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RICHARD L. ABEL

How the Plaintiffs' Bar Bars Plaintiffs

ABOUT THE AUTHOR: Richard L. Abel is Cornell Professor of Law at U.C.L.A. He has written extensively about both torts and the legal profession.

The New York Law School Plaintiffs' Bar Symposium focused on the plaintiffs' *bar*. Like many of the participants, however, I am ultimately interested in the bar's *plaintiffs* and how they obtain redress.¹ In this article, I begin by asking whether we could dispense with private lawyers. Concluding (reluctantly) that this is politically unfeasible, in part II I analyze the divergence between the interests and capacities of clients and lawyers. In part III, I examine failures in the two institutions that structure the ways in which clients find and retain lawyers: the state and the market. In this section, I analyze a variety of innovative solutions that seek to address these failures: websites that provide better information to clients, aggregation of clients' claims, brokering practices between clients and lawyers, financing arrangements for clients and lawyers, brokering practices in financing arrangements, and marketizing of claims. In part IV, I conclude with some (pessimistic) thoughts about the politics of reforming the tort claiming process.

I. DO PLAINTIFFS NEED LAWYERS?

We should begin by considering the possibility of eliminating lawyers, who are always expensive (inevitably, given their investment in human capital; deliberately, given the profession's long history of anti-competitive practices).² There are two ways of doing so.

A. *Alternatives to Tort*

We could abolish some or all tort claims. Victims would be relegated to savings (and loss insurance); tortfeasors would go undeterred and unpunished. Legal immunities and defenses do this for some torts and to some victims, but even the most extreme tort "reformers" (i.e., defendants and their hired guns) do not go so far. Most people have enough savings to subsist for only a few months without work (even when unencumbered by their additional medical expenses).³ Most

1. I focus on compensation, even though Myriam Gilles, panelist at New York Law School's Plaintiffs' Bar Symposium and Professor of Law at the Benjamin N. Cardozo School of Law, reminds us of Richard Posner's dictum that the sole justification for tort law is deterrence. Damages are paid only "as the price of enlisting their [victims' and lawyers'] participation in the operation of the system." Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972). Unfortunately, we know almost nothing about the deterrent effect of tort liability and have ample reason to believe it is far from optimally efficient. Unlike Posner, I am also interested in the plight of victims; and we *do* know that delivering compensation can alleviate it.

2. See generally RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) [hereinafter ABEL, *AMERICAN LAWYERS*]; RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988) [hereinafter ABEL, *LEGAL PROFESSION*]; RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003) [hereinafter ABEL, *ENGLISH LAWYERS*].

3. In 2002, American households saved only 2.2% of their annual income. Bureau of Economic Analysis, National Economic Accounts, tbl.2.9, *Personal Income and Its Disposition by Households and by Nonprofit Institutions Serving Households*, 1.46, available at <http://www.bea.gov/bea/dn/nipaweb/TableView.asp>.

people have little or no private loss insurance,⁴ and fewer than half have long-term disability insurance.⁵ Americans are not about to repudiate their exceptionalism and join the rest of the advanced industrialized world in providing an adequate social welfare system.

Alternatively, we could adopt a strict liability scheme. The obvious model is workers' compensation which was motivated, in part, by the goal of dispensing with lawyers.⁶ Not surprisingly, they quickly made themselves indispensable once again. Perhaps there is a principle of conservation of litigious energy — a first law of juridical dynamics (analogous to that of thermodynamics): eliminate or reduce litigation over one issue (fault) and lawyers direct their efforts to other issues (causation and damages).⁷ In any case, defendants and their insurers and lawyers strenuously oppose strict liability, endlessly repeating the myths of litigiousness and frivolous claims.⁸ And they are preaching to the choir: if my first-year law students are any guide, laypeople have a strong (if unreflective) attachment to the fault principle.⁹

A variant of the first alternative above would be to allow subrogated insurers, but not victims, to make tort claims.¹⁰ This has definite advantages. It restores deterrence (although moral judgment is compromised when the *victim* is not seeking redress). The liability insurers that are presently repeat-player defendants would become repeat-player plaintiffs as loss insurers. They would have the same monetary incentive as victims (though not the emotional need for

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4. In 2004, 45.8 million people lacked any health insurance. U.S. Census Bureau, Health Insurance Coverage: 2004, <http://www.census.gov/hhes/www/hlthins/hlthin04/hlth04asc.html> (last visited Nov. 4, 2006).
 5. Only forty-two percent of all full-time employees of medium and large private establishments had long-term disability insurance in 1999. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 1999 SUPPLEMENTARY TABLES 3 tbl.1, available at <http://www.stats.bls.gov/ncs/ebs/sp/eibt0001.pdf> (last visited Oct. 28, 2006).
 6. See generally PHILIPPE NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY (1969) (providing a sociological analysis of workers' compensation).
 7. At a 1978 conference on plea bargaining, I remember repeated analogies comparing the criminal justice system to a water bed (a natural metaphor at the time): suppress discretion in one area and it bulges out in another. *Special Issue on Plea Bargaining*, 13 LAW & SOC'Y REV. 189 (1979) (listing the participants of the Plea Bargaining Conference).
 8. See generally WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004) (providing a sociological analysis of the creation of a moral panic about litigiousness); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984) (analyzing tort-claiming behavior in the rural Midwest).
 9. See Sally Lloyd-Bostock, *Fault and Liability for Accidents from the Accident Victim's Perspective*, in HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 139-40 (1984).
 10. Maurice Rosenberg once proposed that government should assume the task of compensating victims and aggregating their claims in a suit against tortfeasors. Maurice Rosenberg, *Devising Procedures That Are Civil to Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 813-16 (1971). Given the growth of American antipathy to government since he wrote this article, it seems more palatable to let private insurers compete to do this.

justice, apology, or punishment). Claims would be institutionalized and routine.¹¹ Given the small number of players on both sides, linked in ongoing relationships, an even higher proportion of claims would be settled.¹² (Indeed, a single company would often insure both parties.) Insurers would have greater bargaining power and, of course, they would be expert in retaining lawyers (in-house or outside counsel). Defendants would lose the enormous leverage they now wield over needy victims by stalling.¹³ (Those who get exercised over the mythic “tort liability crisis” somehow brush aside the real “tort impunity crisis” — defendants who assert frivolous defenses, stonewall, abuse procedure, file hopeless appeals, misuse bankruptcy, hide behind the corporate veil, or conceal assets or move them outside the jurisdiction, all to discourage legitimate claims and delay payment.)

But this proposal also introduces significant problems. It imposes much higher transaction costs: roughly an extra dollar for every dollar delivered to the victim.¹⁴ More importantly, many victims will have little or no loss insurance. There is reason to believe that those most likely to be seriously injured (because of the work they do, the cars they drive, the homes they inhabit, the consumer products they own, the environments in which they live) will be least likely to purchase loss insurance because they lack discretionary income — or even the confidence that they can plan for and control their destinies. These differences will reproduce inequalities not only of class but also of race (and probably age and gender). We could provide universal coverage through social insurance, but that is politically unrealistic. And first-party insurance is *always* less generous than tort damages, rarely replacing all lost income, and never compensating for intangibles.¹⁵ Those deficiencies would obstruct all three tort goals: compensation, deterrence, and punishment.

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11. This is one reason why a much higher proportion of automobile accident victims make more claims than victims of accidents that occur elsewhere, for example in the workplace or at home. Richard L. Abel, *£'s of Cure, Ounces of Prevention*, 73 CAL. L. REV. 1003, 1008 (1985).
 12. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963).
 13. See generally Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1 (1996) (discussing how tortfeasors' judgment-proofing strategies undermine the liability system).
 14. Alfred F. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 311 (1964). See generally Jeffery O'Connell & Jay Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913 (1986) (providing statistics on claiming behavior and transaction costs); James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation*, 1986 RAND CORP. 1 (providing statistics on claiming behavior and accident costs).
 15. However, I have also argued against such compensation. See Richard L. Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006).

B. *Alternatives to Lawyers*

If we reject all three alternatives, victims have no choice but to claim in tort against defendants. Studies of many different kinds of injuries, in both the United States and the United Kingdom, confirm that only about a tenth of accident victims file claims.¹⁶ And in those cases, almost none does so alone. The jurisdictional limits of small claims courts exclude significant injuries.¹⁷ No layperson can litigate effectively against an institutional defendant in a regular court. Even Nolo.com, a website dedicated to self-help, advises that “the following types of injuries and accidents almost certainly require a lawyer’s help: long-term or permanently disabling injuries . . . severe injuries . . . medical malpractice . . . toxic exposure” and a catch-all: “when an insurance company refuses to pay.”¹⁸ Independent paraprofessionals might be able to negotiate settlements in the more routine, less serious cases (for far less than the one-third to one-half contingent fee charged by lawyers).¹⁹ Claims assessors do so in England (referring to lawyers the cases they cannot settle).²⁰ As non-lawyers, furthermore, they may aggressively seek clients. Needless to say, this provokes fury among solicitors (who, oxymorically, cannot solicit). It is hard to imagine the American plaintiffs’ bar — which is much larger, better organized, and wealthier than its English counterpart — tolerating such a breach in its monopoly. The legal profession has attacked far less serious competitive threats as “unauthorized practice of law.”²¹ American lawyers want to pocket their contingent fees while paraprofessional employees do much of the work.²² In any case, American “low-

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16. Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443, 448 (1987).
 17. In California, an individual cannot recover for more than \$7500 in small claims court. California Courts, Self-Help Center, Small Claims Basics, How Much Money Can I Ask For?, <http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm#howmuch> (last visited Oct. 29, 2006). In New York, the limit on recovery in small claims court is \$5000. New York City Small Claims Court, In General, <http://www.courts.state.ny.us/courts/nyc/smallclaims/general.shtml> (last visited Oct. 29, 2006).
 18. Nolo.com, When You Need a Lawyer to Handle Your Personal Injury Claim, <http://www.nolo.com/article.cfm/objectID/6F50E401-DD2F-4F36-ADB1FD1C2BACAA9A/104/199/113/ART/> (last visited Sept. 6, 2006). Similarly, HALT (“An Organization of Americans for Legal Reform,” formerly “Help Abolish Legal Tyranny”) urges and assists self-help for many legal problems but not for serious injuries. Halt.org, <http://www.halt.org> (last visited Sept. 6, 2006).
 19. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 264 (2004).
 20. See ABEL, ENGLISH LAWYERS, *supra* note 2, at 231–32. The leading innovators, Claims Direct and The Accident Group, have since folded. Jon Robins, *Law: An Accident Waiting to Happen*, INDEP., June 10, 2003, at Features.
 21. See generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (critically analyzing bar association enforcement of unauthorized practice of law restrictions).
 22. For example, Carroll Seron describes an entrepreneurial workers’ compensation lawyer on Long Island who has “forty operators . . . answering questions on about 7,500 open cases Attorneys take over only at the point of the hearing.” CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 100 (1996).

