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LEGAL ACCESS AND ATTORNEY ADVERTISING

*Adapted from remarks presented to the AALS Section on Professional
Responsibility, January 8, 2011*

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My current project involves law firms I call settlement mills, which are high volume, heavy advertising, personal injury law firms in the United States. I'm going to begin by briefly describing what settlement mills are and then consider how they might shed light on what we know about attorney advertising and access to justice in the contingency fee context. We have now had attorney advertising in the United States for some three decades. In that time, at least in the personal injury context, there is some evidence that attorney advertising *has* made legal services more readily available to those of limited means—just as proponents of attorney advertising hoped and predicted. But attorney advertising, while apparently narrowing one justice gap, has perhaps produced another. This justice gap, I will suggest, is based not on claimants' willingness to retain counsel, or even claimants' ability to afford counsel, but is rather based on claimants' ability to choose counsel wisely, and it manifests itself in the *kind* of counsel one selects.

Thus far, my broader project studies twelve settlement mills from ten different states. I've done extensive original research to build a composite view of these firms by combing through files from attorney disciplinary proceedings, reviewing records from attorney malpractice actions in state and federal courts, and conducting fifty telephone interviews with past and current settlement mill attorneys and non-attorney employees. To be sure, twelve firms is not a huge number, but these twelve firms, in their heydays, collectively accounted for the settlement of more than 15,000 claims annually, which is, it seems, a fairly significant amount of attorney-client interaction.¹

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1. Indeed, during its roughly fifteen-year existence, one of the firms I studied

So, what are settlement mills? In a recent paper entitled *Run-of-the-Mill Justice*, I walk through ten characteristics that define settlement mills and help to distinguish these firms from other, more typical, personal injury practices.² Here, I'll just emphasize four traits that are particularly salient. First, and most relevant for our purposes, settlement mills are aggressive advertisers. Attorney advertising is big business. But despite the seeming ubiquity of attorney ads and the hundreds of millions of dollars spent on attorney advertising annually, in terms of numbers, relatively few personal injury lawyers advertise on television.³ Most don't. Meanwhile, even *heavy* advertisers still typically obtain the majority of their clients from traditional sources, namely practitioner referrals and client word-of-mouth.⁴ In contrast, *all* of the settlement mills I have so far studied advertise; they all advertise on television, and they all obtain the majority or vast majority of clients from these advertising efforts.⁵

The second notable characteristic is that settlement mills have a high volume of small claims. Personal injury lawyers are known for having

reportedly settled a whopping 30,000 claims. Penny Font, *Disbarred, But Not Disbranded*, BUSINESSREPORT.COM (May 18, 2009), <http://www.businessreport.com/news/2009/may/18/disbarred-not-disbranded-1gl1/> (quoting E. Eric Guirard). Another firm founder is likewise on record saying that, in his twenty-year practice, he represented "thousands and thousands" of accident victims. Transcript of Record at 10, Comm'n for Lawyer Discipline v. Weiss, No. 94-CI-18282 (Tex. Dist. Ct. Feb. 1, 1996) [hereinafter Weiss Disciplinary Transcript] (testimony of Joe W. Weiss). In comparison, only about 2,200 civil claims are resolved each year by juries in all of the nation's federal courts. See ADMIN. OFF. OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR JAMES C. DUFF, 2010 JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 388, tbl.T1, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/T01Sep10.pdf>.

2. See generally Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).

3. A recent study found that, even among those Texas lawyers with the highest volume of relatively low-dollar claims, only 13% advertised on television. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1789 n.19 (2002); see also AM. BAR ASS'N COMM'N ON ADVERTISING, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 52 (1995) [hereinafter, ABA COMM'N ON ADVERTISING] (reporting on a 1993 Gallup Poll commissioned by the *ABA Journal*, which found that 61% of respondents indicated that their firms advertised but that only 2% did so on television); *Bar Defends Advertisement Rules*, FLA. TIMES-UNION, July 26, 1989 (quoting Florida Bar President Stephen N. Zack, who indicated that fewer than fifty of Florida's 35,000 attorneys advertised on television).

4. See Daniels & Martin, *supra* note 3, at 1789 (showing that, though most Texas plaintiffs' lawyers advertise, lawyer advertising is not any lawyer group's predominant client source); see also HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 47-50, 55 (2004) ("Among the personal injury specialists who do advertise, an average of 21 percent of the clients come as a direct result of the advertising; only two of the personal injury specialists reported obtaining half or more of their clients from advertising.").

