ARTICLES

ATTORNEY ADVERTISING AND THE CONTINGENCY FEE COST PARADOX

Nora Freeman Engstrom*

It has long been taken as gospel that attorney advertising drives down the cost of legal services. The Supreme Court assumed it when first permitting attorney advertising in the landmark First Amendment case, Bates v. State Bar of Arizona. *And, in the decades following* Bates*, courts, commentators, the ABA, and the FTC have followed suit, frequently touting advertising's ability to cut consumer costs. The price effect of attorney advertising is thus both seemingly settled and also deeply embedded in its judicial justification.*

But there is a wrinkle. Though it appears advertising did drive down prices for routine legal services in the years immediately following Bates*, in the intervening decades, there has been a decided, yet heretofore unexplored, shift. Contemporary attorney advertising is now mostly the province of the personal injury bar. Yet there is scant evidence that attorney advertising reduces the contingency fees personal injury lawyers charge. To the contrary, the best, most sophisticated, most comprehensive study of legal fees and attorney advertising ever conducted found that, unlike for most basic legal services (e.g., wills, personal bankruptcies, uncontested divorces), those who advertised personal injury legal services charged higher prices than their non-advertising counterparts. Other evidence likewise shows contingency fees have not dropped, even while personal injury lawyers' ad expenditures have soared.*

This fact has been all but ignored, though it is of enormous consequence for both the legality of attorney advertising and the delivery of legal services more generally. This Article aims to reopen and reorient the "settled" attorney adver-

* Associate Professor, Stanford Law School. My thanks to Richard Abel, Michael Asimow, Lester Brickman, Steven R. Cox, Andrew F. Daughety, David Freeman Engstrom, John P. Freeman, Lawrence M. Friedman, Gillian Hadfield, C. Scott Hemphill, Daniel Ho, Herbert Kritzer, Jonathan Levin, Stewart Macaulay, Van O'Steen, Michael P. Stone, Robert Rabin, Deborah Rhode, Norman Spaulding, John Fabian Witt, and Eyal Zamir for helpful comments on previous drafts. Thanks as well to the participants at the Stanford Law School faculty workshop, Stanford Law School Center on the Legal Profession work-in-progress workshop, and the International Legal Ethics Conference for helpful discussion. I am finally indebted to Sara Abarbanel, Agnes Chong, Laura Mathe, Rachael Samberg, and Laurel Schroeder for exceptional research assistance. All errors are mine.

tising debate, in light of the particularities of personal injury practice and the changing nature of the market for personal legal services in the United States.

INTRODUCTION

On June 27, 1977, in the landmark case *Bates v. State Bar of Arizona*, the Supreme Court invalidated state bans on attorney advertising as incompatible with the First Amendment.[1] In so doing, the Court made a critical judgment about attorney advertising's effect on attorney price. Responding to the Arizona State Bar's assertion that legal advertising would drive up the cost of legal services, the Court declared: "It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer."[2]

1. 433 U.S. 350, 379 (1977).
2. *Id.* at 377.

Prominent commentators were bolder in their predictions. Then-Solicitor General Robert H. Bork penned an amicus brief in the *Bates* case which bluntly proclaimed: "Prohibitions upon advertising indirectly increase prices . . . ."[3] In an influential article published six years after the *Bates* decision, Geoffrey Hazard and his coauthors theorized: "For the consumer of standardizable services, the probable result of permitting lawyers to advertise will be lower priced services of better quality."[4] And a few years after that, in a now-frequently-cited dissent, Justice O'Connor referenced the Hazard piece and wrote that "[t]he best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles."[5] "Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers," she continued, "presumably reduce the efficiency of the mechanisms of supply and demand," permitting suppliers to "maintain a price/quality ratio . . . that is higher than would otherwise prevail."[6]

The theory that attorney advertising would reduce the cost of basic legal services made sense. And, as we will see, it was well supported. Throughout the 1970s and 1980s, academics published a host of studies confirming advertising's power to reduce consumer prices for a range of everyday items, from eyeglasses to gasoline. Moreover, within a few years of the *Bates* decision, prominent economists from the Federal Trade Commission (FTC) embarked on an ambitious effort to test advertising's price power, particularly in the legal services marketplace. After compiling attorney price information from approximately 3200 lawyers in seventeen cities, what these economists found was as promising as it was unsurprising: "Advertising of legal services, as is generally true for goods and other services, tends to lead to lower prices . . . ."[7] Further-

---

3. Brief for the United States as Amicus Curiae, *Bates*, 433 U.S. 350 (No. 76-316), 1976 WL 178669, at *12. The Solicitor General's brief also included the following testimony by economist Steven R. Cox. "Q: Is it fair to conclude from your examination of these studies and from other experiments that you have done that a ban on price advertising in general marketing tends to drive up prices?" In response, Cox accused the questioner of being "very cautious" and offered what he characterized as an "even stronger" conclusion: "The answer definitely is yes. . . . Yes, price advertising is pro-competitive and will decrease prices, and conversely, a ban on price advertising will be anticompetitive and will increase prices. There are very few areas where they are going to get that kind of agreement among economists, but here's one of them." *Id.* at *12 n.14.

4. Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1109 (1983). In making this assertion, Hazard and his coauthors were in good company. *See, e.g.*, Albert J. Hudec & Michael J. Trebilcock, *Lawyer Advertising and the Supply of Information in the Market for Legal Services*, 20 U.W. ONT. L. REV. 53, 75 (1982); Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUND. RES. J. 179, 182.

5. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 488 (1988) (O'Connor, J., dissenting).

6. *Id.*

7. William W. Jacobs et al., CLEVELAND REG'L OFFICE & BUREAU OF ECON., FTC, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS

more, "attorneys who advertised a specific service tended to provide that service to the public at a lower price than . . . those attorneys who did not advertise."[8] The study's findings, in fact, were splashed across national newspapers and sent to state bar associations, and the authors explicitly presented their research as providing "convincing support for the proposition that greater flexibility to engage in . . . advertising will be associated with lower prices for consumers of legal services."[9]

In the ensuing decades, the FTC's report and a follow-on study utilizing the same data have taken on a kind of talismanic significance. "Advertising by lawyers encourages competition, which results in lower prices," intones one recent—and representative—article.[10] Or, as Ronald Rotunda recently wrote:

ON TRUTHFUL ADVERTISING, at ix (Nov. 1984) [hereinafter FTC STUDY]. For more on the FTC study's methodology, see *infra* note 176.

8. *Id.* at 125.

9. *Id.* at 126. For the fact newspapers trumpeted the study's finding as providing proof that lawyer advertising lowered consumer prices, see, for example, Philip Hager, *Lawyer Ads Lower Prices, FTC Finds*, WASH. POST, Dec. 9, 1984, at F3; Linda Greenhouse, *Business and the Law: Competition and Lawyers*, N.Y. TIMES, Dec. 25, 1984, at 42; and Peter Mancusi, *FTC Study Group Finds Fees Lower Where Lawyers Advertise*, BOS. GLOBE, Dec. 7, 1984, at 8. For the fact the study was transmitted to state bars "for consideration in setting advertising policies," see Ann McDaniel, *Lawyer Ads: FTC Staff Says They Cut Fees*, A.B.A. J., Feb. 1985, at 35, 35.

10. Michael D. Johnston, *Notes and Comments—The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 200 (2007); *see also, e.g.*, Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 222 (2002) ("Advertising has been found to limit legal fees by creating a competitive market."); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1437 & n.155 (1999) (contending that lawyer advertising "tends to drive down the price of legal services"); Christopher M. Mensoian, Essay, Bates*, the* Model Rules*, and Attorney Advertising*, 32 MCGEORGE L. REV. 77, 81 (2000) (suggesting that "the public receives a direct economic benefit from attorney advertising"); Van O'Steen, Bates v. State Bar of Arizona*: The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245, 250-51 (2005) ("Since *Bates*, at least four studies have been conducted . . . intended to measure the effect of advertising on the pricing of legal services. All came to the same conclusion. Competition among lawyers, in the form of commercial advertising, has resulted in lower prices to consumers. . . . [T]he debate on this question appears settled." (footnote omitted)); Steven Wechsler, *Direct Mail Solicitation by Attorneys: A Pragmatic Approach to a New Rule*, 39 SYRACUSE L. REV. 973, 988 (1988) ("As the Supreme Court predicted in *Bates*, lawyers' advertising increases competition and reduces prices." (footnote omitted)); Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 508 (1999) (discussing the FTC, *supra* note 7, and the Muris-McChesney, *infra* note 105, studies and concluding "these studies demonstrate that permitting attorney advertising does in fact increase consumer welfare" (internal quotation marks omitted)); Israel Dahan, Comment, *Attorney Direct-Mail Solicitation Revisited in* Florida Bar v. Went For It, Inc.*: A Step Too Far*, 4 J.L. & POL'Y 611, 655 (1996) ("Attorney advertising . . . reduces legal fees . . . ."); *States Attack Lawyers' Ads, and Public Is the Loser*, USA TODAY, Nov. 2, 1995, at 10A ("The facts are clear: Legal services cost less where advertising promotes competition.").

> Some people incorrectly assume that legal advertising must raise the costs to the consumer, because someone must pay for the cost of the advertising. But we now know that advertising *lowers* prices . . . . This unhappy fact may explain why some lawyers have opposed televised lawyer commercials. Television commercials lead to price wars, and no consumer of legal services has ever been wounded in a price war.[11]

Consumer groups have repeated such claims—and their consistent and vocal support for attorney advertising has largely hinged on their belief that lawyer ads stimulate price competition, lower fees, and thus expand legal access.[12] The FTC has consistently, and forcefully, said as much.[13] The American Bar Association (ABA), when liberalizing the Model Code's relatively conservative marketing constraints, explicitly credited "[e]mpirical studies of lawyer advertising" that "indicate that it reduces cost and increases consumer access."[14] Litigants have pointed to advertising's price power when successfully challenging state advertising restrictions.[15] And courts, not surprisingly, have accepted—and acted upon—advertising's competitive effect, relaxing restraints on attorney advertising because, as the Supreme Court of New Jersey put it, it is in the public interest to provide legal services at lower cost, and "attorney advertising is one of the best ways to foster price competition."[16]

But it is not that simple. Typically ignored in all this commentary is the fact that *Bates* itself involved a particular *type* of legal service provider. It involved a legal clinic—a law firm that handled routine matters, such as wills, uncontested divorces, name changes, and personal bankruptcies—for flat,

11. Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 57 (1999).

12. *See, e.g.*, Ronaleen R. Roha, *Personal Law: A Decade of Lawyer Ads*, CHANGING TIMES, Oct. 1987, at 120 (stating that attorney advertising "fosters lower fees and brings legal aid within reach of those who might not otherwise get help").

13. STAFF OF THE FEDERAL TRADE COMMISSION, SUBMISSION TO THE AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING 15 (1994) ("Truthful, non-deceptive advertising promotes competition and consumer choice. This is as true of advertising for professional services as it is of advertising for other services and products."); Letter from Jeffrey I. Zuckerman, Dir., Bureau of Competition, FTC, to the ABA House of Delegates 1-2 (Feb. 6, 1987), *available at* http://www.ftc.gov/opp/advocacy/1987/P874634.pdf ("Empirical evidence suggests that the removal of restrictions on the dissemination of truthful information about lawyers and legal services will tend to enhance competition and lower prices.").

14. MODEL RULES OF PROF'L CONDUCT R. 7.1, at 187 (Proposed Final Draft 1981) (citing Muris & McChesney, *supra* note 4, and LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1980)).

15. For example, the petitioner in *Shapero v. Kentucky Bar Association*, who convinced the Supreme Court to invalidate Kentucky's ban on direct mail advertisements, devoted an entire section of his Supreme Court brief to the argument "Targeted Direct Mail Advertising Reduces Prices to Consumers," and even went so far as to assert that "especially for complex legal services, increasing use of direct mail advertising reduces consumer costs." Brief for Petitioner, Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (No. 87-16), 1987 WL 880491, at *41-42.

16. *In re* Felmeister & Isaacs, 518 A.2d 188, 192-93 (N.J. 1986).

transparent, and reasonable rates.[17] This was not coincidental. In the late 1970s and early 1980s, as we will see, low-cost legal clinics, such as Arizona's Bates & O'Steen, Cleveland's Hyatt Legal Services, California's Jacoby & Meyers, and Baltimore's Cawley & Schmidt were the biggest advertisers, *by far*.[18] In advertising's absence, clinics, with their razor-thin profit margins, had trouble generating the volume of clients necessary to stay afloat. After the *Bates* decision, however, legal clinics bloomed, and as they prospered, the price for routine legal services apparently plunged, just as advertising's advocates had hoped and the era's economic theory would predict.[19]

But some thirty-five years have now elapsed since the *Bates* decision. And in this time, the identity of attorney advertisers has changed considerably. Legal clinics, as they existed in the late 1970s and early 1980s, are history. Starting in the early 1990s, as we will see, most were downsized, dismantled, or so radically reorganized as to render them unrecognizable.[20] So who has taken clinics' place as the most aggressive attorney advertisers? That distinction, without question, belongs to the personal injury (PI) bar. Most personal injury attorneys, it appears, advertise,[21] and most of the biggest advertisers are personal injury lawyers. Indeed, PI lawyers are, and have long been, the dominant TV advertisers.[22] They are, and have long been, the dominant Yellow Pages

17. Brief for the Appellants, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (No. 76-316), 1976 WL 181234, at *5-8 (describing the Bates & O'Steen clinic). For more on clinics' development, growth, and operation, see Parts I and II, below.

18. *See infra* note 117.

19. Samuel S. Smith, *Lawyer Advertising—It's Here to Stay*, 59 FLA. B.J. 9, 9 (1985) (reporting that, eight years after the *Bates* decision, "lawyer advertising has . . . reduced the cost of routine legal services"); Stuart Auerbach, *The Case for Lawyers' Advertising: It Wins Clients*, WASH. POST, June 20, 1978, at A1 ("[T]here are strong indications from around the country that lawyer advertising is lowering the cost of everyday legal services—uncontested divorces, simple wills and personal bankruptcy cases, for example—as consumer advocates had hoped."); *see also infra* notes 101-108 and accompanying text.

20. For a discussion of clinics' demise, see Part II.B, below.

21. *See* Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1789 tbl.4 (2002) (providing data from Texas). Personal injury specialists, as compared to general practitioners, also appear to obtain a higher proportion of clients from advertising. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 48 tbl.3.1, 55 (2004).

22. In 2006, for instance, twenty-five of the top twenty-nine TV attorney advertisers practiced some personal injury law. *See* KANTAR MEDIA, LEGAL TOP 30 (as of Mar. 11, 2010) (on file with the author); *see also* ABA COMM'N ON ADVER., LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 130 (1995) [hereinafter ABA CROSSROADS] ("Most television advertisements have been for personal injury or other contingency fee-based services."); ABA COMM'N ON ADVER., YELLOW PAGES LAWYER ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS 81 n.4.3 (1992) [hereinafter ABA YELLOW PAGES] ("[O]nly two of the 20 top television law firms in 1990 did not concentrate on personal injury.").

advertisers.[23] And, according to the *New York Times*, of the top ten spenders on legal advertising (of all types), *all* are personal injury or plaintiff-related law firms.[24]

If advertising reduces fees (as many studies have found and most courts, consumer groups, the FTC, the ABA, and academics assume), and if personal injury lawyers are far and away the most aggressive advertisers (as data suggest), one might infer there's been a steep reduction in plaintiffs' lawyers' fees in recent years. But all available evidence is to the contrary. Indeed, evidence suggests that, over the past three decades, contingency fees, on a percentage basis, have not dropped, even while ad expenditures have soared—and tort recoveries have risen.[25] And the FTC study cited above, which is the best, most comprehensive, most sophisticated study of advertising and attorney fees ever conducted in the United States, made a strange—yet almost entirely overlooked—discovery. While it found that "attorneys who advertised a specific service tended to provide that service to the public at a lower price" than those attorneys who did not advertise,[26] it *also* found:

> The one area in which the results were different was personal injury. In the three cities with statistically significant results . . . , attorneys who advertised personal injury services appeared to charge about a 3 percent higher contingent fee if the case was settled before trial than those who did not advertise personal injury services.[27]

Advertising personal injury lawyers thus seem to buck most economic predictions. It is an anomaly that has escaped attention in the scholarly literature.[28]

---

23. I have reviewed attorney Yellow Pages ads from thirteen cities, with volumes dated March 2007 through December 2008. Of the 957 quarter-page or larger attorney ads in the sample, 518 (54%) advertised some type of personal injury practice. Of the 406 full-page ads in the sample, 283 (70%) advertised some kind of personal injury practice. For more on the contours of this review, see *infra* note 254. *See also* ABA YELLOW PAGES, *supra* note 22, at 74 (finding, in a 1992 ABA study of Yellow Pages ads in six midsize cities, that the majority of advertisers (56%) concentrated on a "contingency fee field of practice").

