets of respondents also indicated that they would be unlikely to hire an attorney with no jury trial experience.

After collecting and analyzing the responses from the *Potential Individual Client Survey* and the *Potential Institutional Client Survey*, we conducted an additional survey to see how attorneys would respond if they were asked the same

A Charts





For potential individual clients (black bars) the average rating of importance for hiring a plaintiff's attorney was ~6.0, and the average rating for hiring a defense attorney was ~6.2. For potential institutional clients (gray bars) the average rating of importance for hiring a plaintiff's attorney was ~6.2, and the average rating for hiring a defense attorney was ~6.2.

B Charts

For both potential individual clients and potential institutional clients, the average rating of likelihood of hiring an attorney with no jury trial experience was ~2.3.

questions regarding their decision-making process. As the graphs on the next page *(C Charts)* show, responses to this survey indicate that when attorneys are themselves in need of civil litigation services, information regarding a litigator's jury trial experience is an important factor in their hiring decision as well. Notably, these graphs also indicate that individual clients (black bars), institutional clients (light gray bars), and attorneys as clients (dark gray bars) all attach approximately the same level of importance to a litigator's jury trial experience when making a hiring decision.

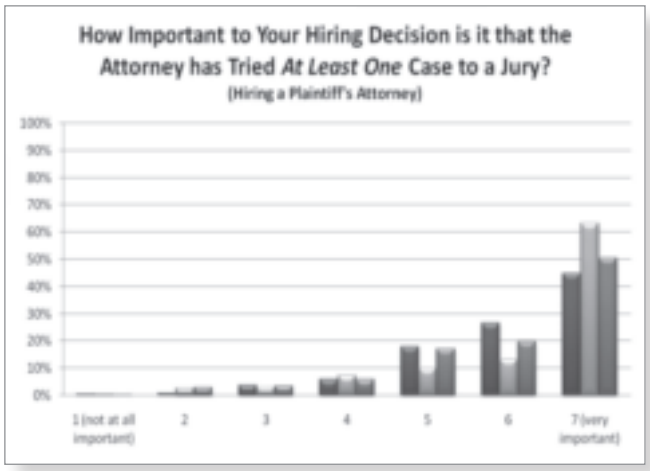
In addition, the attorney respondents indicated that they would also be unlikely to hire a litigator with no jury trial experience.

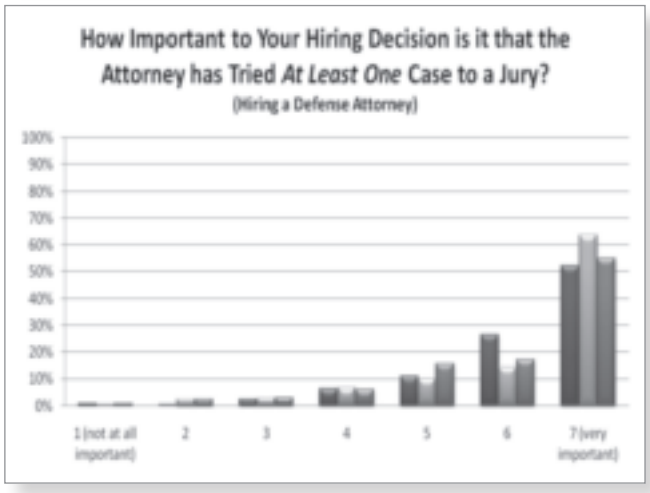
The responses to these surveys certainly suggest that information about a litigator's lack of jury trial experience would be important to the hiring decision of both individual and institutional clients. If this information is important to the decision-making process, it should be deemed material.

Finally, it is important to note that many of the litigators surveyed who lacked jury trial experience believed their own lack of experience to be immaterial to prospective clients. Possibly they perceived other litigation experience to make up for a lack of jury trial skills. Of the 345 responding litigators with no jury trial experience, 96% had participated in at least one mediation and approximately 20% had participated in 20 or more mediations. This may also be the reason for the moderate level of confidence in one's own ability to try a case to a jury expressed among the 345 litigators with no previous jury trial experience.

