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# Mystery Shopping: Demand-Side Phenomena in Markets for Personal Plight Legal Services

By Noel Semple<sup>1</sup>

**Abstract:** "Personal plight" is the sector of the legal services industry in which the clients are individuals, and the legal needs arise from disputes. This article proposes that competition among personal plight law firms is suppressed by three demand-side phenomena. First, consumers confront high search costs. Identifying competing law firms willing and able to provide the needed services often requires significant expenditure of temporal and psychological resources. Second, comparable price and quality information about firms is scarce for consumers. Both of these factors impede comparison shopping and reduce competitive pressure on firms. A third competition-suppressing factor is observed in tort legal service markets, where offerings are typically priced on a contingency basis. Contingency fees have relatively low salience to consumers, and this reduces consumers' willingness to negotiate and comparison-shop on the basis of price. This analysis is supported by the author's empirical research with Ontario personal plight lawyers as well as the existing literature. The article concludes by suggesting possible consequences of this analysis for regulatory policy.

## 1 Introduction

The legal services industry has been modelled as a square divided into quadrants.<sup>2</sup> A vertical line running through this square divides the personal client hemisphere from the corporate client hemisphere.<sup>3</sup> A horizontal line divides dispute-based practice from transactional or compliance-oriented practice.<sup>4</sup> In this model, *personal plight* is the quadrant in which the clients are individuals, and the legal needs arise from disputes. Family law, criminal defence, and plaintiff-side tort matters are examples of personal plight legal needs, served by firms in this quadrant.

This article argues that three demand-side phenomena suppress competition among personal plight law firms. Consumers in these markets (i) experience high search costs, (ii) lack price and quality information about firms, and (iii) are discouraged by behavioural factors from comparing contingency-based prices. The author's interviews with Ontario personal plight

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<sup>2</sup> John P. Heinz and Edward O. Laumann, "The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies" (1978) 76 Michigan Law Review 1111; John P. Heinz and Edward O. Laumann, *Chicago Lawyers: the Social Structure of the Bar* (New York: Russell Sage Foundation and American Bar Foundation, 1982).

<sup>3</sup> Practice for small, owner-operated corporations is included in the personal client hemisphere.

<sup>4</sup> Relatedly, see Legal Services Board (England & Wales), *A framework for understanding risks to affordability of legal services* (London: 2016) online: LSB <[http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/2017/20170426\\_A\\_framework\\_for\\_understanding\\_risks\\_to\\_affordability\\_of\\_legal\\_services\\_-\\_final.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/2017/20170426_A_framework_for_understanding_risks_to_affordability_of_legal_services_-_final.pdf)> (last accessed: 15 April 2018) at 13, distinguishing "distress" from "transaction" legal services.

lawyers support this analysis, which is also grounded in the relevant sociolegal, legal-economic, and policy literature.

The article begins in Part 1 by describing personal plight law firms and demand-side competition problems, and explaining the research methodology. Part 2 asks how prospective clients seek out personal plight law firms. The dominant search processes (referral and advertising) leave search costs high, and comparison shopping rare, in these markets. Part 3 shows why only poor price and quality information is available to most consumers in these markets. Part 4 argues that contingency fees impose little "pain of payment" on consumers for cognitive reasons, and this diminishes the willingness of tort legal services consumers to negotiate and comparison-shop on the basis of price. Part 5 identifies the factors distinguishing personal plight markets from other professional service and consumer markets, and suggests the consequences of this analysis for regulatory policy.

### 1.1 Personal Plight Law Firms

In Canada, personal plight legal needs are met primarily by small firms and sole practitioners.<sup>5</sup> Large firms generally withdrew from these practice areas over the course of the 20<sup>th</sup> century, in order to focus their efforts on corporate clients. New entrants such as AxxessLaw and LegalWills.ca have disrupted markets for uncontested "personal business" services using commoditization, technology and non-lawyer labour.<sup>6</sup> However, these new entrants have not yet made major incursions into markets for contested personal plight services.<sup>7</sup> The rise of practitioner specialization has been a major long-term trend affecting the legal industry, including personal plight. Thus firms, as well as individual practitioners, are increasingly likely to specialize in only one personal plight niche such as criminal defence or family law, especially in larger towns and cities.<sup>8</sup>

### 1.2 Competition

Competition can be defined as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms."<sup>9</sup> Quality competition means firms striving to improve the value of their offerings to consumers. Competing on quality can mean either providing traditional offerings at a higher standard, or inventing new goods and services that consumers value. Price competition involves firms striving to attract consumers by charging less than they would otherwise charge. The level of competition in a market is influenced by factors such as the number of firms, the ease with which they can enter or leave

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<sup>5</sup> This includes state-funded legal aid services, which in Canada are primarily delivered by private sector firms compensated by the government, as well as by non-profit legal clinics.

<sup>6</sup> John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services" (2014) 82 *Fordham Law Review* 3041 at 3050-1.

<sup>7</sup> Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers" (2014) *Journal of the Legal Profession* 25, online: <[ssrn.com/abstract=2436438](https://ssrn.com/abstract=2436438)> (last accessed: 15 April 2018) at 36.

<sup>8</sup> John P. Heinz *et al.*, *Urban Lawyers: The New Social Structure Of The Bar* (Chicago: University of Chicago Press, 2005) at 37; Harry W. Arthurs, "Will the Law Society of Alberta Celebrate its Bicentenary?" (2008) 45 *Alberta Law Review* 15, online: <[http://digitalcommons.osgoode.yorku.ca/scholarly\\_works/857/](http://digitalcommons.osgoode.yorku.ca/scholarly_works/857/)> (last accessed: 15 April 2018).

<sup>9</sup> Merriam-Webster Dictionary, "Definition of 'Competition'," <<https://www.merriam-webster.com/dictionary/competition>> (last accessed: 15 April 2018).

the market, and the level of information available to consumers.<sup>10</sup> That competition generally advances consumers' interests is a basic premise of policy-makers in market economies.<sup>11</sup>

How competitive are markets for personal plight legal services? Some suggest that competition is robust or intensifying for Canadian legal services generally.<sup>12</sup> On the other hand, the UK's Competition and Markets Authority (CMA) concluded that "competition in the legal services sector for consumers and small businesses is not working well."<sup>13</sup> Consonant with the CMA's analysis, this article will argue that distinct, competition-suppressing factors exist in the personal plight quadrant of the industry. While the empirical data comes from Ontario, most of the analysis would apply to all developed economies.

### 1.3 Demand-Side Competition Problems

The level of competition in a given market depends on the characteristics and behaviour of both buyers and sellers in that market. "Supply-side" problems, involving sellers, were the original, and still dominant focus of competition law and policy.<sup>14</sup> Monopoly, market concentration, collusion, and abuse of dominant position are all supply-side issues that can

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<sup>10</sup> Lester Brickman, "The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?" (2003) 25 *Cardozo L. Rev. Cardozo Law Review* 65 at 76.

<sup>11</sup> Jill Johnstone and Alena Kozakova, *Imperfect Markets* National Consumer Council (UK), 2006) online: NCC <[http://collections.europarchive.org/tna/20080520143211/http://www.ncc.org.uk/nccpdf/poldocs/NCC135\\_imperfect\\_markets.pdf](http://collections.europarchive.org/tna/20080520143211/http://www.ncc.org.uk/nccpdf/poldocs/NCC135_imperfect_markets.pdf)> (last accessed: 15 April 2018) at 4; Competition & Markets Authority (UK), *Legal services market study: Final Report* (London: 2016) online: CMA <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> (last accessed: 15 April 2018) at 196; Council of Economic Advisers (USA), *Benefits Of Competition And Indicators Of Market Power* (Washington, D.C.: CEA, 2016) online: CEA <[https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502\\_competition\\_issue\\_brief\\_updated\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf)> (last accessed: 15 April 2018) at 1-2.

<sup>12</sup> Regarding Ontario, see Iacobucci & Trebilcock, *supra* note 11 and Edward Iacobucci and Michael Trebilcock, "An Economic Analysis Of Alternative Business Structures For The Practice Of Law" (2013) 92 *Canadian Bar Review* 57, online: <[https://cbaapps.org/cba\\_barreview/Search.aspx?VolDate=12%2f01%2f2016](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016)> (last accessed: 15 April 2018) at 81. See also Simon Fodden, *Voices of Change: Canadian Social Media and Other Writings on the Future of Legal Practice* (Ottawa: CBA, 2013) online: CBA <[http://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/CBA%20Legal%20Futures%20PDFS/Voices-Paper-Summary-Linked-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Voices-Paper-Summary-Linked-eng.pdf)> (last accessed: 15 April 2018) and Jordan Furlong, "The rise of market pricing (Law21, June 1, 2017)" (2017), online: <<https://www.law21.ca/2017/06/rise-market-pricing/>> (last accessed: 15 April 2018).

<sup>13</sup> Competition & Markets Authority (UK), "Legal services market study: Final Report." (London: 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>>.

<sup>14</sup> Organisation for Economic Co-operation and Development Committee on Consumer Policy, *Roundtable On Demand-Side Economics For Consumer Policy: Summary Report* (Paris: OECD, 2006) online: OECD <<https://www.oecd.org/sti/consumer/36581073.pdf>> (last accessed: 15 April 2018) at 8; Sean F. Ennis and Alberto Heimler, *Promotion of Competition on the Demand Side (Working Paper)* (Paris: SSRN, 2004) online: SSRN <<https://ssrn.com/abstract=622722>> (last accessed: 15 April 2018)

impede competition.<sup>15</sup> In legal services markets, supply-side impediments to competition include barriers to entry (licensing),<sup>16</sup> and restrictions on capital supply.<sup>17</sup>

Demand-side competition problems are the focus of this article. These are attributes and behaviour of *buyers* that impede competition in a market. Even if suppliers lack market power and make no effort to collude with each other, demand-side problems can still prevent competition from delivering the expected benefits for consumers.<sup>18</sup> One example of a demand-side phenomenon is switching costs – the difficulties that prevent a consumer from moving to a different long-term service provider with better price or quality attributes.<sup>19</sup> Switching costs are not very important in this context, because personal plight legal needs typically arise only occasionally in one's life.<sup>20</sup>

However, this article argues that three other demand-side phenomena– high search costs, information scarcity, and the cognitive profile of contingency fees– do impede competition in markets for personal plight legal services. They do so by deterring comparison-shopping, which is a key demand-side ingredient for competition.<sup>21</sup> If consumers do not actively compare vendors' offerings before making consumption decisions, then vendors lose the economic

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<sup>15</sup> Johnstone & Kozakova, *supra* note 11; Amelia Fletcher, *The Role of Demand-Side Remedies in Driving Effective Competition* (London, UK: Which?, 2016) online: Which? <<http://www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf>> (last accessed: 15 April 2018) at 12. Scholars differ regarding whether or not these phenomena occur in personal plight. Claiming that they do not, see Iacobucci & Trebilcock, *supra* note 11 at 19-20. Claiming that they exist in tort plaintiff markets, see Brickman, *supra* note 10 at 99.

<sup>16</sup> Mario Pagliero, "What is the Objective of Professional Licensing? Evidence from the US Market for Lawyers" (2011) 29 *International Journal of Industrial Organization* 473; Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013) 21 *International Journal of the Legal Profession* 267, online: <<http://ssrn.com/abstract=2303987>> (last accessed: 15 April 2018); Mercer, *supra* note 16.

<sup>17</sup> Law firms in Canada and the United States are generally prohibited to have non-lawyer partners or shareholders. This restricts their access to capital: Iacobucci & Trebilcock, *supra* note 11 at 7; Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2014) 38 *International Review of Law and Economics* 43; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) ["*Legal Services Regulation*"].

<sup>18</sup> Michael Waterson, "The role of consumers in competition and competition policy" (2003) 21 *International Journal of Industrial Organization*; Organisation for Economic Co-operation and Development Committee on Consumer Policy, *supra* note 14 at 4.

<sup>19</sup> Johnstone & Kozakova, *supra* note 11 at 13; Organisation for Economic Co-operation and Development and Committee for Information Computer and Communications Policy, *Enhancing Competition in Telecommunications: Protecting and Empowering Consumers* (Paris: OECD, 2008) online: OECD <<https://www.oecd.org/sti/consumer/40679279.pdf>> (last accessed: 15 April 2018) at 22.