level” plaintiffs’ personal injury lawyers already perform such a referral role, as I discuss below.²³

C. Alternatives to the Market for Lawyers

If lawyers are essential to claiming in tort, we could socialize the costs of legal representation. For half a century — from the Legal Aid Act of 1948 to the Access to Justice Act of 1999 (an Orwellian name, since it severely restricted access) — English legal aid paid private practitioners to represent tort victims (recovering most of the expense from liable defendants under cost-shifting rules).²⁴ That still let the client choose a lawyer (a quality control problem). Although the English Legal Aid Board (now the Legal Services Commission, commonly referred to as “LSC”) had the power to regulate quality (as well as cost), it made little effort to do so, especially since it lacked the client’s incentive. In the United States, what little legal aid remains after twenty-five years of Republican attacks on the Legal Services Corporation has always excluded fee-generating work like personal injuries (at the insistence of private practitioners).²⁵ It is politically inconceivable to challenge this exclusion given the profitability of contingent fees. Even if it were possible, the employed lawyers who deliver legal aid in the United States would lack the contingent fee incentive for zealous advocacy (if also the perverse incentive to settle prematurely).²⁶

23. JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 75 (1962).

24. See ABEL, *ENGLISH LAWYERS*, *supra* note 2, at 293–353. At its inception, English legal aid covered eighty percent of the population; even after the ravages of both Conservative and Labour governments, the legal aid covered about half of the population.

25. The 2006 LSC budget was just \$327 million; controlled for inflation, that is about forty percent of its highpoint in 1980 (President Carter’s last year). Legal Services Corporation, Press Releases, LSC Requests \$411.8 Million for FY 2007 (Feb. 2, 2006), *available at* http://www.lsc.gov.press/pr_detail_T7_R17.php. In England, which long reviled American contingent fee lawyers as “cowboys,” the Labour government used conditional fees to justify eliminating legal aid for *all* money cases. See ABEL, *ENGLISH LAWYERS*, *supra* note 2, at 294–95.

26. On the distortions of contingent fees, see generally Kevin M. Clermont & John Currihan, *Improving on the Contingent Fee*, 63 *CORNELL L. REV.* 529 (1978); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 *J. LEGAL STUD.* 259 (1997); Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 *LAW & SOC’Y REV.* 251 (1985); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 *J. LEGAL STUD.* 189 (1987); and Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 *STAN L. REV.* 1125 (1970) (demonstrating divergence between interests of lawyer and client). Economic modelers argue that contingent fees allow both clients and lawyers to signal the quality of the case and choose the optimal mix of those fees and hourly rates or fixed retainers. Daniel F. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 *RAND J. ECON.* 343 (1993). In fact, virtually *all* personal injury cases are taken on contingent fees, and the percentages are strikingly uniform. KRITZER, *supra* note 19, at 39 tbl.2.4, 264.

II. MAPPING THE INTERESTS AND CAPACITIES OF CLIENTS AND LAWYERS

That leaves the onus on the injured victim to choose and instruct a lawyer.²⁷ This generates a number of problems. One way to map them is to contrast the interests and capacities of clients and lawyers.

A. Choice

Clients want to choose from a range of lawyers: more than one, but not too many. (Manufacturers and retailers know that excessive choice depresses consumption; information overload compels satisficing.)²⁸ While rural areas and small towns offer too few choices,²⁹ the metropolis offers far too many.³⁰

Lawyers want to choose clients rather than be chosen by them. Lawyers want an exclusive source of business, i.e., protection from competition with other lawyers,³¹ and perhaps a filter to weed out junk cases.³²

B. Information about Quality

Clients want information about lawyer quality (in order to maximize likelihood of success and size of award). The asymmetries generated by the division of labor (which gave rise to the legal profession in the first place) make such information difficult to acquire, especially since the quality of services (unlike that of products) is better assessed *ex post* than *ex ante*. Clients are likely to place undue reliance on inputs such as credentials (which is why lawyers display framed university diplomas and bar admission certificates on their walls), process

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27. On the importance of victims actively participating in the pursuit of their claims, see generally DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (providing a sociological analysis of lawyer-client relations in tort cases).
 28. See Barry Schwartz, Hazel Rose & Alana Conner Snibbe, *Is Freedom Just Another Word for Many Things to Buy*, N.Y. TIMES, Feb. 26, 2006, at 14; see also BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004) (arguing that greater choice can hurt consumers). See generally Barry Schwartz, Andrew Ward, Sonja Lyubomorsky, John Monterosso, Katherine White & Darrin R. Lehman, *Maximizing Versus Satisficing: Happiness is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178 (2002).
 29. See generally DONALD LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* (1990).
 30. The Yellow Pages for any major city list thousands of lawyers and provide no useful distinctions.
 31. Some nineteenth century professions required a potential competitor to obtain permission from the client's previous professional service provider before offering services. Like other feudal status relationships, this one lasted for a lifetime — and often across generations. There are still vestiges of that practice. Kritzer reports that a Wisconsin firm depending heavily on referrals "jealously guards its relationships with referring lawyers, to the point that if a client previously referred by another lawyer directly contacts the firm about a new case, the firm will ask the client to go back through the original lawyer." KRITZER, *supra* note 19, at 60.
 32. What one of Sara Parikh's informants called "piece-of-shit cases, excuse my language." Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* 124 (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with author).

(the legal equivalent of bedside manner),³³ outcomes/recoveries (which do not control for the other factors of production: evidence of liability and magnitude of damages), and the visible accoutrements of success (office address and furnishings, the lawyer's clothes and car, media publicity). Some clients want second opinions; but all lawyers may offer overly optimistic predictions in order to get business.

Lawyers want to maximize their attractiveness while concealing deficiencies. (That is one reason why the profession denies the public access to information about client complaints to disciplinary bodies.) Lawyers want to control the information available to clients; they resent second opinions (an act of *lèse majesté*, which appears to question their judgment). They want accurate information about the strength and value of the client's case, which clients have an incentive to exaggerate.

C. *Information about Cost*

Clients want to minimize cost. If they engage in comparison shopping, they are likely to give excessive weight to price (which can be estimated in advance) without being able to judge the quality tradeoff (because this cannot be determined until after the fact, and even then cannot be measured without controls for inputs). Alternatively, clients may mistake a high price as a reliable signal of quality.³⁴

Lawyers want to maximize profit, i.e., obtaining a return on their investment of capital, overhead, and especially time. This creates many possibly perverse incentives affecting case selection, substitution of capital for labor, delegation to nonprofessionals, premature settlement (because of diminishing return on additional hours invested), and package deals with insurers (selling big cases short to get more for small ones).³⁵ Lawyers do not want to quote prices to clients in advance.³⁶ They detest clients who shop around. Moreover, there is virtually NO price competition in contingent fees.

D. *Who Waits for Whom*

Clients want lawyers available on demand but do not want to pay when not using them. (The English Bar claimed that as an advantage over both a unified profession and employed advocates.)

33. "When asked the question, 'How can someone tell if he has chosen a very competent lawyer?' . . . 30% (22 of 59) said by his manner once you have met him. . . ." ROSENTHAL, *supra* note 27 at 130.

34. When he was practicing law in Los Angeles, Richard Nixon observed with his usual cynicism: "I never realized how easy it is to make money. I just got twenty-five thousand dollars for telling a bunch of stupid jerks something they could have learned from the newspapers," that "France will remain stable as long as de Gaulle's in power." PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* 100 (1973).

35. ROSENTHAL, *supra* note 28, at 103. *See generally* H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1980) (analyzing insurance claims adjustment).

36. *See* ABEL, *ENGLISH LAWYERS*, *supra* note 2, at 361-63.

Lawyers (like doctors or contractors) want a queue of waiting clients. (But in order to ensure a steady flow of work, barristers' clerks overbook, often requiring them to return a brief to the solicitor's firm on the eve of trial.)³⁷

E. Responsiveness and Speed

Clients want to be kept informed of the progress of their cases and get quick results. (Failures in both areas provoke clients' most frequent complaints.)³⁸

Lawyers want to control the information available to clients: "Don't call me, I'll call you." They want to invest their time where it will produce the highest returns for themselves, not the quickest results for clients. They tend to blame delays on the legal system.

F. Billing

Clients want transparent bills and a means of questioning charges.³⁹

Lawyers want clients who pay without challenging the one-line statement "for services rendered."

III. MATCHING THE INTERESTS OF CLIENTS AND LAWYERS

A. Collective Failures

Two institutions determine whether clients get what they want: the state and the market. Although laissez-faire ideologues oppose all regulation, some regulation is necessary since the information asymmetry that justifies professions also introduces serious imperfections into the market for legal services. However, existing regulation does a poor job of both correcting those imperfections and maximizing quality while minimizing price. Entry barriers have more to do with occupational rent-seeking behavior than with ensuring competence and integrity.⁴⁰ Neither professional discipline nor malpractice liability does a good job of preventing or correcting misconduct or negligence.⁴¹ Peer pressures are as

37. See ABEL, LEGAL PROFESSION, *supra* note 2, at 188.

38. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1495 tbl.1 (2006).

39. The English Law Society required all solicitors' firms to establish an internal mechanism for handling complaints and to inform clients about it. Christa Christensen, Suzanne Day & Jane Worthington, *Learned Profession? — The Stuff of "Sherry Talk": The Response to Practice Rule 15*, 6 INT'L J. LEGAL PROF. 27 (1999).

40. See generally MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? (Upjohn Inst. ed., 2006) (analyzing the anti-competitive effects of licensing laws).

41. ABEL, ENGLISH LAWYERS, *supra* note 2, at 335; ABEL, AMERICAN LAWYERS, *supra* note 2, at 143.

likely to encourage bad conduct as good.⁴² In any case, much of the plaintiffs' bar practices alone⁴³ and much of the harmful behavior is invisible to other lawyers.