Regardless of whether litigators believe their experience is immaterial, it is the client — and not the attorney — whose expectations must be examined when determining if information is material or not.[1] In our view, the clients' belief that jury trial experience is needed is neither irrational nor immaterial. By contrast, the inexperienced litigator's belief

C Charts





Average ratings of importance when hiring a plaintiff's attorney were very similar between the three surveyed groups: potential individual clients ~6.0; potential institutional clients ~6.2; potential attorneys as clients ~6.0. The results are also very similar when looking at the ratings of importance when hiring a defense attorney: potential individual clients ~6.2; potential institutional client ~6.2; potential attorneys as clients ~6.1.

Again the average ratings were quite similar between the three surveyed groups: potential individual clients (black bars) ~ 2.3; potential institutional clients (light gray bars) ~2.3; potential attorneys as clients ~2.6.

that he or she could try a jury trial to a successful conclusion may reflect an abundance of self-confidence or wishful thinking, but it is certainly an untested belief—and one that many litigators may have no intention of testing.

The determination of whether information about a litigator's lack of jury trial experience constitutes material information is important because both state ethics rules and the legal duties that attorneys owe their clients as fiduciaries require the disclosure of material information.

C. Ethical Obligations & Fiduciary Duties Regarding Material Information

In pursuit of its goal to assure "the highest standard of professional conduct," the American Bar Association promulgates the Model Rules of Professional Conduct ("Model Rules"). While the Model Rules lack inherent authority, they are the basis for most states' professional conduct rules. Through these state rules, state lawyer regulatory bodies have the authority to discipline attorneys for professional misconduct, including the failure to communicate adequately with clients and the failure to explain matters to the extent reasonably necessary to permit the client to make informed decisions.

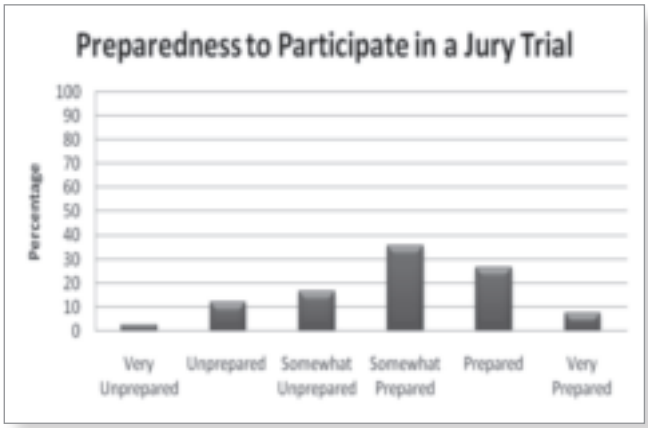
Two sections of the Model Rules create attorney disclosure obligations. Model Rule 1.4 creates disclosure obligations in the context of the attorney-client relationship, and Model Rule 7.1 creates disclosure obligations with regard to the conveyance of information about the legal services an attorney can provide for a client.

Model Rule 1.4, which deals with general communication between lawyers and potential clients, states in relevant part:

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The official comments flesh

D Charts



These graphs represent the responses of only those who have never tried a case to a jury. Respondents were asked to rate how prepared they feel based on their training and experience.

out this Rule by emphasizing the importance of reasonable attorney-client communications so that the client has sufficient information to "participate intelligently in the decisions concerning the objectives of the representation and the means by which they are to be pursued." In addition, the comments emphasize this rule's essential point: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Finally, the comments serve as a reminder that attorneys may not withhold information to serve their own interests.

Model Rule 7.1, dealing with communications regarding lawyer services, states in relevant part that:

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

The comments to Rule 7.1 explain that even truthful statements can be misleading "if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

While Model Rule 1.4 and 7.1 create general ethical disclosure obligations, neither rule specifies what is necessary for an attorney to meet his or her ethical obligation to a client. Neither Model Rule 1.4, nor its comments, specify how a lawyer should determine reasonable client expectations. In addition, it also fails to specify any particular information that must be disclosed. Similarly, Model Rule 7.1 and its comments do not specify what constitutes a material misrepresentation or omission. These rules are necessarily general in order to fit the multitude of fact patterns which may invoke them. However, Model Rule 8.4(c) clearly explains that engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" constitutes professional misconduct. Thus, taken together, these Model Rules establish ***(1)*** that attorneys are ethically obligated to make material disclosures to clients regarding information necessary for clients to make informed decisions, and ***(2)*** that omission of facts that rise to the level of misrepresentation constitutes professional misconduct.