24. Maria Aspan, *Getting Law Firms to Like Commercials*, N.Y. TIMES, June 19, 2007, at C5.

25. *See infra* notes 188, 245.

26. FTC STUDY, *supra* note 7, at 125.

27. *Id.*

28. One notable exception is Stewart Macaulay's excellent but unpublished paper, *Lawyer Advertising: "Yes, But . . ."* which seized on this finding. Stewart Macaulay, *Lawyer Advertising: "Yes, But . . ."* 38-39 (Univ. Wis. Inst. for Legal Studies, Working Paper No. 2, 1986). Terry Calvani and his coauthors also mention the "reverse effect" for personal injury lawyers but speculate that "the existence of advertising may lower prices, even if particular firms that advertise can charge relatively higher prices." Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 786 (1988); *see also* Daniel T. Graham, Comment, *Professional Responsibility—An Economic Analysis of* Shapero v. Kentucky Bar Association*: Is There Any Possibility of Overreaching in a Targeted, Direct Mail Solicitation?*, 14 J. CORP. L. 809, 824 (1989) (flagging the anomaly and asserting: "[T]he almost uniformly accepted position that advertising tends to lower prices by stimulating competition may not hold true for advertising of all types of legal services.").

And it is somewhat tricky to explain. But it is an anomaly that cries out for analysis and carries with it enormous consequences, for both the legality of attorney advertising and the delivery of legal services more generally.

This Article proceeds in five Parts. Drawing on scores of contemporaneous press and journal accounts, Parts I and II are largely historical. Specifically, Part I examines the socio-legal template on which the Supreme Court issued its opinion and emphasizes that *Bates* was a *legal clinic case*. *Bates* came along at a time when middle-class Americans' unmet legal need was fast becoming a pressing political issue. Legal clinics promised to expand legal access. And, by abolishing advertising restrictions, the Court in *Bates* sought to remove barriers to legal clinics' growth and expansion. Part II then considers the immediate post-*Bates* world, by studying first the rapid rise of legal clinics—"a new breed of lawyer born of advertisements"[29]—and then clinics' disintegration and personal injury advertising lawyers' unexpected ascent. Parts I and II trace the rise and fall of legal clinics because one cannot understand the price predictions made in *Bates*—and how contemporary personal injury advertising challenges those predictions—without understanding clinics' centrality.

After putting *Bates*, and legal advertising more generally, in context, Parts III and IV step back and shift focus from the historical to the theoretical and empirical. Part III recites the many reasons why attorney advertising was *expected* to reduce prices, and it reviews the many studies, involving a wide variety of products and services, which confirmed the theory worked. Part IV then puts the pieces together to reveal the contingency fee price paradox: though there is ample reason to believe advertising reduces the cost of *certain* legal services, there is scant evidence that it reduces contingency fees. To the contrary, though data are partial and fragmentary, it appears that PI advertisers might charge higher contingency fees, on a percentage basis, than their non-advertising counterparts.

Part V asks why. Drawing on research from the fields of cognitive psychology and behavioral economics and extrapolating from a recent study concerning the price effect of physician advertising, Part V considers less and more plausible explanations for why these advertisers' practices might not mesh with advertising predictions—while also contributing new insights to the long-observed but little-understood stickiness of contingency fee pricing in the personal injury marketplace. Finally, the Conclusion identifies four implications of the above analysis—and charts a possible path forward.

As we shall see, attorney advertising, born of *Bates*, is now a roughly two-billion-dollar-a-year business.[30] Indeed, I submit that *Bates* and its progeny

---

29. Steven V. Roberts, *A New Breed of Lawyer Born of Advertisements*, N.Y. TIMES, Nov. 26, 1978, at 26 (capitalization altered).

30. Data suggest that legal service advertisers spent $574 million on TV spot advertisements in 2011, outstripping spending on spot ads for toiletries, cosmetics, beverages, and department stores *combined*. *See* KANTAR MEDIA, AD SPENDING (FULL YEAR 2010-11)

have had a bigger practical impact on contemporary legal practice—and thus on the transmission of legal services—than any other line of cases in American history.[31] This jurisprudence, which has tended to relax advertising restrictions, is, as the Supreme Court has acknowledged, "based in part on certain empirical assumptions as to the benefits of advertising."[32] This Article challenges the empirical foundation on which the doctrine of attorney advertising now so firmly rests.

I. THE PRE-*BATES* WORLD

To understand the *Bates* decision and the price predictions made therein—and thereafter—one must understand the socio-legal template on which the opinion was issued. That, in turn, requires some understanding of the pre-*Bates* restrictions on attorney advertising and also an understanding of how the Bar's advertising restrictions were, by the mid-1970s, bumping up against broader societal and political forces agitating for change.

A. *Unmet Client Need*

The 1960s and 1970s marked a time when a number of substantive legal rights were created, and it also marked a time when there was sustained attention on the *vindication* of those rights—how to make counsel more readily available.[33] A watershed moment came in 1963, when the Supreme Court ex-

---

(2012), *available at* http://www.tvb.org/trends/898295. Yellow Pages spending likely approaches $1 billion. *See* Douglas S. Malan, *In Search of a Perfect 10*, CONN. L. TRIB. (July 21, 2008), http://www.ctlawtribune.com/PubArticleCT.jsp?id=1202557042529 (subscription required) (quoting Avvo CEO Mark Britton as stating that lawyers spent $1.3 billion to advertise in the Yellow Pages in 2007). And lawyers appear to spend more than $50 million annually to secure Google keywords. Alison Frankel, *Plaintiffs' Lawyers Spend Millions in Online Ads. Should We Care?*, THOMSON REUTERS (Feb. 29, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=40874. So, if one just counts spot TV, Yellow Pages, and Google assists, a conservative estimate would be that attorneys spent more than $1.5 billion per year on promotional activity. I estimate the true total is closer to $2 billion because, to that $1.5 billion, one also needs to tally expenditures for radio ads, newspaper ads, magazine ads, billboards, direct mailings, brochures, and all the costs associated with developing and maintaining each firm's marketing strategy and Internet presence.

31. *See* Ruth Marcus, *Practicing Law in the Advertising Age: High Court Ruling 10 Years Ago Freeing Attorneys to Market Services Has Broad Impact*, WASH. POST, June 30, 1987, at A6 (quoting New York University School of Law Professor Stephen Gillers as stating that *Bates* is "probably the single most important Supreme Court opinion affecting the structure of the practice of law and the delivery of legal services").

32. *In re* R.M.J., 455 U.S. 191, 200 n.11 (1982) (discussing the justification for the commercial speech doctrine).

33. *See* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1181 (1972) ("In recent years there has been a growing awareness of the importance of access to the courts in a functioning democracy.").

tended a right to counsel to indigent criminal defendants in *Gideon v. Wainwright*.[34] Then, in 1966, Rule 23 was amended and liberalized to make the class action device more readily available.[35] In 1971, the Supreme Court ruled in *Boddie v. Connecticut* that access to the courts could not be denied to litigants who could not afford court fees.[36] In 1972, in *Argersinger v. Hamlin*, the Court extended the *Gideon* rule to all facing incarceration.[37] And, in 1974, Congress formed the Legal Services Corporation (LSC), which was charged with providing "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[38]

As a result of the Court's opinions and the LSC's formation, some commentators of the era suggested (rightly or wrongly) that the legal needs of the poor were, at least momentarily, satisfied.[39] Concern thus shifted to the legal needs of the middle class, the group ABA President-Elect Robert Meserve had taken to referring to as "our forgotten clientele."[40]

The focus on middle-income clients was fueled by contemporaneous research of the day. In 1971, the ABA House of Delegates passed a resolution directing that a nationwide survey be conducted "to ascertain the extent to which the public recognizes the need for and uses legal services."[41] The ultimate survey, conducted by Barbara Curran from October 1973 to March 1974, indicated

34. 372 U.S. 335 (1963). Responding to *Gideon*, the federal government passed the Criminal Justice Act of 1964, which provided funds for indigent criminal defendants in federal proceedings. *See* Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2011)). Every state also established systems to provide counsel to indigent criminal defendants. Gerry Singsen, *New Providers in the Marketplace: Prepaid, Mass Market and Clinical Legal Services*, at II-6 (Harvard Law Sch. Program on the Legal Profession, Working Paper, 1984) (on file with author).

35. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10-15 (2000).

36. 401 U.S. 371, 380 (1971) (holding that cost requirements "may offend due process" if they "operate[] to foreclose a particular party's opportunity to be heard").

37. 407 U.S. 25, 37 (1972).

38. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, sec. 2, § 1001(2), 88 Stat. 378, 378 (codified as amended at 42 U.S.C. § 2996); *see also* Thomas Ehrlich, *With Justice for All**, HUM. RTS., May 1978, at 42, 43.

39. *See, e.g.*, John A. Jenkins, *FutureLaw: Lawyers Confront the 21st Century*, WASH. ST. B. NEWS, Jan. 1980, at 16, 21 ("[M]ost observers do not believe there is a major problem in the delivery of legal services to the poor. Particularly where criminal matters are concerned, their needs are being met.").

40. Robert W. Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A. J. 1092, 1092 (1971); *see also* ABA CROSSROADS, *supra* note 22, at 36 ("In the years immediately prior to the *Bates* decision . . . [i]t became increasingly apparent that there was a crisis in the ability of the public, particularly the middle class, to gain access to lawyers and legal services."); Benjamin N. Schoenfeld, *Philadelphia's New Pre-Paid Legal Insurance Program*, 46 PA. B. ASS'N Q. 211, 211 (1975) ("While lawyers accommodate the needs of the affluent and while government programs, public defender offices and various legal services serve the very poor, those of moderate means have been effectively priced out of legal services." (footnote omitted)).

41. ABA, ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 143-44 (1972).

some incongruity between legal need and legal use. In general, less than a third of respondents who had recently experienced a legal problem consulted a lawyer.[42] And, for some types of problems (for example, issues of job discrimination, consumer matters, and wage collection), the percentage of problems taken to lawyers was lower still.[43]

In considering *why* some individuals' legal needs weren't being met, there were a few obvious culprits. Part of the problem, commentators of the era agreed, was minimum fee schedules. These schedules set minimum fees for particular legal services and, in so doing, artificially inflated service cost—and dampened client demand.[44] Made popular during the 1950s, minimum fee schedules had, by the early 1970s, become fairly ubiquitous; as of 1973, they were utilized by thirty-four states, more than 700 local bar associations, and the majority of practicing lawyers.[45] But in 1974, fee schedules were challenged on antitrust grounds, and on June 16, 1975, in *Goldfarb v. Virginia State Bar*, a unanimous Supreme Court relegated bar-imposed fee schedules to the dustbins of history.[46]

After *Goldfarb* abolished fee schedules, the concern about unmet legal need did not diminish, but it did shift: by the fall of 1975, perceived inadequacies in access seemed increasingly the result of informational problems. As Meserve's successor, ABA President James Fellers, declared, middle-income Americans still "don't know how to find a lawyer; they're afraid of lawyers [and] they think they cost too much."[47] Or, as Curran found in her major ABA study of legal need: a full 83% of respondents agreed with the statement "[a] lot of people do not go to lawyers because they have no way of knowing which

42. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 260-61 & tbl.7.1 (1977).

43. *Id.* Additional matters taken to lawyers with similarly low frequency were constitutional rights, torts, and governmental issues. *Id.*

44. Starting in 1970, the ABA took the position that "mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action." ABA Comm. on Prof'l Ethics, Formal Op. 323 (1970). Previously, the ABA had suggested that the habitual charging of below-schedule fees could be evidence of ethical misconduct. ABA Comm. on Prof'l Ethics, Formal Op. 302 (1961).

45. For more on fee schedules' development and scope, see Brief for the United States as Amicus Curiae at 3, 15-16, Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (No. 74-70).

46. 421 U.S. at 789-93. (Note that Justice Powell did not participate in the consideration or decision of the case.)

47. Mark J. Green, *The High Cost of Lawyers*, N.Y. TIMES MAG., Aug. 10, 1975, at 8, 9 (alteration in original) (quoting Fellers). Elsewhere, Fellers declared:

> [I]t is important for us to recognize that the near-poor and the middle-income citizens of this country still need competent legal services, and we are doing very little to meet this demand. I view the production of legal services for this group of people, who have been so long overlooked, to be the Bar's most pressing and crucial task.

James D. Fellers, *The Economics and Delivery of Legal Services*, 58 JUDICATURE 114, 114 (1974).

lawyer is competent to handle their particular problems."[48] And if *that* was the problem, the Bar's long-established ban on attorney advertising, which restricted information about available lawyers and also, some said, jacked up the price of legal services by restricting price competition, seemed at least partly to blame.[49]

Like most professions during this period, attorneys were not permitted to advertise, limited by the Model Code provision which barred "any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients."[50] There were, to be sure, a few gaps in the Bar's advertising ban, but they were narrowly drawn and zealously policed. The profession *itself* was permitted to engage in institutional advertising.[51] And an attorney wanting to grow his business could take a few feeble steps. He could attach a dignified sign to his door (although he could not indicate what kind of law he practiced). He could (starting in 1976) list himself in the Yellow Pages (and provide a few bare-bones facts).[52] And he could, for a fee, provide a brief biographical sketch in provider directories (often called "law lists") approved by the ABA, but these directories, many complained, were expensive to join, limited in information, and insufficient in reach.[53] There were also a few *services* that attempted to link lawyers and clients—namely, bar-sponsored referral networks,[54] prepaid legal service plans for individual subscribers,[55] and group

48. CURRAN, *supra* note 42, at 228 tbl.6.1.

49. *See* BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 136-38 (1970); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 135-37 (1974).

50. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(A) (1969); *id.* DR 2-101(B) (laying out additional restrictions on advertising). The ban had been in place since 1908, as the initial Canons declared that advertisements "def[ied] the traditions and lower[ed] the tone of our high calling, and [were] intolerable." CANONS OF PROF'L ETHICS, Canon 27 (1908).

51. Thomas E. Skowronski, Comment, *Of Shibboleths, Sense and Changing Tradition—Lawyer Advertising*, 61 MARQ. L. REV. 644, 651-52 (1978) (describing institutional advertising).

52. Under pressure from consumer groups, the ABA House of Delegates amended DR 2-102(A)(6) in February 1976 to permit attorneys (for the first time) to publish limited ads in the Yellow Pages. Few states implemented these amendments prior to the *Bates* decision, however, and in *Bates*, the Supreme Court rejected these "spartan" advertisements as insufficient. Bates v. State Bar of Ariz., 433 U.S. 350, 366-67 (1977). For more on the 1976 amendments, see Skowronski, *supra* note 51, at 656.

53. For a description and critique of law lists, see Peter H. Schuck, *Consumer Ignorance In the Area of Legal Services*, 43 INS. COUNS. J. 568, 569 (1976); Raymond T. Bonner, *Should Lawyers Advertise? Should Tiffany's?*, L.A. TIMES, Feb. 9, 1976, at C7; Barbara A. Stein, *Looking into Law Lists*, TRIAL, Sept. 1976, at 48, A8.

54. Typically sponsored by local bar associations, lawyer referral networks matched prospective clients with participating attorneys. But these networks offered little in the way of quality assurance, and their matching was extremely coarse, with little regard for a client's preference or lawyer's specialty, thus prompting the critique that they did little more than "match the client's wallet with a lawyer's outstretched hand." Sandy DeMent, *Legal Services Dilemma: View from the Market*, TRIAL, Aug. 1976, at 26, 30; *see also* CHRISTENSEN, *supra* note 49, at 173-204.

legal service plans, established by unions, civil rights groups, and consumer cooperatives.[56] But, like the exceptions above, these prepaid plans and referral networks left much to be desired.[57]

Meanwhile, throughout the mid-1970s, the Bar's advertising ban was increasingly under attack—particularly from antitrust enforcers (who were active during the era) and leaders of the era's muscular consumer movement.[58] First, starting in the early 1970s, the FTC and the Antitrust Division of the Department of Justice embarked on a broad campaign to target anticompetitive practices *throughout* the professions, initiating eight major suits against professional groups between 1974 and 1977.[59] In the midst of this campaign, on June 25, 1976, the federal government filed a lawsuit specifically against the ABA, alleging that the Model Code's anti-advertising provisions violated the Sherman Act.[60]

---

55. Operating much like health insurance, these plans cushioned the cost of legal services and entitled policyholders to legal assistance for routine problems such as divorces, estate planning, and misdemeanor defense. But these, too, had limits. Problems included: a tangle of regulations that stymied growth, the possibility that consumers would sign up for the service just as legal trouble loomed, uneven attorney quality, and a lack of consumer interest. Indeed, one insurer that conducted a survey prior to launching its own prepaid program found that 75% of respondents indicated they would not be willing to pay *any* amount for insurance of this type. *See* Stephen Z. Meyers, *Consumerism and the Delivery of Legal Services*, 49 CAL. ST. B.J. 256, 261 (1974); *see also* DeMent, *supra* note 54, at 30.