Law could emulate medicine (as it often does)⁴⁴ by institutionalizing de facto specialization. But there is still the problem of measuring competence and integrity. How predictive are input measures, like experience and formal examination? (As far as I know, there has *never* been any attempt to validate the entry barriers to the legal profession by empirically testing correlations between law school or bar exam grades and lawyer performance.) Process measures, like file review, may be the most accurate, but they are also the most expensive to apply and tend to accentuate what can be counted.⁴⁵ Outcome measures — like those that open the door to the Inner Circle of Advocates and the Richard Grand Society — may simply reflect chance (the injury victim's bad luck, the lawyer's good luck) and certainly do not demonstrate good, much less excellent, performance.⁴⁶ General practitioners resent and resist any certification that places them at a competitive disadvantage, sometimes demanding that they be grandfathered in.⁴⁷ And any additional entry barrier (even mere certification) has the potential to extract further monopoly rents.

42. JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 96–116 (1966).

43. Nearly half of all private practitioners are solo, which is more than a third of all lawyers. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE LEGAL PROFESSION IN 2000* tbls.6 & 7 (2004). Fifty-six percent of Rosenthal's sample practiced alone or with one other lawyer. ROSENTHAL, *supra* note 27, at 133. A 1995 survey of Wisconsin contingent-fee lawyers found that they worked in firms whose median size was six lawyers; only five percent worked in firms of fifty or more. KRITZER, *supra* note 19, at 29.

44. In the 1920s American lawyers sought to do a "Flexner." The ABA persuaded the Carnegie Commission, which had previously produced the Flexner report recommending drastic cuts in the number of new doctors, to fund a similar study of lawyers. But the investigator, Alfred Z. Reed, urged the profession to recognize that two distinct tiers of lawyers served different clienteles. Disgusted, the ABA commissioned Elihu Root to produce the report it wanted and then used it to justify raising entry barriers. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 46.

45. See Avrom Sherr, *Assessing the Quality of Legal Work: Measuring Process*, 1 INT'L J. LEGAL PROF. 135, 143–44 (1994). See generally AVROM SHERR, RICHARD MOORHEAD & ALAN PATERSON, *LAWYERS — THE QUALITY AGENDA: ASSESSING AND DEVELOPING COMPETENCE AND QUALITY IN LEGAL AID* (1994) (developing and testing measures of lawyer quality).

46. In 1972 Richard D. Grand secured the highest pain and suffering damages ever awarded: \$2.5 million for a severely burned engineering graduate student with a wife and baby. See *Wry v. Dial*, 503 P.2d 979 (Ariz. App. Ct. 1972). (I have taught that case for thirty years to illustrate the subjectivity of juror evaluations.) Grand celebrated his victory by inviting lawyers who had won a million dollars to join his "Inner Circle of Advocates," whose logo featured a "7," representing their "seven-figure verdict[s]." Inner Circle, <http://www.innercircle.org> (last visited Oct. 28, 2006). To ensure exclusivity, he subsequently limited membership to 100. A quarter-century later he founded a similar organization of "pre-eminent personal injury and medical malpractice lawyers" in the U.K., modestly naming it "The Richard Grand Society." Richard Grand Society, <http://www.richardgrandsociety.com> (last visited Oct. 27, 2006).

47. For an account of a struggle between inclusion and exclusion, see ABEL, *ENGLISH LAWYERS*, *supra* note 2, at 226–29.

B. Market Failures

That leaves clients dependent on the market. This concluding section will evaluate existing mechanisms and consider some alternatives. Defendants, unlike plaintiffs, are adequately served by the market.⁴⁸ They are repeat players. They can reduce costs by employing paraprofessionals (e.g., claims adjusters).⁴⁹ In-house counsel has the expertise to evaluate the performance of outside counsel and the bargaining power to negotiate lower fees (such as reverse contingent fees) and force lawyers to compete in beauty parades to get their business. The middle class once had family lawyers (just as they had family doctors). Only the wealthy have either today.⁵⁰ The average American uses a lawyer only twice in a lifetime.⁵¹ Half of Americans report *never* having had a serious tort problem.⁵² Only about a fourth of those who report having had a serious tort problem saw a lawyer.⁵³ Individuals do not like to anticipate the unpleasant events that force them to consult lawyers: arrest, deportation, eviction, debt collection, IRS audits, job loss, bankruptcy, injury, divorce, death. Lawyers had reputations in small-scale face-to-face societies (although the information may have been inaccurate or irrelevant, and choice was more limited).⁵⁴ English solicitors still know something about barristers' reputations. But few Americans have any meaningful knowledge about the competence of personal injury lawyers. Personal injury clients emerge from the encounter with their lawyers with a far worse impression than those who consult lawyers about any other problem.⁵⁵ This negative judgment extends across every dimension of performance: keeping clients informed of progress, paying attention, charging fair fees, being prompt, interested and honest, and providing full explanations.⁵⁶ But even experienced clients only know about the one or two lawyers they have used, not the other 99.99%.

Lawyer referral services allocate clients to lawyers. But because the schemes are run by professional associations, they suppress competition by choosing lawyers randomly (usually in alphabetical order), without screening for competence

48. Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, VAND. L. REV. (forthcoming 2007).

49. *See generally* ROSS, *supra* note 35.

50. "After their accident, a mere twenty percent (twelve of fifty-nine) of the clients consulted with an attorney they had used before, whom they thought of as their 'family lawyer.'" ROSENTHAL, *supra* note 27, at 128-29.

51. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 190 (1977).

52. *Id.* at 102, 103 tbl.4.8.

53. *Id.* at 103. *Compare* fig.4.1 *with* fig.5.14.

54. *See generally* LANDON, *supra* note 29.

55. CURRAN, *supra* note 51, at 198 fig.5.17.

56. *Id.* at 213 fig.5.23.

or fitness.⁵⁷ Prepaid legal service plans limit clients to those lawyers who sign up. Because legal insurance almost always is a fringe benefit of employment, clients have no say about which lawyers belong to the plans and little information to guide clients in choosing among lawyer members.⁵⁸ In any case, such plans usually exclude personal injuries because of the availability of contingent fees.

The Internet has privatized referral services. Although the new technology is free, fast, and available to anyone with on-line access, it has its own severe limitations. Martindale-Hubbell allows victims to seek a lawyer by tort and location. But a search using the terms “automobile accidents” and “Los Angeles” produced 114 listings, with little useful information to guide victims in choosing among them (or an explanation why the tens of thousands of other Los Angeles lawyers were excluded).⁵⁹ Typing “personal injury lawyer” into Google produced ninety-one million results. But few tort victims are likely to go beyond the sponsored links and websites on the first page. Unlike Martindale-Hubbell, which purports to encompass most practitioners (if it does not make referrals to all of them), other websites favor a few lawyers. The fact that the same ones appear on several sites strongly suggests that they pay to be there. PersonalInjuryFYI.com lists only three firms in all of Los Angeles: Booth & Koskoff (which boasts of having collected over \$283 million), Vieira Trial Law, and the Law Offices of Cavalluzzi & Cavalluzzi.⁶⁰ PersonalInjuryLawyerShop.com lists the same three.⁶¹ AccidentNetwork.com refers to a single law firm in all of Los Angeles and Orange Counties.⁶² A few sites let even casual visitors (like me) learn that lawyers can buy referrals.⁶³ PersonalInjuryLawOffices.com promises lawyers “an exclusive listing and a guarantee that our keywords will remain a first page-

57. See BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 173–204 (1970); ROSENTHAL, *supra* note 27, at 140–41. The California State Bar website lists twenty-six lawyer referral services for Los Angeles County. California State Bar, <http://www.calbar.ca.gov> (last visited Oct. 28, 2006). When I checked the service for my own city, Santa Monica, it promised that “[a]ll lawyers are carefully screened and meet both State bar and LRIS experience requirements.” Santa Monica Bar Association, <http://www.smba.net> (last visited Oct. 28, 2006).

58. See generally F. RAYMOND MARKS, ROBERT P. HALLAUER & ROBERT R. CLIFTON, *THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES* (1974).

59. Find a Lawyer, <http://www.lawyers.com> (last visited Sept. 5, 2006). An earlier study of personal injury lawyers found that only two of the sixty-two were rated by Martindale. ROSENTHAL, *supra* note 27, at 136. There were nearly 140,000 lawyers in California in 2005. American Bar Association, National Lawyer Population by State, http://www.abanet.org/marketresearch/2006_national%20_lawyer_population_survey.pdf (last visited Sept. 5, 2006). A guesstimate would put at least 50,000 in greater Los Angeles. Hence, Martindale offered information about only 0.2% (although not all practice personal injury law).

60. Personal Injury, <http://www.personalinjuryfyi.com/search/zip.html> (last visited Sept. 25, 2006).

61. Injury Lawyer Shop, <http://www.injurylawyershop.com> (last visited Sept. 25, 2006).

62. Accident Network, http://www.accidentnetwork.com/attorneys_California.html (last visited Sept. 25, 2006).

63. Injury Board, <http://www.injuryboard.com> (last visited Oct. 1, 2006).

sponsored link for the duration of the agreement.”⁶⁴ PersonalInjuryLawyers.com promises to “help drive traffic to your law practice and/or website by ranking on the first page of results for many terms which encompass Personal Injury Law.”⁶⁵ “We limit the number of law firms to one per metro area or one per state. This model eliminates any conflict from your completion [sic] and maximizes the number of contacts. Simple idea, right?” Right: it lists a single Santa Ana firm for all of California (with 140,000 lawyers).⁶⁶ InjuryBoard.com lists just seventy-four firms throughout the state.⁶⁷ TotalInjury.com simply offers a toll free number with no information about the lawyers it uses.⁶⁸ Several other sites ask potential clients to describe their cases but say nothing about the lawyers to whom they make referrals.⁶⁹ These web-based referrals are worse than useless. They mislead clients into believing that they assure quality. They drastically narrow the range of alternatives in response to *lawyer* interests. Most victims would do better relying on the experience of acquaintances — or even picking randomly.⁷⁰

The Supreme Court’s 1977 decision in *Bates*⁷¹ allowed lawyers to advertise, although the Court’s 1993 decision in *Went for It*⁷² upheld the Florida Bar’s prohibition on mail to victims within thirty days of an accident. But advertising tells clients little about competence, price, speed, or responsiveness.⁷³ Indeed, many states discourage price advertising. Furthermore, legal advertising is inefficient: most of the audience either has no present need for legal services or is ignorant of that need and hence disregards the information; those aware of their

64. Personal Injury Law Offices, <http://www.personalinjurylawoffices.com/forlawyers.html> (last visited Sept. 25, 2006).

65. *Id.*

66. *Id.*

67. Injury Board, <http://www.injuryboard.com> (last visited Sept. 25, 2006).

68. Total Injury, <http://www.totalinjury.com> (last visited Sept. 25, 2006).

69. *E.g.*, Legal Connection, Personal Injury Lawyer, <http://www.legalconnection.com/personal-injury.html> (last visited Sept. 25, 2006).