In addition to ethical obligations to disclose material information, attorneys owe their clients fiduciary duties to disclose material information. As noted earlier, attorneys, by definition, are fiduciaries, and attorney-client relationships are fiduciary as a matter of law. As such, an attorney owes the client the fiduciary duties of competence, diligence, and loyalty. It is these duties that enable clients to place their trust in the attorney's ability to represent him or her effectively, and it is these duties that are the crux of the attorney-client relationship.

Of particular importance to this article is the duty of loyalty an attorney owes the client. This duty requires that an attorney "must make disclosures to a client necessary to avoid misleading the client." Essentially, attorneys are required to disclose all information that a reasonable client would need to chart intelligently the course of his or her matter. Failure to disclose this information deprives clients of their right to self-determination and constitutes a breach of the duty

of loyalty. However, an attorney's fiduciary duties do not require disclosure of information that is immaterial, unreliable, or already known to the client. In addition, an attorney is under no obligation to disclose information merely because another person might find that information useful, interesting or beneficial.

So how does an attorney determine what information must be disclosed? This determination will be based on client expectations. While expectations vary from client to client, data discussed in part B of this section illustrates that it is highly likely a potential client would find information about a litigator's lack of jury trial experience material. If this is so, then for the reasons discussed above litigators have an ethical obligation and a fiduciary duty to disclose this information if it is not already known to the client.

SECTION II: Lack of Jury Trial Experience Must be Disclosed

A. Clients Must Be Able to Assess Credibility to Make Informed Decisions

Litigators advise their clients in a wide range of areas of the law, and a client needs to have some way of deciding whether to follow this advice. However, disclosing that a litigator does not have jury trial experience is unlikely to help a client determine whether it is necessary to spend a fortune discovering everything under the sun; whether the settlement offer made is truly adequate based on the client's case; whether a matter should be resolved in arbitration, mediation, or in a trial; etc. Short of earning a law degree themselves, there is no good way for a client to accurately assess the *reliability* of a litigator's advice.

However, a disclosure of a litigator's lack of experience *can* help a client assess the *credibility* of the litigator providing the advice. It can also trigger additional questions the client might to ask to probe the nature and extent of the information being disclosed. *This* is the true value of such disclosure for a client. Failure to give such a disclosure leaves a client with an inability to accurately assess *either* the reliability of the advice *or* the credibility of the litigator giving that advice.

B. "Don't Ask, Don't Tell" is an Unacceptable Policy

One counterargument to requiring disclosure is that a litigator's lack of jury trial experience information is easily discoverable—a prospective client need only ask. Ordinarily, there is no duty to speak because a rule countenancing nondisclosure creates an incentive for persons to protect their own interests by acting diligently. Thus, "[t]he individualism of the common law requires each person to live, or die, by his own wits." Under this theory, there is no remedy available for prospective clients who fail to inquire about their attorney's jury trial experience. However, while a "don't ask, don't tell" policy might work in situations where a prospective client is aware that he or she should ask about a litigator's jury trial experience, it cannot be said that failing to ask demonstrates a lack of due diligence if the prospective client did not know to ask the question.

There are several explanations why a prospective client may not inquire about this information prior to hiring a litigator. One is that prospective clients are unaware of the rarity of civil jury trials and the resulting decreased number of opportunities for litigators to gain this experience. Another related explanation may be that the manner in which a litigator presents his or her professional image—on a firm website and in person—may cause a prospective client to assume that this litigator fits within the client's conception regarding what a litigator is and what a litigator can do.[2] Finally, prospective clients may not inquire about this information because the client either does not want, or does not expect, resolution by jury and is unaware of the numerous, subtle disadvantages associated with hiring a litigator without jury trial experience.

Right now, the state ethics codes do not expressly require lawyers to affirmatively disclose their lack of trial experience. Yet how can we, as attorneys, honestly say that our lack of candor is the client's problem? Clients are entitled to believe what is being "sold" by their lawyer. The wood-paneled office and prestigious address are all meant to entice the client. Many of us spend significant time and money making sure that we get hired. Our resistance to acknowledging our fiduciary duty is that we do not want to tell our clients about our lack of experience precisely because we have expended some effort either concealing or obscuring it. We cannot imagine having to disclose to our corporate client that despite the $400-600 an hour billing rates and the status of partner, we have no actual trial experience. So instead we talk about "litigation skills"—cases resolved, arbitrations, negotiations, mediations, and hearings.