56. Group plans came in two types: open-panel and closed-panel. Open-panel plans permitted clients to choose virtually any lawyer in town and simply covered some portion of the lawyer's fee. Closed-panel plans, by contrast, involved preselected lawyers either working in-house or via contract. The Bar generally favored open-panel plans, complaining that closed plans unduly constrained client choice, could compromise client loyalty, and depersonalized the attorney-client relationship. Unions and consumer groups, however, tended to favor closed-panel plans, contending they were cheaper and amenable to more rigorous quality control. For a time it looked like group plans were poised for take-off. Indeed, a member of the American Bar Foundation's committee on legal services estimated that, by the early 1980s, 70% of the public would be enrolled in a group or prepaid plan. Charles Baron, *Will You Be Missing a Few Million Clients?*, STUDENT LAW., Oct. 1976, at 12, 15. That prediction was, it seems, unduly optimistic. *Cf. Prepaid Legal Services—All You Need to Know*, WORLDLAW DIRECT (Jan. 31, 2011), http://www.worldlawdirect.com/article/555/prepaid-legal-services-all-you-need-know.html (suggesting that, as of 2011, only thirteen million Americans were covered). For more on group legal service plans and the promise and limits thereof, see CHRISTENSEN, *supra* note 49, at 149-50.

57. By 1974, ABA President-Elect James Fellers was quoted conceding: "At present, the average person is at a loss as to how to find an individual attorney competent in the area in which he needs help." Andrew Erskine, *Legal Clinic Lauded by Top ABA Official*, L.A. DAILY J., Mar. 14, 1974.

58. *See* Lester Brickman, *Advertising: A Business Technique for Lawyers?*, VA. B. NEWS, July-Aug. 1975, at 15, 15 ("Th[e] quickening of the pace of the discussion of lawyers' advertising is not an isolated incident in the annals of our culture but is a part of a broad-ranging movement in our society which may be denoted as 'consumerism.'").

59. John H. Shenefield, *Warning: The Justice Department Has Its Eye on the Professions*, B. LEADER, Sept.-Oct. 1977, at 20, 23.

60. The government's complaint alleged that the ABA's "combination and conspiracy has had the following effects, among others: . . . . Price competition in the provision of legal

At the same time, consumer groups managed to turn the Bar's ban—and the access to justice problem that they alleged it engendered—into a "political issue" generating widespread concern.[61] Indeed, the *Los Angeles Times* declared in 1973 that "the cost of legal services may be shaping up as the 'hot' consumer issue of the year."[62] Discontent was running so deep that, for a time, even governmental regulation over the long self-regulating legal profession seemed possible. For example, in 1974, consumer champion Mark Green testified in Senate hearings (which had been specifically convened to investigate whether the legal profession was "self-serving or serving the public") that, just like meatpackers in the early 1900s and automobile executives in the mid-1960s, the time had come to submit lawyers to regulatory scrutiny: "The thought will shock the legal old guard, just as it did self-confident meatpackers and auto executives in their days of innocence, but the likelihood for federal authority over the profession increases commensurate with the bar's failure to make itself more accessible to the public."[63] The same year, Sargent Shriver repeated a similar warning at an ABA gathering.[64] And, a year later, Senator John Tunney, fresh off chairing the Senate hearings investigating the legal profession, wrote: "[T]he organized bar should take the initiative to relax the restrictions on advertising for *all* lawyers. If this occurs, Federal and other governmental intervention should not be necessary."[65]

---

services has been restrained . . . [and] Lawyers have been restrained in their ability to make legal services readily and fully available to consumers." *Justice Department Challenges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A. J. 979, 980 (1976) (quoting from a complaint filed by the United States against the ABA in 1976). For more on the federal government's crackdown on the legal profession's anticompetitive practices, see Brief for the United States as Amicus Curiae, *supra* note 3, 1976 WL 178669, at *1-4.

61. James D. Fellers, *The Challenges of Supplying Legal Services*, 60 A.B.A. J. 43, 43 (1974) (stating that the supply of legal services to Americans of moderate means was "increasingly a political issue challenging the legal profession for new decisions").

62. Alexander Auerbach, *The Consumer: State Bar Challenges Cut-Rate Legal Clinic*, L.A. TIMES, Apr. 6, 1973, at H13. Also in 1973, Ralph Nader sponsored a counter-convention to the ABA's annual convention in Washington, DC, "which concluded that the Canons of Ethics operated more like 'Canons of Profits' to protect lawyers rather than the public." Green, *supra* note 47, at 57.

63. *The Organized Bar: Self-Serving or Serving the Public?: Hearing Before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93d Cong. 107 (1974) (statement of Mark Green, Director, Corporate Accountability Research Group).

64. SHARON TISHER, LYNN BERNABEL & MARK GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS, at I (1977) (quoting a speech Sargent Shriver delivered at an ABA gathering, which stated that "if successful lawyers do not meet their obligation to provide adequate representation to the poor and not-so-poor, they may lose their privilege to overcharge the rich").

65. *Senator Tunney: "Advertising Should Be Permitted Unless It Is Fraudulent or Misleading,"* VA. B. NEWS, Nov.-Dec. 1975, at 36, 36 (excerpting a statement filed by Senator Tunney with the ABA Committee on Ethics and Professional Responsibility).

In sum, by the late 1970s, some saw the choice as between expanding access by permitting attorney advertising or, alternatively, submitting to pervasive governmental regulation.[66] The status quo was increasingly untenable.

B. *Enter Legal Clinics: "A New Breed of Lawyer Born of Advertisements"*[67]

It was against this backdrop that the *Bates* opinion was issued. And more important for our present purposes, it was to this world that legal clinics, a distinctive form of law firm that ABA President James Fellers declared offered the "greatest potential" to solve the profession's "most pressing" concern, first opened their doors.[68]

Invented on September 13, 1972, when Leonard Jacoby and Stephen Meyers, two idealistic young lawyers, first hung out a shingle in a small storefront in Van Nuys, California, legal clinics were viewed as a new and promising way to bridge the vexing legal service gap.[69] As the President of the Consumer Federation of California put it in 1973 when speaking at a Jacoby & Meyers press conference: "The largest sector of our society, the middle-income group . . . is not being provided with the services it so badly needs. What this clinic provides

66. *See, e.g.*, TISHER ET AL., *supra* note 64, at I ("The legal profession itself is beginning to feel uneasy about criticism over its members' fees and wealth, if only because lawyers fear public regulation and loss of monopoly privileges."); Meserve, *supra* note 40, at 1092 (warning that, if the Bar did not succeed in expanding legal services "fundamental changes in the mode of practicing law will be determined to our disadvantage . . . by forces outside of the profession"); Joe Sims, *Professional Responsibility and the Informed Choice: The Ethics of Lawyer Advertising*, 7 MD. L.F. 46, 51 (1977) ("[M]aking the legal profession more open and accessible . . . through advertising (with the resultant competition) can help stave off movements by those who would impose strict governmental regulation on the legal profession. And there should be no doubt that competition, even with all of its putative dangers, offers a much brighter promise than does pervasive governmental control."); Robert P. Cochran, *Legal Advertising: Don't Panic but the Hour is at Hand*, 3 BARRISTER, no. 1, 1976, at 6, 7 ("If the Bar does not face and solve the dilemma of legal advertising on its own, it will likely lose the privilege of self-regulation.").

67. Roberts, *supra* note 29.

68. Fellers, *supra* note 47, at 114-16. The legal establishment was a bit schizophrenic when it came to legal clinics. On the one hand, as the quote above makes clear, ABA President Fellers was clearly optimistic about the potential role legal clinics could play in ameliorating America's access to justice problems. On the other hand, state bars energetically enforced advertising bans against legal clinics, thus stifling their initial success—and threatening their very existence. *See* Stephen Z. Meyers, *Legal Clinics: Their Theory and How They Work*, 52 L.A. B.J. 106, 106 (1976) (Steven M. Hayes & Gail J. Koff eds., 1977) (reporting that, of the six legal clinics then in existence, at least four were "currently in active disputes with the bar associations of their states").

69. *See* ABA SPECIAL COMM. ON THE DELIVERY OF LEGAL SERVS., REPORT ON THE SURVEY OF LEGAL CLINICS AND ADVERTISING LAW FIRMS 36-38 (1990) [hereinafter ABA LEGAL CLINICS] (describing the development of the legal clinic "movement" and stating that "clinics were perceived to be an answer to [the legal service] gap").

is an effective legal delivery system to handle the day-to-day problems of the consumer."[70]

The clinics that took shape in the early 1970s were different from conventional law firms in many respects.[71] And, in their differences, they were tailor-made to serve the needs of their mostly middle-income clientele.[72] They were distinctive in their pricing, charging flat, transparent, and lower-than-average fees for basic legal services. In fact, according to contemporaneous press reports, clinics charged just "a fraction of what most general practitioners charge."[73] They were distinctive in their volume. Some clinics, in their heydays, served literally hundreds of thousands of clients annually.[74] They were

70. Sally Disco & Susan Meyers, *Legal Supermarkets: Demystifying the Lawyers*, HARPER'S MAG., July 1973, at 30, 30 (quoting Frank Damrell) (internal quotation marks omitted).

71. Indeed, they were modeled not on conventional law firms but rather on medical clinics. Ellen Stern Harris, *Consumer Advocate: A Legal Clinic for the Middle Class*, L.A. TIMES, Sept. 24, 1972, at D6 (detailing the similarities between medical and legal clinics). The ABA conducted a study of legal clinics in 1990, in which it identified eight characteristics that defined this law firm form: (1) standardized rather than tailor-made forms for pleading, motion practice, and agreements; (2) routinized processing of individual cases; (3) use of advertising and marketing tools; (4) specialization; (5) reduced prices; (6) use of paralegals rather than lawyers whenever possible; (7) fixed fees; and (8) neighborhood offices. ABA LEGAL CLINICS, *supra* note 69, at 38. Notably, not all firms that self-identified as "legal clinics" shared those traits, and some firms not named "clinics" adopted these operational practices, leading to some definitional imprecision. *See, e.g.*, Charles Storch, *Justice Still Isn't Cheap, but It's Become More Affordable*, CHI. TRIB., Jan. 12, 1982, at C3 (quoting William Bolger, staff attorney for the National Resource Center for Consumers of Legal Services as stating: "There are a lot of definitional problems with legal clinics. No firm registers as a clinic, and it's hard to say what is a clinic and what is a one-man practice").

72. For the fact that clinics were explicitly crafted to serve the middle class, see Karen Metzger, *Legal Clinics: Getting into the Routine*, TRIAL, June 1976, at 32, 33, which reported, based on discussions with clinic lawyers: "All clinic lawyers felt keenly that those who were too wealthy to quality for free legal services, but too poor to pay the prevailing rate for simple matters, should receive quality legal care and created their clinics to fill this perceived need in their various communities." *See also* Interview by Fred Wilcox, S.F. Radio Station KCBS, with Leonard Jacoby, Partner, Jacoby & Meyers (Nov. 29, 1972) ("Len Jacoby: The middle income field of people has been neglected as far as legal services are involved, and we feel that we, what we have done is restructured a law firm so that it can bring quality legal services to middle income people at reduced rates . . . .").

73. Tom Goldstein, *Effects of Ruling on Lawyers*, N.Y. TIMES, June 28, 1977, at 14; *see* Anne L. Draznin, *Legal Clinics: Illegitimate Children of Permissive Advertising Rules*, *in* LEGAL SERVICES FOR THE MIDDLE CLASS 32 (1979) ("One trademark of most legal clinics is their ability to generally charge less than traditional practitioners."); Davida Maron, *Legal Clinics*, LEGAL ECON., Winter 1978, at 46, 46 (stating that the fees clinics charge are "generally one-third to one-half the standard rates in their locales"); Barbara Slavin, *Lawyers and Madison Avenue: How Attorneys Are Handling the Freedom to Advertise*, BARRISTER, Summer 1979, at 46, 47 (reporting that clinics charge fees that are "typically half to a third of the going rate").

74. During their run, Hyatt Legal Services and Jacoby & Meyers likely represented more than three million and two million individual clients, respectively. Karen Dillon, *After the Revolution*, AM. LAW., Apr. 1996, at 63, 64. *But see* ABA SPECIAL COMM. ON THE

distinctive in the *kind* of case they accepted, specializing in cases that were "inherently routine."[75] Legal clinic behemoth Hyatt Legal Services, for example, specialized in $45 wills, $275 divorces, and $350 bankruptcies.[76] They were distinctive in their accessibility. Attempting to "demystify" access to counsel, clinic founders located offices in shopping centers and strip malls, accepted credit cards, and added weekend and nighttime hours, making, in the words of *Harper's Magazine*, "the storefront office . . . as approachable as the drugstore on the corner or the five-and-ten down the street."[77] They were distinctive in their routinization, relying on paraprofessionals, boilerplate forms, and cookie-cutter procedures.[78] In fact, Hyatt so thoroughly routinized its operations that it employed a 100-page training manual just for use of the telephone.[79] And clinics were—crucially and controversially—distinctive in their reliance on advertising. Advertising was seen as indispensable to gin up the volume of clients necessary, both for clinics to stay afloat (since profit margins were low, a high volume was needed) and to harness the economies of scale necessary to make legal clinics' assembly-line mode of production sustainable.[80] That dependence on advertising, however, ran smack up against the Bar's longstanding advertising ban—and out of this collision, the *Bates* case was born.

DELIVERY OF LEGAL SERVS., LEGAL CLINICS: MERELY ADVERTISING LAW FIRMS? 6 (1981) [hereinafter ABA SPECIAL COMMITTEE] (reporting that "legal clinics are not necessarily high volume operations" (capitalization altered)).

75. Muris & McChesney, *supra* note 4, at 195; *see* Draznin, *supra* note 73, at 33 (discussing the routine cases clinics typically accept and noting that "[p]ersonal injury cases . . . are frequently not acceptable").

76. Tamar Lewin, *Leader in Legal Clinic Field*, N.Y. TIMES, May 9, 1983, at D1 (listing prices).

77. Disco & Meyers, *supra* note 70, at 30; *see* Margaret Carlson, *Discovering the Advantages of Lawyering to the Unfashionable*, WASH. POST, Feb. 12, 1984, at B3 (quoting Joel Hyatt as stating: "We're trying to demystify the law").

78. Singsen, *supra* note 34, at III-4 (describing Hyatt's "routinization"); *see* FTC STUDY, *supra* note 7, at 64 (describing clinic standardization).

79. Singsen, *supra* note 34, at III-4. Another firm, Cawley & Schmidt, was so devoted to routinization that it spent two years devising step-by-step procedures for the handling of each type of case—before it ever even opened its doors. Christopher Gilson & Harold W. Berkman, *The Client as Consumer: Marketing the Law, Clinic-Style*, 7 J. ACAD. MARKETING SCI. 428, 432-34 (1979).

80. Roberts, *supra* note 29 (quoting Stephen Meyers as stating: "Without advertising . . . it would be impossible to generate a clientele sufficiently large enough for us to deliver services efficiently"); Slavin, *supra* note 73, at 47 (quoting Van O'Steen as stating: "[L]egal clinics and advertising have to go together"); *Complaints About Lawyers: Are They Justified? Interview with Thomas Ehrlich, Dean, School of Law, Stanford University*, U.S. NEWS & WORLD REP., July 21, 1975, at 46, 49 (quoting Thomas Ehrlich as stating: "[A] legal clinic that specializes in a few areas—such as consumer credit, wills, real estate and divorce—has to have a large volume of business to charge low fees. And in order to get that volume, it has to advertise").