70. “Generally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet.” ROSENTHAL, *supra* note 27, at 129.

71. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

72. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995).

73. *See generally* Stewart Macaulay, *Lawyer Advertising: Yes But . . .*, in INSTITUTE FOR LEGAL STUDIES: WORKING PAPERS (Ser. 1, Working Paper No. 2, 1986) (analyzing the limited value of lawyer advertising for consumers), *available at* http://www.law.wisc.edu/facstaff/macaulay/papers/lawyer_advertising.pdf; Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case of Legal Clinics*, 1979 AM. B. FOUND. RES. J. 179 (1979). Consider the following poster: “The Law Offices of C. Conrad Claus” (superimposed over a sword). “Former Las Vegas Deputy District Attorney” and “Former LVMPD in Service Training.” Claus does criminal defense, constitutional law, family and juvenile law, personal injury, and traffic violations/DUI. His photo shows a shaved head, goatee, black shirt, big rings — not someone you’d want to meet in a dark alley — or a courtroom. His slogan is “LET ME GO TO WAR FOR YOU.” His website is www.lawiswar.com; his phone number is 384-4WAR. Law Offices of C. Conrad Claus, <http://www.lawiswar.com> (last visited Sept. 9, 2006).

need are unlikely to hear from most advertisers.⁷⁴ Targeted solicitation of accident victims would be a much more efficient and effective means of educating them about their legal rights, but the Supreme Court upheld the Ohio ban on solicitation in *Ohralik*.⁷⁵ I oppose that ban, but I see no prospect of overturning it. Some lawyers flout the prohibition, engaging in overt or covert ambulance chasing. Because such conduct is illegal, they presumably charge clients a vice tax for running the risk of exposure (discipline and criminal prosecution)⁷⁶ and pay kickbacks to the intermediaries: police, tow truck operators, ambulance drivers, and healthcare providers.⁷⁷ But most competent lawyers will not take such chances. Indeed, specialist associations of the plaintiffs' bar (which enroll the more competent practitioners) may impose their own, more stringent restraints on solicitation.⁷⁸ Given the limits of advertising and the ban on solicitation, clients seek information about legal rights and lawyer referrals from networks of friends and relatives (for the middle class), fellow workers and unions, neighbors, churches, and ethnic groups.⁷⁹ Such sources are likely to be least effective for the most common injuries, which occur outside the workplace and off the roads.⁸⁰ Mass tort victims sometimes form support groups, but organizing the dispersed victims of defective products entails very high transaction costs.⁸¹ At best, these referral sources satisfice, ruling out the patently incompetent or dishonest; however, these informants rarely know more than one or two lawyers and little or nothing about their competence compared with the rest of the bar.⁸²

74. A survey of Wisconsin contingency fee lawyers reported that less than one percent of their cases came from direct mail and just three percent from advertising. KRITZER, *supra* note 19, at 48.

75. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

76. See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (arguing that many criminal laws merely increase the price of the forbidden goods and services).

77. See generally BAXTER WARD, *ILLEGAL ATTORNEY REFERRAL ACTIVITY IN LOS ANGELES COUNTY* (1974); Kenneth J. Reichstein, *Ambulance Chasing: A Case Study of Deviation and Control Within the Legal Profession*, 13 SOC. PROBS. 3 (1965) (empirically demonstrating the prevalence of ambulance chasing).

78. The American Trial Lawyers Association prohibited members from contacting potential clients or even visiting the scene of an accident unless requested. David Margolick, *Trouble in the Trial Bar: A Lawyers' Group Chases After Ambulance Chasers*, N.Y. TIMES, May 25, 1990, at B6.

79. See generally Jack Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, 11 LAW & SOC'Y REV. 207 (1976) (providing an empirical study of how clients choose lawyers).

80. See generally Lloyd-Bostock, *supra* note 9.

81. See generally MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985) (demonstrating the difficulty of organizing women injured by Dalkon Shield); SUSAN L. PERRY & JIM DAWSON, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* (1985).

82. "Many putative knowledgeable are not in fact very well informed about either personal legal problem solving or the professional standing of the attorneys they refer people to." ROSENTHAL, *supra* note 27, at 131.

IV. INNOVATIVE MARKET SOLUTIONS

Given the inadequacy of all the existing mechanisms for helping tort victims, I want to speculate about others that are just emerging or are purely conceptual.

A. The Market for Information about Lawyers

A disinterested organization could evaluate the quality of legal service providers, much the way Consumers Union rates products (on the basis of its own tests)⁸³ or Zagat critiques restaurants (based on diners' opinions). Angie's List collects consumer evaluations of services, but it presently serves only eighty-five cities (with another two coming soon); and though it covers more than three hundred services (including accountants and financial planning), it does not evaluate lawyers (or doctors).⁸⁴ More recent entrants — including InsiderPages, Zipingo, Judy's Book, and Yelp — also exclude lawyers.⁸⁵ It is more difficult to establish quality standards for services than for goods. Jacoby & Meyers, Hyatt Legal Services, and other legal clinics sought to standardize the quality and price of services like divorce and bankruptcy, but they deliberately excluded personal injury as too individualized.⁸⁶ The crude mortality and morbidity rates hospitals are required to report do little more than identify the most egregious examples of mistreatment (and do not control for differences in patient population). Neither a lawyer's win:loss ratio nor the size of a judgment means anything without knowledge about inputs. Professionals successfully keep secret disciplinary complaints that do not eventuate in serious punishment. Anyone who published evaluations of lawyer quality would have to be prepared to defend against business defamation lawsuits, even ill-founded ones.⁸⁷

B. Aggregating Victims

Accident victims are classic examples of one-shot players in the legal system because most serious injuries are random, dispersed, and infrequent.⁸⁸ Indeed,

83. Consumer Reports, <http://www.consumerreports.org> (last visited Sept. 6, 2006).

84. Angie's List, <http://www.angieslist.com> (last visited Sept. 6, 2006).

85. InsiderPages, <http://www.insiderpages.com> (last visited Oct. 26, 2006); Zipingo, <http://www.zipingo.com> (last visited Oct. 26, 2006); Judy's Book, <http://www.judysbook.com> (last visited Oct. 26, 2006); Yelp, <http://www.yelp.com> (last visited Oct. 26, 2006); see Damon Darlin, *Let's Say Your Toilet Backs Up, How Do You Find a Good Plumber?*, L.A. TIMES, Aug. 5, 2006, at B1.

86. See generally JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* (1997) (providing a sociological analysis of legal clinics).

87. For example, Parkslopeparents.com was threatened by a child care provider after a parent posted criticism of the quality of their lawyer. Motoko Rich, *For Online Parents' Group, A Legal Scare*, N.Y. TIMES, Nov. 13, 2005, at 38. Websites might find some protection in anti-SLAPP statutes. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 217 (1996).

88. See generally Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1975) (a classic article on the advantages of repeat players).

repeat players would be suspect.⁸⁹ It might be possible to aggregate some victims. Class actions are one means, but federal courts are increasingly hostile to them, especially for personal injury claims.⁹⁰ Voluntary associations, such as trade unions, automobile clubs, recreational associations, and neighborhood groups, can play an informational role, but claims remain individual. Members of the plaintiffs' bar themselves are repeat players: accumulating expertise, routinizing work, confronting the same adversaries in the same fora, possessing a stake in the outcome extending beyond the particular case. Although a few firms are highly capitalized as a result of the obscene contingent fees earned in mass tort cases (especially asbestos and tobacco), and many workers' compensation mills employ large numbers of paralegals, most plaintiffs' firms remain very small and thinly capitalized (compared with their adversaries representing corporate defendants and insurance companies). This fragmentation undoubtedly has multiple causes: aggressive litigators are highly individualistic; lawyers are very possessive about their clients and cases; co-counsel squabble about divvying up profits. And there are few economies of scale in litigating individual tort cases (unlike mass torts).

C. Tort Lawyering Brokers

Brokers could mediate between clients and lawyers, as they do in many other markets, such as labor, real estate, automobiles, travel, entertainment, insurance, used goods (consignment stores), art, and literary works. As repeat players, brokers would be well positioned to acquire good information about lawyer competence and integrity. But this would introduce the usual agency problems: brokers in ongoing relationships with lawyers would maximize self-interest at the expense of victims, with whom they have only transitory contacts. (Insurance brokers, who have a fiduciary duty to find the best deal for their clients, also risk capture by the insurance industry.) Furthermore, the Internet is supplanting human agents: Travelocity and Expedia for travel; Redfin, ZipRealty, and BuySideInc for real estate.⁹¹

Lawyers already perform the broker role between clients and litigators. The divided legal profession in England (and some of its former colonies) institutionalized referrals between solicitors (to whom, alone, clients had direct access) and barristers (who, until recently, enjoyed exclusive rights of audience in the higher

Those who reported having experienced a serious tort had a lifetime mean of 1.3 personal injuries and 2.0 property damages. CURRAN, *supra* note 51, at 102, 103 tbl.4.8.

89. Even to the lawyers who represent them. Kritzer reports a lawyer saying: "I just had a client come back. I settled his auto case, and now he got hit by a car as a pedestrian. You find . . . that the same people have accidents over and over. . . ." KRITZER, *supra* note 19, at 62.

90. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

91. Travelocity, <http://www.travelocity.com> (last visited Oct. 26, 2006); Expedia, <http://www.expedia.com> (last visited Oct. 26, 2006); Redfin, <http://www.redfin.com> (last visited Oct. 26, 2006); ZipRealty, <http://www.ZipRealty.com> (last visited Oct. 26, 2006); BuySideInc, <http://www.BuySideInc.com> (last visited Oct. 26, 2006).

courts).⁹² The agency problem was summed up in the exhortation to barristers: thou shalt not hug a solicitor.⁹³ Barristers responded by delegating this “dirty work”⁹⁴ to their clerks, chosen in part for their ability to hold their alcohol and spend hours in pubs drinking with solicitors who might send them business.⁹⁵ Although the United States does not divide its lawyers into *de jure* professional categories, American low-level personal injury practitioners have referred cases to higher-level litigators since at least the 1950s.⁹⁶ Sara Parikh and Herbert Kritzer confirm that this practice persists a half-century later.⁹⁷

Economists, who usually start with an assumption of perfect competition, initially argued that referrals would always benefit clients.⁹⁸ One empirical study found that lawyers to whom cases were referred secured much higher recoveries than those who obtained cases directly from clients.⁹⁹ But that, of course, may reflect selection bias rather than greater effort or competence. Indeed, we know (not surprisingly) that larger cases are more likely to be referred.¹⁰⁰ More sophisticated economic analysis has shown that referral does not assure clients better results.¹⁰¹

92. See generally ABEL, ENGLISH LAWYERS, *supra* note 2.

93. See Robert Hazel, *Introduction to the Bar*, in THE BAR ON TRIAL 17, 17–19 (Robert Hazel ed., 1978).

94. The phrase was coined by Everett Hughes. See, e.g., Everett C. Hughes, *Good People and Dirty Work*, 10 SOC. PROBS. 3–10 (1962).