If trial skills are inconsequential and irrelevant in complex litigation, then there should be no hesitancy on our part disclosing that we have none. Lawyers cannot have it both ways. We cannot claim the immateriality of trial experience, and then deprive the client of knowledge about our lack of experience on the theory that they don't need to know something that we consider immaterial. As supported by our data, clients, regardless of supposed sophistication, are generally unaware of the general lack of jury trial experience amongst 21st century litigators. Whose burden is it to correct this impression at the moment when the impression is most material to the client?

(1) Client Conception v. Litigation Reality

As was previously discussed, the traditional role of litigators trying cases to juries is generally not the role of the 21st century litigator. Yet

it is the more traditional role of trial lawyer that is most often depicted in popular culture. One can watch a "Law & Order" episode any night of the week. Despite the rarity of trials and prevalence of ADR in modern litigation, rarely, if ever, does popular culture portray litigators involved in arbitration or mediation. Courthouses still exist, television shows and movies still pretend that lawyers try cases, and Court TV finds the few remaining trials to televise—perhaps by doing so, inadvertently exaggerating their frequency. Trial lawyers, alleged runaway juries, and so-called tort reform are still political and media hotbed topics. How clients know about the vanishing trial in spite of these contradictions? We predicted that potential individual clients would be unaware of the actual rarity of litigators trying cases to juries, but we assumed that potential institutional clients would be more aware of this litigation reality, because they are routinely advised by attorneys or have regular contact with the civil justice system.

To test our predictions, survey respondents from both groups were asked to estimate the number of jury trials they believed a civil litigator would have tried in his or her first five years of practice. The individual participants were shown a standard webpage biography for a five-year litigator at a fictitious law firm. The biography page was deliberately "average" in describing the lawyer's credentials, based upon an examination of similar web pages across the country. For potential individual clients the median response was 16 trials with 10 trials being the most frequent estimation. The institutional clients were not shown a webpage and were asked simply to estimate the number of jury trials of a five-year litigator. The median response was 8 trials[3] with 5 trials being the most frequent estimation. However, *both* groups' estimates were far in excess of the actual jury trial experience of responding litigators with five years of experience, 96.7% of whom had tried less than 5 cases to a jury and none more than 6.

The disconnect between the popular conception of a litigator and the reality of the 21st century litigator may explain why a prospective client, individual or institutional, would not ask the litigator about his or her jury trial experience before making a hiring decision. If a prospective client reasonably believes that an answer is so obvious that the question need not be asked — a belief that litigators actually try cases to a jury is certainly reasonable — the prospective client can hardly share much blame for not making the inquiry, especially within a fiduciary relationship.

(2) "Lawyer Marketing" Works

In the world of online window shopping, a prospective client's first impression of a litigator likely comes from a website or other marketing effort of the law firm. Whether it is a tasteful magazine, paper or airport ad, circulated white papers and newsletters, or the announcement of a newly-minted partner, lawyer marketing works hard to attract clients. Regardless of the size or prestige of the firm, nearly all firms and solo practitioners maintain websites that at least contain biographical pages to introduce the attorneys to prospective clients. These biographical pages are almost always filled with recitations of big cases handled, concluded, and resolved favorably for important clients, as well as discussions of hearings, motions and arbitrations. Firm websites do not, however, alert clients to the lack of trial experience of litigation associates and partners. These biographical pages are designed to attract a first date—the prospective client meeting. The impression the attorney makes on the prospective client in this meeting is critical, as the prospective client will likely decide during this meeting whether he or she wants to take this to the next level and develop an attorney-client relationship.