5. See Engstrom, *supra* note 2, at 1492-93, 1521-24.

high claim volumes, as compared to other lawyers in other specialties.⁶ And settlement mills' case volumes are roughly triple the personal injury average.⁷ While studies suggest that conventional personal injury attorneys have around seventy open files at any one time and serve roughly 110 clients per year, the average settlement mill negotiator might juggle 250 claims at any one time and settle around 350 claims annually.⁸ Some lawyers handle substantially more. For example, a lawyer from a Georgia firm reported that she personally settled 600 or 700 claims in a mere thirteen-month-span, which roughly translates into settling a claim every four working hours.⁹ Most of these claims, meanwhile, are small, principally soft-tissue injury claims (e.g., sprains, strains, contusions, and whiplash) sustained in auto accidents.¹⁰ Thus, it is fair to think of settlement mills as auto accident specialists.

Third, settlement mills tend to have an entrepreneurial, rather than a professional, orientation. As one settlement mill partner put it: "I always . . . approached this as a business first and a law firm second."¹¹ At these firms, there is a lot of delegation to non-attorney employees, and there is little emphasis on traditional "lawyering," meaning there is very little legal research, little factual investigation of claims, and little substantive interaction with clients.¹² In fact, at some firms, it's not unusual for lawyers and clients to never meet.¹³ The lawyers at such firms, perhaps not surprisingly, tend to describe the work as being very routinized

6. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 435-36 tbl.B.1 (1982) (showing "Mean Number of Clients per Year" for various specialties).

7. Engstrom, *supra* note 2, at 1492.

8. Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 247 (2006) (citing JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005) (unpublished data)) (reporting that Chicago plaintiffs' personal injury lawyers surveyed in 1995 served an average of 142 clients per year); Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar*, Unpublished Ph.D. Thesis, at 73 (2001) (reporting that low-end personal injury practitioners in Chicago served an average of seventy-nine clients per year).

9. Sworn Statement of S.S. at 6 (Aug. 19, 1998).

10. Engstrom, *supra* note 2, at 1499-1500.

11. Brett Barrouquere, *Attorneys Hit Local Airwaves—Many Say Business Savvy As Important As Legal Skills*, ADVOC. (BATON ROUGE), Nov. 30, 2003 (quoting E. Eric Guirard); see also Weiss Disciplinary Transcript, *supra* note 1, at 19 (testimony of Joe W. Weiss) ("I do my best to conduct my business as best I can.").

12. To be sure, it is not unusual for even conventional personal injury attorneys to spend comparatively little time engaged in legal research, investigating claims, and preparing pleadings. See KRITZER, *supra* note 4, at 99, 136. Nor is it unusual for conventional attorneys to delegate tasks to underlings and keep a careful eye on the bottom line. *Id.* at 112-13, 137. What sets settlement mills apart, though, is the extreme emphasis on efficiency, the extent to which procedures are mechanized, and the lopsided balance struck between the conceptualization of the practice of law as a business, rather than a profession.

13. Engstrom, *supra* note 2, at 1493-95, 1500-01.

and mechanized, with some describing their work in the following manner:

- “I might as well have been working on an assembly line.”¹⁴
- “I felt like a claims adjuster with a law license.”¹⁵
- “Most of the cases I handled, I didn’t even know the facts of the case.”¹⁶
- “[I]t’s a cookie-cutter. It’s routine. You call and they offer you \$500 and you ask for \$2,000 a month, and then you go to \$1,000. If you get \$1,200, you do it, but it’s just boom, boom, boom like that.”¹⁷
- “We’ve got a Stop and Go’s here. Drive in, get you something to drink, get out on the road. That’s the way they’re run. It is not a conventional law firm. They do not want you to practice conventional law.”¹⁸

Fourth, and related to the quotes above, at settlement mills, the focus is on *settlements*. It is not on lawsuits. It is not on referrals. It is certainly not on trials.¹⁹ This focus on settling is sometimes maintained by quotas or contests, imposed on settlement negotiators, requiring that negotiators—who may or may not be lawyers—settle a given number or dollar value of claims within a particular time period or offering rewards or prizes to those who do.²⁰ One firm in Louisiana, for example, used a series of carrots and sticks to spur settlements. At that firm, non-attorneys negotiated settlements, and their compensation was tied to fees they generated. The firm bestowed a monthly lion award on the highest fee generator (to reward the “king of the jungle”) and gave a monthly “monkey” award to the lowest fee generator, who was said to have a “monkey on their back.” And last but not least, the firm sponsored group contests, whereby, if the negotiators generated a particular amount in fees during a particular period, all in the firm would be rewarded with group trips to exotic locales.²¹ Further