C. *The* Bates *Decision*

Neither coincidentally nor surprisingly, it was a legal clinic that ultimately challenged the Bar's advertising proscription.[81] Former attorneys with the Maricopa County Legal Aid Society, John Bates and Van O'Steen founded a legal clinic in Phoenix, Arizona in March 1974 that offered assistance with divorces, domestic relations matters, adoptions, individual bankruptcies, wills, probates, changes of name, and personal injury cases.[82] In so doing, the partners' stated aim was, in Van O'Steen's words, "to extend . . . quality legal services at the most reasonable fees possible" to people who "traditionally had difficulty finding lawyers."[83]

But after two years of practice, the firm's business was flagging. Faced with dwindling revenue and a shrinking clientele, the partners decided that advertising was needed if their low-fee, high-volume clinic practice was to work. As O'Steen ultimately testified: "I don't mind confessing to you that this has not been a terribly profitable operation up to this point, but we think it can be made profitable . . . and if that doesn't happen this clinic concept will not survive."[84] Thus, on February 22, 1976, Bates and O'Steen placed a block ad in the *Arizona Republic*. Headed by the words: "Do You Need a Lawyer? Legal Services at Very Reasonable Fees," the ad proceeded to enumerate the types of legal service they would provide and the fee they would charge for each service. Uncontested divorces were $175; adoptions were $225; individual bankruptcies were $250; and name changes were $95, plus filing fees and publication costs.[85] Though the ad was hardly flashy, it did run afoul of Arizona Disciplinary Rule 2-101(B), which provided, among its various prohibitions, that "[a] lawyer shall not publicize himself . . . through newspaper . . . advertisements,"[86] and Bates and O'Steen were subsequently disciplined. Their case was litigated "with full realization," the State Bar's lawyers later explained, that it was a case of historic consequence.[87]

---

81. To be sure, Bates and O'Steen were not alone. By 1976, at least nine other challenges were wending their way through the court system. William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 264 (2005).

82. Appendix at 71-72, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (No. 76-316) (testimony of Van O'Steen) (for specialties); *id.* at 88 ("[B]oth of our backgrounds is from the Legal Aid Society.").

83. *Id.* at 75.

84. *Id.* at 122.

85. *See* ANDREWS, *supra* note 14, app. I at 89 (capitalization altered) (reprinting a copy of the controversial ad).

86. *Bates*, 433 U.S. at 355 (quoting the then-existing restriction on attorney advertising).

87. *Supreme Court Will Hear Lawyers' Advertising Case from Arizona*, 62 A.B.A. J. 1422, 1422 (1976) (quoting Orme Lewis and John Frank, counsel for the Arizona State Bar).

Of course, of historic consequence it was, though the Supreme Court may itself have underestimated the decision's sweep. With an eye on Bates and O'Steen's fledgling Arizona practice and with a nod to the need to expand legal access to middle-income Americans, the clinic context—and the justice gap clinics promised to help bridge—infused the Court's opinion.[88] The Court even went so far as to declare that its opinion would only affect that particular market niche: "The only services that lend themselves to advertising are the routine ones," the Court intoned, "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, [and] the change of name . . . ."[89] Legal clinics, the Court implicitly yet fatefully predicted, would be the providers to advertise—and the *only* providers to advertise—in the years ahead.

II. THE POST-*BATES* WORLD

A. *"Legal Clinics Have Come of Age"*[90]

For a time, the Court proved prescient. As soon as *Bates* came down, high-volume, low-cost legal clinics started to open up. In 1976, there were only about a dozen clinics operating in the United States.[91] Within six months of the Court's June 1977 decision, however, that number tripled.[92] Then, by 1979, there were an estimated 200 clinics in existence, not counting branch offices, and more clinics were opening for business almost daily.[93]

The era's two biggest clinics were Jacoby & Meyers (which, as noted, was founded in California in 1972), and Hyatt Legal Services, founded by Yale Law School graduate Joel Hyatt in 1977, on the heels of the *Bates* decision.[94] In the

88. In terms of access, the Court cited the Curran study, *supra* note 42, and explicitly described advertising as a way to alleviate America's unmet legal needs. *Bates*, 433 U.S. at 370.

89. *Id.* at 372. For more on the Court's prediction, see *infra* note 118 and accompanying text.

90. Draznin, *supra* note 73, at 41 (capitalization altered).

91. Meyers, *supra* note 68, at 106 ("In the entire country, only six legal clinics are now operating."); Slavin, *supra* note 73, at 47 (suggesting that "barely a dozen" clinics were operating in early 1977).

92. Gregory H. Bowers & Otis H. Stephens, Jr., *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEMPHIS ST. U. L. REV. 221, 261 (1987).

93. Slavin, *supra* note 73, at 47. By 1980, the American Legal Clinic Association's executive director estimated that there were more than 500 clinics in operation. *Legal Clinics: Searching for an Image*, 66 A.B.A. J. 1348, 1348 (1980). Even experts did not agree on precise figures, however. *Compare* Storch, *supra* note 71 (quoting a source estimating that there were 1500 clinics in operation by 1982), *with* Singsen, *supra* note 34, at IV-6 (suggesting that there were fewer than 400 clinics by 1982).

94. When *Bates* was decided, Hyatt was working at a top corporate law firm in New York. Within months of the Court's decision, he had moved back home to Cleveland to found Hyatt Legal Services. Lewin, *supra* note 76.

late 1970s and early 1980s, both clinics grew rapidly. By 1978, Jacoby & Meyers—ultimately dubbed the "General Motors of clinics"—had opened seventeen branch offices and was serving 30,000 clients per year.[95] The following year, the firm grew bigger, with plans to serve 50,000 individual clients.[96] And by 1983, Jacoby & Meyers *had* grown larger but had nevertheless been surpassed. Jacoby's chief competitor, Hyatt Legal Services, was, by 1983, serving 15,000 new clients *per month*.[97] Further, by 1986, Hyatt was the country's second biggest law firm, employing 674 attorneys, operating 200 offices in 21 states, and serving roughly 300,000 clients annually—and discussing plans for further expansion.[98]

Legal clinics thus flourished in the wake of the *Bates* opinion—fulfilling expectations. In fact, clinics not only *opened* as expected—they initially *operated* just as advertising's advocates had hoped. First, by most accounts, the legal clinics that opened in the 1970s and early 1980s *did* expand legal services to average Americans.[99] As clinic founder Joel Hyatt put it: "Most Americans don't have a lawyer, and they don't know how to find one. Using television advertising, I have developed a way to give these people access to legal services."[100]

So too, it appears that, once advertising was permitted and legal clinics expanded, the cost of routine legal services did drop.[101] In 1985, a report pub-

95. Colleen Sullivan, *The Upstart Lawyers Who Market the Law*, N.Y. TIMES, Aug. 26, 1979, at 97; Roberts, *supra* note 29.

96. Sullivan, *supra* note 95.

97. Lewin, *supra* note 76.

98. For the fact Hyatt had 200 offices, see Joan Hanauer, *Legal Profession Still Arguing About Lawyer Ads*, UNITED PRESS INT'L, Sept. 14, 1986. For the fact Hyatt was the second biggest law firm in 1986, see Mike France, *Hobbled Hopes; Legal Clinics: Lights Go Out for Storefronts*, NAT'L L.J. Dec. 12, 1994, at 3. For the 300,000 figure, see Dillon, *supra* note 74, at 63. In one interview Hyatt said that he planned to operate 400 to 500 offices by 1990. Lewin, *supra* note 76.

99. *See, e.g.*, ABA LEGAL CLINICS, *supra* note 69, at 21 (concluding, on the basis of 162 responses to a written questionnaire, that "firms with a legal clinic philosophy increase first-time lawyer use"); Linda Greenhouse, *Lawyer Advertising Found Cutting Fees*, N.Y. TIMES, Aug. 3, 1980, at 16 (quoting Roger Brosnahan, Chair of the ABA's Commission on Advertising, as stating that increased use of advertising had resulted in new clients); *cf.* Madeline Johnson et al., *Attorney Advertising and Changes in the Demand for Wills*, 22 J. ADVERTISING 35 (1993) (analyzing time-series data from 1974 through 1989 tracking the proportion of estates probated without a will and finding a drop in intestate deaths starting in 1977, when *Bates* was decided).

100. Lewin, *supra* note 76.

101. One must view these claims with caution since *Bates* and *Goldfarb* were decided in quick succession. Some of what commentators attributed to advertising and legal clinics may, instead, have followed from *Goldfarb*'s elimination of minimum fee schedules. Nevertheless, even sophisticated commentators gave clinics the credit. *See, e.g.*, B. Kimball Baker, *You Can Advertise Now—But Should You?*, BARRISTER, Summer 1981, at 14, 16 ("There is little question . . . that lawyer advertising and legal clinics have meant substantial savings to the consumers of the services offered."); Chester N. Mitchell, *The Impact, Regulation and Efficacy of Lawyer Advertising*, 20 OSGOODE HALL L.J. 119, 130 (1983) ("What is clear is

lished by the Harvard Law School Program on the Legal Profession declared that "[l]egal clinics, both local and national, have reduced the cost of services significantly (perhaps 10 percent to 30 percent)."[102] And journals and newspapers of the late 1970s are replete with accounts supporting that assertion. Following *Bates*, the *Washington Post* reported, for example, that in New York, some lawyers' fees for uncontested divorces dropped from more than $750 to between $150 and $250.[103] In Chicago, the price of an uncontested divorce was cut roughly in half.[104] In Baltimore, the price of an uncontested divorce dropped further, from $344 to $75.[105] In Atlanta, there were reports of uncontested divorces offered for a mere $39.[106] And, in Florida, an uncontested divorce was briefly cheaper still.[107] Back in Arizona, meanwhile, Supreme Court petitioner Van O'Steen good-naturedly complained that increased competition brought about by advertising forced him to cut his fee for a contested divorce almost in half.[108]

Third, clinics' reliance on advertising also lived up to expectations. In the years after *Bates*, nearly all legal clinics (some 99%, according to one study) advertised,[109] and some clinics advertised heavily. Jacoby & Meyers and Hyatt

that higher volume operations in the U.S. do lower prices on a certain range of legal services.").

102. GERRY SINGSEN, PERSONAL LEGAL SERVICES: PROBLEMS AND POSSIBILITIES IN THE MARKETPLACE 50 (1985).

103. Stuart Auerbach, *Maryland Lawyers*, WASH. POST, Nov. 26, 1977, at B1 (reporting on drops in New York); *see also* Carol H. Falk, *Legal Upheaval: Lawyers Are Facing Surge in Competition as Courts Drop Curbs*, WALL ST. J., Oct. 18, 1978, at 1 (quoting New York University School of Law Professor Stephen Gillers as stating that, after advertising, the cost of a divorce or name change in Manhattan dropped substantially).

104. *See Now-Legal Lawyer Ads Lag*, CHI. TRIB., Jul. 3, 1978, at 17 ("[A] sample of one day's classified ads shows attorneys offering a simple divorce at rates ranging from $145 to $250 plus court costs when, for years, $300 plus court costs was considered the going rate."). There were also, it seems, significant price drops in Detroit. *See* Lawrence Dubin, *Ethics: Why Should Lawyers Sully Themselves in the Marketplace? To Better Serve the Public, for One Thing*, STUDENT LAW., Jan. 1987, at 5, 6-7.

105. The Maryland State Bar Association's 1975 survey of its members found that the average cost of an uncontested divorce was $344. Fred S. McChesney & Timothy J. Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503, 1504 (1979). By the summer of 1978, it was reported that some lawyers were offering uncontested divorces for a mere $75. Davida Maron, *Over 1 Billion Clients Serviced: Reasons 1-10 for the Legal Clinic Boom*, DISTRICT LAW, June-July 1978, at 23, 24.

106. Greenhouse, *supra* note 99.

107. Jane Bryant Quinn, *Shopping for Prices Can Save on Lawyer's Fees*, WASH. POST, May 14, 1979, at D10 ("Where there are several legal clinics, price wars have broken out. A Florida clinic offered uncontested divorces for only $35 shortly before it went out of business.").

108. *See* ANDREWS, *supra* note 14, at 80 (quoting Van O'Steen).

109. ABA SPECIAL COMMITTEE, *supra* note 74, at 7, 23 (finding that 99% of clinics advertised).

Legal Services, for example, financed seven-figure ad campaigns.[110] Also as expected, clinics depended heavily on advertising for client generation; Baltimore's Cawley & Schmidt, for example, reportedly obtained a whopping 95% of its clients from advertising efforts.[111]

Just as important, the *content* of clinics' advertisements mostly conformed to expectations. The *Bates* Court had predicted that "advertising will permit the comparison of rates among competitors."[112] Others, too, assumed that advertising would enable clients to "compare various fees before making an appointment to see an attorney."[113] Fulfilling prophecy, clinics commonly (albeit not uniformly) advertised the price they would charge for particular services. An article appearing in the journal *Juris Doctor* in September 1977, noted, for example, that, in the three months since the *Bates* opinion, most attorney advertisers were "follow[ing] the Bates & O'Steen formula of listing a handful of relatively routine problems—uncontested divorces, wills, personal bankruptcies, name changes—and the fee charged."[114] Another article, appearing in 1979, provided: "So far the tone of the advertisements has been conservative. Typically they list the prices for services and note areas of practice; some merely announce that the lawyer or law firm exists."[115] Even in the late 1980s, Harvard's Gerry Singsen wrote: "Newspaper ads routinely list specific fees for divorces, bankruptcies, immigration work, and other personal legal services—fees usually well below the going rate in the general practice bar."[116]

---

110. Dillon, *supra* note 74, at 65 (stating that, in its heyday, Jacoby & Meyers spent "nearly $5 million a year on television advertising"); Philip H. Dougherty, *Advertising: Promoting Law Firms on TV*, N.Y. TIMES, Mar. 13, 1986, at D19 (stating that, by 1986, Hyatt's annual TV ad budget was $4 million).

111. FTC STUDY, *supra* note 7, at 68-69 (discussing clinics' heavy reliance on advertising and recounting an interview with Linda Cawley).

112. Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977).

113. *Once Over: It's Time Lawyers Told More About Themselves*, 41 CONSUMER REP. 252, 253 (1976); *see also* THOMAS EHRLICH & MURRAY L. SCHWARTZ, REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT, REPORT TO THE SUBCOMM. ON REPRESENTATION OF CITIZEN INTERESTS OF THE S. COMM. ON THE JUDICIARY, 93D CONG. 4 (Comm. Print 1974) ("The relevant information that would be provided through advertising is difficult to foresee; most likely, it would relate to prices only."); Hazard et al., *supra* note 4, at 1108 (assuming that, if advertising were liberalized, clients would "readily compare prices"); Jim Rossi & Mollie Weighner, Contemporary Studies Project, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 IOWA L. REV. 179, 217 (1991) ("The primary justification for lawyer advertising is that it informs and educates the public about the availability and cost of legal services.").

114. Daniel B. Moskowitz, *The Great Ad Venture: The Legal Marketplace After Bates & O'Steen*, JURIS DR., Sept. 1977, at 15, 16.

115. S.D. Ross, *Lawyers and the Public—How to Bring Them Together*, 53 AUSTL. L.J. 184, 190 (1979).

116. Gerry Singsen, *Competition in Personal Legal Services*, 2 GEO. J. LEGAL ETHICS 21, 23 (1988); *accord* Johnson et al., *supra* note 99, at 36 ("[W]ills are frequently advertised and the price is often included in the ad."). *But see* FTC STUDY, *supra* note 7, at 101 (reporting that few surveyed attorneys advertised specific fees).

Finally, in these early years, nonclinic lawyers (i.e., non-"routine" providers who were not expected to advertise) also stayed on script.[117] As mentioned previously, the *Bates* Court explicitly predicted that only purveyors of "routine" services, like uncontested divorces, simple adoptions, and name changes would advertise.[118] In so predicting, the Court was in good company. Chester Mitchell wrote in 1983, for example: "Certain legal work is very personalized or specific. Such work will not be advertised."[119] That same year, Geoffrey Hazard, Jr., Russell Pearce, and Jeffrey W. Stempel prominently agreed. Lawyer advertising, they opined, would be used only by attorneys providing "[s]tandardizable" services, those "matters such as uncontested divorces, simple wills, and routine collection litigation, each of which is best delivered through a routinized system of production."[120]

---

117. *See* ANDREWS, *supra* note 14, at 13 ("Far and away . . . the most extensive and most creative users of advertising are the legal clinics."); *Grace Buys a Better Image . . . Ads by Lawyers . . . A Moving Appeal*, WALL ST. J., Dec. 18, 1980, at 31 ("Ever since the Supreme Court's 1977 approval of lawyer advertising, nearly all the firms that advertise have directed their appeals to middle-income consumers looking for counsel for divorces, wills and other common problems.").