(3) The Potential Disadvantages Are Too Easily Overlooked

Disclosure is also necessary because the potential disadvantages extend beyond just the ability to try a case. Consequently, they are easy to ignore. These disadvantages are particularly obscured when a client does not want, or does not expect, a matter to be resolved in trial. Even among other attorneys, these disadvantages may be unseen. Numerous respondents to the *Potential Institutional Client Survey* and the *Attorney as a Potential Client Survey* indicated that a litigator's jury trial experience would only be material to their hiring decision if the respondent wanted or expected the matter to be resolved by a jury. For instance, an attorney working as in-house counsel at a Fortune 500 company responded that "[w]hether a litigator has actual trial experience is less important at the outset of a matter. We're more interested in experienced attorneys to handle motion practice. We can retain additional trial counsel if and when we reach that point." This "wait-and-see" attitude was echoed by many others including these California associates who responded that "I might initially hire an attorney who lacked trial experience but had other significant litigation experience; but, if the matter were to proceed to trial, I would likely require new or co-counsel with trial experience," and that it "[d]epends entirely on whether I thought trial was likely. Usually it isn't and in those cases trial experience would not matter to me."

C. Buyer Beware: Caveat Emptor for Hiring an Attorney?

Generally, an attorney's ethical obligations and fiduciary duties begin when the attorney-client relationship is formed. Therefore, another counterargument to requiring disclosure of lack of jury trial experience to prospective clients is that a litigator does not owe any duty to a prospective client before he, she, or in the case of an institutional client, it, becomes an actual client. After all, the fiduciary duties outlined in the *Restatement (Third) of the Law Governing Lawyers* presupposes the existence of an attorney-client relationship. However, if such a disclosure requirement is truly meant to protect clients from the potential disadvantages associated with being represented by a litigator who lacks jury trial experience, then this disclosure must be made *prior* to the formation of the attorney-client relationship.

Hiring an attorney should not be a "gotcha" game. As the allegory in the introduction alluded to, clients hire litigators because they need a guide to help them navigate through the strange land of the law. Thus, before hiring a litigator a prospective client must be given the material information necessary in order to make an informed decision regarding the guide's ability to navigate through the land of the law. Clients should not be held to a "buyer beware" standard where they learn only after making a hiring decision that no one on the litigation "team" has actual trial experience. As Professor Vincent Johnson and Shawn Lovorn explain in their article entitled, *Misrepresentation by Lawyers About Credentials or Experience*:

"[I]t would be absurd to permit a lawyer to not disclose unfavorable information before signing a client, but then require the lawyer to reveal the information immediately thereafter. Once the attorney-client relationship has come into existence, the lawyer should be focused on making the relationship work, rather than on revealing prior adverse information that might undo the relationship or make it less productive. The attorney's fiduciary obligation should be to work as hard as possible to ensure that the representation is successful, rather than reveal negative past information that might induce 'buyer's remorse.'"

Johnson and Lovorn conclude that "[a] lawyer should be required to reveal adverse facts relating to credentials or experience when a fiduciary is reasonably expected to reveal those facts."

A litigator's failure to disclose his or her lack of jury trial experience is the same as withholding information a reasonable client would find material. Thus, as Professor Lisa Lerman[4] argues in *Lying to Clients*, a litigator's intentional failure to disclose should be considered deception. As Lerman notes, there is no justification for self-interested deception of clients by lawyers, including misleading a client about the attorney's level of experience.[5] This information is material and must be disclosed, because a reasonable client, knowing that an attorney lacks jury trial experience might choose to retain another lawyer.[6]

Clients cannot be expected to ask in board rooms, mediation conference rooms or offices whether their lawyer has trial experience. No circumstance ever alerts the client that the lack of experience would be a possibility. Pleadings are filed with a jury demand. Questions in depositions are asked as if juries will hear the final answer. Trial settings are obtained. Discovery proceeds.

Section III: Establishing and Enforcing a Disclosure Requirement

Just as the courts and bar organizations should define the sufficiency of jury trial experience, so should they define the exact language and scope of the necessary disclosure. Conceivably, there may be various levels of disclosure depending upon the availability of lawyers with trial experience and their level of actual involvement with the case. Likewise, the amount in controversy and potential risk of harm to the client may govern the level of disclosure. Obviously, every lawyer has to have a client for the first trial so the disclosure requirement should not cause clients to be overly fearful about using lawyers who are developing their jury trial skills.

The disclosure should be complete enough to make clear to a reasonable or disinterested person the risks inherent in retaining counsel that lacks jury trial experience. Ideally the simple notice would be followed by a discussion of the more detailed ramifications for that particular client followed by written consent similar to the waiver of any other conflict. An affirmative disclaimer of trial experience does not mean that a solo lawyer will never be hired for his or her first jury trial—plainly, there are some clients who for financial or other practical reasons[7] will accept an inexperienced lawyer with modest fee demands rather than hold out for a more experienced and more expensive competitor. But that choice cannot be made in the absence of fair disclosure to the client.