95. JOHN FLOOD, BARRISTERS' CLERKS: THE LAWS MIDDLEMEN 109–11 (1983).

96. CARLIN, *supra* note 23, at 75. Upper level practitioners obtained better results for their clients. ROSENTHAL, *supra* note 27, at 134.

97. See Parikh, *supra* note 32, at 124. See generally KRITZER, *supra* note 19. Stephen J. Spurr attributed a decline between 1972 and 1984 in the proportion of Manhattan and Bronx personal injury cases referred from other lawyers to four factors: advertising, no-fault, an increase in the number of lawyers per capita, and an increase in the proportion of cases not involving automobile accidents. Stephen J. Spurr, *The Impact of Advertising and Other Factors on Referral Practices, With Special Reference to Lawyers*, 21 RAND J. ECON. 235, 239–40 (1990). Two of these seem unconvincing: the decrease began well before advertising, and relatively few cases are obtained through it; lawyers quickly found ways around no-fault. Furthermore, I would have expected a higher proportion of referrals in non-auto cases, which require more specialized expertise. I think the likeliest explanation is Spurr's observation that the profession grew rapidly, and young lawyers lack referring partners.

98. Mark V. Pauly, *The Ethics and Economics of Kickbacks and Fee Splitting*, 10 BELL J. ECON. 344, 358 (1979).

99. Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 LAW & SOC. INQUIRY 87, 107–08 (1988).

100. Parikh, *supra* note 32, at 123.

101. See Bruce L. Hay, *The Economics of Lawyer Referrals* 32 (Harvard Law School, John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 203, 1996) (stating that “when lawyer profits and net client recovery are negatively correlated” a client cannot “design a referral fee that aligns her interests with the lawyer's”). Furthermore, two factors tug in opposite directions. The client wants to encourage a referral to the best possible lawyer; this is best achieved by requiring the lawyers to use contingent share arrangement. But the client also wants to encourage hard work on the part of the referee lawyer; this is best achieved by requiring the lawyers to use simple up-front payment. *Id.* at 59.

What do we know about actual referral patterns among lawyers? First, lawyers are accustomed to splitting fees, whether or not ethical rules allow it (as they do in forty states), paying a third to a half to the referring lawyer.¹⁰² Second, although economists tend to presuppose that anonymous actors maximize individual (usually short-term) advantage through transitory transactions, sociologists consistently reconfirm Stewart Macaulay's finding¹⁰³ that much market interaction occurs within ongoing relationships.¹⁰⁴

Sara Parikh's research on sixty-two Chicago personal injury lawyers practicing in 1998–2000 offers the best account.¹⁰⁵ She makes it clear that lawyers prefer personal patronage to the impersonal market. One informant said:¹⁰⁶

I think if you were to ask most plaintiff PI attorneys who have a desire to have a respected reputation in Chicago, given their druthers . . . I think, to a person, they'd say they'd rather not have to advertise Having a good, strong referral base means that you don't have to do the other things that most attorneys desiring respect would want to avoid: advertising, chasing, having to work really hard

These referral dyads are highly stable, lasting an average of ten years for low-end practitioners and seventeen to nineteen for upper.¹⁰⁷ Most grow out of an existing non-economic relationship (rather than representing a systematic search for the "best" attorney) and retain a social component.¹⁰⁸ Case recipients make frequent gifts to referring partners.¹⁰⁹ (This sounds strikingly like the patterns of pre-capitalist exchange, which Malinowski described in the Trobriand Islands and Mauss further theorized.)¹¹⁰ Half of low-end lawyers and forty percent at the high-end engage in reciprocal referrals.¹¹¹ In order to ensure continuing referrals, a lawyer to whom a referred client brought an unrelated matter years

102. CARLIN, *supra* note 23, at 69, 81–82, 162–63; ROSENTHAL, *supra* note 27, at 100. Before the Model Rules were amended to allow this in 1983, fees had to be proportioned to the work done by the referring lawyer — a rule that was easy to evade.

103. *See generally* Macaulay, *supra* note 12.

104. *See* Wayne E. Baker, *Market Networks and Corporate Behavior*, 96 AM. J. SOC. 589, 594 (1990); *see also* Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 ADMIN. SCI. Q. 35, 52 (1997). *See generally* Wayne E. Baker, *The Social Structure of a National Securities Market*, 89 AM. J. SOC. 775 (1984) (discussing social structural influences on markets).

105. *See generally* Parikh, *supra* note 32.

106. *Id.* at 143.

107. *Id.* at 126.

108. *Id.* at 126–28.

109. *Id.* at 161. They even do so to non-lawyers, although they realize this violates ethical rules. *Id.* at 163. And they feel demeaned by it: "We don't kiss ass" *Id.*

110. *See* BRONISLAW MALINOWSKI, *CORAL GARDENS AND THEIR MAGIC* 40–41 (1935); MARCEL MAUSS, *THE GIFT* 26 (1954).

111. Parikh, *supra* note 32, at 56, 128 tbl.XVIII.

later sent the client back to the referring lawyer (who could thereby earn another fee for referring the case again).¹¹²

Referring lawyers satisfy. ¹¹³ Parikh describes one Chicago lawyer who said: “If you find one firm, it’s a lot easier . . . to make one phone call to find out how these fifteen cases are doing, rather than having to remember, ‘okay, three I sent to this firm, five to this firm, seven to this firm.’”¹¹⁴ Another agreed: “Shopping, I don’t see much of that. I would imagine like any business over the course of years, people will try something new and if they’re happy with it, they’ll stay.”¹¹⁵ Lawyers tend to be equally indiscriminating in the referrals they accept: “I probably take cases I shouldn’t When your clients are other lawyers, you have to do whatever it’s going to take to keep them sending you cases.”¹¹⁶ Only a third to a fifth of referrals come from other personal injury lawyers (who presumably are better able to evaluate quality than generalists or specialists in other fields).¹¹⁷ The few African American personal injury lawyers in Chicago tended to refer to each other.¹¹⁸ Although referrals up the hierarchy are always reciprocated with fee splitting, those down the hierarchy may not be.¹¹⁹ Some low-end practitioners engage in heavy advertising and then refer *all* their claims (or at least the vast majority that do not settle quickly).¹²⁰ Instead of retiring completely, some older practitioners just stop trying cases, referring whatever they cannot settle.¹²¹

The dyads are often symbiotic: the referrer is “the guy [the client] could talk to,” the recipient “the mouthpiece, or the person with the expertise.”¹²² Indeed, the referrer may be able to prevent a client from being stolen from the recipient by a competitor (to whom an unmediated client would be lost).¹²³ But the recipient does not want the referrer to interfere in case management.¹²⁴ Recipients feel an obligation to deliver the split fee to the referring lawyer “as quickly as possible,” fearing that a dissatisfied source “may shop around for higher turnover.”¹²⁵

112. *Id.* at 154.

113. See generally Herbert Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. (PAPERS & PROC.) 1 (1978) (a classic statement on satisficing).

114. Parikh, *supra* note 32, at 152.

115. *Id.* at 153–54.

116. *Id.* at 162.

117. *Id.* at 129, 131 tbl.XIX.

118. *Id.* at 132.

119. *Id.* at 134. Some of the latter are intended to help struggling novices. *Id.* at 139–40.

120. *Id.* at 138.

121. *Id.* at 141.

122. *Id.* at 146.

123. *Id.* at 155.

124. *Id.* at 149–51.

125. *Id.* at 147.

From the recipient's point of view, indeed, the repeat player referrer is more significant than the one-shot client.¹²⁶ Not surprisingly, the likelihood of referral varies directly with the size of the case.¹²⁷ As one lawyer explained: "something that goes into" the decision to refer "is whether there is enough of a fee available for us to bring in another law firm."¹²⁸ Although the percentage of the contingent fee paid to the referrer varies, it tends to do so by case category and referral partner rather than by individual case.¹²⁹

Parikh's thick description of actual referral practices amply demonstrates that they do not optimize client interest. Referrers choose recipients for many reasons other than expertise: friendship, mentoring, convenience, pay, gifts, or reciprocity. Many referrers know little about the recipient's expertise and even less about how it compares with the rest of the plaintiffs' bar. Once lawyers establish such a relationship they tend not to reevaluate it. Some lawyers do little more than refer — a function that could be performed far more cheaply by non-lawyers, and arguably better. Recipients feel greater loyalty to referrers than to their clients. The likelihood of referral is related to case size, not need. There is little or no competition to drive down the price of referral services. And the fact that recipients have to pay one-third to one-half of the contingent fee to referrers may be part of the reason why that fee itself is a third to a half of damages.

D. *Financing Clients*

That leaves me with speculations about innovative market devices. Could clients borrow against or securitize their claims? Ethical rules forbid lawyers from lending to clients,¹³⁰ but most jurisdictions that have opined on the issue

126. The same is true of intermediaries for pro bono clients. *See generally* Philip R. Lochner, *The No-Fee and Low-Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431 (1975) (providing a sociological analysis of reasons why lawyers take pro bono clients).

127. Parikh, *supra* note 32, at 123; Spurr, *supra* note 99, at 244–45.

128. Parikh, *supra* note 32, at 140–41.

129. *Id.* at 159–60.

130. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2002). A 1981 draft of the 1983 Model Rules would have allowed lawyers to advance living expenses to prevent clients from being forced to accept inadequate settlements, but this was rejected. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.8(3) (1981) *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48(2) (1996). *See* James E. Moliterno, *Broad Prohibition, Thin Rationale: The Acquisition of an Interest and Financial Assistance in Litigation' Rules*, 16 GEO. J. LEGAL ETHICS 223, 234–239 (2003); *see also* Jack P. Stahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY'S L.J. 795, 807 (2003). A number of states allow limited exceptions: CAL. RULES OF PROF'L CONDUCT R. 4-210(a)(2) (2006) (written loan agreement); ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2006) (emergency financial assistance); MISS. RULES OF PROF'L CONDUCT R. 1.8(e) (2005) (reasonable and necessary medical and living expenses); TEX. RULES OF PROF'L CONDUCT R. 1.08(d) (1989) (reasonable and necessary medical and living expenses); MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2005) (lawyers can guarantee a bank loan necessary to avoid settlement "because of financial hardship rather than on the merits"); *see also* MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2006); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2006).

allow lawyers to advise clients about other sources of finance.¹³¹ Starting in the 1980s, several found ways to circumvent older prohibitions against maintenance, champerty, and barratry.¹³² The first litigants to seek finance were not personal injury victims but businesses: a patent infringement case against Parker Brothers' "Masterpiece" game;¹³³ a restaurant suing its shopping mall landlord over the lease;¹³⁴ a bad-faith insurance defense claim by a garage;¹³⁵ a thirty-year fight over patent rights to the optical laser;¹³⁶ the refusal to honor an agreement to convert a loan into an equity interest;¹³⁷ a waterbed patent infringement claim;¹³⁸ a computer program patent infringement claim.¹³⁹ Although plaintiffs' lawyers naturally favor such financing, defendants and their advocates predictably objected that it increased litigiousness.¹⁴⁰ Loans could allow clients to hire lawyers at an hourly rate rather than a contingent fee (which often would be to the client's advantage),¹⁴¹ but this does not seem to have happened.

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131. Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 96-97 (2002).
132. See generally Donald L. Abraham, *Investor-Financed Lawsuits: A Proposal to Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 SYRACUSE L. REV. 1297 (1992); Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529 (1995); Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J. L. REFORM 57 (1999); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485 (1992); Martin, *supra* note 131.
133. See *A Scheme to Sell Pieces of an Action*, BUS. WK., May 24, 1976, at 35; *Firm Born to Fight Corporate Ills Dies of Cash Malnutrition*, WALL ST. J., Mar. 2, 1976, at 20; *Public is Cool to Lawsuit Stock*, 63 A.B.A.J. 166 (1977); *Two Characters in Search of Some Scratch*, FORTUNE, June 1977, at 91. The venture failed for lack of interested investors.
134. Eric Freedman, *They Scan Docket Sheets Instead of the Stock Tables*, 18 NAT'L L.J., Apr. 15, 1996, at B1 (discussing Judgment Purchase's investment in the claim).
135. Margaret Cronin Fisk, *Large Verdicts for Sale: Plaintiffs Sell Portions of Million-Dollar Judgments to Weather Long Appeals*, 20 NAT'L L.J., Jan. 11, 1989, at A1.
136. Daniel C. Cox, Comment, *Lawsuit Syndication: An Investment Opportunity in Legal Grievances*, 35 ST. LOUIS U. L.J. 153, 156, 166 (1990).
137. *Killian v. Millard*, 279 Cal. Rptr. 877 (Cal. Ct. App. 1991).
138. *Intex Plastics Sales Co. v. Hall*, 20 U.S.P.Q.2d (BNA) 1367 (N.D. Cal. 1991); Edmund L. Andrews, *Patents: Financing Inventors' Lawsuits*, N.Y. TIMES, Mar. 11, 1989, at 36.
139. Linda Himelstein, *Investors Wanted — For Lawsuits*, BUS. WK., Nov. 15, 1993, at 78.
140. George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 833 (2001); Catherine Yang, *Psst! Wanna Buy a Lawsuit?*, FORBES, May 19, 1986, at 67. Michael Epstein, a partner at Weil, Gotshal & Manges who defends patent infringement lawsuits, was an unsurprising source of criticism in two separate articles. See Himelstein, *supra* note 139, at 78; Andrews, *supra* note 138, at 36.
141. Roy D. Simon, Jr., *Lawsuit Syndication: Buying Stock in Justice*, 69 BUS. & SOC'Y REV. 10, 11 (1989). One lawyer "bluntly" told Herbert Kritzer: "I'm in contingency fee cases to beat my hourly rate." KRITZER, *supra* note 19, at 75. After an exhaustive analysis of his own data, Kritzer concluded that: [I]t is a small subset of cases, typically the top ten percent, that produce the largest profits. However, the typical contingency fee practitioner can expect even the remaining 90 percent of cases as a portfolio to produce a fee premium on the order of twenty-five to thirty percent of what market-rate hourly fee work generates.

In the last fifteen years, litigation lenders have proliferated and now target personal injury victims almost exclusively. Unfortunately, the market's persistent imperfections seriously disadvantage borrowers. (Litigation lending resembles payday loans and check cashing facilities in poor communities.) Like plaintiffs' lawyers' fees, almost all of these loans are contingent on success, with no obligation to repay either interest (or fee) or capital if there is no recovery. As such, they are exempt from usury laws.¹⁴² But like contingent fee lawyers,¹⁴³ these contingent litigation lenders also do not compete in price. Most reveal little or nothing about the cost of their loans, making it extremely difficult for personal injury victims to compare prices or even understand the terms of the transaction before they are committed to it. LawFinance Group explicitly declines to explain how it prices loans when judgments are on appeal.¹⁴⁴ "LawFinance Group has no single pricing formula when it comes to making an AppealFinance™ investment in a money judgment on appeal. Each funding decision is made on a case-by-case basis."¹⁴⁵ Plaintiff Support Services ("PSS") discloses only its \$350 "processing fee" before retreating behind the statement that "each case is judged on its own merits and PSS carefully considers such issues as likelihood of success, damages sustained, risk of loss of PSS' funds, settlement possibilities and time of potential recovery."¹⁴⁶ It urges lawyers to "be wary of other companies offering to provide services similar to PSS. When comparing, you'll find that PSS provides by far the lowest cost of funds in our industry."¹⁴⁷ At the same time, however, it makes such comparisons almost impossible because it provides such scant information about its cost formula. National Lawsuit Funding says only that its loans "are based upon the potential value of your pending lawsuit."¹⁴⁸ Lawsuit Financial Corp. never mentions cost among its twelve "FAQs."¹⁴⁹ Whitehaven

Id. at 218. This was consistent with two other studies.

142. This is true only if there is a real contingency. A New York court recently found no meaningful contingency in such a loan and invalidated it as usurious. Anthony J. Sebok, What Is Wrong with Investing in Litigation? (Mar. 2006) (unpublished article, on file with author).

143. In New York, the Appellate Division, First Department created a maximum fee schedule to serve as a guide for setting attorneys' fees. ROSENTHAL, *supra* note 27, at 35. However, the maximum contingent fee allowed by law quickly became the minimum as well. KRITZER, *supra* note 19, at 39–42, describes how in Wisconsin he found that sixty percent of contingent fees were one-third and thirty-one percent of contingent fees were at a variable percentage, usually between twenty-five and fifty. But Kritzer conceded he had "no evidence that indicates that the variation reflects market competition" or that "potential clients have any idea that there may be alternatives available or that they 'shop' for the best arrangement." *Id.* at 42.

144. LawFinance Group, http://www.lawfinance.com/solutions_appeal.php (last visited Sept. 6, 2006).

145. *Id.*

146. Plaintiff Support Services, FAQ, <http://www.plaintiffsupport.com/faq.html> (last visited Sept. 6, 2006).

147. *Id.*

148. National Lawsuit Funding, <http://www.nationallawsuitfunding.com> (last visited Sept. 25, 2006).

149. Lawsuit Financial Corp., Frequently Asked Questions, <http://www.lawsuitfinancial.com/faqs.html> (last visited Sept. 6, 2006).

Funding's twelve "Frequent Questions" state only that there are "no hidden or up-front fees" but say nothing about its interest rate.¹⁵⁰ HSAC Funding promises "no hidden fees" but then adds cryptically that "our fee is calculated as a discount on the total settlement amounts we receive. . . ."¹⁵¹ CapTran presents numerous case histories, client testimonials, and legal ethical opinions authorizing its practices.¹⁵² But its "Sixteen FAQs" say nothing about its fees. "We are happy to review your case . . . and tell you the amount of investment fee we would require." American Asset Finance offers a "free quote online" but only after the applicant has completed a detailed three-page form describing the accident and has submitted the full case file.¹⁵³ Case Funding boasts that "applying is free" but cautions that "there may be" (as though this were uncertain) "a processing or origination fee" (amount unspecified) "included in the approved advance" (and thus hidden). Successful clients must repay "upfront costs" (unclear whether this is more than the loan amount) "plus a 'usage' fee" specified in "a schedule . . . attached to your contract Once your case has been reviewed and approved" Case Funding "will be more than happy to go over the fees," which are "higher than interest rates charged by credit card companies because of the risks we take."¹⁵⁴

But do these lenders incur any real risks (much less high ones)? Although the plaintiffs' bar endlessly justifies its 25–50% contingent fee by reference to lost cases, there is reason for skepticism.¹⁵⁵ Selectivity in the acceptance of clients suggests that lawyers winnow out most risk. Kritzer found that the eighty percent of his Wisconsin firms that had been contacted by fewer than seventy-six potential clients the previous year accepted just half of those cases; the eighteen percent of firms contacted by 76–1000 potential clients accepted a little over a third of the cases; and the one percent of firms contacted by more than a thousand potential clients accepted only eight percent of those cases.¹⁵⁶ Parikh reports almost the same profile among her Chicago respondents: the eight percent who were "low-end" practitioners accepted forty-nine percent of the cases; the nineteen percent who were high end accepted thirty-six percent of the cases; and the one percent of elite firms accepted just twenty-four percent of the cases.¹⁵⁷ Daniels and Martin found even lower acceptance rates in Texas, ranging between thirty-

150. Whitehaven Funding, <http://www.whitehavendirect.com/General/faq#Q9> (last visted Sept. 6, 2006).

151. HSAC Funding, <http://hsacfunding.com/plaintiffs> (last visited Sept. 25, 2006).

152. Captran, <http://www.captran.com> (last visited Apr. 29, 2006).

153. American Asset Finance, <http://www.amasset.com> (last visited Sept. 25, 2006).

154. Case Funding, <http://www.casefunding.com/faqs.htm#upfrontFees> (last visited Sept. 25, 2006).

155. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 107 (1989). See generally LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O'CONNELL, *RETHINKING CONTINGENT FEES* (1994).