<sup>20</sup> Legal Services Consumer Panel (England & Wales), *The development of information remedies in legal services* (London, UK: 2016) online: LSCP <[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/20170322\\_Information\\_Remedies.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/20170322_Information_Remedies.pdf)> (last accessed: 15 April 2018) [LSCP, *Development of Information Remedies*] at para 1.9.

<sup>21</sup> Cass R. Sunstein, "Empirically Informed Regulation" (2011) 78 *U. Chi. L. Rev.* 1349 at 1381; Oren Bar-Gill, "Consumer Transactions" in Eyal Zamir & Doron Teichman eds., *The Oxford Handbook of Behavioral Economics and the Law* (Oxford, UK: Oxford University Press, 2014) at 475; Legal Services Board (England & Wales), "A framework for understanding risks to affordability of legal services." (London: 2016), online: <[http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/2017/20170426\\_A\\_framework\\_for\\_understanding\\_risks\\_to\\_affordability\\_of\\_legal\\_services\\_-\\_final.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/2017/20170426_A_framework_for_understanding_risks_to_affordability_of_legal_services_-_final.pdf)> at 18.

incentive to compete by improving the quality and/or price attributes of those offerings.<sup>22</sup> Even if supply-side factors (such as a multiplicity of providers and low costs of entry and exit) favour competition, these supply-side issues can profoundly restrain it.

#### 1.4 Methodology

This paper uses qualitative interview data to explore economic phenomena.<sup>23</sup> The premise is that accounts from market participants can illustrate behaviour patterns and lead to a better understanding of the markets in question. Better-informed regulatory interventions may result. The absence of good quantitative data about legal services markets increases the value of qualitative sources.

The author conducted semi-structured key informant interviews with 26 Ontario lawyers practicing in personal plight niches.<sup>24</sup> Key informant research methodology relies on those who are most familiar with a phenomenon as sources of insight about it.<sup>25</sup> Five of the interviewees were selected using purposive sampling, because their writing and/or reputation led the researcher to believe that they would be useful informants.<sup>26</sup> The other 21 interviewees were identified using the Law Society of Upper Canada's directory of legal practitioners.<sup>27</sup> Invitees were chosen in order to construct a stratified sample roughly representative of Ontario personal plight practitioners in terms of demographic and professional factors, including practice niche within the personal plight quadrant.<sup>28</sup>

As sources of information about demand-side phenomena, it may seem counterintuitive to use lawyers (suppliers) as opposed to clients (demanders). However, personal plight lawyers, unlike their clients, are knowledgeable "repeat players" in their markets. They are therefore helpful informants for research of this nature, provided that care is taken regarding their potential biases about consumers' experiences.

## 2 Search Processes and Search Costs in Personal Plight Markets

Different markets are characterized by different search processes, and varying levels of search costs. Search costs can be defined as all "costs incurred by the buyer to locate an

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<sup>22</sup> United Nations Conference on Trade and Development, *Consumer protection and competition policy* (New York: 2012) online: United Nations <[http://unctad.org/meetings/en/SessionalDocuments/tdbcie2\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/tdbcie2_en.pdf)> (last accessed: 15 April 2018) at 3.

<sup>23</sup> Regarding the use of interviews and other qualitative empirical techniques for this purpose, see Michael J. Piore, "Qualitative Research: Does it fit in economics?" (2006) 3 *European Management Review* 17.

<sup>24</sup> A further five interviews were conducted with personal plight lawyers from other jurisdictions, and Ontario lawyers practicing in uncontested personal business fields. This project was authorized by University of Windsor Research Ethics Board Certificate Number 31927, granted February 25, 2015.

<sup>25</sup> USAID Centre for Development Information and Evaluation, *Conducting Key Informant Interviews* (Washington, DC: U.S. Agency for International Development, 1996) online: USAID <[http://pdf.usaid.gov/pdf\\_docs/pnabs541.pdf](http://pdf.usaid.gov/pdf_docs/pnabs541.pdf)> (last accessed: 15 April 2018).

<sup>26</sup> Janice M. Morse, "Purposive Sampling" in Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao eds., *The SAGE Encyclopedia of Social Science Research Methods* (Thousand Oaks, California: 2004).

<sup>27</sup> Law Society of Upper Canada, "Lawyer and Paralegal Directory," <<http://www2.lsuc.on.ca/LawyerParalegalDirectory/loadSearchPage.do>> (last accessed: 15 April 2018). The former Law Society of Upper Canada is now known as the Law Society of Ontario.

<sup>28</sup> For further detail see Noel Semple, *Accessibility, Quality, and Profitability for Personal Plight Law Firms: Hitting the Sweet Spot* (Ottawa: Canadian Bar Association, 2017) online: CBA <[www.cba.org/PersonalPlight](http://www.cba.org/PersonalPlight)> (last accessed: 15 April 2018) [Semple, *Sweet Spot*]

appropriate seller and to purchase a product.<sup>29</sup> Higher search costs generally lead to less comparison shopping and less competition.<sup>30</sup> Temporal search costs are generally greater than financial search costs in markets with individual consumers. In other words it takes time, more than money, for individuals to identify and compare alternatives and to choose from among them.<sup>31</sup>

Search costs are very different in the two "hemispheres" of the legal services industry. They are relatively low for sizable corporations, for which legal needs are typically routine and recurrent. A corporate client is likely to have one or more "go-to" law firms for those needs that are not met in-house. If it wishes to find new suppliers, it can expect to receive competitive bids from outside firms,<sup>32</sup> and it can usually draw on in-house legal expertise to evaluate these alternatives.

In the personal client hemisphere, a consumer is much less likely to know an appropriate firm from personal experience.<sup>33</sup> This is because individuals' legal needs arise less frequently than corporations' do,<sup>34</sup> and also because law firms are increasingly specialized.<sup>35</sup> The decline of generalism makes it increasingly unlikely that the lawyer whom an individual used for residential property conveyance can be of any assistance in his or her divorce.<sup>36</sup> Thus, most personal plight retainers are necessarily preceded by a search process.

An individual's search process involves finding a firm that he or she is willing to retain, which is also willing to *be* retained on that matter.<sup>37</sup> Personal plight law firms turn prospective clients away because they do not do the type of work needed by the client,<sup>38</sup> or because the firm

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<sup>29</sup> Sven Döring *et al.*, "Evaluation and optimization of the catalog search process of e-procurement platforms" (2006) 5 Electronic Commerce Research and Applications 44.

<sup>30</sup> Michael Waterson, "The role of consumers in competition and competition policy," (2003) 21 International Journal of Industrial Organization ; Simon P. Anderson and Régis Renault, "Firm pricing with consumer search" in Luis Corchon & Marco Marini eds., *Handbook of Game Theory and Industrial Organization* (Edward Elgar Publishing: 2017).

<sup>31</sup> George J. Stigler, "The Economics of Information" (1961) 69 Journal of Political Economy 213 at 216. Psychological costs are also involved in search – see notes 89 and 90 and accompanying text, below.

<sup>32</sup> Bert Kritzer, *The justice broker: lawyers and ordinary litigation* (New York: Oxford University Press, 1990) at 56; Michael Trebilcock, "Regulating the Market for Legal Services" (2008) 45 Alta. L. Rev. 215 at 218. and if they wish to find a new one they can expect to receive competitive bids

<sup>33</sup> Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books, 1997) at 53; Competition & Markets Authority (UK), *supra* note 11 at 43.

<sup>34</sup> Legal Services Board (England & Wales), "A framework for understanding risks to affordability of legal services." (London: 2016), online:

<[http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/2017/20170426\\_A\\_framework\\_for\\_understanding\\_risks\\_to\\_affordability\\_of\\_legal\\_services\\_-\\_final.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/2017/20170426_A_framework_for_understanding_risks_to_affordability_of_legal_services_-_final.pdf)> at 10: " When a product is consumed on an ongoing basis then the consumer has the opportunity to grow in confidence when shopping for this product... [individual] consumers of legal services generally start from a weaker position of not knowing what their needs are."

<sup>35</sup> See section 1.1, above.

<sup>36</sup> Note 8 and accompanying text, above.

<sup>37</sup> Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 46.

<sup>38</sup> Van Hoy, *supra* note 33 at 60 and 116.

is too busy.<sup>39</sup> These contested matters create more scope for problems in the lawyer-client relationship than uncontested needs do, and hence more reasons to turn away clients. Problematic client instructions and client refusal to accept settlement advice are more likely in litigation than they are in personal business matters such as residential property conveyance or will-drafting. Interviewees confirmed that they screen out would-be clients because of difficult client personalities,<sup>40</sup> unreasonable expectations about the outcome or service,<sup>41</sup> other indications that the lawyer-client relationship would be problematic.

Screening out consumers is particularly important in the personal injury niche, where contingency billing is standard and firm revenues depend on the quality of the cases accepted.<sup>42</sup> Herbert Kritzer found Wisconsin contingency fee lawyers accepting roughly 50% of prospective

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<sup>39</sup> Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015); Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015); Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015).

<sup>40</sup> Lawyer PP said: "98% of the time I spoke to every potential client on the phone first and that was my sort of screening. If I got a sense that the person was gonna have a hard time with my direct style, I might make a referral immediately. It's very unscientific. Didn't depend on money or who people knew. It was really what I thought might be a personality clash." ((Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015); Interview with "C2" (Criminal law practitioner, Toronto, male, 11 years since call to the bar. Interviewed April 13, 2016); Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015); Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015); Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015). In the literature, see Van Hoy, *supra* note 33 at 66 and Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 93.

<sup>41</sup> ... "I might say I don't have the time for this because my sense was this was going to be a client who would demand directly from me and wouldn't accept staff intervention a lot of the time. I was never a good hand holder lawyer. Different people have different styles. There are some lawyers who would have tea with their clients and have a chat. That was not me." (Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015). Similar comments came from Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015); Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

<sup>42</sup> Personal injury lawyer WW said: "for me to take on a case it would have to be at the very minimum somewhere around \$50-60000." ... "if you just look from the tort, the deductible perspective, that weeded out a lot of people with claims that would have been worth 20, 30, 40 thousand dollars. I will not touch those cases, so when clients come in and they are either students or they are retirees, I will not take their cases because they have no income." (Interview with "WW" (Personal injury practitioner, Toronto, female, 13 years since call to the bar. Interviewed July 20, 2015)). See also Amy Myrick, Robert L. Nelson and Laura Beth Nielsen, "Race And Representation: Racial Disparities In Legal Representation For Employment Civil Rights Plaintiffs" (2012) 15 *New York University Journal of Legislation and Public Policy* 705 at 742; David Barnhizer, "Cultural Narratives Of The Legal Profession: Law School, Scamblogs, Hopelessness, And The Rule Of Law" (2012) 2012 *Mich. St. L. Rev.* 663 at 2.4; Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at 9-10.



clients. In the 1990s<sup>43</sup> The patchy evidence suggests that many firms today are even more selective.<sup>44</sup> The value of the potential damages is, naturally, an important criterion in the screening process given that the firm's compensation will be a percentage of damages.<sup>45</sup> The likelihood of success and the other risks and likely investments involved in the case also factor into contingency firm screening processes.

## 2.1 Referral

The dominant search mechanism by which personal plight clients find law firms in Ontario is referral,<sup>46</sup> and it will be shown below that this mechanism is not favourable to robust competition. Referral occurs when a third party provides the name of a firm to someone who is seeking legal services, and the service-seeker retains the firm named in the referral. Lawyers interviewed for this project generally confirmed that referral is still king when it comes to getting clients.<sup>47</sup> Satisfied clients of a firm will send new clients to the firm.<sup>48</sup> Referrals also come from

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<sup>43</sup> Kritzer, *"Risks, Rewards, and Reputations"* *supra* note 37 at 71.

<sup>44</sup> Hyman, *supra* note 44 at 1585.

<sup>45</sup> Kritzer, *"Risks, Rewards, and Reputations"* *supra* note 37 at 84. John T. Nockleby reports that in the Los Angeles area, many medical malpractice lawyers won't accept cases in which they estimate the damages at less than \$300,000 to \$500,000: John T. Nockleby, "Faces of the Tort Pyramid" in Scott L. Cummings ed., *The paradox of professionalism : lawyers and the possibility of justice* (Cambridge ; New York: Cambridge University Press, 2011) at 100.