14. Telephone Interview with R.J. (Apr. 8, 2008).

15. Telephone Interview with K.R. (May 1, 2008).

16. Sworn Statement of S.S. at 41 (Aug. 19, 1998).

17. Transcript of Louisiana Disciplinary Bd. Hr’g, *In re* Lawrence D. Sledge, No. 00-DB-135 (Feb. 16, 2001), at 335 (testimony of Lawrence D. Sledge).

18. Telephone Interview with D.W. (May 8, 2008).

19. See Engstrom, *supra* note 2, at 1495-98, 1502-03 (describing the relative paucity of lawsuits and trials); see also Telephone Interview with E.C. (Apr. 22, 2008) (explaining that, at his law firm, his job was to “[s]ettle cases. Set ‘em up and settle them”).

20. Engstrom, *supra* note 2, at 1501.

21. See Transcript of Louisiana Disciplinary Bd. Hr’g, *In re* E. Eric Guirard & Thomas R. Pittenger, File No. 04-DB-005 (Sept. 23, 2004), at 216-28 (testimony of E. Eric Guirard) (describing these incentives). Similar incentives were apparently used to spur settlements at the Azar firm of Colorado. There, attorneys were reportedly expected to generate \$30,000 to \$40,000 in fees per month. The highest fee generator each month was, according to one source, recognized with a “shark” award. And attorneys were compensated via straight commissions rather than salaries. See

highlighting the focus on settlement, a few of the firms I've studied never, as far as I can tell, tried a case to verdict despite settling, literally, thousands of claims.²²

Hopefully that brief overview helps to set the scene for what settlement mills look like and clarifies at least some of the ways in which these firms differ from conventional counsel. Obviously settlement mills raise a host of important questions implicating legal ethics, tort law, bargaining behavior, and so on. However, the issue I want to focus on here is what settlement mills might be able to tell us about access to justice and attorney advertising.

In the United States it is well known that we have two tiers of justice—one for the haves and one for the have-nots. It is a dynamic that plays out in various substantive areas of law, from criminal law, to family law, to landlord tenant law, to bankruptcy law, and so on. The rich, it is said, benefit from highly personalized legal services.²³ The have-nots, on the other hand, when lucky enough to be represented at all, are, and have long been, represented by under-paid and over-burdened practitioners whose adversarial impulses are muted by some mix of high caseloads, insufficient support, and inadequate training.²⁴

The one place that this class justice is often thought *not* to obtain—where it is commonly said that there's "equality of representation"—is in the particular world of personal injury.²⁵ That's because we have the

Engstrom, *supra* note 2, at 1501.

22. See, e.g., Matter of Zang, 741 P.2d 267, 275 (Ariz. 1987) (describing the law firm of Zang & Whitmer, where "no attorney . . . had tried a personal injury case to a conclusion" and there was "a firm policy of not taking cases to trial"); Engstrom, *supra* note 2, at 1509 (reporting that the Dupayne firm, during the late 1990s, "did not take a single case to trial"); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (discussing the Weiss and Rogers law firms, which, according to some accounts, did not conduct any jury trials during the period of study).

23. See EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 50 (1986) (describing the work of a law firm lawyer for the affluent as "the work of a fine custom tailor: highly individualized and with exquisite fit to a particular situation"); see also BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 4 (1970) ("Large efficient law firms have developed as a response to the needs—and ability to pay—of the more affluent segments of society. And the large firms seem to be serving these clients well.").

24. Approximately 80% of low-income residents' legal needs are wholly unmet. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS A-1 (2009). For descriptions of the disappointing services often available to the remaining 20%, see MARJORIE GIRTH, POOR PEOPLE'S LAWYERS 76-77 (1976); Jerome E. Carlin et al., *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9, 55-58 (1966); Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 385 (1965).

25. PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 123 (1997) ("[P]laintiffs' lawyers . . . function in the tort system to provide injured persons with something that aggrieved citizens dealing with other areas of law often lack: access to the courts and *equality of representation*.") (emphasis

contingency fee. It is *very* widely used.²⁶ And the contingency fee is thought to be the “great leveler” or, in H. Laurence Ross’s words: “[T]he contingent fee . . . makes the little man’s claim as interesting to the lawyer as the big man’s claim.”²⁷

Yet, my study of settlement mills suggests that the picture might be somewhat more complicated. Traditionally, some studies suggest that the poor have been less likely than their wealthier counterparts to seek compensation following an accidental injury.²⁸ Poor individuals’ failure to initiate claims, meanwhile, seems attributable not to a lack of financial

added); *see also infra* note 27. Of course, despite this lofty rhetoric, some inequity invariably remains because lost wages are recoverable via the tort system, and consequently, wealthy individuals will tend to suffer (and receive compensation for) higher economic loss.

26. Approximately 96% of individual personal injury plaintiffs pay their lawyers on a contingent-fee basis. *See* Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15 (1996).

27. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 75 (1970); Samuel R. Gross, *We Could Pass a Law . . . What Might Happen If Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 341 (1998) (“Whatever else might be said about the contingent fee, it is a great leveler.”); *accord* James W. Bollinger, *Contingent Fees—The New Suggestion of Judicial Supervision*, 69 CENT. L.J. 355, 356 (1909) (“The contingent fee actually makes the courthouse the one temple of justice for all, equally accessible to both the rich and the poor.”); Lee S. Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served?*, 14 FORUM 406, 406 (1979) (“The contingent fee makes it possible for anyone in our society to get the best lawyer.”); Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, 2 LITIG. 27, 34 (1976) (stating that “the contingent fee’s advantage” is that it “equalizes otherwise unequal litigants”). Notably, a number of states have commissioned comprehensive legal needs studies in recent years, and a number of those studies don’t even inquire about personal injury.

28. For example, in one 1957 study of auto accident claimants in New York City, Robert Hunting and Gloria Neuwirth found that “[f]ollowing a minor car accident, over one-quarter (27%) of those with low socio-economic status (‘SES’) took no action at all, while practically no one (2%) with high SES failed to act.” ROBERT HUNTING & GLORIA NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS 10, 98 (1962); *accord* ROBERT L. HOUCHEMS, RAND, AUTOMOBILE ACCIDENT COMPENSATION VOL. III: PAYMENTS FROM ALL SOURCES 17 (1985) (analyzing a survey of auto accident victims who sustained an injury between August 1975 and August 1977 and concluding that the likelihood of receiving some payment “apparently increases with . . . family income”); *see also* ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 257 (1964) (finding that “seriously injured individuals who did not file a suit tend to have lower incomes and are more likely to be in nonprofessional occupations”); Helen R. Burstin et al., *Do the Poor Sue More? A Case-Control Study of Malpractice Claims and Socioeconomic Status*, 270 JAMA 1697, 1699 (1993) (finding that poor and uninsured patients were significantly less likely to file medical malpractice claims, after controlling for injury severity). Not all studies reach this conclusion, however. *See, e.g.*, FREDERICK C. DUNBAR & FATEN SABRY, NAT’L ECON. RESEARCH ASSOCS., INC., THE PROPENSITY TO SUE: WHY DO PEOPLE SEEK LEGAL ACTIONS 8 (2004) (analyzing RAND data from 1988-89 and concluding that income “tend[s] not to have a robust effect on propensity to claim or sue”); AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 20 tbl.4-I (1994) (finding no meaningful difference in the claiming rates of low and moderate-income individuals).

need—which would, of course, cut in the opposite direction—but rather to a lack of information concerning rights and potential remedies and also a lack of knowledge about, and contact with, lawyers.²⁹

Attorney advertising, which came about in 1977 with the Supreme Court's landmark opinion in *Bates v. State Bar of Arizona*, was supposed to change that.³⁰ In deciding *Bates*, the Court explicitly noted that the “the middle 70% of our population is not being reached or served adequately by the legal profession,” and the Court expressed its faith that attorney ads would dispel unfounded fears about lawyers and would help to expand legal access to those of limited means.³¹ Others, too, predicted that attorney advertising would spur additional claiming and attorney retention. In the year following the *Bates* opinion, for example, one commentator declared: “The advent of ‘attorney advertisements’ will add further to the amount of automobile negligence litigation started by injured parties. Newspaper ads mentioning auto accidents . . . will also raise a question in the minds of the public, who now believe they have no right to sue in tort.”³²