156. KRITZER, *supra* note 19, at 72.

157. Parikh, *supra* note 32, at 78.

five percent and sixteen percent.¹⁵⁸ Litigation lenders seem at least as risk averse. LawFinance Group, Inc. accepted only ten percent of loan applicants. The CEO of ExpertFunding.com claimed that only 2% of the 500 who borrowed in 2000 failed to repay.¹⁵⁹ The president of Judgment Purchase Corp. boasted it had profited in ninety percent of the forty cases it accepted.¹⁶⁰

Some idea of the magnitude of lenders' charges can be gleaned from reports of individual loans. Future Settlement Funding Corporation and Interim Settlement Funding Corporation (related companies) made two loans, one for \$6,000 and another one for \$1,000 to Roberta Rancman, the victim of an uninsured drunk driver, who was suing her own insurer (a relatively low-risk claim). Her obligation to repay varied with the time to settlement: \$16,800 in 12 months, \$22,200 in 18 months, and \$27,600 in 24 months.¹⁶¹ The court found that the lowest possible annual interest rates on the two loans were 280% and 180%, respectively.¹⁶²

A Florida lawyer reported a funding company that offered an \$8,000 advance against a repayment of \$25,000 within a year, a 162% return.¹⁶³ Anthony J. Sebok describes an agreement by Anglo-Dutch Petroleum to borrow \$560,000 in return for paying Law Funds LLC \$2.5 million if it won its lawsuit against Halliburton. Even if this took four years, the interest was nearly four times the principal, or almost 100% annually.¹⁶⁴ Judgment Purchase Corporation ("JPC" — a subsidiary of LawFinance Group) suggested it would pay \$100,000 for a 25% stake in an anticipated \$1 million judgment (being contested on appeal).¹⁶⁵ Its 150% total return would have to be annualized for the years it took to execute judgment.¹⁶⁶ General Electric Capital Corporation paid Lotsoff \$5.8 million for a \$10 million share in a \$151 million judgment against Chase Manhattan Bank.¹⁶⁷ Again, the nearly 100% rate of return would have to be

158. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiff's Practice in Texas*, 80 TEX. L. REV. 1781, 1789 (2002).

159. Mike France, *The Litigation Machine*, BUS. WK., Jan. 29, 2001, at 114.

160. Jennifer Huie, *Sell Futures in Your Verdict*, BUS. WK., Sept. 8, 1997, at 8. On the other hand, ExpertFunding.com was no longer in existence in 2006; neither were four others mentioned in Martin, *supra* note 131, at 99–100. Other groups like Cashfactory.com are still in existence.

161. *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121 (Ohio App. Dist. 2001); Martin, *supra* note 131, at 92.

162. *Rancman*, 99 Ohio St.3d at 124–25.

163. Jean Hellwege, *David v. Goliath Revisited: Funding Companies Help Level the Litigation Playing Field*, TRIAL, May 1, 2001, at 14.

164. Sebok, *supra* note 142.

165. Reynolds Holding, *Investing in Other People's Lawsuits*, S.F. CHRON., Feb. 12, 1996, at B1.

166. *50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.*, Civil SA-95-CA, 1997 WL 790739 (W.D. Tex. May 20, 1997).

167. Fisk, *supra* note 135, at A1; *see also* Bruce Rubenstein, *Company Sells Shares in Jury Award as Appeal Hedge*, CORP. LEGAL TIMES, Dec. 1998, at 32.

annualized. Pacific Group won an \$8.6 million compensatory damage judgment against U.S. Hotel in a contract action. When the latter appealed, Pacific Group borrowed \$70,000 from JPC, repaying \$140,000 when U.S. Hotel settled for \$3 million more than a year later (an annual interest rate of just under 100%).¹⁶⁸ An auto body shop owner won a \$26.4 million verdict against Travelers Indemnity for bad faith failure to represent. In order to resist the appeal the plaintiff auto body shop owner borrowed from LawFinance Group “in the low six figures” with a promise to repay twice as much if he won (as he did).¹⁶⁹ Although these cases suggest that business plaintiffs, which usually have other sources of finance, better information, and greater financial sophistication, can obtain better rates than individuals, even if they are paying interest on the order of 100% a year.

Advance Cost & Settlement Funding (“ACSF”) is more explicit than other lenders about “THE MOST IMPORTANT QUESTION — How much will it cost upon the successful conclusion of my case?”¹⁷⁰ Its rates depend “on our evaluation of your case — the better the case the lower the rate.” In addition to “a small administrative charge . . . to cover the cost of document preparation, monitoring, filing fees, etc.,” rates “typically are anywhere from 3% to 5% per month, compounded monthly . . .”¹⁷¹ (Translated into annualized percentage rates, five percent compounded monthly becomes 80% for one year, 112% for two, 160% for three, 235% for four, and 354% for five). This lender continues: “Unlike other funding companies ACSF has a LOW RATE GUARANTEE. ACSF guarantees to beat any rate of any other funding company, as contained in a written proposal, in cases which it funds.” Either these extraordinary interest rates are *less* than those charged by competitors, or few tort victims are willing or able to submit their cases to multiple lenders in order to obtain comparative quotations. LawMax Legal Finance promises “Rates as low as 3.95% month” (without indicating whether that is compounded — as it almost certainly is).¹⁷² Oasis Legal Finance, which brags that it is “the most active company in pre-settlement funding,” offers as “typical models” a lump sum repayment that represents 60% interest for one year, 50% a year for two, 66⅔% a year for three, and 86% a year for 3.5 years.¹⁷³ For judgments on appeal it charges 35% for the first year and 25% a year for two years. It calls these terms “simple and straightforward.”

168. Huie, *supra* note 160, at 8.

169. Hellwege, *supra* note 163, at 18.

170. Advance Cost & Settlement Funding, Litigation Loan Guarantee for Lawsuit Advance Funding, <http://www.acscorp.com/howItWorks/rateGuarantee.cfm> (last visited Sept. 25, 2006).

171. *Id.*

172. Fund My Case, <http://www.fundmycase.com> (last visited Sept. 25, 2006); Resolution Settlement, <http://www.resolutionsettlement.com> (last visited Sept. 25, 2006); American Cash Flow, <http://www.americancashflow.com/rjcapital> (last visited Sept. 25, 2006).

173. Oasis Legal Finance, Pre-Settlement Funding from Oasis Legal Finance, http://www.oasislegal.com/plaintiff_pricing.php (last visited Sept. 25, 2006).

HOW THE PLAINTIFFS' BAR BARS PLAINTIFFS

A few lenders admit their interest rates are far higher than those charged for mortgages or even credit cards. Legal Funding Group claims to

work diligently to educate the client that even at the lowest rate possible, a non-recourse cash advance is expensive and should only be used as a last resort. Be aware that the Lawsuit Financing industry is full of part timers and very expensive advance operations. Some companies charge an automatic 100% of the advance amount; some charge 15% a month etc. Some even demand a portion of the settlement in addition to the advance amount and fees!

The ones that advertise low rates are simply adding larger front loaded one-time fees. For example, in place of a 10% origination fee — they will charge a 20% origination fee and knock off a 1/2 point on the monthly fees, hardly a bargain. In other cases they are doubling up on application fees.

Our fee structure includes a flat one-time application fee that ranges from \$250.00–\$350.00. A one-time origination fee of 10% of the gross funding amount. Our monthly compounding fees range from 3.0 to as high as 8.9%.¹⁷⁴

Hence in addition to the \$350 “application fee” and 10% “origination fee” the borrower will pay as much as 179% for one year, 338% for two years, 688% for three years, 1483% for four years, and 3343% for five years! I can see why they warn clients away from lower-cost competitors.

Law Capital Enterprises promises “competitive pricing.” “As every case is different, rates charged will vary with the type of case and may include a monthly compounding fee (2.50–4.99%) until your case settles or a flat fee.” (I calculated above the annualized equivalent of 5% compounded monthly.) The variables are “type of case, liability, how long your case has been in progress, insurance coverage and damages.” It makes a “low cost guarantee” to “meet or beat the offer or pay you \$100.00.” But though it claims to “offer you some of the lowest rates in the industry,” it concedes that “legal funding advances are expensive when compared with many other forms of financing. Accordingly, we highly recommend that you first try less expensive resources such as banks, credit cards or family and friends before trying our service.”¹⁷⁵ In other words, only the truly desperate will pay such extortionate interest rates. LawCash concurs.

Is this expensive? Yes. LawCash advises that if you have any other alternative means to meet your immediate economic needs you should do so. LawCash is taking a high risk in providing funding based on

174. Legal Funding Group, Legal Funding Fees, <http://www.legalfundinggroup.com/fees.php> (last visited Sept. 25, 2006).

175. Law Capital Enterprises, <http://www.lawcapital.net> (last visited Sept. 25, 2006).

the future value of your pending personal injury case. Our costs usually range between 2 to 4 percent with an application fee.¹⁷⁶

But “2 to 4 percent” a what? A month? Simple or compounded? LawCash does not say. And the practice of competitors suggests the risk is low.

In 2001 Roy Simon declared that the “solution” to the danger that “sophisticated buyers of claims [would] pay too little to people who don’t know the value of their claims . . . lies in the marketplace. Once syndication becomes a common business, claim holders can shop around and compare prices, selling to the highest bidder.”¹⁷⁷ The following year Susan Martin asserted that “there are now so many companies in the litigation financing business that they will be forced by the market into more competitive pricing.”¹⁷⁸ Like so many deductions from the axiom of market rationality, these predictions are far too optimistic.

E. Financing Lawyers

There is a related, but distinct, market for litigation loans to lawyers who are more sophisticated than clients in purchasing financial services, have more alternative sources of capital, and suffer less urgent need.¹⁷⁹ Counsel Financial Services, which proclaims itself “the largest provider of attorney funding in the United States,” offers loans up to \$15 million.¹⁸⁰ They aggressively tout two years of interest-only payments and assure lawyers that “loan interest is 100% tax deductible” and “in most states, financing charges on behalf of client expenses can be charged back to the client.”¹⁸¹ But they scrupulously avoid disclosing their interest rates.¹⁸² Advocate Capital is even more evasive:

What does it cost?

If implemented properly, the cost to your firm is next to nothing. In addition to our rates being very reasonable, our services enable your firm to get reimbursed from your cases for 100% of the cost of our services. So the net cost to your firm is close to zero.

Our rates float with the Prime Lending Rate as published in the Wall Street Journal. Although we don’t publish our pricing online, you can

176. Law Cash, <http://www.lawcash.net/faq/faq.html> (last visited Sept. 25, 2006).

177. Simon, *supra* note 113, at 11–12.

178. Martin, *supra* note 131, at 101.

179. But legal professions have denied themselves some sources of financing by prohibiting lawyers from forming partnerships with non-lawyers or selling them equity interests in their firms.

180. Counselfin, <http://www.counselfin.com> (last visited Sept. 25, 2006).

181. *See, e.g.*, Chittenden v. State Farm Mut. Auto. Ins. Co., 788 So.2d 1140 (La. 2001); Ohio Bd. Com. Griev. Disp., Ohio Sup. Ct Ethics Op. 2001-3 (2001); Ariz. State Bar Comm. on Rules of Prof. Conduct, Op. 2001-07 (2001).