<sup>46</sup> This has long been the case. See Jerome Carlin, *Lawyers on their Own* (New Brunswick: Rutgers University Press, 1962); Van Hoy, *supra* note 33 at 9-12, Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia, PA: Temple University Press 1996) at 52-3.

<sup>47</sup> Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015); (Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015); Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015); Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with "OO" (Personal injury practitioner, Windsor, male, 36 years since call to the bar. Interviewed June 9, 2015); Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

<sup>48</sup> Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015); Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015); Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015); Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015); Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015)

other lawyers,<sup>49</sup> including lawyers who do not provide the sought-after services,<sup>50</sup> and lawyers who do work in the same niche but have screened out the file.<sup>51</sup> Other sources of referrals include community groups,<sup>52</sup> and other professionals (e.g accountants and social workers).<sup>53</sup> "Intermediaries" such as real estate agents and health professionals often have the opportunity to refer people to lawyers.<sup>54</sup>

### 2.1.1 Compensated Referrals

While some referrals are purely motivated by the referrer's desire to assist the service-seeker,<sup>55</sup> others are compensated in some way by the referred-to firm. The compensation may be completely informal. Referrals are often perceived as favours that should when possible be returned by a referral in the opposite direction.<sup>56</sup>

A referral fee offers a more explicit incentive. Ethics rules in most Canadian provinces permit lawyers to pay referral fees to other lawyers,<sup>57</sup> although not to non-lawyers.<sup>58</sup> In the

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<sup>49</sup> Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015); Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); "UU", 2015 #5965; Interview with "VV" (Personal injury practitioner, Toronto, female, 3 years since call to the bar. Interviewed July 17, 2015); Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015); Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015); Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to the bar. Interviewed May 5, 2015); Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016); Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015); Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

<sup>50</sup> Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

<sup>51</sup> See notes 38 to 45 and accompanying text, above.

<sup>52</sup> "D2", Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016). 2016. NOTE: The downloaded/imported citation did not fit with any Generic that is handled by the GCULC Output Style. Please enter the citation manually using one of the Generics set up for the GCULC Output Style..

<sup>53</sup> Seron, *supra* note 46 at 53; Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015).

<sup>54</sup> Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015); Competition & Markets Authority (UK), *supra* note 11 at 73.

<sup>55</sup> Doing so can have reputational benefits for the referrer: Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at 187; Kritzer, "Risks, Rewards, and Reputations" *supra* note 37 at 67.

<sup>56</sup> Kritzer, "Risks, Rewards, and Reputations" *supra* note 37 at 59.

<sup>57</sup> Federation of Law Societies of Canada, "Interactive Model Code of Professional Conduct," <<http://flsc.ca/interactivecode/>> (last accessed: 15 April 2018) at 3.6-6 and 3.6-7. There are three conditions on lawyer-to-lawyer referral fees in the Model Code Rule which has been adopted in most provinces. First, the referral fee must be paid "because of the expertise and ability of the other lawyer to handle the matter" and not because of a conflict of interest. Second, the referral fee must be "reasonable," and "not increase the total amount of the fee charged to the client." Third, the client must be informed of the fee by the referred-to firm, and must consent to the payment.

<sup>58</sup> Law Society of Upper Canada, *Rules of Professional Conduct (Ontario)* (Toronto: LSUC, 2017) online: LSUC <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>> (last accessed: 15 April 2018), R. RPC 3.6-7; Law Society of Ontario, *Paralegal Rules of Conduct* (Toronto: 2017) online: LSO <<https://www.lsuc.on.ca/paralegal-conduct-rules/>> (last accessed: 15 April 2018) R. 5.01(14).

personal injury field many Canadian firms will pay 15-20% of their fee from a file to the firm that referred the file.<sup>59</sup> In Ontario, prior to the introduction in 2017 of a cap on referral fees,<sup>60</sup> they reportedly sometimes mounted to 30% of the recovered amount *in addition to* "up-front flat-fee payments that [were] sometimes very large."<sup>61</sup> Personal injury lawyers interviewed for this research confirmed that referral fees are common in their niche.<sup>62</sup> They are less common, although not unheard of, in other personal plight niches.

### 2.1.1.2 Referral as a Search Process

Referral will likely remain a central search process for personal legal services. For those who lack direct personal experience in the field, asking a trustworthy and knowledgeable person to name a suitable firm is a natural and flexible way to seek help. As interview respondent DD put the point, "If something bad happened to you, what would you do? ... you start with family, you start with people you trust, a friend, a relative, a doctor, a trusted advisor."<sup>63</sup> A 2010 American Bar Association survey found that 80% of individual respondents, if seeking a lawyer, would find one through "a trusted source, e.g. a family member, friend, work associate or a lawyer they knew."<sup>64</sup>

Referral, however, does not work for everyone as a search process. Not everyone knows and trusts someone who can provide a good referral. Socially isolated and disadvantaged people may be less likely to have the necessary connections. Amy Myrick and her colleagues found that African Americans making employment equity claims were significantly less likely to have lawyers than were caucasian people making comparable claims.<sup>65</sup> One reason for this disparity, they suggested, is that African Americans tend to have more limited networks and therefore more difficulty connecting with lawyers via referral.<sup>66</sup>

Even if the referrer is good, the referral may not be. The high-quality service that causes someone to refer a friend to Firm X may not be the same service that the friend actually receives.

<sup>59</sup> Shannon Kari, "The battle for the personal injury dollar (Canadian Lawyer, November 12, 2012)," <<http://www.canadianlawyermag.com/4402/The-battle-for-the-personal-injury-dollar.html>> (last accessed: 15 April 2018).

<sup>60</sup>Law Society of Upper Canada, "Rules of Professional Conduct (Ontario)." (Toronto: LSUC, 2017), online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>>, R. 3.6-6.1 (1)(e). Referral fees are now capped at \$25,000. They also cannot exceed 15% of the first \$50,000 in fees, plus 5% of any additional fees.

<sup>61</sup> Professional Regulation Committee (Law Society of Upper Canada), *Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)* <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>> (last accessed: 15 April 2018) at 8.

<sup>62</sup> Interview with "OO" (Personal injury practitioner, Windsor, male, 36 years since call to the bar. Interviewed June 9, 2015); Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015). One Toronto personal injury lawyer described an internal referral fee system in his firm, used when one partner would refer a file to another: Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

<sup>63</sup> Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

<sup>64</sup> William T. Hogan, "Re: Issues on the Future of Legal Services (Letter to The ABA Commission on the Future of Legal Services, December 20, 2014)," <[https://www.americanbar.org/content/dam/aba/images/office\\_president/delivery\\_of\\_legal\\_services.pdf](https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services.pdf)> (last accessed: 15 April 2018) at 9

<sup>65</sup> Myrick et al, *supra* note 42.

<sup>66</sup> *Ibid* at 724.

The service might be in a different legal niche where the firm's services are not at the same standard.<sup>67</sup> It might be a different lawyer or team within the firm that provides the service.

From the consumer's point of view, the ideal referral is well-informed and purely oriented to the referral-seeker's interests in quality, price, and choice. Regarding the choice interest, the ideal referral identifies multiple suitable firms with different characteristics, so that the referral-seeker can compare them based on price sensitivity and other personal preferences.<sup>68</sup> This may already be best practice for some referral sources. Toronto personal injury lawyer SS said that "if you got my name from a social worker in the hospital, I know you were given 3 names minimum."<sup>69</sup>

However for many people, referral will at best identify a single firm willing to accept the case, not a selection suitable for comparison shopping. Two lawyers interviewed for this project suggested that clients who do not speak English often obtain poor-quality referrals, i.e. to a single firm which may be named not because it is a good match for the client's need but rather because of the incentive offered to the referrer. One personal injury lawyer told the author that there are "runners" who speak certain languages and monitor hospitals on behalf of certain firms.<sup>70</sup> If a "runner" discovers a seriously injured individual from that background, who does not speak English, the runner will "recruit" that individual and bring him or her to the firm in exchange for compensation of some kind. This lawyer suggested that these injured people often retain the firm with minimal scrutiny because they feel they have no choice, and do not know whether or how to explore other options. As will be seen below, the dominance of referral in the personal plight quadrant helps keep search costs high, and competition muted.

### 2.1.3 Referrer-Focused Competition versus Client-Focused Competition

The dominance of referral as a search process may encourage personal plight firms to compete by improving their offerings to referrers, instead of improving their offerings to clients. They may bid up referral fees, in those niches where such fees are common. In other niches, firms may put significant efforts into networking with and creating positive impressions upon potential referral sources. In either case, the dominance of referral as a search process suppresses the competitive incentive to improve offerings to clients.

## 2.2 Advertising

Advertising, defined broadly as "publication of an announcement in a public medium,"<sup>71</sup> is a secondary search process in Canadian personal plight markets. Law firm print media, radio and television ads, transportation billboards, sponsorships, internet advertising and websites are all in this category. Most law firm advertising was illegal before the 1980s, but it is now permitted across Canada and the United States subject to certain regulatory restrictions.<sup>72</sup>

<sup>67</sup> Douglas E. Rosenthal, *Lawyer and client, who's in charge?* (New Brunswick, N.J.: Transaction Books, 1977) at 131.

<sup>68</sup> Regarding the attributes of good referrals, see Competition & Markets Authority (UK), *supra* note 11 at 241.

<sup>69</sup> Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

<sup>70</sup> Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at 119.

<sup>71</sup> Oxford English Dictionary Online, "Definition of 'Advertising'," <[www.oed.com](http://www.oed.com)> (last accessed: 15 April 2018).

<sup>72</sup> Ethical rules in all provinces prohibit false and misleading advertising. Further restrictions depend on the province, and in some cases include prohibitions on advertising claiming superiority to other firms. Analyzing the at-times uneasy relationship between the economic value of advertising and lawyers' conceptions of professional

Although personal plight law firm advertising has become common, it will be seen below that the type of advertising most often used not foster comparison shopping, price competition, or quality competition in these markets.

Since the 1980s, advertising has become an important source of business for some personal plight firms. In addition to reaching people actually experiencing a legal need, it can help build reputation so that (i) the firm name springs to mind when the need arises in the future, and (ii) referrals to the firm are more likely to be followed. As British Columbia family lawyer GG put the point in describing signs advertising her firm on outdoor benches, "they don't bring any business in, but they do get exposure."<sup>73</sup>

Websites are the most ubiquitous form of advertising for personal plight law firms. They are the contemporary version of the once-standard yellow pages ad.<sup>74</sup> Almost all firms have at least an "online business card" with contact information. Some, such as Toronto employment law firm Whitten & Lublin, go much further. This firm's site includes comprehensive employment law information and a severance payment calculator. Those interested in contacting the firm will find relatively detailed information on fee options,<sup>75</sup> as well as a live chat feature. The name of the website -- <http://www.toronto-employmentlawyer.com> -- seems well chosen to pull people in from internet searches.

Advertising is especially important in plaintiff-side personal injury practice.<sup>76</sup> A partner in a personal injury firm in Windsor, Ontario described the legalization of advertising as a great leap forward for consumer search, and therefore access to justice:

January 1st of 1987 was when the Law Society of Upper Canada lifted restrictions on lawyer advertising. We thought that was a real wise choice for the Law Society to make and we were surprised that they would do it. We were trying to reach real people and it was very difficult for us to do that because our hands were tied. We couldn't tell real people who we were. We had to do what most lawyers did - represent big corporations... when the restrictions on lawyer advertising were lifted we thought 'Yes! We can go to real people and represent real people.' And that's what we did.<sup>77</sup>

### 2.2.1 Advertising as a Search Process

Advertising assists basic search, by providing a consumer with the name and contact information of a firm that provides services in a certain area. A few personal plight law firms get most of their business through advertising. Toronto criminal lawyer C2, a rare practitioner in this

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identity, see Seron, *supra* note 46 and Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at Chapter 4.

<sup>73</sup> Interview with "GG" (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015)

<sup>74</sup> Seron, *supra* note 46.