Now, at a distance of some three decades, there is some evidence that the Court's hope—and the above prediction—have come to pass. In the decades following the *Bates* decision, advertisements for legal services—and particularly personal injury legal services, which now make up the bulk of television attorney advertising—have proliferated.³³ Indeed, attorney

29. Accord Bruce Campbell & Susette M. Talarico, *Access to Legal Services: Examining Common Assumptions*, 66 JUDICATURE 313 (1982-83) (reporting on a Georgia survey which found that low-SES individuals (experiencing a variety of legal problems) were substantially less likely to hire lawyers or identify problems as requiring legal assistance and speculating that these trends might be traceable, in part, to poor individuals' lack of knowledge about the availability of legal services); see HUNTING & NEUWIRTH, *supra* note 28, at 99-100 (speculating that low-SES individuals often fail to pursue a claim because of, inter alia, their “lack of understanding of what their rights may be” and their “lack of contact with lawyers”).

30. 433 U.S. 350 (1977); see Brief of the United States as Amicus Curiae at 24, 34, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (No. 76-316), 1976 WL 178669 (calling for the elimination of the ban on attorney advertising because, inter alia, “there is not now sufficient information available to the public concerning legal services” and “[t]he ban on advertising inhibits the assertion of legal rights by the segment of society least familiar with its rights”).

31. *Bates*, 433 U.S. at 376-77 (declaring that the profession's advertising ban “likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable” and speculating that permitting advertising “might increase the use of the judicial machinery”) (internal quotation marks omitted); see also James Sokolove, President, Trial Lawyers Marketing Association, Letter to the Editor, NAT'L L.J., July 31, 1989, at 2 (“If we are truly to provide ‘justice for all,’ we must keep the doors to our legal system open. And legal services advertising provides the key to that door.”).

32. Lawrence C. Falzon, Comment, *Michigan No-Fault: The Rise and Fall of Socialized Negligence*, 56 U. DET. J. URB. L. 99, 117 (1978).

33. For information on the growth of attorney advertising, see Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15

television outlays have grown exponentially, from \$366,000 in 1977 to roughly \$428 million in 2002, in inflation-adjusted dollars.³⁴ Simultaneously, studies suggest: (1) significantly more auto accident victims are seeking compensation for injuries they sustain; and (2) significantly more auto accident victims are retaining counsel to press their claims.³⁵ Indeed, Insurance Research Council consumer panel survey data show more than a doubling of the proportion of represented auto accident claimants between 1977 and 2002, from 19% to 43%.³⁶

In sum, if the Supreme Court's goal in *Bates* was to improve the public's knowledge about legal options and expand access to legal services, at least in the personal injury automobile context, it appears the Court might well have succeeded. Although other factors could surely explain the above trends—including, for example, the substantial growth in the size of the legal profession during this same period³⁷—it's certainly plausible that the

GA. ST. U. L. REV. 315, 321 (1998). For the fact that the top spenders on legal advertising are personal injury or plaintiff-related law firms, see ABA COMM'N ON ADVERTISING, *supra* note 3, at 130 ("Most television advertisements have been for personal injury or other contingency-fee based services."); Maria Aspan, *Getting Law Firms To Like Commercials*, N.Y. TIMES, June 19, 2007, at C5 (reporting that "the top 10 spenders" on legal advertising "are all personal-injury or plaintiff-related law firms").

34. See Cebula, *supra* note 33, at 321 (providing advertising data from 1977 through 1992); KANTAR MEDIA, TREND REPORT FOR 2000-2004 (providing advertising data for 2002) (on file with author). I converted the above advertising figures to 2011 dollars using an inflation calculator available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

35. For data on increased claiming, see INS. RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, tbl.A-1 (2008) (showing that, between 1980 and 2006, the number of paid bodily injury claims per 100 property damage claims rose dramatically, from 17.9 to 24.5); INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN AUTO INJURY CLAIMS: PUSHING THE LIMITS OF THE AUTO INSURANCE SYSTEM 25 (1996) (noting a "steady increase[]" in bodily injury liability claim frequency from 1980 to 1993). The growth in claims does not appear to be confined to the auto context. See Robert Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 4 n.11 (1988) (comparing medical malpractice claims data from 1956 and 1963 with data from 1984 and 1985 and observing that "over the past two decades the incidence of claims against medical practitioners has risen dramatically"). For data on increased attorney retention, see INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 36 (2004) [hereinafter, IRC, CONSUMER PANEL]; ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW 2d § 10:4 at 10-3 (2002) ("During the period from 1977 to 1987, according to surveys involving almost 100,000 claims, there was a 42.5 percent increase in the number of accident claimants who were represented by attorneys.").