118. Bates v. State Bar of Ariz., 433 U.S. 350, 372 (1977). Other than by way of example, the Court did not define the word "routine." Steven R. Cox, the sole economist to testify in the *Bates* proceeding, has defined the term, however, and he has defined it in a way that clearly excludes representation for accidental injury. *See* Steven R. Cox et al., *Attorney Advertising and the Quality of Routine Legal Services*, 2 REV. INDUS. ORG. 340, 341 (1986) (defining "routine" legal services); Steven R. Cox et al., *Consumer Information and the Pricing of Legal Services*, 30 J. INDUS. ECON. 305, 311 n.11 (1982) (discussing the "non-routine nature" of personal injury representation). Justice Powell, in dissent, criticized the majority's assumption that only purveyors of routine services would advertise and pointed out that "[w]hat legal services are 'routine' depends on the eye of the beholder." *Bates*, 433 U.S. at 392 n.3 (Powell, J., dissenting).

While explicable, this line drawing—this assumption that only purveyors of routine legal services would advertise—was also convenient. Advertising's opponents had long defended advertising restrictions as necessary to protect practitioner quality. Because professional service quality is difficult to gauge, opponents warned that advertising would tempt some unscrupulous practitioners to offer discounted, but low-quality, legal services. That, in turn, could drive high-quality practitioners out of the market (adverse selection) or could cause high-quality professionals to themselves lower their prices and quality of care to negative, and spiraling, effect (possibly generating a "lemons market"). *Cf.* RONALD S. BOND ET AL., FTC BUREAU OF ECON., STAFF REPORT ON EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY 32 (1980). Thus, by suggesting that advertising would be confined to routine matters where quality concerns were absent or at least secondary, the Court avoided the need to confront this quality critique head-on. For more on adverse selection and possible quality deterioration, see FTC STUDY, *supra* note 7, at 127 (calling this the "primary argument against lifting advertising restrictions").

119. Mitchell, *supra* note 101, at 129.

120. Hazard et al., *supra* note 4, at 1101; *accord id.* at 1087 ("[A]dvertising will have a beneficial effect on the market for standardizable legal services, while having little effect on the market for individualized legal services."); *see also id.* at 1105 ("Providers of primarily individualized services have little use for advertising of any kind and no use for mass advertising."). Other prominent commentators of the era likewise: (1) distinguished between "rou-

And critically, for a long time, the prediction held. Whether deterred by some state's outdated or vague guidelines that failed to define what advertising activity would trigger disciplinary action,[121] swayed by Bar leaders who assailed advertising as "shysterism,"[122] or simply befuddled by how one might go about promoting one's services,[123] most nonclinic lawyers refrained from dipping a toe in the advertising stream just as the Court had predicted. To be sure, only days after the *Bates* decision, the *Los Angeles Times* carried a full page of lawyer advertisements.[124] But soon thereafter, interest in attorney advertisements ebbed. In 1978, only 3% of lawyers polled by the *ABA Journal* admitted advertising.[125] And one Texas lawyer's tale might shed light on lawyers' reluctance: after he spent $1,000 in newspaper ads he was reportedly forced to close his practice. "I was the only one advertising here and I caught hell," he said.[126]

---

tine" and "personalized" (sometimes called "complex") legal services; (2) predicted that only purveyors of "routine" legal services would advertise; and (3) either implicitly or explicitly agreed that personal injury lawyers fell on the "complex" or "personalized" side of the standardization divide. *See, e.g.*, Kenneth Bennett, *Lawyer Advertising: The Practical Effects of* Bates, 1 W. NEW ENG. L. REV. 349, 367 (1978) ("Advertising routine services is realistically feasible only for the clinic."); Special Comm. on Consumer Affairs, *Committee Report: Advertising by Lawyers*, 31 REC. ASS'N B. CITY N.Y. 479, 479-80 (1976) (providing "hypothetical advertisements which might result if lawyers were permitted to advertise"—all of which involved routine legal services).

121. After the *Bates* ruling, the contours of permissible conduct were not clear—or as one Bar leader put it: The decision "opened the door but didn't say what could come in." Moskowitz, *supra* note 114, at 15 (quoting the President of the Pennsylvania Bar Association). In addition, some states waited years to update their advertising standards to comply with the Court's opinion. *See* Hazard et al., *supra* note 4, at 1086. Finally, even after amendment, some states' laws continued to include unreasonably draconian restrictions. *See* Lori B. Andrews, *The Selling of a Precedent*, STUDENT LAW., Mar. 1982, at 12, 14, 47 (cataloging various obstacles to effective lawyer advertising and providing examples of states' unreasonable restrictions, including Mississippi, which declared that ads should not be designed to attract attention, and Georgia, which outlawed ads containing color, graphics, or type larger than one-half centimeter); Baker, *supra* note 101 (stating that, in Ohio, the only permissible graphic was the scale of justice portrayed in Bates & O'Steen's original advertisement).

122. *Terror, Legal Ads Top ABA Meeting*, NAT'L L.J., July 22, 1985, at 5, 18 (quoting Chief Justice Warren E. Burger dismissing advertising as "shysterism").

123. FTC STUDY, *supra* note 7, at 72 (pointing out that, since professional service advertising had long been verboten, even marketing specialists lacked expertise in how to promote legal services in the immediate post-*Bates* period).

124. *Attorneys at Law Legal Directory*, L.A. TIMES, July 3, 1977, at 6.

125. *LawPoll: Is Advertising Laying an Egg? Lawyers May Be More Interested in Solicitation*, 64 A.B.A. J. 673, 673 (1978).

126. "I was castigated for stepping out of line, for not being a good ol' boy," the lawyer continued. "The response I got couldn't have been more negative. Advertising blew it for me." Roberts, *supra* note 29; *see also* Andrews, *supra* note 121, at 48 (quoting a New Jersey lawyer's observation that "[t]here's a tremendous amount of peer pressure against advertising").

Indeed, the same 1978 *ABA Journal* poll noted above found that even personal solicitation was viewed more favorably.[127]

In short, if one were to freeze the frame around 1980 (as the FTC's study, which was conducted between December 1980 and March 1982, unwittingly did), the picture would look quite bright.[128] Legal clinics, which provided routine services to mostly middle-income clients, were the firms most apt to advertise. And by their advertising, new clients were reached, prices were displayed and thus compared, fees were apparently reduced, and the problem of unmet legal need was, it seems, ameliorated.

B. *The Unexpected Ascent of the Personal Injury Advertiser*

But time, of course, did not stand still. Instead, starting in the mid-1980s, resistance softened, and more attorneys started to join the advertising ranks. By 1983, 13% of lawyers had engaged in some kind of advertising.[129] By 1985, a full 24% of lawyers had done so.[130] By 1987, 32% had.[131] And, by the early 1990s, the majority of lawyers had acquiesced.[132] Indeed, by 1992, lawyers were spending $419 million on Yellow Pages advertising—significantly more than any other professional group or business category and, indeed, more than restaurants, florists, and chiropractors, *combined*.[133]

Thus, by the late 1980s and early 1990s, the *quantity* of attorney advertising was rapidly changing. Critically, the *identity* of attorney advertisers was also in flux. Starting in the late 1980s or early 1990s, clinics' position started to deteriorate and, in clinics' place, legions of personal injury lawyers took to the airwaves. By 1990, of the twenty firms with the highest television ad expenditures, eighteen concentrated on personal injury.[134] Similarly, a 1992 ABA study of Yellow Pages ads in six midsize cities found that the majority of ad-

---

127. A quarter of responding lawyers indicated a 50-50 or better likelihood that they would personally solicit business within the following year if it were permissible—more than three times the number who expressed an intent to advertise. *LawPoll*, *supra* note 125, at 673-74. The solicitation point was rendered moot later in 1978 when the Supreme Court upheld restrictions on solicitation for pecuniary gain in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

128. FTC STUDY, *supra* note 7, at 83 (describing the survey's methodology).

129. Lauren Rubenstein Reskin, *Lawyer Advertising Is on the Rise*, A.B.A. J., Apr. 1, 1986, at 42, 42.

130. Paul Reidinger, *LawPoll: More Lawyers Now Advertise Their Practice*, A.B.A. J., Nov. 1, 1987, at 25, 25.

131. *Id.*

132. *See* ABA CROSSROADS, *supra* note 22, at 52 (reporting on a 1992 Gallup Poll commissioned by the *ABA Journal* which found that 61% of lawyer respondents reported that their firms advertised).

133. *Id.* at 51.

134. ABA YELLOW PAGES, *supra* note 22, at 81 n.4.3.

vertisers (56%) concentrated on a "contingency fee field of practice."[135] The reversal has been so complete, in fact, that the legal clinic model so instrumental to the Court's analysis in *Bates* is, today, all but a memory. The fall of legal clinics and concomitant ascension of the personal injury bar is most vividly illustrated by tracing what has happened to the prominent clinics born of the *Bates* decision.

By the early 1990s, almost all the firms that joined together to found the American Legal Clinic Association, an organization established in 1977 to promote the spread of legal clinics across the country, had disbanded—as had the Association itself.[136] Around that time too, Hyatt Legal Services, which, recall, was once the second-biggest law firm in the United States, shuttered roughly 165 of its 180 field offices, pulled the plug on its multi-million-dollar television marketing campaign, and radically changed direction. Plagued by low profits, the firm all but abandoned the clinic concept to focus, instead, on providing prepaid legal plans for companies to offer their employees.[137]

Around that time, too, other clinic pioneers likewise changed direction. The course they've charted is revealing. In the mid-1990s, Jacoby & Meyers's founders split up, and the firm closed or spun off the vast majority of its 150 field offices, thinned its lawyer ranks, and altered its specialty.[138] Jacoby & Meyers decided to deemphasize routine legal services (wills, personal bankruptcies, and uncontested divorces), and turn instead to a "more lucrative" area of practice. By 1993, Jacoby & Meyers was, in Stephen Meyers's words, "the largest personal injury firm" in all the United States.[139] Thus, these days, the firm still advertises (spending $3.7 million in 2010, according to the *New York Times*), but a clinic it is not.[140] So too, Baltimore's once-vaunted Cawley & Schmidt, which at its height operated seventeen legal clinics across the mid-

135. *Id.* at 74.

136. France, *supra* note 98, at 3. For more on the American Legal Clinic Association, see *Legal Clinic Conference Nov. 14, 1977*, TRANSCRIPT S.C.B., Sept. 1977, at 12, 12.

137. For a discussion of this shift, see John Gibeaut, *Avoiding Trouble at the Mill*, A.B.A. J., Mar. 1997, at 48, 51-52; Dillon, *supra* note 74, at 63, 65.

138. *See* Jeff Brazil & Henry Weinstein, *Stephen Meyers, Co-Founder of Law Firm Jacoby & Meyers, Dies in Traffic Accident*, L.A. TIMES, Apr. 21, 1996, at A22; Robert McG. Thomas Jr., *Stephen Meyers, 53, Legal Innovator, Dies*, N.Y. TIMES, Apr. 21, 1996, at 43.

139. Dillon, *supra* note 74, at 69 (quoting Stephen Meyers); Randy Kennedy, *Groundbreaking Law Firm Shifts Its Focus to Personal-Injury Cases*, N.Y. TIMES, May 12, 1995, at A29 (stating that Jacoby & Meyers had "all but abandoned the workaday cases—personal bankruptcies, wills, uncontested divorces, real estate closings" to focus on "more lucrative" personal injury cases). Today, a visit to Jacoby & Meyers's home page reveals that the firm considers itself "one of America's best known personal injury law firms." *Jacoby and Meyers—In the News*, JACOBY & MYERS LAW OFFICES, http://www.jacobymeyers.com/jacoby-and-meyers-news.html (last visited Mar. 23, 2013).

140. Andrew Adam Newman, *Winning Is Everything, or So Says a Law Firm*, N.Y. TIMES, Oct. 20, 2011, at B6, *available at* http://www.nytimes.com/2011/10/20/business/media/winning-is-everything-or-so-says-jacoby-meyers.html.

Atlantic and handled 1200 cases a month, also disbanded.[141] Now, William R. Schmidt reports on his new firm's website three prime areas of practice: personal injury, medical malpractice, and criminal defense.[142] Perhaps most telling of all, by the early 1990s, even Van O'Steen—the man whose legal clinic, newspaper ad, bar suspension, and court challenge sparked this legal revolution—had also changed his specialty. He, too, had joined the PI ranks.[143]

III. ADVERTISING AND PRICE: THEORY AND EVIDENCE

Parts I and II traced the delivery of legal services from the 1970s through the 1990s to highlight legal clinic's starring role. But Part II showed that, while clinics were central, they were also ephemeral. By 1994, as the *National Law Journal* declared, "the legal clinic movement [was] dead."[144] This Part continues to explore the factual template on which *Bates* was issued, but it does so by changing focus, from the historical to the theoretical and empirical. Specifically, Subpart A considers theoretical justifications for why permitting attorney advertising should or shouldn't reduce prices for legal services. Subpart B reviews empirical evidence studying the price effect of advertising in other contexts. Finally, Subpart C reviews the limited empirical evidence collected thus far on advertising and the price of legal services.

A. *Theories for Why Advertising Should or Shouldn't Reduce Prices*

At the time of the *Bates* opinion, commentators made any number of predictions—with various theoretical bases—concerning the anticipated price effect of attorney advertising. Some hypothesized that permitting attorney advertising would make prices go up. This prediction was typically premised on the fact that promotional activity costs money and the belief that the additional expense would be passed on to consumers. "The addition of advertising expense to a lawyer's budget can only increase the cost of delivering his services," one

---

141. *See* Baker, *supra* note 101, at 16; *Get a Lawyer for Less at a Clinic*, CHANGING TIMES, Mar. 1979, at 35, 35.

142. *See Attorney Profiles*, LEVINESS, TOLZMAN & HAMILTON, http://www.lthlaw.com/attorneys (last visited Mar. 23, 2013).

143. In a recent conversation, Van O'Steen traced the firm's evolution:

> The answer to the question why so many law firms did gravitate to personal injury work is that it is more profitable work. We struggled attempting to make a living doing non-business bankruptcies, uncontested divorces, name changes, and wills. It was punishing. . . . One by one, we dropped practice areas from the firm until we became exclusively a personal injury, products liability, and medical malpractice law firm. We still, however, charge discount fees for that work. . . . It's natural that providers of goods and services will eventually gravitate toward higher-profit centers.

Telephone Interview with Van O'Steen, Founding Partner, Bates & O'Steen and O'Steen & Harrison (Aug. 16, 2012).

144. France, *supra* note 98, at 3; *see also* ABA LEGAL CLINICS, *supra* note 69, at 29 ("Legal clinics are not booming; in fact, they are dying out.").

Bar leader declared.[145] In addition, some believed that attorney advertising would erect a new, additional barrier to entry, which "might deter or make it difficult, if not impossible, for some young lawyers without that capital to build up a practice."[146] This barrier, some argued, might increase prices by reducing attorney supply.

Most commentators, though, predicted that attorney advertising would have a procompetitive effect. For this, advertising's advocates rolled out a number of arguments.

First, advertising's proponents challenged the dismal predictions above. Disagreeing with the premise that the high cost of advertising would be passed on to clients, they contended that advertising was likely to be cheaper and more efficient than current means of client generation, such as country club memberships and community contacts.[147] Likewise, they rejected the prediction that permitting advertising would erect a new barrier to entry, maintaining instead that it would "make it easier for young lawyers right out of law school to break into practice," thus effectively increasing attorney supply.[148]

Second, advertising's proponents made price predictions based on the operation of legal clinics in particular. The syllogism went something like this: (1) legal clinics charged lower fees than traditional providers; (2) in order for legal clinics to succeed, while charging lower fees, they had to attract a large number of clients; and (3) attracting a large number of clients was impossible in the absence of attorney advertising.[149] Permitting advertising, then, facilitat-

---

145. Brent M. Abel, *President's Message: A "Fresh" Look at the State Bar*, 49 CAL. ST. B.J. 502, 503 (1974); *see* Brief of the State Bar of North Carolina as Amicus Curiae in Support of the State Bar of Arizona, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (No. 76-316), 1976 WL 181246, at *35 [hereinafter North Carolina Amicus] ("The cost of advertising . . . would necessarily increase the cost of legal services.").