<sup>75</sup> Whitten & Lublin Employment Lawyers, "Consultation Fees" (2017), online: <<http://www.toronto-employmentlawyer.com/consultation-fees/>> (last accessed: 15 April 2018).

<sup>76</sup> Shannon Kari, "The battle for the personal injury dollar (Canadian Lawyer, November 12, 2012)," <<http://www.canadianlawyermag.com/4402/The-battle-for-the-personal-injury-dollar.html>>; Van Hoy, *supra* note 33 at 13-14.

<sup>77</sup> Interview with "OO" (Personal injury practitioner, Windsor, male, 36 years since call to the bar. Interviewed June 9, 2015)

niche who does no legal aid work, said that 85% of his clients come from marketing and only 15% from referrals.<sup>78</sup> Class action firms sometimes rely heavily on various forms of advertising to identify and sign up class members. Windsor lawyer QQ said that his advertising expenditures on Google and Facebook had not produced work for him, but they had allowed him to provide referrals to other lawyers, which in turn built goodwill and perhaps reciprocal referrals.<sup>79</sup>

However, there are few firms for which advertising outweighs referral as a source of clients.<sup>80</sup> Even personal injury lawyer "II", whose firm has an elaborate website and a major advertising campaign, claimed that referrals were at least as important or more so.<sup>81</sup> Several lawyer interviewees reported disappointment with the meager effects of advertising in bringing clients in.<sup>82</sup> The limitations of the internet and advertising as sources of information for personal plight consumers will be discussed below.<sup>83</sup>

### 2.3 Search Costs and Competition

The dominant search mechanisms in personal plight markets leave search costs high,<sup>84</sup> discourage comparison-shopping, and diminish the competitive pressure experienced by firms.<sup>85</sup> In England & Wales only 27% of personal clients reported shopping around before choosing a firm,<sup>86</sup> and there is no evidence that the market in Ontario is more likely to foster such behaviour. Even when referral and/or advertising allow a consumer to identify and retain a willing firm in the right niche, these processes do not make it easy for that consumer to identify and compare multiple firms. An in-person consultation in a law firm office is often the only way to get any useful information about the firm's qualities, prices and service options.<sup>87</sup> A would-be

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<sup>78</sup> Interview with "C2" (Criminal law practitioner, Toronto, male, 11 years since call to the bar. Interviewed April 13, 2016).

<sup>79</sup> Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

<sup>80</sup> Shannon Kari, "The battle for the personal injury dollar (Canadian Lawyer, November 12, 2012)," <<http://www.canadianlawyermag.com/4402/The-battle-for-the-personal-injury-dollar.html>>. Similar findings have been made regarding American lawyers: Kritzer, "Risks, Rewards, and Reputations" *supra* note 37 at 47; Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at 118.

<sup>81</sup> E.g. Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015). Of course, referral as a source of business reflects more favourably on a firm than advertising and so this claim should be treated cautiously.

<sup>82</sup> *Ibid.*; Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015); Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015). See also Van Hoy, *supra* note 33 at 12.

<sup>83</sup> Sections 3.1.3 and 3.1.4, below.

<sup>84</sup> Regarding tort plaintiff legal services, see Brickman, *supra* note 10 at 77.

<sup>85</sup> Regarding the tendency of search costs to have these effects in various markets, see United Nations Conference on Trade and Development, *supra* note 22 at 8.

<sup>86</sup> Legal Services Consumer Panel (England & Wales), *Tracker Survey 2017 Briefing note: how consumers are choosing legal services* (London: 2017) online: LSCP <[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/How\\_consumers\\_are\\_choosing\\_Final\\_2017.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/How_consumers_are_choosing_Final_2017.pdf)> (last accessed: 15 April 2018) [LSCP, *Tracker Survey 2017*].

<sup>87</sup> Ann Juergens, "Toward a More Effective and Accessible Solo and Small Firm Practice Model" in Samuel Estreicher & Joy Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) at 384.

client seeking to comparison-shop must travel to many different law firm offices (or at least phone them), and tell his or her story repeatedly.<sup>88</sup>

The search costs involved in comparison shopping may be especially hard to "afford" for consumers in this quadrant of the legal services industry. Personal plight legal needs often arise from a stressful or traumatic life event (e.g. divorce, incarceration or loss of employment), which reduces the availability of temporal and psychological resources for the search process. Personal injury lawyer UU said "people don't really know. You're in a car accident and then you maybe never had a lawyer... these people are in shock and they don't really know what to do."<sup>89</sup> Given that the events giving rise to personal plight legal needs are often traumatic and/or embarrassing, relating them to multiple strangers in succession is unlikely to be pleasant or easy. Urgency is another characteristic of many personal plight legal needs (e.g. a threat of deportation from the country or eviction from housing) and this further impedes comparison shopping given the temporal search costs involved.<sup>90</sup>

Comparison shopping does in fact seem to be relatively rare in personal legal services markets. Lawyers interviewed for this project generally reported that few of their clients had visited other lawyers.<sup>91</sup> One personal injury lawyer estimated that 50% of clients in that field simply go to the first lawyer they see, and others said that only 5% or 20% engage in any comparison shopping.<sup>92</sup> A2, who does both personal plight work (criminal defence) and personal business work (immigration visa applications) suggested that there is less "shopping around" in the former category.<sup>93</sup> He attributed this to generally lower client "sophistication."<sup>94</sup> Estate litigator HH described the decision of which firm to retain as "impressionistic," and said comparisons are made "very rarely."<sup>95</sup> Quantitative evidence from the UK paints a similar

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<sup>88</sup> Ken Le, Peter Nacsa and Rebbecca Phillips, *Smart Legal Start: Access To Justice Innovation Challenge Proposal (Ryerson Law Practice Program)*. Document on file with author. (Toronto: Ryerson University Law Practice Program, 2016); Australian Government Productivity Commission, *Access to Justice Arrangements: Inquiry Report* (Canberra: ACPC, 2014) online: ACPC <<http://www.pc.gov.au/inquiries/completed/access-justice/report>> (last accessed: 15 April 2018) at 204.

<sup>89</sup> Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015).

<sup>90</sup> Competition & Markets Authority (UK), *supra* note 11 at 25-6.

<sup>91</sup> Interview with "VV" (Personal injury practitioner, Toronto, female, 3 years since call to the bar. Interviewed July 17, 2015); Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015).

<sup>92</sup> Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015); (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)).

<sup>93</sup> Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

<sup>94</sup> *Ibid.* C2 also said that client sophistication is correlated to comparison shopping (Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016)). Personal injury lawyer SS said that people relying on a referral from a trusted source generally do not engage in comparison shopping (Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015)).

<sup>95</sup> Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

picture.<sup>96</sup> Even if comparison shopping in personal plight has increased in recent years,<sup>97</sup> it seems to remain low relative to other consumer markets with four-to-five digit price tags.<sup>98</sup>

### 3 Information Scarcity in Personal Plight Markets

The second major demand-side phenomenon that dampens competition in personal plight markets is information scarcity.<sup>99</sup> A consumer who accepts the high search costs involved in comparison shopping will be able to meet with a few firms, get a "feel" for the legal professionals involved, and perhaps get some sense of what it would be like to work with them. If willing to invest more time, this consumer might also be able to check previous client references provided by the firms. However, she will still find it hard to assess the price and quality attributes the firms that do personal plight work.<sup>100</sup> Therefore, firms seeking to improve their quality and price offerings to consumers will not necessarily be rewarded with more business. This section will describe four sources of information available to consumers about personal plight law firms, and then suggests that price and quality information nonetheless remains scarce. This further impedes comparison-shopping and competition in these markets.

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<sup>96</sup> Simon Domberger and Avrom Sherr, "The impact of competition on pricing and quality of legal services" (1989) 9 *International Review of Law & Economics* 41 at 46. Quantitative research in the United Kingdom suggests a lack of comparison shopping among personal clients in both contested and non-contested matters. One survey found that only 22% of personal clients had compared firms before selecting one: IFF Research, *Market study into the supply of legal services in England and Wales – consumer findings (Prepared for the Competition and Markets Authority)* (London: Assets Publishing Service (UK), 2016) online: APSUK <<https://assets.publishing.service.gov.uk/media/577f626940f0b652dd00011d/IFF-legal-services-research-report.pdfz>> (last accessed: 15 April 2018) at 11; Competition & Markets Authority (UK), *supra* note 11 at 103. See also Richard Moorhead, "Filthy lucre: lawyers' fees and lawyers' ethics – what is wrong with informed consent?" (2011) 31 *Legal Studies* 345 at 364-5: "What was very clear from discussions with claimants is that very few had engaged in an informed choice of representative. Most depended on recommendations from friends and colleagues or on a cursory scan of lists of solicitors (such as those in the yellow pages or a web search). A few sought a solicitor who was *local* or those who offered contingency fees. Only rarely did they attempt to identify solicitors who specialised in employment tribunal work and such attempts were rudimentary. Mostly clients picked the first firm they came to in a list."

<sup>97</sup> Personal injury lawyer RR said that comparison shopping has increased in the past five years (Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015)). See also Nika Kabiri, *Sink or swim: How to adapt to the New Legal Consumer* (2016) online: Avvo <<http://lawyernomics.avvo.com/practice-management/client-relationships/adapting-to-the-new-legal-consumer.html>> (last accessed: 15 April 2018).

<sup>98</sup> Regarding prices for personal plight legal services in Canada, see Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93 *Canadian Bar Review* 639, online: <[https://cbaapps.org/cba\\_barreview/Search.aspx?VolDate=04/01/2016](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016)> (last accessed: 15 April 2018).

<sup>99</sup> The CMA identifies "information issues" as the primary cause of weak competition problems in the UK consumer legal services sector: Competition & Markets Authority (UK), "Legal services market study: Final Report." (London: 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 104.

<sup>100</sup> Legal Services Consumer Panel (UK), "Opening up data in legal services" (2016), online: <[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/OpenDataInLegalServicesFinal.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDataInLegalServicesFinal.pdf)> (last accessed: 15 April 2018) at 26; Australian Government Productivity Commission, "Access to Justice Arrangements: Inquiry Report." (Canberra: ACPC, 2014), online: <<http://www.pc.gov.au/inquiries/completed/access-justice/report>> at 191. For survey results regarding "market transparency" in England & Wales, see LSCP, *Tracker Survey 2017*, *supra* note 86.



### 3.1 Consumer Sources of Information about Firms

What sources of information about firms are available to potential clients? Regulation, consumer reputation, advertising, and the internet are leading sources. They are evaluated here in terms of the extent to which they offer useful price and quality information to consumers of personal plight legal services. Sections 3.2 and 3.3 discuss the scarcity of price and quality information, and section 3.4 shows how information scarcity affects the level of competition.

#### 3.1.1 Regulation as a Source of Information

Regulation provides consumers with baseline quality information regarding the practitioners in the market. Consumers who are aware of the regulatory regime applicable to the practice of law are effectively informed that each licensee has surmounted entry requirements, and is subject to license suspension or revocation if persistently unable to meet minimum quality requirements.<sup>101</sup> Regulation treats quality as a "discontinuous" or binary attribute, and informs consumers that all options in the market possess baseline quality.<sup>102</sup> This is a form of quality information about suppliers that may not be available to, for example, consumers of used vehicles.

For simple uncontested personal legal services (e.g. straightforward will-drafting or residential property conveyance) this quality information may be sufficient for consumers if backstopped by a guarantee of redress in the event of defective service. However, contested personal plight matters are different. In this quadrant of the market, regulation's baseline quality guarantee leaves room for large variation both in firms' service quality and in their efficacy in accomplishing legal objectives.<sup>103</sup>

#### 3.1.2 Consumer Reputation as a Source of Information

Consumer reputation is a traditionally central form of information for consumers in markets for personal plight legal services.<sup>104</sup> Reputation, like referral, involves a consumer learning about a firm from a third party. The difference is that a firm's reputation is information the consumer was aware of *before* he or she started looking for legal services. Reputation can pertain to an individual legal professional or to a firm.<sup>105</sup> It often exists within a particular social, occupational, or ethnic group. For example, family lawyer FF said that her firm gets many files from Toronto police officers, because of the reputation that one of the partners has within that community.<sup>106</sup>

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<sup>101</sup> David B. Wilkins, "Legal Realism for Lawyers" (1990) 104 Harv. L. Rev 469 at 472-3.