36. IRC, CONSUMER PANEL, *supra* note 35, at 36. Of course, this discussion tables the difficult—and contested—normative question of whether increased claiming and increased representation by counsel are positive or negative developments. There is also some evidence that attorney advertising has increased attorney retention in other areas too. See, e.g., Madeline Johnson, et al., *Attorney Advertising and Changes in the Demand for Wills*, 22 J. OF ADVERTISING 35 (Mar. 1993) (analyzing time series data from 1974 through 1989 tracking the ratio of estates probated without a will to estates probated with a will and finding a drop in intestate deaths, starting in 1977, suggesting (albeit not proving) that attorney advertising, which came about in 1977, increased the demand for wills).

37. THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 80-81 (2010)

growth of attorney advertising has played a role.³⁸ But now, we see a new wrinkle when we shift focus from the identity of those who claim or fail to claim to the identity of the lawyer one selects.

When I interviewed past and current settlement mill practitioners, I usually asked them to describe their typical client. These responses are fairly representative of the answers I received:

- “[T]hey were all poor; they were all uneducated.”³⁹
- “Lower income.”⁴⁰
- “Working class People who don’t have any particular understanding of the legal system, except what they’ve heard from television.”⁴¹

So, here is a puzzle. Settlement mills, to be sure, have certain clear advantages; as I have discussed at length elsewhere, they actually have much to recommend them.⁴² But they are, at bottom, a cut-rate legal service provider. And, despite the existence of the contingency fee—the “great leveler”—this cut-rate legal service (which, incidentally, *costs* no less, on a percentage basis, than a traditional legal service) is predominantly utilized by low-income clients.⁴³

What explains this puzzle? There are, I think, a few possibilities. First, as Barbara Curran reported after her 1977 national survey, *when* low-income individuals pursue tort claims, they are perhaps more likely to seek the assistance of counsel, presumably because of a sense, which may or may not be well-founded, that they lack the literacy, sophistication, or savvy to handle the problem effectively without legal assistance.⁴⁴ If, as

(highlighting the near-quadrupling in the size of the legal profession from 1970 to 2009).

38. *Accord* MARJORIE M. BERTE, HIT ME—I NEED THE MONEY: THE POLITICS OF AUTO INSURANCE REFORM 41 (1991) (attributing increased attorney involvement in auto insurance claims to lawyer advertising); JOOST, *supra* note 35, at § 10:11, at 10-13 (same); *see* JOHN D. STUCKEMEYER, WASH. LEGAL FOUND., “EXTRAORDINARY HOW POTENT CHEAP MUSIC IS”: THE CASE FOR REFORMING LAWYER ADVERTISING 2-7 (1993) (attributing increase in auto accident claiming to the increase in attorney advertising).

39. Telephone Interview with C.P. (May 20, 2008).

40. Telephone Interview with T.H. (Apr. 15, 2008).

41. Telephone Interview with T.T. (July 14, 2008); *see also* Engstrom, *supra* note 2, at 1524 (describing typical settlement mill clients).

42. *See generally* Engstrom, *supra* note 22.

43. For more on settlement mill fees, *see id.* at 845-49.

44. BARBARA CURRAN ET AL., THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 152, 156-57 (1977) (“Problem-havers who consulted lawyers on tort matters had substantially lower mean income (\$8000) than those who did not (\$11,000).”); *see also* HUNTING & NEUWIRTH, *supra* note 28, at 98-99 (reporting that “[o]f those who decide to take action, persons with the lowest SES are most likely to employ a lawyer”). *But cf.* U.S. DEP’T OF TRANSP, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, Vol. 1, 338 tbl.46S (1970) (comparing attorney retention rates by “highest grade completed” and reporting that

Curran suggests, the poor disproportionately want lawyers even for their very small claims, and if, as noted previously, settlement mills occupy the particular market niche willing to accept these very small claims, then that will predictably affect settlement mills' clientele.⁴⁵ Second, as also noted previously, settlement mills settle, and settle quickly, and the poor, often lacking sturdy safety nets, might disproportionately prefer payment certain and without delay. This, indeed, resonates with something Jerome Carlin found in his now-classic studies of low-income clients, when he reported that "poor clients often exert strong pressure to 'settle out' so that they can pay their bills and have 'something extra' to live on."⁴⁶ Now, we come to the third possibility for why settlement mills tend to represent low-income individuals. It is the most provocative and returns us to our discussion of attorney advertising. Specifically, the ABA's 1994 Comprehensive Legal Needs study found that the poor are far more likely to choose a lawyer on the basis of attorney advertising as compared to their wealthier counterparts.⁴⁷