The remedies for lack of disclosure must also be determined by those entities closest to the situation. In some states, fee disgorgement is an available remedy for an attorney's breach of his or her fiduciary duties, even in instances where the client cannot show specific harm by the breach.[8] Fee disgorgement may be appropriate for failing to disclose lack of jury trial experience, but some courts may see the need to tailor the remedies based upon the harm to the clients and the culpability of the lawyer or firm. Courts and regulators should resist the temptation to trivialize the harm to clients. It is tempting to equate non-disclosure with technical violations or petty breaches by lawyers. This is a mistake. Just because individual lawyers may not value trial skills does not mean that the client is entitled to less candor.

Part III: Creating Alternative Paths for Clients

SECTION I: Suggestions For Gaining Trial Experience

At this point, one pertinent question is: what can we do to get lawyers more trial experience? The goal of the article is not to fuel a new cause of action against lawyers, but to get more litigators to develop trial skills. A fully-developed tool kit is what our clients and justice system deserve. We would think it absurd for a lawyer to take the opposite approach—"I will not settle cases. I will only go to trial. If you hire me, I will not mediate, I will not negotiate, I will not entertain a plea." The system works better when litigators serve clients with a full range of legal skills.

The article also does not propose that lawyers force clients into unnecessary trials just to get experience. Certainly allowing trials to take place in the natural course of events will probably force us to better manage court dockets. Citizens will actually have to report for jury duty again. As lawyers, we might even have to learn how to try cases more efficiently and less expensively. And, it would be vital to explore what caused our distrust of juries and why we have been so willing to believe in the mythology surrounding the civil justice system.

The article does support inherent confidence in the jury system and a willingness to make it better. Increased participation by lawyers, clients and citizens can ultimately be of benefit. Juries and ADR are not mutually exclusive. Calling for disclosure with the hope that trial experience will increase is not an attack on the principles of ADR. It is only a recognition that clients pay for and deserve lawyers with competency in both forums and professional objectivity about what best serves the client's needs and goals.

How to develop trial skills? ***1)*** Increase emphasis on trial skills in law schools. The more confident young lawyers are with those skills, the less fearful they will be when they enter practice. ***2)*** Law firms should also emphasize the value of trial skills. Law students and law schools will respond to market forces placed on them by employers. ***3)*** Firms and governmental agencies should promote strong trial training programs. Lawyers who have worked out the fears and kinks of trying cases in simulation, while not the same, are likely to be better able to try a case for real. ***4)*** Create expectations that lawyers within firms should develop jury trial experience. ***5)*** Require quality trial experience before making partner. As noted in *Access to the Courts*,[9] there are not enough lawyers available to represent low-income people in civil legal matters resulting in four-fifths of the civil legal needs of low-income individuals going unmet.[10] This article is a great resource for examining the state of legal services and legal funding in both the civil and criminal systems.[11]

Many old-line law firms used to keep smaller dockets of work done at significantly lower billing rates simply to train their young lawyers. Pro bono work is not just for indigent defendants and divorces. It can be for

associations, non-profit businesses and agencies, churches and neighbors. Young lawyers may also be happier when they have cases of their own and get to try cases, so attrition rates within firms may decrease and productivity may increase. ***6)*** Firms can recruit laterally from governmental agencies where young lawyers get more trial experience. With so many law students eager to gain trial experience, many quality students go first to public-practice jobs with local and federal prosecutors, military legal offices, and other entities that have no choice but to routinely try cases**.** ***7)*** Firms can alter billing practices to take "smaller trial" cases for a flat rate instead of hourly. If trials were more affordable, clients might prefer to have their day in court rather than settling for what some feel is the extortion factor of "defense costs" and "nuisance value." ***8)*** Hybrid methods, such as summary jury trials coupled with mediations, might let clients gain judicial and juror feedback while still maintaining the ability to settle the case. ***9)*** Courts may need to do for trials what they did for ADR when it was first starting. Perhaps judges should question lawyers harder on whether cases should be tried and create shorter, faster dockets to accommodate smaller cases. Perhaps seasoned judges and trial lawyers can help more inexperienced lawyers better evaluate whether a case should be tried or settled. Even for cases less suitable for trial, seasoned trial lawyers should help develop the discovery plans and litigation strategies so as to pass on their experiences. ***10)*** Firms should develop databases of comparative statistics for arbitrator awards, jury verdicts, bench trials, and mediations results. More research should be spent actually analyzing jury verdicts instead of parroting convenient myths of runaway juries[12] Lawyers can then use hard data to help determine what resolution mechanism is best for the specific case. ***11)*** We should encourage lawyers to watch the few trials that remain and learn from the good and bad they see. Firms should treat that as valuable learning time, not a waste of a billable hour. Experienced lawyers need to drag less experienced lawyers with them to trial. Bar organizations need to help match solo and small-firm lawyers with experienced mentors and judges. In short, now is the time for groups like the American Inns of Court, the American College of Trial lawyers, ABOTA, *etc*., to gather their resources and creatively work with lawyers to salvage what remains of the right to trial by jury. ***12)*** We have to change the current notion that an actual jury trial represents a failure of the system.