<sup>102</sup> Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional regulation : a staff study of accountancy, architecture, engineering and law in Ontario prepared for the Professional Organization Committee* (Toronto: Ministry of the Attorney General, 1979) at 78.

<sup>103</sup> Mercer, *supra* note 16.

<sup>104</sup> Kritzer, "Risks, Rewards, and Reputations" *supra* note 37 at 14; Camille Chaserant and Sophie Harnay, "The regulation of quality in the market for legal services: Taking the heterogeneity of legal services seriously" (2013) 10 The European Journal of Comparative Economics at section 3.1.

<sup>105</sup> Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015): "The firm is a very reputable firm. It has a fantastic brand name.... a fantastic brand to the layperson."

<sup>106</sup> Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

Consumer reputation is especially important in smaller geographic and ethnic communities and in smaller practice niches.<sup>107</sup> It can be positive or negative. RR is a personal injury lawyer in the town of Chatham, Ontario (population 43,000). He said that "in a community the size of Chatham, I use the 'Rule of Ten.' If I have a disappointed client walk out the door, they'll tell ten people. If I have a satisfied customer, they'll maybe tell one."<sup>108</sup>

Referral and reputation can work together when a consumer is considering firms. If an individual is referred by a trustworthy source to Firm X, the individual's willingness to retain Firm X depends on what she heard about the firm before the legal need arose. Some interviewees suggested that clients came to them because of their reputations for reasonable fees,<sup>109</sup> or for a settlement-oriented approach.<sup>110</sup>

Consumer reputation, like referral, is a long-established dynamic in personal legal service markets. In England & Wales, reputation is the factor most often identified by consumers driving choice of firm.<sup>111</sup> Functional sociologists of the professions considered reputation to be an "invisible hand" that would remove any incentive professionals might experience to bilk or under-serve inexperienced clients.<sup>112</sup> However, given the legal inexperience of the typical personal plight client, consumer reputation suffers from some of the same limitations that referral does. In large and relatively anonymous cities, people are less likely to have heard any useful information about a given law firm than they are in smaller and closer-knit communities.

Another consequence of consumer legal inexperience in these markets is that consumer reputations may or may not be deserved.<sup>113</sup> In other words, they may or may not reflect the actual characteristics of a firm's services.<sup>114</sup> A negative report about a firm might be unreliable if it came from a client who had unrealistic expectations. Conversely, a positive report might be

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<sup>107</sup> Mather et al, *supra* note 40 at 106.

<sup>108</sup> Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

<sup>109</sup> Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015): "Part of the reputation I got was she's not x and she's not going to bill you thousands of dollars to talk to her each time. That was part of their informed choice in selecting me in the beginning."

<sup>110</sup> I've been doing what I'm doing for a long time. I think I have a pretty good reputation. I'm scrupulous with my clients about risk benefit. I really don't encourage litigation as a rule. It's unpredictable, it's very expensive. So I think over time your reputation sells your practice." (Interview with "E2" (Family law practitioner, Alberta, male, 19 years since call to the bar. Interviewed April 21, 2015)).

<sup>111</sup> LSCP, *Tracker Survey 2017*, *supra* note 86 at 2.

<sup>112</sup> Russell Pearce, "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve The Conduct And Reputation Of The Bar" (1995) 70 N.Y.U. L. Rev. 1229 at 1245; William J. Goode, 'Community within a Community: The Professions,' 22 *American Sociological Review* 194, 22 (1957) ; Alexander Carr-Saunders and P.A. Wilson, *The Professions* (Oxford: Oxford University Press, 1933) at 471; Semple, *Legal Services Regulation*, *supra* note 17 at 191.

<sup>113</sup> Camille Chaserant and Sophie Harnay, "The regulation of quality in the market for legal services: Taking the heterogeneity of legal services seriously," (2013) 10 *The European Journal of Comparative Economics* at section 3.2.

<sup>114</sup> Regarding the strengths and limitations of clients as sources of information about legal service value, see Noel Semple, *Measuring Legal Service Value (Working Paper)* 2018) online: SSRN <<https://ssrn.com/abstract=3144771>> (last accessed: 15 April 2018) [Semple, "Measuring Legal Service Value"] at section 3.

unreliable if it came from someone who had a very "easy" case, or someone for whom the lawyer in question had a special affinity.<sup>115</sup>

### 3.1.3 Advertising as a Source of Information

Advertising by personal plight law firms has become ubiquitous in North America since the 1980s. Does it provide clients with useful information about personal plight legal services? *Legal consciousness*, in the sense of awareness that disputes and problems arising in life have potential legal remedies, is plausibly improved by law firm advertising. Advertising may lead some people to seek legal remedies to which they are entitled, when they otherwise would not do so.<sup>116</sup> Advertising's legal consciousness-raising effects may be especially valuable to people with fewer social connections, who are less likely to have access to reliable referrals and reputational knowledge about the law and about law firms.<sup>117</sup> Presumably almost everyone now knows that people injured in car crashes may be entitled to compensation, and that law firms may help crash victims on a "no win no fee" basis. This legal consciousness was not created by the public education system or non-profit outreach; it was created by paid advertising. Other fields in which popular legal consciousness is patchier, such as employment law,<sup>118</sup> might benefit if their firms advertised more.

Some advertising does provide detailed and useful legal information.<sup>119</sup> "Earned media" activities, for example lawyers providing legal information on TV or the radio,<sup>120</sup> are an example. Websites like AdviceScene, where lawyers answer questions from people experiencing legal needs, are a 21<sup>st</sup> century variation on this theme.<sup>121</sup>

However, most paid advertising for legal services does not help consumers make informed comparisons among personal plight firms and therefore does not promote competition. Advertising fosters competition and consumer welfare when it conveys useful information about the price, quality, and variety of the goods or services offered and encourages firms to improve their offerings along these lines.<sup>122</sup> An example is advertisements for vehicles in a magazine like AutoTrader. These listings provide objective information about price (purchase or lease rates)

<sup>115</sup> Competition & Markets Authority (UK), *supra* note 11 at 241.

<sup>116</sup> Professional Regulation Committee (Law Society of Upper Canada), "Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)." (2016), online: <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>> at 3- 4.

<sup>117</sup> Van Hoy, *supra* note 33 at 20.

<sup>118</sup> "Employment law is not being represented because people don't know their rights. So they don't know to the lawyer's office to know if they had a case. At least in personal injury they spoke to a lawyer or paralegal and said no we won't take it. Then the question becomes what kind of disputes are there in our society. That is the fundamental question and then because if we are looking at access to justice we need to look at what kind of disputes arise in our society and why aren't they coming to the justice system." (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)).

<sup>119</sup> Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas 2015) at 134-6.

<sup>120</sup> Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015). PP discussed a "radio show for CKLW, which is an AM radio station that had a call in show. I started doing that in 1987 and did it until the time I was appointed. I would often get people who said I heard you on the radio and my mother told me that her friend used me, so that kind of thing."

<sup>121</sup> "AdviceScene," <[www.advicescene.com](http://www.advicescene.com)> (last accessed: 15 April 2018).

<sup>122</sup> Nora Freeman Engstrom, "Attorney Advertising and the Contingency Fee Cost Paradox" (2013) 65 *Stanford Law Review* 633 [Engstrom, "Attorney Advertising"] at 661; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

and quality (year of manufacture, distance driven, vehicle features). The publications cater to consumers' interests in choice by showing a large number of options in a relatively easy-to-compare format. They encourage sellers to price competitively. Thus print advertising for vehicles is, from a consumer welfare point of view, good advertising.

North American personal plight law firm advertising is very different. Information about price is generally completely absent.<sup>123</sup> The ads often proclaim a law firm's expertise,<sup>124</sup> but precise quality claims are usually vague and unreliable. At most, the advertisements trumpet opaque designations such as the "Best Lawyers in Canada" or "Lexpert Ranked" brands.<sup>125</sup> The ads do not foster comparisons between alternative firms (indeed regulation restricts their ability to do so),<sup>126</sup> so they do nothing to advance consumers' interests in informed choice either. The slender American data suggests that advertising may, somewhat counterintuitively, tend to *increase* the price that personal injury firms charge their customers.<sup>127</sup>

Rather than communicating price and quality information, name recognition or "mindshare" seems to be the goal of most advertising for personal legal services. Each advertising firm wants its name to pop into a person's head when he or she thinks about the type of problem upon which that firm works (e.g. personal injury, divorce, or criminal charge). The competition that the advertisements promote is competition for mindshare. It is not the welfare-enhancing competition that lowers prices, improves quality, or encourages innovation. Thus, while advertising does seem to improve popular awareness about legal rights, it does not provide concrete price and quality information about individual firms and thus does not help competition improve consumer welfare.

#### 3.1.4 The Internet as a Source of Information

For many consumer products, the internet provides price and quality information as well as lowering search costs.<sup>128</sup> In addition to the firm websites mentioned above, personal plight consumers now also have access to sites listing multiple firms. Law societies and bar associations offer online directories and referral sources that let one identify practitioners within

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<sup>123</sup> This is also apparently true in England & Wales. Market research recently found that only 18% of consumer law firms advertise price information in any way: Solicitors Regulation Authority (England and Wales), "Greater price transparency would help people make better choices about legal services (25 January 2018)," <<https://www.sra.org.uk/sra/news/press/price-transparency-research-2018.page>> (last accessed: 15 April 2018). Regarding the United States at the time, see Brickman, *supra* note 10.

<sup>124</sup> "If you look at all lawyer advertising whether it's magic circle firms to the most sort of tawdry personal injury ambulance-chaser, basically they're all sort of saying the same thing: come to me, I'm an expert. Well... duh... you know clients assume you are because you're a lawyer. That's of no value to clients. Clients assume that you have the necessary expertise to do the job, that's not a value add for clients. The value add is 'how, in what circumstances.' " (Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015)).

<sup>125</sup> Regarding the methodology of these rankings, see Semple, "Measuring Legal Service Value," *supra* note 114, at sections 4.1.3 and 4.1.4.1.

<sup>126</sup> "Suggesting qualitative superiority to other lawyers" is provided as an "example of marketing that may contravene" the Law Society of Upper Canada's *Rules of Professional Conduct*. In addition to being true and not deceptive, lawyer advertising in Ontario must be "in the best interests of the public and is consistent with a high standard of professionalism." (Law Society of Upper Canada, "Rules of Professional Conduct (Ontario)." (Toronto: LSUC, 2017), online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>>, Rule 4.2-1, Commentary [2].

<sup>127</sup> Engstrom, "Attorney Advertising," *supra* note 122 at 665-6, 670

<sup>128</sup> Anderson and Renault, *supra* note 30.

a certain niche. However, they contain no price information, and their quality information is limited to records of disciplinary infractions.<sup>129</sup> In England & Wales only 6% of consumers were able to find price information on law firms' websites,<sup>130</sup> and the proportion for Ontario would be very unlikely to be higher. A few private sector directories offer limited information about price and/or service options, generally for a small number of firms.<sup>131</sup> So far the internet does little to provide comparable price and quality information to Canadian personal plight consumers, although innovation could change this picture quickly in the future.<sup>132</sup>

### 3.2 Scarcity of Price Information in Personal Plight Markets

The available information leaves consumers relatively ignorant about their options in these markets. Price is basic information that any consumer would expect to know before buying a product or service. This expectation is often disappointed in markets for personal plight legal services. In North America, final price tags are usually calculated either from the time docketed by the firm's practitioners (time-based billing), or as a percentage of the amount ultimately recovered for the client (contingency).<sup>133</sup> Neither time-based nor contingency-billing allows a consumer to be sure before purchasing what the final price will be, unless accompanied by binding estimates that firms are usually unwilling to give.<sup>134</sup> What's more, hourly and contingent rates are not generally advertised by personal plight firms on their websites or elsewhere. Making personal contact and (often) taking the time to attend a consultation is, in many cases, the only way for a consumer to get access to any pricing information.<sup>135</sup>

The consumer who obtains hourly or contingent price quotes is still not necessarily in a position to make price comparisons between firms.<sup>136</sup> Final accounts in time-billed matters depend not only on the billing rates of the practitioners within the firm, but also on the number of hours billed and which practitioners bill them. Time-billing firms have discretion to, for example, increase their lawyers' hourly rates during the term of a retainer, or allocate work

<sup>129</sup> Law Society of Upper Canada, *supra* note 27.