146. North Carolina Amicus, *supra* note 145, 1976 WL 181246, at *34-35.

147. *See, e.g.*, Muris & McChesney, *supra* note 4, at 189-90. On this, the *Bates* Court sided with proponents, dismissing the argument that "advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees," as "dubious at best." *Bates*, 433 U.S. at 377.

148. *See* Moskowitz, *supra* note 114, at 22 (quoting Charles Baron, a Boston University law professor); *see also* FTC STUDY, *supra* note 7, at 82. The Supreme Court sided with this view, providing:

> In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

Bates, 433 U.S. at 378.

149. *See, e.g.*, Stuart Auerbach, *Lawyer Advertising Issue Preoccupies ABA Delegates*, WASH. POST, Aug. 12, 1977, at A2 ("Advertising is vital to the survival of legal clinics that are springing up around the country because it allows them to get the high volume that results in cutrate prices."). Bolstering this argument, some clinics that went bust prior to *Bates* blamed their failure on their inability to advertise. *See* Thomas S. Johnson, *Legal Clinics Are Not Just for the Poor*, B. LEADER, Mar. 1976, at 23, 26.

ed clinic development and expansion and the sharp price reductions they'd bring.

Third, commentators made similar but more explicitly volume-based claims. Writing for the American Bar Foundation in 1979, Timothy Muris and Fred McChesney predicted, for example, that attorney advertising would increase client volume. That higher volume, Muris-McChesney continued, would facilitate broad cost savings as economies of scale could be harnessed in the production of legal services, via increased specialization, greater use of boilerplate forms, heavier reliance on technology, and additional delegation to paraprofessionals.[150] As the costs of providing legal services dropped, Muris-McChesney theorized, so would the prices charged clients.[151]

Finally, a number of advertising's supporters—including, most notably, the U.S. Solicitor General—advanced the "advertising-as-information" argument. And indeed, this was the argument ultimately accepted, and reiterated, by the *Bates* majority. Originating with George Stigler's seminal paper on the economics of information, the idea is that competition requires informed consumers. If consumers are not informed—which is likely where search is costly—consumers will not locate the purveyor with the lowest possible price, giving sellers some degree of monopolistic power. By reducing search costs, price advertising can stimulate more comparison shopping and generate more price competition and less price dispersion, to positive effect.[152] Espousing this model, the Solicitor General declared: "economic theory . . . explains that an advertising prohibition increases the cost to consumers of discovering the lowest cost seller of acceptable quality; as a result, sellers obtain greater independence in setting prices and lack incentives to price competitively."[153] And implicitly embracing this model, the Supreme Court agreed: "The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced."[154]

150. Muris & McChesney, *supra* note 4, at 183-89. Put simply: "As firms have larger planned volumes, they can lower their per-unit costs and, accordingly, their prices." *Id.* at 207.

151. *Id.* at 189. Others made similar points. *See* FTC STUDY, *supra* note 7, at 82; Hazard et al., *supra* note 4, at 1109; Note, *supra* note 33, at 1201-08.

152. George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 224 (1961) ("The effect of advertising prices, then, is equivalent to that of the introduction of a very large amount of search by a large portion of the potential buyers. It follows . . . that the dispersion of asking prices will be much reduced.").

153. Brief for the United States as Amicus Curiae, *supra* note 3, 1976 WL 178669, at *12 n.14. The Brief continued: "When price and other information is readily available, searching for appropriate low-cost sellers becomes practical for consumers. Sellers in turn are forced to be more competitive with regard to both price and quality." *Id.*

154. Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977).

B. *Empirical Evidence from Other Contexts*

Just as theorists advanced a number of hypotheses for why prices might drop as advertising restrictions were relaxed, starting in the early 1970s, empiricists conducted a number of studies, on a range of goods and services, which generally confirmed the theory worked. As marketing restrictions were lifted, prices fell.[155]

Lee Benham was the first modern researcher to study advertising's price effect, in a study published in 1972 and subsequently cited by the *Bates* majority.[156] Using data from a 1963 national survey, Benham traced advertising's effect on the price of ophthalmic goods and services. Classifying states as "restrictive" or "nonrestrictive" with regard to the permissibility of ophthalmic promotional activity, Benham found that prices were "substantially lower" in less restrictive states.[157] Price effects were, in fact, huge: strict restrictions increased the price of eyeglasses anywhere from 25% to 100%.[158] A few years later, in 1975, Benham (this time with coauthor Alexandra Benham) again evaluated the impact of professional regulation on the price of eyeglasses, utilizing a larger sample and deploying more precise measures of professional control.[159] Though the effect was less stark, results generally held. Eyeglasses were discounted 25% to 40% when laws were liberalized.[160]

In 1976, another researcher, John Cady, published a study probing advertising's effect on the price of prescription drugs, which was also cited by the *Bates* Court.[161] After collecting price data for ten prescriptions from over 1900 pharmacies in a number of states, Cady classified the originating states as either unregulated or regulated based on their formal marketing controls. He ultimate-

---

155. In suggesting that attorney advertising would reduce the cost of legal services, the *Bates* Court explicitly referenced advertising's salutary effect on the price of consumer products. Specifically, the Court provided: "Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Id.*

156. *See id.* at 377 & n.34 (citing Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972)).

157. Benham, *supra* note 156, at 352.

158. *Id.* at 344.

159. Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421 (1975).

160. *Id.* at 446. A follow-up to the Benhams' study, conducted by Roger Feldman and James Begun, also found that bans on optometric and optician price advertising were associated with higher prices. Specifically, eye exams cost 16% more in states that banned both optometrists and opticians from engaging in price advertising. Roger Feldman & James W. Begun, *The Effects of Advertising: Lessons from Optometry*, 13 J. HUM. RESOURCES 247, 247 (1978).

161. *See Bates*, 433 U.S. at 377 & n.34 (citing JOHN F. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS (1976)).

ly concluded that drug prices were roughly 5.2% higher in the latter; marketing restrictions were associated with a marginal increase in consumer price.[162]

A final pre-*Bates* study, conducted by Alex Maurizi, tried to assess the impact of city ordinances prohibiting on-premises advertising of retail gasoline prices.[163] This study appeared to find that the cities that prohibited on-premises advertising had *lower* average prices than those that permitted such advertising—but data problems may have explained the unexpected result.[164]

After *Bates*, researchers conducted roughly a dozen additional studies, with findings much the same.[165] For example, in 1978, Maurizi (this time with coauthor Thom Kelly) re-analyzed the effects of price posting in the retail gasoline industry, using a better dataset. On this second try, consistent with expectations, Maurizi found posting reduced prices.[166] Maurizi then partnered with Ruth Moore and Lawrence Shepard to extend the Benhams' work on eyeglasses. Maurizi, Moore, and Shepard analyzed price differences between advertising and non-advertising ophthalmologists, optometrists, and opticians in two counties in California and found that, while relatively few providers advertised outside the telephone book, those who did charged 17% less than those who didn't.[167] Then, in 1980, the FTC's Bureau of Economics got in the act, also testing advertising's effect on the price of optometric services—and also finding that eye exams and eyeglasses cost less in cities with fewer ad restrictions and that optometrists who advertised charged lower prices than their non-advertising counterparts.[168] Indeed, an advertiser in a city with the fewest re-

---

162. CADY, *supra* note 161, at 11.

163. Alex R. Maurizi, *The Effect of Laws Against Price Advertising: The Case of Retail Gasoline*, 10 W. ECON. J. 321 (1972).

164. *Id.* at 328 (stating that the unexpected conclusion may be "due to the systematic error present in the wholesale price data"); *see* Steven R. Cox, *Advertising Restrictions Among Professionals:* Bates v. State Bar of Arizona, *in* THE ANTITRUST REVOLUTION 134, 155 n.22 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989) ("Maurizi's findings, especially his price means, are somewhat clouded by the poor wholesale price data available to him.").

165. *See* Cox, *supra* note 164, at 148 ("Eight additional studies have been completed since *Bates*. . . . The results of all eight studies, like those of the earlier Benham and Cady studies, are consistent with the hypothesis that advertising increases market competition."); *see also, e.g.*, Amihai Glazer, *Advertising, Information, and Prices—A Case Study*, 19 ECON. INQUIRY 661 (1981) (studying grocery prices during a newspaper strike and finding that stores that typically advertised raised prices during the strike and dropped their prices afterward); Jeffrey Milyo & Joel Waldfogel, *The Effect of Price Advertising on Prices: Evidence in the Wake of* 44 Liquormart, 89 AM. ECON. REV. 1081 (1999) (finding that, after a ban on liquor price advertising was lifted in Rhode Island, advertisers dropped the prices of advertised products by over 20%).

166. ALEX MAURIZI & THOM KELLY, PRICES AND CONSUMER INFORMATION: THE BENEFITS FROM POSTING RETAIL GASOLINE PRICE 49-50 (1978).

167. Alex R. Maurizi et al., *The Impact of Price Advertising: The California Eyewear Market After One Year*, 15 J. CONSUMER AFF. 290, 290 (1981).

168. BOND ET AL., *supra* note 118, at 23. A consumer could get an eye exam and glasses for roughly $10 less in a city that imposed the fewest restrictions on advertising, even from a non-advertiser. *Id.* at 57.

strictions charged only $64.73 for an eye exam and glasses, compared to the $94.73 charged by a non-advertiser in a highly restrictive city.[169] In 1986, researchers studied the ban on broadcast advertising of cigarettes—concluding that it increased cigarette prices.[170] Finally, in 2007, C. Robert Clark studied the price of breakfast cereal in Quebec, where advertising directed at persons under the age of thirteen is outlawed. Clark found that "the prices of children's cereals are higher in Quebec than the rest of Canada."[171]

Findings were not unanimous, however.[172] Most notably, in 1992, John Rizzo of Yale and Richard Zeckhauser of Harvard published an article studying the advertising behavior of primary care physicians. After compiling survey data from 1615 practitioners, and after controlling for selection effects, Rizzo and Zeckhauser found that, contrary to conventional wisdom, primary care physicians who had advertised during the five preceding years charged significantly higher prices than those who hadn't.[173] But that study was not published in a legal journal and, as far as I can tell, despite the FTC's past recognition that "advertising may have a comparable impact on" the legal and medical professions, the article's explosive implications—revisited in Part V—have never informed the attorney advertising debate.[174]

In sum, over the past four decades, a number of studies have examined the price effect of advertising, some predating and some postdating the *Bates* opinion. And those studies, surveying everything from breakfast cereal to gasoline and eye exams to cigarettes have, on the whole, powerfully supported advertising's competitive effect. With the exception of Rizzo-Zeckhauser's finding regarding primary physician services, the permissibility of advertising is gener-

---

169. *Id.* at 5 tbl.1. After the Bond study, others further probed the effects of optometric advertising, finding much the same. *See, e.g.*, Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 J.L. & ECON. 165, 182 (1986); John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. R. 211, 216 (1984).

170. Robert F. Porter, *The Impact of Government Policy on the U.S. Cigarette Industry*, *in* EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS, 447, 459 (Pauline M. Ippolito & David T. Scheffman eds., 1986).

171. C. Robert Clark, *Advertising Restrictions and Competition in the Children's Breakfast Cereal Industry*, 50 J.L. & ECON. 757, 761 (2007).

172. An additional study contradicting the conventional wisdom was published in 1999. In that study, John Rizzo studied whether promotional activity decreased prices for antihypertensive drugs. He found strong evidence that drug promotion led to *higher* equilibrium prices. John A. Rizzo, *Advertising and Competition in the Ethical Pharmaceutical Industry: The Case of Antihypertensive Drugs*, 42 J.L. & ECON. 89, 89-92 (1999).

173. John A. Rizzo & Richard J. Zeckhauser, *Advertising and the Price, Quantity, and Quality of Primary Care Physician Services*, 27 J. HUM. RESOURCES 381, 381, 396 (1992). The refined model controlled for preexisting differences between advertisers and non-advertisers.

174. A March 22, 2013, search of the article's title in the "Journals & Law Reviews" Westlaw database, along with the term "attorney advertising," returned no documents. For the FTC's recognition of the relationship between the two professions, see FTC STUDY, *supra* note 7, at 141.

ally associated with lower prices for goods and services; as advertising regulations fall, consumer prices tend to follow.

C. *Studies on Advertising's Effect on Legal Services*

Finally, in addition to the many studies cataloged above, two studies have specifically examined—and reached clear conclusions about—advertising's effect on the cost of legal services.[175] The first study was an ambitious effort published by the staff of the FTC in 1984, seven years after the *Bates* decision.[176] This FTC study leveraged the fact that states differed in their response to *Bates*. Some dragged their heels, adopting rigid regulations that basically limited the opinion to its facts (or, more dubiously, gave the opinion such a crabbed reading that even the block ad Bates and O'Steen published wouldn't pass muster), while others took a more laissez-faire approach, permitting all ads, save those that were false or misleading.[177] This variance created a natural

---

175. A third study, McChesney & Muris, *supra* note 105, is often cited for the proposition that advertising reduces legal fees. But that study, which was specifically focused on the *quality* of representation the Jacoby & Meyers legal clinic provided its clients, did not meaningfully address the cost question. Rather, the authors noted what Jacoby & Meyers charged for the studied service (an uncontested divorce at $150) and simultaneously observed that $150 was below California's previously-prevailing minimum fee schedule price. *Id.* at 1504. A fourth study, conducted by Jim Rossi and Mollie Weighner, *has* looked at the cost question but reached only ambiguous results. Specifically, Rossi and Weighner compared the cost of simple wills, bankruptcies, and dissolutions of marriages in Wisconsin (where attorneys face few advertising restrictions) and Iowa (where attorneys face strict advertising restrictions). The researchers found, somewhat surprisingly, that Iowa lawyers charged less than Wisconsin lawyers. But, the study's authors cautioned that this result might be explained by the different rural/urban makeup of the two states and concluded that "the data are ambiguous" as to advertising's "effect on the fees lawyers charge for their services." Rossi & Weighner, *supra* note 113, at 250. Many additional researchers have studied attorney advertising, but rather than studying the cost question, most have instead focused on whether advertising harms the public's perception of or attitudes about lawyers. For a small taste of this extraordinarily broad literature, see, for example, Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503 (1998); William A. Weeks & Donald E. Stem, Jr., *Media and Price Disclosure Effects in Legal Service Advertising: A Comparison of Attorney and Consumer Attitudes*, 3 J. PROF. SERV. MARKETING 257 (1987).

176. *See* Calvani et al., *supra* note 28, at 783 (deeming the FTC study "[t]he most comprehensive study on attorney advertising"). The seventeen-city FTC study was comprised of a six-city survey conducted by Cox under a grant from the National Science Foundation and an eleven-city survey conducted by Louis Harris Associates (for the FTC), which utilized Cox's survey instrument. FTC STUDY, *supra* note 7, at 79; *see also* STEVEN R. COX, A COMPARISON OF ATTORNEYS' FEES AND ADVERTISING PRACTICES ACROSS AREAS WITH WIDELY DIFFERENT ATTORNEY ADVERTISING REGULATIONS: A FINAL PROJECT REPORT (1983) (on file with author) (reporting the results of Cox's original six-city survey). Prior to his six-city survey, Cox had conducted a pilot study in Phoenix, Arizona, also with funding from the National Science Foundation. *See* COX, *supra*, at 1.

177. *See supra* note 121 (describing states' differing responses).

laboratory to test advertising's early economic effect. To do so, between December 1980 and March 1982, FTC researchers identified seventeen cities, which were selected to provide a sample of the regulatory spectrum then in existence, and compiled attorney price information from approximately 3200 surveyed lawyers practicing therein. Surveyed lawyers were asked about the fees they would charge for four different routine legal services (reciprocal sample wills with and without a trust provision, an uncontested personal bankruptcy, and an uncontested divorce) and one non-routine service (a plaintiff personal injury case).

Analyzing this survey data, the FTC economists, as noted above, found it was generally true "that restrictions on advertising raise prices."[178] For all specialties, attorneys practicing in states with restrictive advertising rules reported, on average, higher prices than the fees charged by attorneys practicing in permissive states.[179] It was also typically true that attorneys who advertised a specific service reported providing that service at a lower price than their non-advertising counterparts.[180] The exception, of course, was personal injury law. "In the three cities with statistically significant results," the FTC's economists found, "attorneys who advertised personal injury services appeared to charge about a 3 percent higher contingent fee if the case were settled before trial than those who did not advertise personal injury service."[181]

A second and final study was published a few years later, in 1987, by John Schroeter, Scott Smith, and Cox, using the FTC's original seventeen-city dataset but deploying different statistical tools and excluding personal injury practitioners.[182] Not surprisingly, the authors found that the data were "consistent with the hypothesis that advertising increases competition among sellers in a market."[183] "Thus," the authors concluded, "the trend over the past decade toward fewer restrictions on seller advertising in professional service markets would appear to be a very favorable one, at least as far as consumers are concerned."[184]

178. FTC STUDY, *supra* note 7, at 79.

179. *Id.*

180. *Id.* at 125.