Why might the poor prefer advertising lawyers? Three explanations again seem likely. First, as the ABA speculated, as opposed to their wealthier counterparts, the poor know fewer lawyers and are less likely to have used legal services in the past, meaning they are less likely to know more personal ways to find lawyers and also less likely to know the reputations of various practitioners.⁴⁸ And this rings true, given what I have

seriously-injured auto accident claimants with college and graduate degrees were far more likely to retain counsel, as compared to claimants with less formal education).

45. Not all lawyers accept simple soft-tissue injury cases. See Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1256 tbl.8 (2004) (reporting on a survey of Texas plaintiffs' lawyers which found that the majority (59.2%) of respondents would not accept a hypothetical case involving "a simple car wreck," clear liability, adequate insurance, and "soft tissue injuries worth \$3000"); see also Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 LOY. L.A. L. REV. 1585, 1587 (2008) ("[T]ort plaintiffs with strong liability claims but not exorbitant damages have little access to justice.").

46. See Carlin et al., *supra* note 24, at 77. For the fact that settlement mills appear to resolve claims with relative speed, see Engstrom, *supra* note 2, at 1502.

47. AM. BAR ASS'N, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994); ABA COMM'N ON ADVERTISING, *supra* note 3, at 4 ("Nationally, more than one in every five low income households who have used the services of a lawyer found that lawyer through some form of advertising."); accord Scott Sandlin, *Poster Boy or Scapegoat?*, ALBUQUERQUE J., Oct. 12, 1997, at A1 (quoting Will Hornsby of the ABA's Commission on Advertising: "If you look at who responds to advertising, they are people who don't otherwise know how to find a lawyer" and are generally "newly-relocated, low-income, undereducated, and minorities"); TOM L. LEE, CONSUMER ATTITUDES, RESPONSE PATTERNS AND MOTIVATION FACTORS 62, 65 (1985) (reporting on a national survey that found low-income respondents were more likely to indicate that they would identify a lawyer using advertising, as compared to middle-income or high-income respondents).

48. See ABA COMM'N ON ADVERTISING, *supra* note 3, at 97 (observing that low-income individuals "are the least likely to know of other resources for finding a lawyer," and, compared to wealthier individuals, are less likely to know the reputations

heard from settlement mill practitioners. As one firm founder publicly explained: “There are no lawyers in my clients’ personal social circles.”⁴⁹ Another former settlement mill lawyer similarly pointed out that her clients “didn’t know what a real law firm was.”⁵⁰

Second, there is an issue of targeting. Some attorney advertisers, the ABA found and my interviews at least anecdotally confirm, specifically target low-income groups.⁵¹ So, for example, one firm founder from California called himself the “People’s Lawyer” and, in his advertisements, tried “to appeal to folks who may not be upward-income individuals.”⁵² Another firm founder, from Louisiana, likewise said his ads targeted “working class” individuals and those home during the day.⁵³

Third and finally, there appears to be a belief shared by some low-income individuals that attorney advertisers are actually *superior* to non-advertisers. Here, a 1992 New Mexico study, specifically focused on direct-mail advertisers, found that the poor and least educated were far more likely to think attorney advertisers were of *higher* quality than non-advertisers and inclined to give a better deal.⁵⁴ The least educated were

of various practitioners); *see also* Kirk Johnson, *State Bar Acts to Limit How Lawyers Advertise Themselves*, N.Y. TIMES, June 21, 1992, available at <http://www.nytimes.com/1992/06/21/nyregion/state-bar-acts-to-limit-how-lawyers-advertise-themselves.html?pagewanted=all&src=pm> (quoting Professor Bruce Rogow as stating: “People who respond to these ads don’t know other lawyers.”); *TV Advertising Advice for Attorneys*, GARY DAVIS MEDIA, <http://televisionadvertising.com/lawyers.htm> (last visited Sept. 11, 2011) (advising prospective television advertisers to “Know Your Prospect” and specifying: “Your prospect from TV advertising is not just someone who needs a lawyer. Your prospect is someone who needs a lawyer and will hire one from TV. This usually means someone who does not already have a lawyer and does not know any lawyers, someone whose economic demo, in most cases, is working class or lower.”).