<sup>130</sup> LSCP, *Tracker Survey 2017*, *supra* note 86.

<sup>131</sup> "MySupportCalculator," <[www.mysupportcalculator.com](http://www.mysupportcalculator.com)> (last accessed: 15 April 2018) Flatlaw, "Litigation," <<https://www.flatlaw.ca/flatrate/All/Litigation/All>> (last accessed: 15 April 2018); National Self-Represented Litigants Project, "National Directory of Professionals Assisting SRLs," <<https://representingyourselfcanada.com/directory/>> (last accessed: 15 April 2018). Reviewing American comparison sites, see Renee Newman Knake, "The Commercialization of Legal Ethics" (2016) 29 *Georgetown Journal of Legal Ethics*, online: <<https://ssrn.com/abstract=2838440>> (last accessed: 15 April 2018).

<sup>132</sup> American and British competitors are significantly better-developed in this regard. See for example <http://www.avvo.com/> and <https://www.thelawsuperstore.co.uk>

<sup>133</sup> Depending on the details of the contingency retainer, it may also depend on the stage at which the matter is resolved and/or the number of hours billed (under "Iodestar" contingency retainers.) See Bert Kritzer, "Reforming Fee Regimes And The Cost Of Civil Justice" in Trevor Farrow & Les Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018).

<sup>134</sup> Brickman, *supra* note 10 at 77; Semple, *Sweet Spot*, *supra* note 28, Chapter 2.

<sup>135</sup> Research in England & Wales with legal services consumers found that "only 15 percent of consumers were able to obtain the pricing information they wanted without having to make a specific request first." Solicitors Regulation Authority (England and Wales), "Greater price transparency would help people make better choices about legal services (25 January 2018)," <<https://www.sra.org.uk/sra/news/press/price-transparency-research-2018.page>>.

<sup>136</sup> Centre for Innovative Justice, *Affordable Justice* (Melbourne: RMIT, 2013) online: RMIT <[mams.rmit.edu.au/qr7u4uejwols1.pdf](http://mams.rmit.edu.au/qr7u4uejwols1.pdf)> (last accessed: 15 April 2018) at 14.

within the firm in a manner that increases the fee without commensurate increases in service quality.<sup>137</sup>

In a contingency retainer, the client is paying for the legal service by giving up a fraction of his or her recovery. However to the extent that the recovery is unpredictable, the service price is unknowable at the outset.<sup>138</sup> Moreover, Canadian contingency fee retainers are complex. In addition to entitling the firm to X percent of damages, they also take differing approaches to (i) settlement sums characterized as "costs,"<sup>139</sup> (ii) responsibility for disbursements, and (iii) adverse cost liability as between client and firm.<sup>140</sup> Thus, the firm's percentage of damages under a certain agreement is not necessarily a "single, clear signal of price."<sup>141</sup> Thus comparison becomes even more challenging for the consumer and price competition is further weakened.

### 3.3 Scarcity of Quality Information in Personal Plight Markets

Quality is the second primary interest of consumers. Information is, again, scarce for consumers regarding the quality of personal plight legal service offerings.<sup>142</sup> Toronto litigator BB, speaking about personal injury plaintiffs, said:

You should be shopping on the basis of 'does my lawyer have trial credibility. But unfortunately, no client possibly could know that. You wouldn't know. Just like, when you're finding a physician, how would you know that your family doctor is a better family doctor than the guy across the hall. You cannot possibly know.<sup>143</sup>

Criminal defender C2 makes a similar point about his niche:

Judges... know which lawyers are good, which prepare. But the public doesn't. if you've got a flashy website or your cellmate tells you that so and so beat up the witness really bad last time and that's what you are relying upon to retain a lawyer, then what else can you go on. Even the most informed consumer, let's say you don't have lawyer friends, but

<sup>137</sup> Noel Semple, "Shady Billing: Closing the Hall of Shame (Slaw.ca, January 30th 2018)," <<http://www.slaw.ca/2018/01/30/shady-billing-closing-the-hall-of-shame/?highlight=semple>> (last accessed: 15 April 2018).

<sup>138</sup> Brickman, *supra* note 10 at 94.

<sup>139</sup> Cost-shifting increases the complexity of Canadian contingency retainers relative to American retainers.

<sup>140</sup> Contingency Fee Agreements, <https://www.ontario.ca/laws/regulation/040195>; Allan C. Hutchinson, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario* (Toronto: Osgoode Hall Law School, 2017) online: OHLS <<https://www.scribd.com/document/336923555/Hutchinson-Report>> (last accessed: 15 April 2018); Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Trevor Farrow & Les Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, forthcoming 2018)<<https://ssrn.com/abstract=2959477>> (last accessed: 3 June 2016). However, the Law Society of Ontario is likely to soon require all contingency fee retainers to follow a template which will reduce firm discretion to alter these terms.

<sup>141</sup> Richard Moorhead, "Filthy lucre: lawyers' fees and lawyers' ethics – what is wrong with informed consent?," (2011) 31 *Legal Studies* 345 at 370.

<sup>142</sup> Brickman, *supra* note 10 at 96-7; Malcolm Mercer, "Disclosure and Investigated Complaints (Slaw.ca, April 28th 2017)," <<http://www.slaw.ca/2017/04/28/disclosure-and-investigated-complaints/>> (last accessed: 15 April 2018).

<sup>143</sup> Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).

you are sophisticated, you are an engineer. You say I'm going to make an informed decision, well how do you do that? This is a real problem.<sup>144</sup>

As noted above, referral is the most common, and probably the most reliable source of quality information in personal plight markets today.<sup>145</sup> However, not everyone has access to a high-quality referral which is oriented to the consumer's interests as opposed to the referrer's financial incentive.<sup>146</sup> Moreover, even the best referrals have limitations as sources of quality information. A referral from a former client of a firm may tell a consumer whether the firm is responsive and easy to work with, but it won't necessarily say much about the efficacy of the firm in accomplishing legal objectives.<sup>147</sup>

This is because personal plight legal services have *credence* characteristics: it is difficult for a consumer to evaluate quality even after the service has been provided.<sup>148</sup> A legally-inexperienced client may evaluate a firm's efficacy on the basis of the outcome in his or her particular matter, which is not reliable evidence. In contested legal matters, much more than in uncontested ones, the outcome depends not only on the quality of the legal service but also on factors such as the behaviour of the other side and the strength of the case. Even experienced parties on the demand-side find quality-assessment challenging. Speaking to a Law Society of Upper Canada working group studying contingency fees, "hospital counsel expressed frustration as to the lack of a well-accepted, externally validated award or recognition through which leading personal injury lawyers could be identified."<sup>149</sup>

A consequence of information scarcity is that personal plight legal services may become "Giffen Goods." Demand for such goods increases as the price goes up, contrary to the normal law of supply and demand.<sup>150</sup> In the absence of useful quality information, a consumer may assume that a higher-priced lawyer must be "better" than a less expensive one. Clearly, this scenario is not favourable to competition.

Information is distributed asymmetrically in these markets – the firms know more about their price and quality attributes than the consumers do.<sup>151</sup> However, information *scarcity* is a more accurate description of the problem, because it is not clear that even the firms themselves have very good information about the quality of their services and those of their competitors.

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<sup>144</sup> Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016)

<sup>145</sup> See section 2.1, above.

<sup>146</sup> See section 2.1.2, above.

<sup>147</sup> Semple, "Measuring Legal Service Value," *supra* note 114 at Section 3.

<sup>148</sup> Uwe Dulleck and Rudolf Kerschbamer, "On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods" (2006) 44 *Journal of Economic Literature* 5; Engstrom, "Attorney Advertising," *supra* note 122 at 673; Semple, *Legal Services Regulation*, *supra* note 17 at 23.

<sup>149</sup> Professional Regulation Committee (Law Society of Upper Canada), "Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)." 2016), online: <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>> .

<sup>150</sup> Rolf Poulsen and Kourosh Marjani Rasmussen, "Financial Giffen goods: Examples and Counterexamples" (2008) 191 *European Journal of Operational Research* 572; Toby Unwin, *Law's Secrets Revealed: A Big Data Look at Litigation* (Miami: 2016) online: Premonition AI <<http://premonition.ai/wp-content/uploads/2016/03/Laws-Secrets-Revealed-Revised.pdf>> (last accessed: 15 April 2018) at 5.

<sup>151</sup> LSCP, *Development of Information Remedies*, *supra* note 20 at para 1.10; Mercer, *supra* note 16; Semple, *Legal Services Regulation*, *supra* note 17 at 23-25.

Legal consultant and author Jordan Furlong reports that he has never encountered a law firm that systematically measures "whether and to what extent the firm has delivered the outcome[s] the client[s] paid it for."<sup>152</sup>

### 3.4 The Effect of Information Scarcity on Competition

Consumer protection policy has long recognized that information deficits undermine not only individual consumers' ability to protect their interests in the market, but also competition's ability to deliver benefits to consumers generally.<sup>153</sup> Acquiring information about potential purchases has costs as well as benefits for consumers, and rational consumers will only acquire information when the perceived benefits exceed the perceived costs of doing so.<sup>154</sup> Although perhaps endemic in consumer markets generally, information scarcity is especially severe for consumers of personal plight legal services.

Hamilton criminal defender A2 was interviewed for this research, and his comments illustrate the effects of information on competition. A2 was asked whether clients and referral sources can "tell the difference between good lawyers and bad lawyers to the extent that your reputation actually will suffer if you are short changing people." He responded that, while "the better guys here in the city are concerned about that," there are also

some guys who are less concerned about that. They've been around for so long that they don't need referrals regardless. Just from name recognition. They are less concerned about the quality of the service they are providing. The guy who comes to mind ... he was the first guy to bill over a million dollars a year to Legal Aid. We used to call him Mr. Guilty Pleas.<sup>155</sup>

"Mr. Guilty Pleas" is not a complementary nickname. It implies that this lawyer indiscriminately recommends poor Crown plea bargain offers to his clients, instead of holding out for better offers and going to trial if necessary. Based on A2's report, "Mr. Guilty Pleas" has an entrenched market position based on name recognition. Better-quality firms are unable to displace him. The same conditions exist to varying extents in other personal plight niches, and these are not favourable conditions for competition.

## 4 The Cognitive Attributes of Contingency Fees in Personal Plight Markets

Personal plight retainers priced on a contingency basis include most plaintiff-side tort and class action matters, some employment matters, and a few other matters.<sup>156</sup> In North America the typical arrangement involves a legal fee calculated as a percentage of the amount recovered for the plaintiff through settlement or adjudication. No fee is owed if nothing is recovered. This

<sup>152</sup> Jordan Furlong, "Is Your Law Firm Fulfilling Its Purpose? (Slaw.ca, June 2d 2017)" (2017), online: <<http://www.slaw.ca/2017/06/02/is-your-law-firm-fulfilling-its-purpose/>> (last accessed: 15 April 2018).

<sup>153</sup> Gillian K. Hadfield, Robert Howse and Michael J. Trebilcock, "Information-Based Principles for Rethinking Consumer Protection Policy" (1998) 21 *Journal of Consumer Policy* 131 at 140; Organisation for Economic Co-operation and Development Committee on Consumer Policy, *supra* note 14 at 4.

<sup>154</sup> Hadfield et al, *ibid.* at 162.

<sup>155</sup> Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

<sup>156</sup> Most other personal plight matters have time-based billing.



section will begin by offering evidence that price competition in Ontario's personal injury markets is subdued at best. It will then suggest that contingency billing has cognitive attributes that, along with high search costs and information scarcity, help to deter competition in these markets.