181. *Id.* In an explanatory footnote, the FTC researchers noted that they could not "offer a compelling explanation for this occurrence." *Id.* at 125 n.267.

182. John R. Schroeter, Scott L. Smith & Steven R. Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49 (1987). For a more technical description of these various studies, see Cox, *supra* note 164, at 145-51.

183. Schroeter et al., *supra* note 182, at 49.

184. *Id.* at 59.

IV. THE PARADOX: PERSONAL INJURY ADVERTISERS APPEAR TO BUCK ECONOMIC PREDICTIONS

To this point, we have considered theoretical explanations for why advertising might reduce prices, and we have also reviewed a number of studies that, with a couple exceptions, appear to confirm the theory works. We have also seen that legal clinics, the first and most aggressive advertisers, *did* appear to charge reduced prices for routine legal services, just as theory would dictate and experience from other markets might predict.[185] But, we have also seen that, since the late 1980s or early 1990s, personal injury lawyers have supplanted legal clinics as the biggest attorney advertisers, by far.[186]

Having laid that factual foundation, we can confront the puzzle this Article exposes and explores: though advertisers typically charge less than non-advertisers, there is *no evidence* that advertising personal injury lawyers charge less, on a percentage basis, than their non-advertising counterparts. Nor is there evidence that, despite the swell of personal injury attorney advertising, contingency fees—the near-uniform method of payment for PI services[187]—have dropped over the past four decades.[188] True, contending that attorney ads *ha-*

---

185. *See supra* notes 101-108 and accompanying text.

186. *See supra* notes 21-24 and accompanying text.

187. Approximately 99% of individual personal injury plaintiffs pay their lawyers on a contingent-fee basis. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 16 tbl.5 (1996).

188. *See* Robert D. Peltz, *Legal Advertising—Opening Pandora's Box?*, 19 STETSON L. REV. 43, 108 (1989) ("Despite the tremendous onslaught of personal injury advertising subsequent to *Bates*, the amount of such fees has not changed at all in practice."). For evidence that contingency fees have changed little, compare Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 284-86 (1998) (reporting on the results of a survey of Wisconsin lawyers which found that most lawyers charged a fee of 33%), with F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 116 (1964) (suggesting, on the basis of a review of available data, that the average contingency fee in the United States was approximately 33%).

Of course, it would make sense for contingency fees to remain steady at 33% over the course of four decades if advertising's downward pressure on fees were offset by another countervailing force. One countervailing force might be an increased risk of nonrecovery or lower judgments when recoveries obtain, as higher contingency fee percentages would be needed for the lawyer's recovery to remain constant. But this does not appear to be a valid explanation. While it's true that the years 1992 through 2005 witnessed a steep reduction in jury trial awards, *see* LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 10 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf, when one steps back further and compares the world today with the world of the early 1960s (when MacKinnon was writing), the picture for plaintiffs seems brighter, not bleaker, *see* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 66-69 (2003) (discussing the substantial expansion of tort liability from 1960 to 2000). Another possible countervailing force might be a shift from "gross" to "net" contingency fee calculations. If, in the past few decades, more lawyers started deducting contingency fees from clients' *net* recoveries (computing fees only after deducting litigation *ven't* reduced contingency fees is perilous because data here are notoriously spotty. There is no requirement that attorneys publicly report the fees they charge, and there have been few systematic studies.[189] But fragmentary evidence suggests that, if anything, advertising PI lawyers charge *higher* contingency fees, on a percentage basis, than non-advertising PI lawyers, and that, with some notable exceptions,[190] contingency fees for legal services are—and have long remained—sticky around 33%.[191]

---

expenses), rather than from clients' *gross* recoveries, that shift could obscure our ability to appreciate actual reductions. But this explanation, too, appears wanting. It seems, in fact, that gross contingency fee arrangements have become more, rather than less, common in recent decades, pushing effective contingency fees higher. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.5-1, at 170 n.55 (2012-2013 ed.) ("It has become more common for lawyers to apply their contingency fee percentages to the gross recovery, which results in charging all litigation expenses to the client's share.").

189. WILLIAM A. BOLGER ET AL., NAT'L RES. CTR. FOR CONSUMERS OF LEGAL SERVS., THE COST OF PERSONAL LEGAL SERVICES 4 (1988) ("Data and studies on lawyers' fees are scarce."); KRITZER, *supra* note 21, at 183 ("There is surprisingly little prior research on the kinds of fees and incomes lawyers earn from contingency fee work.").

190. As noted in the text, there are a number of exceptions. Some federal statutes cap fees. *See, e.g.*, 28 U.S.C. § 2678 (2011) (limiting legal fees for claims brought under the Federal Tort Claims Act); 42 U.S.C. § 406(b) (limiting legal fees that may be awarded to a prevailing claimant under the Social Security Act). In addition, a number of states cap or otherwise restrict the contingency fee a lawyer can collect in medical malpractice cases. *See Contingent Fee Reform*, ATRA, http://www.atra.org/issues/contingent-fee-reform (last visited Mar. 23, 2013) (compiling state legislative efforts); *see also, e.g.*, CAL. BUS. & PROF. CODE § 6146 (West 2012) (limiting contingency fee awards, pursuant to a sliding scale, in "connection with an action for injury or damage against a health care provider"). Some other states have enacted across-the-board caps. *See, e.g.*, CONN. GEN. STAT. § 52-251c(b) (2013) (limiting contingent fees in personal injury and wrongful death cases to 33 ⅓% of the first $300,000; 25% of the next $300,000; 20% of the next $300,000; 15% of the next $300,000; and 10% of any amount exceeding $1.2 million). Class actions also deviate from the one-third model; there, fees are substantially lower. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004). Airline accidents are also outliers. In the plane crash context, known victims, high damages, and low risk (in fact, for a time, insurers sent out letters that included early offers of settlement) have combined to reduce fees below 20%. *See* JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION 44-45 (1988); Brickman, *supra* note 188, at 107-12. Likewise, early on in asbestos litigation when the risk of nonrecovery was unusually high and the litigation was particularly complex and time-consuming (in part because the average case had sixteen defendants), fees seemed responsive to that risk, approaching 40%. JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 40-42 (1984) [hereinafter KAKALIK ET AL., ASBESTOS]. But even in the asbestos context, there is no evidence that contingency fees fell once case settlement procedures settled into a predictable pattern. *See* STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 102-03 (2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

191. Many have remarked on contingency fee uniformity. *See, e.g.*, RICHARD L. ABEL, LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT 449 (2011) ("The problem [with the contingency fee] is that all lawyers charge virtually identical percentages . . . ."); Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 337 (1998) ("At present, it is uncommon for plain-

In an ideal world one could directly test assertions about promotional activity's effect on contingency fees. One could, for instance, compile copious data from a representative group of PI specialists and specify a regression model, regressing fees (whether by contingency fee percentage charged or effective hourly rate realized[192]) on an indicator variable set to one if the firm advertised and zero otherwise along with a range of independent variables that theory and evidence suggest will impact fees or are logically necessary controls, including firm size, attorney experience, subspecialties within PI, and so forth. Better still, one could further refine the model to account for a firm's advertising intensity, as a single Yellow Pages ad and blanket TV coverage might generate very different effects. While even such a sophisticated research design would fall considerably short of a causal model, it would capture the correlation (or relationship) between advertisements aired and fees charged.[193] Unfortunately, though, that data is not currently available and, without it, I am left to rely on

---

tiffs' attorneys to compete by varying the terms of the contingent fee contracts that they offer."); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 628 (1993) (remarking that, in the contingent fee context, "virtually all lawyers charge the standard percentage"); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 279 (2007) ("[D]espite some limited evidence of price competition in the plaintiffs' market, the price term in plaintiffs'-side personal injury retainers is remarkably sticky."). *But see* ABA CROSSROADS, *supra* note 22, at 130 ("Recently, however, contingency fee rates have decreased in a few jurisdictions, including Arizona and Rhode Island.").

192. Effective hourly rates are calculated by dividing the fee earned by the amount of time the lawyer had to expend in order to earn that fee.

193. A firm's decision to advertise is likely to be, in empirical terms, endogenous and thus impacted by other, unobserved aspects of the legal environment. Among many other possibilities, attorneys who advertise might be more (or less) experienced, might have higher (or lower) case volumes, or might focus their practice on very different case types from those who don't. The problem is that these unobserved factors will affect both the likelihood of a firm's resort to advertising *and* the amount of fees commanded or realized, potentially biasing empirical estimates. A standard approach to work around such problems is instrumental variables estimation. By separately (and exogenously) predicting a lawyer's propensity to advertise, one could theoretically derive a causal estimate of advertising's effect. The resulting model is sometimes referred to as a two-stage least squares model. However, finding the "instrument" necessary for such a model is notoriously difficult. Absent one, a regression analysis would be entirely descriptive, capturing the correlation (or relationship) between advertising and fees. For an especially lucid discussion, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 113-33 (2009).

Still another ideal approach would compare legal fees charged in two (or more) jurisdictions, one (or some) with advertising and one (or some) without, and utilize matching techniques to control for attorney, client, and case characteristics. Using these matching techniques, one could evaluate not only whether otherwise similar PI advertisers tend to charge more than non-advertisers—but also, and more importantly, the claim arguably more central to any policy judgment about advertising's price effect: whether the presence of advertising in a jurisdiction reduces fees charged by lawyers in that jurisdiction, relative to otherwise similar lawyers in a jurisdiction without advertising. For more on matching, see Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007).

either dated or descriptive information, meaning that conclusions are necessarily tentative.

Three prime sources of data inform the study of the relationship between contingency fees and attorney advertising. The most systematic evidence ever collected, by far, was compiled by the staff of the FTC. As noted, that study found that, unlike for all other specialties, in the three out of seventeen cities with statistically significant results, personal injury advertisers charged higher contingency fees than their non-advertising counterparts.[194]

Herbert Kritzer's empirical work also sheds light on this question. In a survey of Wisconsin contingency fee practitioners, he found that lawyers in firms that employ media or direct mail advertising earn *higher* mean and median effective hourly rates, as compared to non-advertisers.[195] Specifically, he found that advertisers earn mean effective hourly rates of $326, compared to $220 for non-advertisers, and median effective hourly rates of $182, compared to $122 for non-advertisers.[196] When weighted to adjust the sample to the Wisconsin population, the difference becomes more stark. Advertisers earned a mean of $513, as compared to $269, and a median of $182, as compared to $165.[197] This study was not confined to PI practitioners, and it did not, of course, speak directly to the precise contingency fee *percentage* advertising lawyers charge, but it is at least suggestive that today's advertising lawyers are not cutting fees to the bone.

Third, my own work exploring high-volume, heavy-advertising personal injury law firms, which I have labeled "settlement mills," provides some additional, albeit anecdotal, support. When it comes to fees, all of the settlement mills I've so far studied charge a "tiered" or "graduated" contingency fee, which is a fee that escalates at pre-ordained intervals.[198] This reliance on tiered fees is itself unusual; Kritzer's Wisconsin data, for example, reveal that tiered fees are utilized by only a minority of practitioners.[199] Even more unusual, though, when one compares settlement mills' tiered fees to the tiered fees of other personal injury lawyers, it appears that settlement mills both start with a higher contingency fee percentage and also trigger the escalator earlier in the

---

194. FTC STUDY, *supra* note 7, at 123-25.

195. KRITZER, *supra* note 21, at 193 tbl.6.2a. For more on the survey sample, see *id.* at 19-20.

196. *Id.* at 193 tbl.6.2a.

197. *Id.* at 197 tbl.6.2b. Kritzer concludes: "Lawyers in firms that employ media or direct mail advertising produce higher returns." *Id.* at 200. Kritzer chalks up some of the disparity to the fact that "those employing this type of advertising tend to be in firms that specialize in personal injury work." *Id.* Maybe—but advertising lawyers as a group earn higher effective hourly rates than personal injury specialists as a group (an unweighted mean of $326 versus $293 and unweighted median of $182 versus $153). *Id.* at 193 tbl.6.2a. For more on Kritzer's methodology, see *id.* at 189.

198. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1498 (2009).

199. *See* KRITZER, *supra* note 21, at 39-40.

litigation process. That is, while Kritzer found that Wisconsin firms employing tiered fees typically started at a fee of 25% and increased the fee to one-third only after completing "substantial trial preparation," all settlement mills in my (admittedly small and unscientifically drawn) sample started with a contingency fee of at least 33% (and sometimes 40%) and increased the fee when suit was merely filed.[200] Furthermore, settlement mills charge what appear to be higher-than-average fees even though, as compared to most personal injury practitioners, they handle a higher volume of cases (which should provide various economies of scale), spend comparatively little time and effort on the cases they do resolve (which should lower the cost of inputs), delegate more tasks to paraprofessionals (which should also reduce inputs), and incur very little risk, since the vast majority of settlement mill cases result in some recovery.[201]

Given that the data we have is highly imperfect, one cannot say for sure that PI advertisers charge more than PI non-advertisers. At the same time, however, the *opposite* claim—made so often, so confidently, and so consequentially in the past—is left wanting for support.

V. CONFRONTING THE PARADOX

This final Part attempts to unravel the paradox identified above. Assuming the FTC study is right, why *might* personal injury lawyers buck most economic predictions? I start by analyzing four potential explanations I consider to be somewhat implausible. These explanations are: (1) advertising PI lawyers are of particularly high quality; (2) advertising lawyers refer cases to other lawyers at especially high rates, and higher fees are needed to facilitate attorney referrals; (3) collusion within the PI bar keeps prices high and uniform; and (4) advertising lawyers handle particularly small and/or risky cases, and a higher fee is needed to compensate for these cases' lower expected value.

With those explanations considered and largely discarded, in Subpart B, I consider explanations I find more convincing. These more plausible explanations draw heavily on literature from the fields of behavioral economics and cognitive psychology, train a careful eye on the unique characteristics of the PI/contingency fee marketplace, and contrast the PI/contingency fee marketplace with the legal clinic context, discussed in some detail above. Specifically, I suggest that it is *predictable* that advertising will fail to lower prices when: (1) there is very little price advertising; (2) quality is vitally important yet impossible to assess, and, to make matters worse, some consumers incorrectly be-

200. *See* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 845-46 (2011); *cf.* ACTION COMM'N TO IMPROVE THE TORT LIAB. SYS., ABA, REPORT TO THE HOUSE OF DELEGATES 28 (1987) ("If a settlement is reached in a case after an exchange of letters and some brief telephone conversations, but before suit is filed, a one-third fee would generally not be considered reasonable.").

201. *See* Engstrom, *supra* note 200, at 847-49. *See generally* Engstrom, *supra* note 198, at 1492-1503 (discussing settlement mills' distinctive attributes).

lieve that advertising and quality go hand in hand; and (3) payment of attorneys' fees is discounted in consumers' minds because it is *uncertain* (given contingency fees' no-win, no-pay feature) and, even if fees are to be paid, fees are *deducted* from recoveries *long after* attorney retention.

A. *Less Plausible Explanations*

1. *Advertising personal injury lawyers are of higher quality?*

The first possibility is that personal injury advertisers do charge higher fees, on a percentage basis, than non-advertisers—but only because advertisers actually provide a superior service. If the representation you get is better with an advertising lawyer, it only makes sense to pay proportionally more.[202]

Why might advertising lawyers be genuinely superior to non-advertisers? There are two prime possibilities. First, advertising lawyers tend to specialize in a specific area of practice, which might permit those lawyers to become more expert in that field.[203] Second, as some economists point out, advertising is a source of "brand name capital." Advertising, and especially television advertising, is expensive, and it amounts to a sunk cost; it has no value if the lawyer's practice should fail. Given that investment, holding all else equal, advertisers may be especially dependent on repeat purchase.[204] Given this heavy reliance on repeat purchase, as economist Steven Cox has stated in the attorney-advertising context, "advertisers will tend to offer brands (products or services) of higher quality" than their non-advertising counterparts.[205] It only makes sense for quality providers to invest in brand name capital; ergo, only quality providers will advertise.