CONCLUSION

Like the woman hiring the guide in the introduction, clients hire litigators with the expectation that they can lead them through the strange land of the law. Jury trials have become the road less traveled. We are just beginning to assess the ripples caused by the near cessation of trials. Most litigators have little or no trial experience, especially those practicing less than 10 years. Our data shows that clients of all types assume that *litigators* are trial lawyers and that trial experience is important to clients, yet most litigators do not disclose the true facts about their lack of experience. Cases are being settled in mediation in part on significant speculation about jury trials rather than on the hard facts of real trial results. On this basis, lack of trial experience must be disclosed to prospective clients.

The benefits of jury trial experience are not just limited to the actual trial but are instructive, regardless of the form of resolution. Non-judicial case resolution is premised on the consent and agreement of clients. Both actual consent and the supposed voluntary nature of ADR are compromised when clients lack honest information about their true options. We are lawyers. With the privilege of a law license comes the responsibility to our clients and the system of justice. Justice requires better from us. We can and must be honest with ourselves and our clients. We must be willing to be and call ourselves "Trial Lawyers" again. ■

[1] Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation By Lawyers About Credentials or Experience*, 57 Okla. L. Rev. 529, 547 (2004).

[2] A pervasive cultural influence should not be underestimated: Television programs and movies about lawyers typically depict courtroom scenes and lawyers preparing for and going to trial. Lawyers are not depicted as afraid to go to trial or urging mediation in lieu of trial. As a result, a real lawyer who promotes herself as a "litigator," "family law attorney," or a "criminal defense attorney" is reasonably assumed by a prospective client to be experienced and capable of offering the full range of legal services associated with such practices, including going to trial.

[3] If outliers (estimates in excess of 100) are included, the median response increases to 11 trials.

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[5] Lerman, *Lying to Clients*, *supra* note _____, at 685.

[6] *Id.* at 686.

[7] For example, a less-experienced lawyer may be more willing to take on a riskier, more difficult case than a more established, more experience lawyer would in order to gain some needed trial experience.

[8] *See, e.g.,* Slovensky v. Friedman, 142 Cal. App. 4th 1518, 1519 (Cal. App. 2006); Rockefeller v. Grabow, 39 P.3d 577, 588 (Idaho 2001); Burrows v. Arce, 997 S.W.2d 229, 234 (Tex. 1999).

[9] David S. Udell and Rebekah Diller, *Access to the Courts*, 95 Geo. L.J. 1127 (2007).

[10] *Id.*

[11] For example it compares the number of client a typical legal aid attorney serves, 6,861 versus the number of private attorneys of people in the general population, 525. The authors point out that according to an ABA report, the average attorney donates less than a half hour a week to pro bono services. *Id.* at 1133. In another ABA report on the status of criminal indigent defense post-*Gideon v Wainwright*, the current system suffers from "meet'em plead'em" lawyers, with defendants encouraged to waive their right to counsel, never assigned counsel at all — and a lack of participation in indigent defense by the private bar. *Id.* at 1137. See also the American Bar Association Section of Litigation report of the Task Force on Training the Trial Lawyer, June 2003.

[12] We could also demand that more reporting from mediation and arbitration occur without necessarily compromising appropriate confidentiality. We have been operating for so long in the shadow of the law that there is no longer any light in the process.

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