#### 4.1 Evidence of Weak Price Competition in Contingency-Billed Matters

Toronto personal injury lawyer "SS," whose firm works only on catastrophic injuries, said that his firm charges 15% of the damages recovered for the client plus 100% of the costs recovered.<sup>157</sup> SS also said that

most of the top firms charge the same... we all know that 15% is a reasonable amount. Everybody wants to make more money but 15% seems like the fair amount – I don't know why people don't undercut it, but people don't. It's just sort of an unwritten thing – hey 15%'s the basement.<sup>158</sup>

Both SS and another personal injury lawyer interviewed for this research told the author that they simply do not negotiate their fees with clients.<sup>159</sup>

In a price-competitive market one would expect to find contingency-billing firms charging different percentage rates to different clients depending on the risk/reward profiles of their cases.<sup>160</sup> Consider a personal injury client, or a class, whose case has (i) a high likelihood of (ii) generating a high settlement with (iii) a low investment of the firm's time and money. This case offers firms a high *expected effective hourly rate*,<sup>161</sup> because the retained firm will stand a good chance of earning a high fee without having to invest much in the case. In a competitive market, firms would bid down the contingency rates on their retainers to attract such cases.<sup>162</sup> They would also charge less on "walk-in" retainers than they would on referred retainers, whose net proceeds are reduced by the obligation to pay a referral fee.<sup>163</sup>

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<sup>157</sup> Other firms, whose cases may have lower average settlement values charge more. One interviewee reported a standard contingency rate at her firm of 35% of the damages, plus costs and disbursements. (Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015))

<sup>158</sup> Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015)

<sup>159</sup> *Ibid.*; Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015); Interview with "VV" (Personal injury practitioner, Toronto, female, 3 years since call to the bar. Interviewed July 17, 2015). Stating that tort lawyers generally refuse to negotiate price, see Brickman, *supra* note 10 at 90. Brickman also suggests that the lack of price advertising in of itself is evidence of weak competition.

<sup>160</sup> Richard W. Painter, "Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty" (1995) 71 *Chicago-Kent Law Review* 625 at 657-8; Brickman, *supra* note 10; Semple, *Legal Services Regulation*, *supra* note 17 at 279-281.

<sup>161</sup> Kritzer, "*Risks, Rewards, and Reputations*" *supra* note 37 at 18.

<sup>162</sup> Semple, *Legal Services Regulation*, *supra* note 17.

<sup>163</sup> Brickman, *supra* note 10 at 74; Nora Freeman Engstrom, "Sunlight and Settlement Mills" (2011) 86 *N.Y.U. L. Rev.* 805 at 865, note 286. Medina et al argue that, if certain assumptions are made about the market for contingency fee services, a market with uniform fees is in the interests of clients: Barak Medina, Eyal Zamir and Uzi Segal, "Who Benefits from the Uniformity of Contingent Fee Rates?" (2014) 9 *Review of Law & Economics* 357. However the realism of the assumptions is questionable. In any case this analysis does not touch directly on the question addressed here, regarding the extent of price competition in this market. Regarding the question of whether

However, data suggests that there is relatively little variation in personal injury contingency fees, at least in the United States.<sup>164</sup> Hyman et al studied the contingency-billed files handled by three American personal injury firms. They found that roughly 60% of the retainers paid the firm between 32% and 34% of the plaintiff's recovery, and very few paid less than 20% or more than 34%.<sup>165</sup> This is consistent with Kritzer's data from Wisconsin firms in the 1990s.<sup>166</sup> DD is the leader of a large personal injury firm, not presently active in Canada. DD said in his interview that

the original idea behind contingency fees was that... it was a way of rewarding for risk. In personal injuries cases where contingency fees were applied, they were a gradation of risk. And so it's curious that in most personal injuries cases lawyers apply the same contingency fee. It's curious isn't it?<sup>167</sup>

In the United States, effective hourly rates for contingency-billing lawyers are at least somewhat higher than the average for all lawyers.<sup>168</sup> Respondent DD said that personal injury firms in Canada are "about twice as profitable as they are anywhere else except the United States."<sup>169</sup> The alleged lucrateness of contingency-billed personal injury work, for which there is some evidence, would be consistent with a lack of price competition. One former personal injury lawyer interviewed for this research said:

if plaintiff side injury lawyers are good, they have plenty of work, they never need to look back. And at some point when you know hey, if I work 20 hours, or have my associate work 20 hours, I can make \$50,000 in fees, then that's much better than you can do hourly anywhere.<sup>170</sup>

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uniform pricing might have efficiency advantages and therefore exist in a relatively competitive market, see also Brickman, *supra* note 10 at 80-88.

<sup>164</sup> Brickman, *ibid.*, Nora Freeman Engstrom, 'Attorney Advertising and the Contingency Fee Cost Paradox,' 65 *Stan. L. Rev.* 633, 668, 681 (2013). The only Canadian information is from a 2017 Law Society of Upper Canada working group report, which found that "contingency fees for tort claims generally range between 25 – 35%," while paralegals handling statutory accident benefits claims "often" charge 15%. (Law Society of Upper Canada Advertising & Fee Arrangements Issues Working Group, *Fifth Report* (Toronto: LSUC, 2017) online: LSUC <[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2017/Convocation-June2017-Professional-Regulation-Committee-Report.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Professional-Regulation-Committee-Report.pdf)> (last accessed: 15 April 2018) at para 193).

<sup>165</sup> Hyman, *supra* note 44 at 1581-2.

<sup>166</sup> Kritzer, "*Risks, Rewards, and Reputations*" *supra* note 37 at 39.

<sup>167</sup> Interview with "DD" (Personal injury law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

<sup>168</sup> Eyal Zamir and Ilana Ritov, "Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis" (2010) 39 *Journal of Legal Studies* 245 at 251; Kritzer, "*Risks, Rewards, and Reputations*" *supra* note 37 at 218.

<sup>169</sup> Interview with "DD" (Personal injury law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

<sup>170</sup> Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).

Warren Bongard, president of legal recruiting firm ZSA, told the Toronto Star in 2012 that *most* of the highest-earning lawyers in Canada bill on a contingency basis.<sup>171</sup> This is a striking assertion, given that the personal plight quadrant, (the only quadrant in which contingency billing is used),<sup>172</sup> is sometimes assumed to be unremunerative relative to corporate-hemisphere practice.<sup>173</sup> The top earners to whom Bongard was referring were presumably personal injury, class action, or employment lawyers, as the use of contingency fees in other niches is rare. Bongard also opined that the highest earning lawyer in the country (whose income exceeded \$8 million in 2012 according to Canada Revenue Agency documents) was almost certainly a partner in a class action firm.<sup>174</sup> High incomes do not in of themselves prove a lack of price competition,<sup>175</sup> but they are consistent with it.

#### 4.2 Low-Pain Contingency Payments: Cognitive Factors Impeding Competition

In addition to the search cost and information scarcity issues affecting personal plight matters generally, there appear to be cognitive factors suppressing price competition when contingency pricing is used. Price competition depends on the willingness of a consumer who has been quoted a contingency percentage to (a) seek a lower price from another firm and/or (b) ask for a lower price from the quoting firm. However, both shopping around and pushing back on price are behaviours with temporal and psychological costs. One such cost is the relatively arduous consultation process required to get a competing quote.<sup>176</sup> Another is the stress of dickering with or walking out on the initially-consulted lawyer, who may present as an ally to a client in distress.<sup>177</sup>

Consumer willingness to accept these temporal and psychological costs is affected by the "pain of paying" the quoted contingency price. Pain of paying has been defined as the "direct and immediate displeasure or pain from the act of making a payment."<sup>178</sup> It has been found, for example, that paying by credit card is less "painful" than paying by cash. People are therefore willing to spend more when using a credit card.<sup>179</sup>

<sup>171</sup> Niamh Scallan, "The verdict: Lawyer well paid at \$8 million (Toronto Star, Fri., March 30, 2012)" (2012), online: <[https://www.thestar.com/news/canada/2012/03/30/the\\_verdict\\_lawyer\\_well\\_paid\\_at\\_8\\_million.html](https://www.thestar.com/news/canada/2012/03/30/the_verdict_lawyer_well_paid_at_8_million.html)> (last accessed: 15 April 2018).

<sup>172</sup> As well as some employment matters and family law matters in a few provinces where this is permitted

<sup>173</sup> Heinz et al, *Urban Lawyers*, *supra* note 8 at 84; Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," *supra* note 7 at 42.

<sup>174</sup> Scallan, *supra* note 171. See also Kritzer, "*Risks, Rewards, and Reputations*" *supra* note 37 at 32.

<sup>175</sup> Contingency-billing lawyers accept more risk than other lawyers, which might explain their higher average incomes. Moreover, the income of a contingency-billing lawyer in any one year – let alone from any one case – can be misleading insofar as these lawyers manage "portfolios" of cases, some of which may produce little or nothing: Kritzer, "*Risks, Rewards, and Reputations*" *supra* note 37 at 11 and 181.

<sup>176</sup> Section 2.3, above.

<sup>177</sup> Injured people, in particular, may be inclined to defer to and trust lawyers during initial consultations, and deference and trust do not favour shopping around or pushing back on price. Regarding the emotional reliance of some personal plight clients on their layers, see Mather et al, *supra* note 40 at 102 and Daphne Dumont, "'Better . . . or Worse?' The Satisfactions and Frustrations of the Lawyer-Client Relationship" in David L. Blaikie, Thomas Cromwell & Darrel Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012) at 24.

<sup>178</sup> Ofer Zellermyer, *The Pain of Paying* (Ph.D. Dissertation, Carnegie Mellon University) 1996)<[https://www.researchgate.net/publication/280711796\\_The\\_Pain\\_of\\_Paying](https://www.researchgate.net/publication/280711796_The_Pain_of_Paying)> (last accessed: 15 April 2018); Drazen Prelec and George Lowenstein, "The Red and the Black: Mental Accounting of Savings and Debt" (1998) 17 *Marketing Science* 4.

<sup>179</sup> Prelec & Lowenstein, *ibid.*

### 4.3 Why are Contingency Payments Low-Pain?

There are two sets of cognitive reasons why contingency fees seem to create low pain of payment. Lack of loss aversion was identified in this context by Eyal Zamir and Ilana Ritov. They conducted a series of experiments in which individuals were placed in the position of personal injury plaintiffs retaining lawyers. Participants were asked to choose between (i) a contingent fee arrangement with the lawyer, and (ii) a flat fee arrangement. Majorities of participants preferred the contingent fee, even when it could be expected to equal two or three times as much as the flat fee. Based on their results in related experiments, Zamir and Ritov suggest that this is because a contingency fee agreement presents as a "pure positive gamble." To the plaintiff, there seems to be nothing to lose if the contingency fee is selected. The legal fee will always be less than the total amount recovered, and if nothing is recovered there will be no fee.

By contrast, a time-based or flat fee is a "mixed gamble" because the client could end up with a net loss if the amount recovered is less than the fee. A purely rational *homo economicus* client would choose a mixed gamble over a pure positive gamble if the price were right – if the fee were low enough to compensate for the risk of experiencing a net loss. However Zamir and Ritov conclude that loss aversion – people's willingness to accept a much lower "upside" in exchange for safety from "downside" risk – drives consumers to prefer contingency fees (even relatively high ones) over noncontingent fees.<sup>180</sup> The pure positive gamble appearance of the contingency fee also keeps pain of payment low, which in turn reduces consumer willingness to invest time and stress in searching for lower prices.

The second cognitive reason why contingency fees are low-pain payments, proposed briefly by Nora Freeman Engstrom, is that they have relatively low *salience*.<sup>181</sup> The salience of a price is the extent to which it "stands out," or is prominent in the awareness of a consumer.<sup>182</sup> Behavioural economists have established that the salience of a certain price has an effect on consumer behaviour, independent of the actual size of the price.<sup>183</sup> For example, consumers are willing to pay more for an item if its advertised price is divided into a main price, plus a smaller amount for "shipping and handling."<sup>184</sup> Many consumers disregard the shipping and handling charge, or put it in the back of their minds and assess value based on the more salient main price.

Contingency fees have several characteristics that reduce their salience, compared to flat fees or time-based fees accompanied by an upfront cash retainer requirement.<sup>185</sup> First,

<sup>180</sup> Eyal Zamir and Ilana Ritov, "Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis," (2010) 39 *Journal of Legal Studies* 245 at 249.

<sup>181</sup> Engstrom, "Attorney Advertising," *supra* note 122 at 686.