182. The same is true for Law Finance Group. Law Finance, Firm Finance Pricing, <http://www.lawfinance.com/firm-pricing.html> (last visited Sept. 25, 2006).

click here to request a detailed proposal for your firm including exact costs.¹⁸³

“[F]loat with the Prime” (aside from evoking Muhammad Ali) suggests that the two are about the same, but of course Advocate Capital’s rates are much higher; they just *fluctuate* with the Prime. Oasis Legal Finance writes opaquely of “negotiable terms.” But CEO Gary Chodes (a former plaintiff’s lawyer) said “we’re priced closer to venture capital than a bank loan.”¹⁸⁴ A solo practitioner who won a \$152 million verdict on behalf of 600 minority police officers suing Los Angeles County for discrimination was paying Oasis thirty-seven percent annually on her million dollar loan while she resisted the appeal. Even capped at three years, this was \$1.21 million in interest for a \$1 million dollar loan. Loans to lawyers are big business: three lenders claim to have advanced at least \$100 million each.¹⁸⁵ And since, as the lenders boast, it is clients who ultimately foot the bill, some will end up paying extortionate interest rates for their own loans *and* their lawyers’ loans (as well as their lawyers’ contingent fees, inflated by any referral fees). As in “Bleak House,” lawyers and lenders may consume the entire award.¹⁸⁶

F. *Brokering Finance*

Could brokers reduce some of these market imperfections?¹⁸⁷ This is a workable solution only if market forced brokers to demonstrate their independence from lenders. That several lenders actively encourage brokers and offer advice about how to become one¹⁸⁸ suggests the potential for capture (as well as for the generation of more business). Oasis Legal Finance, for instance, claims to pay “generously” — “the highest commissions in the industry” — for referrals of both plaintiffs and lawyers needing litigation loans.¹⁸⁹ For Oasis Legal Finance, the “numbers tell the story”:

183. Advocate Capital, <http://www.advocatecapital.com/about.html> (last visited Sept. 25, 2006).

184. Oasis Legal, Cash Loan Information from Oasis Legal, http://www.oasislegal.com/attorney_limitedcourse.php (last visited Sept. 25, 2006).

185. Alison Frankel, *Helping Underfunded Plaintiff’s Lawyers — at a Price*, AM. LAW, Feb. 13, 2006, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1139565913200>.

186. A client who had borrowed \$200,000 in exchange for a promise to repay \$600,000 rejected a \$1 million settlement because it was insufficient to repay the loan and the contingent fee. When the case was lost at trial the lawyer sued for tortious interference with contract, fraud, and unfair trade practices. A federal court denied a motion to dismiss. *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, 162 F. Supp. 2d 448 (W.D.N.C. 2001).

187. Simon, *supra* note 114, at 10.

188. *See, e.g.*, National Lawsuit Funding, <http://www.nationallawsuitfunding.com> (last visited Sept. 25, 2006); Case Funding, <http://www.casefunding.com> (last visited Sept. 25, 2006).

189. Oasis Legal, Settlement Loan Funding is Available From Oasis Legal Finance, http://www.oasislegal.com/referral_opportunities.php (last visited Sept. 25, 2006).

Nationwide, less than 1,000 brokers make referrals for settlement loans.

There are 10,000,000 lawsuits in the legal system at any one time. 30% of the cases either don't qualify or have been resolved.

There are 3,250,000 new civil lawsuits each year, which keeps the number at approximately 10,000,000.

An overwhelming 90% of all qualified lawsuit plaintiffs have not been approached about a settlement loan.

That means the market has 9,000,000 plaintiffs needing to be contacted regarding a settlement loan.

Are brokers likely to warn tort victims that litigation loans are extraordinarily expensive — thereby jeopardizing their chance for a “generous” commission? Will they even be motivated to steer clients to the cheapest lender?¹⁹⁰

G. *A Claims Market*

Sale of part or all of the claim would give clients the discounted present value of the future probability of recovery.¹⁹¹ Lawyers would be the likeliest buyers. But most jurisdictions prohibit the sale or assignment of personal injury claims as well as lawyer solicitation.¹⁹² In the early twentieth century, Texas allowed such transactions, and even permitted non-lawyer solicitation. For at least two decades after World War I, Frank McCloskey bought tort actions, at one point owning sixty percent of all pending claims against the San Antonio Traction Company (the local streetcar).¹⁹³ But this would be legally impossible today. Even if it were allowed, lenders, investors, and buyers would face problems in evaluating the worth of claims (which victims are interested in exaggerating). And all would confront the moral hazard of victims losing interest in pursuing their claims vigorously (a risk that could only be reduced, not eliminated, by fiduciary duties and a mandatory residual financial interest). Without an effective national registration scheme, there could also be confusion about title and the danger of victims transacting with multiple lenders and buyers.

Could the internet help rationalize market relations between clients and lawyers? Martindale-Hubbell, for example, has created a site where clients with questions about their potential claims can describe their accidents and injuries.¹⁹⁴

190. *Id.*

191. See Simon, *supra* note 141, at 10. See generally Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435 (1995); Cox, *supra* note 136; Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

192. However, they can purchase accounts receivable and sue on them. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-416 (2000).

193. Shukaitis, *supra* note 191, at 342-43.

194. Community Lawyers, <http://communitylawyers.com/messageboards> (last visited Sept. 25, 2006).

But the replies come from laypeople — indeed, the same few individuals, apparently with nothing better to do than surf the site — and are generally unhelpful. Martindale also hosts chat rooms: laypeople can submit questions in advance and get a lawyer's response. But personal injuries are discussed only every two weeks, and many victims will not wait that long for an initial response.¹⁹⁵ Could lawyers post descriptions of past cases and bid for new ones on the internet? This would most likely be impossible since there would be far too many serious problems of confidentiality, accuracy, and reliability. Somehow I don't think plaintiffs and their lawyers are ready for e-Bay.

V. WHO'S RESPONSIBLE?

Tort victims encounter many barriers to recovery. Lawyers should not be blamed for some: lay ignorance; the widespread cultural stigma on claiming; both realistic and exaggerated fear of retaliation by the defendant (employer, landlord, relative); misrepresentations by for-profit referral services; litigation lenders' anti-competitive practices.¹⁹⁶ But though individual plaintiffs' lawyers energetically champion their clients' interests, the plaintiffs' bar and other lawyer collectivities bear considerable responsibility for making it difficult and expensive for victims to claim.

Plaintiffs face an informational disadvantage when pursuing their personal injury claims. They lack sufficient information about the quality of lawyers and are ill-served by referral schemes. The legal profession erects, defends, and raises entry barriers without any evidence that these are essential to ensure minimum quality or that the incremental quality gains exceed the access losses caused by price increases. Furthermore, the legal profession prevents non-lawyers from advising and assisting victims, prosecuting the few foolish enough to defy the ban. Lawyers discourage second opinions. Generalist lawyers resist specialist certification (or make it so easy to obtain as to render it meaningless). No jurisdiction requires specialization. Lawyer referral schemes do not discriminate in terms of quality. The legal profession prohibits lawyers from paying laypersons to refer cases (ambulance chasing) but allows lawyers to pay other lawyers for doing so; the unjustified one-third to one-half referral fee becomes another justification for the one-third to one-half contingent fee. The profession forbids solicitation, a mechanism far more efficient and effective than advertising in dealing with imperfect information.

The legal profession imposes a wide variety of restrictive practices, all of which inflate prices for plaintiffs and/or otherwise disadvantage them. It prohibits victims from selling their causes of action and lawyers from advancing

195. Community Lawyers, <http://communitylawyers.com/chat> (last visited Sept. 25, 2006).

196. See generally HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999) (analyzing how people decide to claim); Engel, *supra* note 8.

money to clients, thereby preempting a source of competition that might drive down the extortionate interest rates charged by litigation lenders. It forbids non-lawyers to invest in firms, denying them a source of capital. Bar rules limit advertising of prices and results, which is part of the reason why the plaintiffs' bar does not compete in the percentage charged for contingent fees. These fees are higher than hourly rates, sometimes obscenely so. Although the plaintiffs' bar justifies the premium by reference to the risk of loss, most lawyers take few if any losing cases. Personal injuries are excluded from legal aid and prepaid legal services to ensure that plaintiffs' lawyers will continue to receive their contingent fees. The legal profession subverted the workers' compensation goal of making lawyers superfluous and successfully resisted or effectively marginalized no-fault automobile accident schemes.

Why do victims tolerate this? There are several causes, each of which would be difficult to overcome. The first is the collective action problem. Before an injury occurs, the prospect of injury is too incalculable and inchoate to motivate anticipatory measures. Even after it happens, victims are dispersed, anonymous strangers. Individually they lack economic and political clout, and the costs of organizing them are enormous. Second, victims are extraordinarily vulnerable and needy. An accident, by definition, is unplanned. Its consequences are traumatic: physically, financially, relationally, and emotionally. For most victims, it is a unique experience. Even if they know other accident victims, those other accident victims also can draw on only one incident. Third, tort damages are found money. (In this they resemble inheritance, another situation where lawyers engage in shameless fee-gouging, and the sale of the marital residence following divorce.) Most Americans have no significant savings (other than the illiquid equity in their homes, which many have reencumbered to refinance their growing credit card debt). Tort involuntarily converts their human capital into damages. Victims need to replace their lost earnings *now* (and hence are willing to pay exorbitant interest rates for litigation loans). They need medical care *now* (rendering the 45.8 million without insurance dependent on health care providers willing to accept a lien on future recovery). But pain and suffering is gravy. (Indeed, most victims only want a token payment that acknowledges their loss — the Roman law “solatium.”)¹⁹⁷ So victims passively let lawyers take most of it. (Indeed, lawyers' fees are one of the many unpersuasive rationalizations for pain and suffering damages.)

What is to be done? The plaintiffs' bar has a huge stake in preserving the status quo. Victims cannot organize themselves into a force for change. Some politicians have been happy to take money from the “tort reform” lobby (corporations, insurers, doctors), others from the plaintiffs' bar, but neither interest group represents victims. It would take a visionary to see and appeal to the constitu-

197. ROGER BRYANT HUNTING & GLORIA S. NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS 41-42, 91 (1962).

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ency of past and future personal injury victims (and their families and acquaintances) who want to see tort law continue to play its essential roles of compensation, deterrence and punishment, without paying lawyers excessive fees for tasks that laypeople could perform far more cheaply and probably better.