49. Mark Ballard, *The Ad-Made Man and the Old-Line Firm: Changes in Law Practice Are Played Out in Baton Rouge*, NAT’L L.J., Sept. 30, 2002, at A1 (quoting E. Eric Guirard).

50. Telephone Interview with S.S. (May 30, 2007).

51. ABA COMM’N ON ADVERTISING, *supra* note 3, at 97 (“Those who advertise personal legal services, especially personal injury or other contingency-fee services, target low and moderate-income populations.”); *cf.* Carl Hiaasen, *Ad Man Tells Lawyers: Cash in on TV*, MIAMI HERALD, Apr. 5, 1989, at 1B (quoting Paul Landauer, who, by his count, has produced more than 7,000 commercials for lawyers in 127 cities, as stating of his client-audience: “I want ‘em young, stupid and aggressive.”).

52. Deposition of James M. Rogers at 18-19, *Wilson v. Law Offices of James M. Rogers*, No. 823761-7 (Cal. App. Dep’t Super. Ct. Aug. 23, 2000).

53. Barrouquere, *supra* note 11 (quoting E. Eric Guirard); *see also* Telephone Interview with K.N. (Nov. 8, 2007) (reporting that ads at a South Carolina firm were targeted to the “lowest common denominator”); Telephone Interview with L.T. (Mar. 6, 2008) (reporting that, at the same South Carolina firm, ads were “geared to the lower socio-economic class”).

54. *See* Petition for Writ of Certiorari at apps. 51, 52, *Revo v. Disciplinary Bd. of the Sup. Ct. for N.M.*, 521 U.S. 1121 (1997) (No. 96-1780) (appending a December 1992 survey of Albuquerque adults’ responses to direct mail advertisements that was commissioned by the Disciplinary Board of the Supreme Court of New Mexico).

also twice as likely as their most educated counterparts to incorrectly believe that advertising lawyers are legally required to be “experienced in the trial” of cases in the substantive area in which they advertise, with a full 77% of the least educated respondents sharing that view.⁵⁵ Or, as one former settlement mill client said: “I figured . . . they wouldn’t let him on TV that much if—you know, if he hadn’t been a good lawyer.”⁵⁶

What settlement mills appear to highlight, then, is in some ways a replication of the traditional justice gap but in the unlikely contingency fee context. It is playing out not in whether a client gets a lawyer or not, but—particularly for the small subset of settlement mill clients with serious injuries—in the *kind* of legal services selected. And it is traceable, quite crucially, not to inequities in clients’ ability to *afford* counsel, because the contingency fee takes care of that, but rather, to clients’ ability to *choose* counsel wisely and the unequal resonance of attorney advertising. This fact, I contend, has profound implications for the Bar’s duty to make objective information about lawyer quality more readily available.

55. *See id.* This finding comports with the result of a 1990 survey of Nevada residents, commissioned by the Nevada Lawyers’ Advertising Study Committee. That survey found that, of those who have not completed high school, 67% of respondents incorrectly believed “that lawyers who advertise for certain types of cases necessarily have specialized knowledge, training and skills in handling those types of cases.” John DeWitt, *Report of Findings: Nevada Lawyers’ Advertising Survey*, 55 INTER ALIA 11, 16 (1990). *But cf.* Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 ARK. L. REV. 703, 730-33 (1997) (raising doubts about bar-commissioned studies). Also supportive is a recent survey of 1554 individuals, which found that individuals who have less education, lower income, and who are non-Caucasian are significantly more likely to respond favorably to the question: “Would you be more likely or less likely to use a lawyer that advertises or would it not make any difference to you?” That study found, quite strikingly, that “[f]or each additional academic degree a potential client receives, his or her probability of hiring an attorney who advertises decreases by 23%,” and “[c]hanging a potential client’s racial category from non-Caucasian to Caucasian would decrease the likelihood he or she would hire an attorney who advertises by 32%.” Michael G. Parkinson & Sabrina Neeley, *Attorney Advertising: Does It Meet Its Objective?*, 24 SERVS. MARKETING Q. 17, 25-26 (2003).

56. Transcript of Record at 866-67, *May v. Bloomfield*, No. D029136 (Cal. Ct. App. 1993), at 3324 (testimony of Jerry May).