<sup>182</sup> Oxford English Dictionary Online, "Salience, definition 2b," <[www.oed.com](http://www.oed.com)> (last accessed: 15 April 2018); Alain Samson, "An Introduction to Behavioral Economics," <<https://www.behavioraleconomics.com/introduction-to-be/>> (last accessed: 15 April 2018).

<sup>183</sup> Katrina Jessoe and David Rapson, "Knowledge is (Less) Power: Experimental Evidence from Residential Energy Use" (2014) 104 *The American Economic Review* 1417 at 1418; Tom Blake *et al.*, *Price Salience And Product Choice (Working Paper)* (New Haven: Yale University, 2017) online: Yale University <<http://economics.yale.edu/sites/default/files/bmst.pdf>> (last accessed: 15 April 2018); Dilip Soman, "The Effect of Payment Transparency on Consumption: Quasi-Experiments from the Field" (2003) 14 *Marketing Letters* 173–183.

<sup>184</sup> Tanjim Hossain and John Morgan, "...Plus Shipping and Handling: Revenue (Non) Equivalence in Field Experiments on eBay" (2006) 6 *Advances in Economic Analysis & Policy* 1.

<sup>185</sup> As a Law Society of Upper Canada working group observed, "the contingency fee model ... reduces the perceived importance at the outset of the basis on which the fees will eventually be charged." (Professional

contingency payments are deferred: they are not due until the case is resolved through settlement or adjudication.<sup>186</sup> Delayed payments tend to be less salient than upfront payments, and agreeing to them is less painful for a consumer.<sup>187</sup> Second, a contingency fee is presented to a consumer as a percentage of future recovery (e.g. 25% or 30% of damages), not as a dollar figure. Third, a contingency fee will be deducted from the money that the firm will receive in trust from the other side when the case ends. Thus, the client will never have to write a cheque to the firm.<sup>188</sup> Finally, the contingent fee may never be charged—there is a chance (which some firms may strongly emphasize in initial consultations regardless of the actual risk) that nothing will be recovered in which case no fee will be paid.<sup>189</sup>

A client confronted with a \$3000 cash retainer requirement, and an immediate accumulation of \$300 hours, must both stare her legal fee right in the face and contemplate the possibility of paying it without getting anything in return. She is motivated to negotiate the fee with the firm, and she is motivated to seek competing quotes from other firms.<sup>190</sup> By contrast, contingency fees present as pure positive gambles, and therefore tend not to trigger consumers' loss aversion instincts. They also lack salience because they are deferred, not presented in dollar terms, are deducted from recoveries, and have a chance of never being paid at all. Cognitive factors make contingency fees relatively low-pain payments, and reduce the extent to which consumers are willing to engage in competition-promoting behaviours such as pushing back on price or shopping around.

## 5 Conclusion

Robust competition is a tango that requires two dancers: a competitive supply-side and a competitive demand-side. This article has suggested that, at least in Ontario personal plight legal services markets, consumers tend to have difficulty mastering the steps. Drawing on qualitative interviews and other evidence, the paper identified three demand-side phenomena that are problematic for competition in personal plight legal service markets. First, search is costly. The dominant search processes, such as referral and "mindshare" advertising, do not encourage comparison shopping. Second, even consumers who accept the search costs find a dearth of price and quality information useful for evaluating and comparing firms. Thus, firms have relatively weak incentives to improve quality or cut prices. Finally, the low pain-of-payment of contingency fees diminishes the incentive for firms in tort markets to price competitively in order to attract clients.

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Regulation Committee (Law Society of Upper Canada), "Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)." 2016, online: <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>>).

<sup>186</sup> Engstrom, "Attorney Advertising," *supra* note 122 at 687-8. This is referred to in behavioural economics as "myopia bias."

<sup>187</sup> Frank van der Horst and Ester Matthijsen, *The Irrationality of Payment Behaviour* (Amsterdam: De Nederlandsche Bank NV, 2013) online: DNB <[https://www.dnb.nl/binaries/OS%201104%20WEB\\_tcm46-294816.pdf](https://www.dnb.nl/binaries/OS%201104%20WEB_tcm46-294816.pdf)> (last accessed: 15 April 2018) at 24.

<sup>188</sup> Engstrom, "Attorney Advertising," *supra* note 122 at 688.

<sup>189</sup> *Ibid* at 687.

<sup>190</sup> Flat rate fees may be even more favourable to price competition. Criminal defence lawyer C2, who bills on a flat rate basis, complained that his colleagues all "run towards the bottom and all try to undercut the next person in terms of how much we will do a bail hearing for." Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

### 5.1 How Unique is Personal Plight?

Markets for personal plight legal services are not the only ones that exhibit these phenomena. As noted above, consumer markets for complex products often suffer from demand-side problems such as information scarcity.<sup>191</sup> Arguably professional services markets, even those with experienced corporate consumers, will never exhibit the level of price and quality competition characteristic of markets for manufactured goods. Competition-suppressing factors such as credence characteristics and time-based billing are not uncommon in any market in which esoteric professional expertise is to be applied to clients' unique needs.<sup>192</sup>

However, personal plight markets are also distinctive. They simultaneously involve bespoke professional services, inexperienced consumers, and underlying personal crises that create the legal needs and make it harder for those experiencing them to comparison-shop effectively. Especially when combined with the unique behavioural consequences of contingency fee pricing, these factors seem to create a perfect storm of demand-side factors impeding competition.

### 5.2 How can Regulators Respond?

Some might say that the lack of competition is inevitable given the inherent characteristics of these services and these consumers. "Golden dream" is the phrase used by Andy Boon to describe the ambition of legal services regulators in England & Wales to make the market more competitive.<sup>193</sup> Competition is not the only way to improve consumer welfare. Regulators might choose to improve quality and reduce prices through direct interventions such as stricter quality requirements and price regulation, or through "softer" techniques encouraging professionalism and altruism on the part of practitioners.

Others might say that personal plight firms already provide good value for money, and that aggressive competition is inappropriate for true professions such as law. Personal plight firms might scale-back altruistic *pro bono* or discounted services for low-income clients if their margins on files for more affluent clients were pared to the bone by competition.<sup>194</sup> Eliot Freidson argued that the "logic" of the market – including reliance on competition to improve consumer welfare – is inappropriate for professional services.<sup>195</sup> Freidson proposed that a completely distinct logic of professionalism is needed, in order to foster the “development and practice of specialized knowledge and skill” in fields such as medicine and law.<sup>196</sup> Fierce competition might help some consumers, but at the expense of these positive externalities. A "social contract" is sometimes said to support regulated professions, whereby practitioners are

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<sup>191</sup> Section 1.3, above. See also notes 153 and 154, above, and accompanying text.

<sup>192</sup> Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar: Cheltenham, UK and Northampton, MA, USA, 2008); Larry E. Ribstein, 'Ethical Rules, Agency Costs and Law Firm Structure,' 84 Va. L. Rev. 1707, 1712–13 (1998).

<sup>193</sup> Andrew Boon, "England and Wales: A Cocktail of Strategies for Legal Services Reform" in Andrew Boon ed., *International Perspectives on the Regulation of Lawyers and Legal Services* (Oxford, UK: Hart, 2017).

<sup>194</sup> Regarding "cross-subsidization," see Julian Webb, "The Dynamics of Professionalism: The Moral Economy of English Legal Practice - and Some Lessons for New Zealand" (2008) 16 Waikato L. Rev. 21 at 38.

<sup>195</sup> Eliot Freidson, *Professionalism : the third logic* (Cambridge: Polity Press, 2001).

<sup>196</sup> *Ibid*, at 14.

shielded from competition in exchange for their services to society above and beyond what is compensated in the market.<sup>197</sup>

However, legal services regulators could also try to take the bull by horns, and break down the impediments to competition in personal plight markets. Search costs might be lowered, for example by increasing disclosure requirements on firms,<sup>198</sup> and building out regulators' online directories into full-featured comparison sites.<sup>199</sup> The salience of contingency fees might be improved, perhaps adapting the techniques used by financial services regulators to encourage people to take credit card interest rates seriously.<sup>200</sup>

Addressing information scarcity would perhaps be the thorniest challenge for regulators taking this path. It would require a definition of law firm quality, methods for measuring it, and appropriate ways to communicate it to consumers whose capacity to make use of information is not unlimited.<sup>201</sup> Filling the price information vacuum is scarcely easier, given the complexities of time-based and contingency fees.<sup>202</sup> The UK's Legal Services Consumer Panel cautions that information remedies to market failure are not sure-fire, especially if they disregard the behavioral context of consumption decision-making in the particular sector.<sup>203</sup>

Along with lawyers' self-regulatory organizations, legislators, and courts, competition authorities are also potential regulators of legal services that might take up this task. Canada's

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<sup>197</sup> Dietrich Rueschemeyer, "Professional autonomy and the social control of expertise" in Robert Dingwall & Peter Lewis eds., *The sociology of the professions: Lawyers, doctors and others* (London: MacMillan, 1983) at 41; Terence C. Halliday, *Beyond monopoly: lawyers, state crises, and professional empowerment* (Chicago: University of Chicago Press, 1987) at 370.

<sup>198</sup>LSCP, *Development of Information Remedies*, *supra* note 20; Competition & Markets Authority (UK), "Legal services market study: Final Report." (London: 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 224. The CMA proposes that regulators should require firms to disclose more price and quality information to consumers, regulators, and intermediaries.

<sup>199</sup> CBA Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues Report* (Ottawa: Canadian Bar Association, 2013) online: Canadian Bar Association <[http://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-issues-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-issues-eng.pdf)> (last accessed: 15 April 2018) at 27; Richard Susskind, *Key Trends in the Legal Marketplace* (Ottawa: CBA Futures Initiative, 2012) online: CBA <[http://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/CBA%20Legal%20Futures%20PDFS/Susskind-Linked-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Susskind-Linked-eng.pdf)> (last accessed: 15 April 2018) at 21-2.

<sup>200</sup> E.g. requiring credit card statements to tell consumers how long it would take to pay off the balance if only minimum payments were made. See Sumit Agarwal *et al.*, "Regulating Consumer Financial Products: Evidence from Credit Cards" (2014) 130 *Quarterly Journal of Economics* 111, online: <<https://ssrn.com/abstract=2330942>> (last accessed: 15 April 2018).

<sup>201</sup> For the author's effort in this regard, see Semple, "Measuring Legal Service Value," *supra* note 114. For general studies, see Nicola Howell and Therese Wilson, "The limits of competition: reasserting a role for consumer protection and fair trading regulation in competitive markets" in Deborah Parry ed., *The Yearbook of Consumer Law 2009* (London: Routledge, 2009) and Pete Lunn, *Regulatory Policy and Behavioural Economics* (Paris: OECD, 2014) at 31.

<sup>202</sup> Legal Services Consumer Panel (UK), "Opening up data in legal services," (2016), online: <[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/OpenDatainLegalServicesFinal.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDatainLegalServicesFinal.pdf)> at 20.

<sup>203</sup>LSCP, *Development of Information Remedies*, *supra* note 20. See also Matthias Kilian, "Germany: the Constitutional Court as the Driver of Change in the Regulation of Legal Professions" in Andrew Boon ed., *International Perspectives on the Regulation of Lawyers and Legal Services* (Oxford, UK: Hart, 2017) at 192.

Competition Bureau, although generally preoccupied with supply-side issues, says it also seeks to "empower" consumers, give them "access to accurate information," and see that they "benefit from a wide range of products and services at competitive prices."<sup>204</sup> In the United Kingdom, the Competition and Markets Authority is actively pursuing policies designed to foster a competitive demand-side in the legal services industry.<sup>205</sup> (Sceptics of lawyers' self-regulation may be unsurprised that it is competition authorities, not lawyer-controlled law societies, that have taken the lead in promoting competition.) It is clear that Canadians shopping for personal plight law firms do not, for various reasons, behave in a manner that promotes quality and price competition. Whether their regulators can change this state of affairs – and whether they even want to try – remains to be seen.

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<sup>204</sup> Competition Bureau (Canada), *2015–2018 Strategic Vision* (Ottawa: Competition Bureau Information Centre, 2015) online: CB <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html>> (last accessed: 15 April 2018).

<sup>205</sup> Competition & Markets Authority (UK), *supra* note 11. See also LSCP, *Development of Information Remedies*, *supra* note 20.