Analyzing these two possibilities, the specialist argument is initially plausible. H. Laurence Ross, for example, has compared personal injury recoveries obtained by specialists to the recoveries obtained by nonspecialists and found that the former obtain substantially more.[206] Furthermore, another (albeit dated)

---

202. Another (and more troubling) possibility is that advertising PI lawyers don't *actually* provide a higher quality service than non-advertisers but that clients think they do. That possibility is explored below in Part V.B.

203. ABA CROSSROADS, *supra* note 22, at 129 (advancing this thesis); *see also* FTC STUDY, *supra* note 7, at 138 ("A specialist is more familiar with procedural requirements, maintains a more current knowledge of the evolving law, has familiarity with less common, more difficult legal problems in one area, and is generally more experienced in a particular area than the lawyer who trys [sic] to be competent in a wider range of legal specialties.").

204. *See* Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 734 (1974).

205. Steven R. Cox, *Attorney Advertising: The Alpha and the Omega!*, ARIZ. ATT'Y, Oct. 1988, at 23, 24.

206. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 167, 193 tbl.5.4 (1970). Notably, however, Ross did not attempt to control for the size of claims or their quality—so it might be that specialists' better outcomes

study has found, in the PI context, that specialists tended to charge higher contingency fees than nonspecialists, on a percentage basis.[207] But Cox's "brand name capital" thesis, when applied to personal injury attorney advertising, raises immediate red flags. For one, in the PI realm, repeat "purchase" is rare. Consumers in the PI marketplace are overwhelmingly one-shotters; few individuals are unlucky enough to sustain multiple tortiously inflicted personal injuries.[208] It seems doubtful, then, that any PI attorney's advertising strategy really depends on repeat "purchase" for its success.[209] Moreover, even if an accident-prone individual *were* to retain multiple personal injury lawyers over the course of his lifetime, a client's inability to judge attorney quality creates another major complication. While a supplier's ability to advertise heavily may be taken as a proxy for quality for "search goods," where consumers can discover false or inflated claims prior to purchase, and while it may also be taken as a proxy for quality for "experience goods," where quality is difficult to judge ex ante but can be judged ex post, legal services are "credence goods."[210] Consumers of credence goods cannot easily judge the quality of the good they have purchased, even ex post.[211] So, a client who *wanted* to return only to a lawyer who had provided above-average service in the past would still, more or less, be flying blind.[212]

---

reflect superior raw material received (that is, greater intrinsic case value), as opposed to better legal talent displayed.

207. Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 28 (1961).

208. The average American uses a lawyer (of any kind) only once or twice in a lifetime. CURRAN, *supra* note 42, at 190.

209. *See* JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 21 (1997) ("The success of television advertising allows attorneys to have little concern for repeat business . . . ."). *But see* KRITZER, *supra* note 21, at 62 (discussing the fact that a surprising proportion of personal injury clients are "repeaters").

210. For the fact that legal services are credence goods, see James H. Love & Frank H. Stephen, *Advertising, Price and Quality in Self-Regulating Professions: A Survey*, 3 INT'L J. ECON. BUS. 227, 229 (1996). For information on credence goods, see Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 J. ECON. LITERATURE 5, 5-6 (2006). The distinction between search and experience goods derives from Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312-14 (1970).

211. *See* Winand Emons, *Expertise, Contingent Fees, and Insufficient Attorney Effort*, 20 INT'L REV. L. & ECON. 21, 25 (2000) ("The attorney's services thus constitute 'credence' goods, as distinct from search and experience goods—from *ex post* observations, the client can never be certain of the quality of the services he has obtained." (citation omitted)); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 90, 91 n.195 (1979) (highlighting the difficulty clients have evaluating attorney quality, even after services are rendered, and observing that only "sketchy" evidence supports a correlation between client satisfaction and objective attorney quality).

212. Hindering a client in his after-the-representation appraisal of a particular PI lawyer is the fact that there is no way for even a sophisticated client to know whether the settlement he received was comparatively generous or stingy. After all, there is no central repository recording settlement amounts, and, even if there were, claims are infinitely variable in

Further undermining the broader quality hypothesis, there is little evidence that it is the genuinely better, more expert, or harder working lawyers who most aggressively take to the airwaves to tout their wares.[213] Indeed, anecdotal evidence suggests just the opposite. Some aggressive attorney advertisers are mostly case brokers; they advertise heavily and, in exchange for a referral fee, distribute the cases they receive to other practitioners.[214] James Sokolove, for example, who claims to be the "largest advertiser of legal services in the country" and fields calls from 200,000 to 300,000 potential clients annually, is just that.[215] In fact, he acknowledges "I'm more of a CEO than a case handler. I can't do both."[216] Some other aggressive advertisers, meanwhile, are essentially case bundlers; they advertise aggressively and funnel individuals hurt by the same product into multidistrict litigations (MDLs). Once cases are swept into the MDL, the role of non-lead lawyers, who perform no common benefit work, is quite limited—and any benefit to a client flowing from the lawyer's expertise is bound to be quite small.[217] Likewise, as noted earlier, some aggressive attor-

strength, and injuries are infinitely variable in severity. Nor can a client evaluate paths not taken. To make this latter point concrete, picture a client seriously injured by a negligent motorist. Assume too that the negligent motorist had automobile liability insurance limits of $75,000. If the client received a settlement of $75,000 (a "policy limit settlement"), he may think his lawyer performed admirably, even expertly, under the circumstances. The client is still likely to think this even if a *truly* expert lawyer could have circumvented the defendant's low liability limits by pursuing what tort scholars call a "secondary defendant," by, for example, alleging that the client's car was not crashworthy and seeking damages from the client's car manufacturer.

213. *See* KRITZER, *supra* note 21, at 90 ("I could find no evidence that those who relied heavily upon advertising for clients differed in years of experience from those who did not.").

214. *See* Witt, *supra* note 191, at 286 ("Many lawyers who advertise as personal injury specialists are little more than referral mills. They serve as intake offices for claims that they then farm out to specialized lawyers in return for a contingent referral fee."); Bill Rankin, *Bar Takes Aim at Lawyers' Ads: Court Battles Likely if Restrictions Are Adopted*, ATLANTA J.-CONST., June 17, 1994, at B10 (quoting lawyer Sam Engram, who supervised a committee on attorney advertising for the Georgia State Bar, as stating: "[M]any lawyers use these ads for case-brokering. . . . They're just running a factory, taking phone calls and directing cases to other lawyers and taking a cut of the fee").

215. According to Sokolove's CEO, the firm has a "unique business model." Each year it spends roughly $25 million on advertising, and from that advertising, it generates calls from 200,000 to 300,000 potential clients. It then screens those clients and farms accepted clients' cases out to 300-plus law firms around the country. *TWIB: Unique Workings of Sokolove Law*, NECN, at 0:55 to 1:52 (June 7, 2009), http://www.necn.com/Boston/Business/2009/06/07/TWIB-Unique-workings-of/1244423823.html (featuring an interview of Michael Skoler, CEO of Sokolove Law); *see also* Francis Storrs, *He's Attorney James Sokolove*, BOS. MAG. (Jan. 2009), http://www.bostonmagazine.com/articles/2008/12/he-s-attorney-james-sokolove.

216. Maria Shao, *Dial-A-Suit Lawyers' Battle over Advertising Heats Up as Mass. Bar Jumps into Fray*, BOS. GLOBE, Oct. 10, 1995, at 37 (quoting James Sokolove) (internal quotation marks omitted).

217. *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1026 (1993) ("Many law

ney advertisers run firms I call settlement mills. These lawyers advertise heavily and process cases in a routinized basis. And, again, there is no evidence that these firms employ particularly expert counsel or secure especially advantageous settlements for their clients.[218] Samuel Spital of San Diego provides a case in point. Spital was once the third-biggest attorney advertiser in the United States, and he ultimately settled thousands of PI claims for his injured clients.[219] Even so, he himself had never tried a case or taken a deposition, for a time, employed no one with substantial jury trial experience, and took vanishingly few cases to trial—to the point where one former lawyer complained that the firm's clients were "abused by insurance adjusters and defense attorneys" while others agreed that clients' recoveries were compromised.[220]

A couple of quantitative studies—though each is susceptible to criticism and is hardly definitive—also undermine the view that advertising PI lawyers are of a higher caliber than their non-advertising counterparts. First, a 1991 study (though with a very small sample size) found that plaintiffs represented by television advertisers attained favorable trial verdicts less often than plaintiffs represented by non-advertisers. Specifically, jurors in personal injury cases voted for the plaintiff 59.7% of the time when the plaintiff's attorney did not advertise on television and voted for the plaintiff only 16.7% of the time when the attorney did run television advertisements.[221] Second, a 1985 study compared attorneys who did and did not advertise in the Yellow Pages based on (1) their Martindale-Hubbell ratings (which were, in turn, developed based on reviews by fellow professionals and judges), and (2) rankings of law schools the lawyers attended. That study found that lawyers with higher Martindale-

firms that advertise serve only as referring lawyers who sign up and then refer claims to experienced law firms that specialize in representing mass tort claimants . . . .").

218. Engstrom, *supra* note 200, at 839-41.

219. For the fact that Spital was once the country's third-biggest attorney advertiser, see Debra Cassens Moss, *Law Firms' TV Ad $$ Hiked*, A.B.A. J., Nov. 1986, at 19, 20. For the fact that the firm settled thousands of claims, see Transcript of Trial at 5060, May v. Bloomfield, No. D019136 (Cal. Ct. App. Feb. 2, 1994) (statement of presiding Judge Vincent P. DiFiglia estimating that, during its existence, Spital's firm handled between 8000 and 12,000 cases for injured clients).

220. For the fact that the firm, for a time, employed no one with substantial jury trial experience, see Trial Transcript, *supra* note 219, at 3041, 3063 (testimony of Shawn M. Sornson, a former attorney with Spital's firm); *id.* at 5058-59 (statement of presiding Judge Vincent P. DiFiglia concluding, at the end of a very lengthy trial probing all manner of the firm's operations: "It was uncontested, uncontested that [Mr. Spital] had never tried a case, that he had never taken a deposition . . . ." (capitalization altered)). For the fact that a lawyer complained clients were "abused by insurance adjusters and defense attorneys," see *id.* at 1869 (capitalization altered) (introducing the Loker memorandum). Attorney Shawn Sornson agreed that, while working for Spital, he was not able to obtain for his clients every dollar to which they were entitled. *See id.* at 3062 (testimony of Shawn M. Sornson).

221. Stephanie M. Myers, et al., *A Survey of Jurors' Attitudes Toward Attorney Advertising*, INTER ALIA, July 1991, at 11, 14. As noted in the text, however, among other potential problems with the study, the sample size was small. Just fifty-four trials were studied, and only six of the cases were tried by advertising lawyers. *Id.* at 13.

Hubbell ratings and those who attended more prestigious law schools were less apt to advertise.[222] The view, then, that it is the best personal injury lawyers who advertise is thus open to some doubt.

Nor does it appear that advertising lawyers invest more heavily in the cases they accept. In fact, Cox, who made the "brand name capital" argument discussed above, has, along with coauthors, conducted a survey of lawyers who performed routine (so, excluding personal injury cases, among other more complicated matters) legal services in seventeen metropolitan areas. They found that, as compared to non-advertising lawyers, advertising lawyers devoted comparatively *less* time to each case.[223] It is unclear whether Cox et al.'s finding translates to the personal injury realm. But anecdotal evidence about some heavy personal injury advertisers suggests it might. The Spital firm, for example, burdened attorneys with such heavy caseloads that it was (according to one neutral observer) impossible for attorneys to provide competent representation, and the firm sometimes delegated even settlement negotiations to paralegals, only initiated lawsuits in a tiny fraction of claims, and often conducted no independent accident investigation prior to assembling clients' settlement packages.[224]

Stepping back, even assuming arguendo that advertisers *are* genuinely superior, there is no evidence that better personal injury lawyers charge higher contingency fees, on a percentage basis. A 1988 study conducted by the National Resource Center for Consumers of Legal Services surveyed lawyers across a variety of specialties, including divorce, real estate, misdemeanor defense, and so on. The study found, as one might expect, that attorney experience generally exerts a nontrivial influence on legal fees. More experienced lawyers tend to charge more. But, the same study found remarkable uniformity

---

222. Gene W. Murdock & John White, *Does Legal Service Advertising Serve the Public's Interest? A Study of Lawyer Ratings and Advertising Prices*, 8 J. CONSUMER POL'Y 153, 160 (1985). The authors themselves concluded: "[I]t appears that lower quality lawyers are more prone to use Yellow Pages advertising than higher quality lawyers." *Id.* at 162. The study's quality measures are obviously imperfect, and this study, like Myers's study cited above, is susceptible to various interpretations. It may, for example, really only confirm the view that (1) well-established lawyers, who develop Martindale-Hubbell ratings, are biased against advertisers and/or (2) well-established lawyers are not likely to advertise. *See* Richard Thomas, *Legal Service Advertising—A Comment on the Paper by Murdock and White*, 8 J. CONSUMER POL'Y 165, 165 (1985) (criticizing the Murdock-White study).

223. *See generally* Cox et al., *Attorney Advertising and the Quality of Routine Legal Services*, *supra* note 118, at 343-47.

224. For the paucity of investigation, see Trial Transcript, *supra* note 219, at 3103 (testimony of Lo Roane Schwaeber, a former senior paralegal with Spital's firm). For the fact that the "overwhelming number [of claims] were settled prior to or without litigation," see *id.* at 3071-72, 4705 (capitalization altered) (testimony of Samuel E. Spital). For the fact that paralegals negotiated settlements, see *id.* at 3104 (testimony of Lo Roane Schwaeber) and *id.* at 698-99 (testimony of Samuel E. Spital). As for the caseload point, after a very lengthy trial, a trial court judge concluded: "the lawyers working under him were handling caseloads for plaintiff's personal injury work which simply cannot be done in a competent fashion." *Id.* at 5059 (capitalization altered) (statement of Judge Vincent P. DiFiglia).

in the personal injury arena. The authors concluded that, unlike in other specialties, "[b]reakdowns by law firm characteristics" (such as by years of lawyers' experience) yielded, in the personal injury context, "only tiny, meaningless differences" in fees charged.[225] Kritzer has found much the same. In his studies of contingency fee practitioners, Kritzer has found "no appreciable evidence" that lower contingency fees are charged by the lawyers who experience less success.[226]

Nor does it appear that—as a general rule—higher contingency fees are correlated with additional effort. To the contrary, a 1961 study reviewed confidential closing statements of settled or litigated cases from New York and found—somewhat surprisingly—that *lower* fees (on a percentage basis) were generally charged in cases that culminated in a trial, while *higher* fees were charged for similarly sized recoveries obtained without the necessity of even filing suit. Attempting to explain that unexpected result, in his classic contingency fee monograph, F.B. MacKinnon explained: "Perhaps lawyers who take cases to trial exercise more of the self-restraint associated with their professional duties than do those who perform only the work of claims adjusting."[227]

In short, while one might hypothesize that, to the extent personal injury advertisers charge higher contingency fees, it is only because they provide a superior service, the assertion finds little empirical support.

2. *Referrals?*

Second, one might posit that advertising lawyers refer cases to other lawyers at especially high rates, and speculate that higher fees are needed to facilitate these (arguably advantageous) attorney referrals.

Practitioner referral networks describe the mechanism by which certain cases (often cases that are particularly large or complex) make their way from certain lower-echelon practitioners to certain higher-echelon practitioners in return for a portion (typically around 30% to 50%) of the ultimate fee.[228] Referrals, some scholars believe, are ubiquitous—and also quite salutary, as practitioner referral networks (and the fees which grease their wheels) help better cases get in the better, more expert lawyers' hands, which of course benefits

225. BOLGER ET AL., *supra* note 189, at 28, 39.

226. KRITZER, *supra* note 21, at 42. *But cf.* MACKINNON, *supra* note 188, at 178 (noting, based on New York studies, that "[f]ees charged by specialists appear to run somewhat higher than those of nonspecialists").

227. MACKINNON, *supra* note 188, at 188, 192 n.48 (providing data and citing Marc A. Franklin et al., *supra* note 207, at 26-27). For their part, Franklin and coauthors flagged the "odd conclusion that the less the effort involved, the greater the reward." Franklin et al., *supra* note 207, at 25-26.

228. Engstrom, *supra* note 200, at 862.

injured individual clients and may even advance tort law's substantive development.[229]

So is that what explains what we observe? Doubtful. It is true that some heavy advertisers, such as Boston's Sokolove, provide mostly referrals. As noted, Sokolove attracts cases through his multi-million-dollar promotional campaign and then farms the cases he receives out to specialist providers.[230] So certain advertising lawyers' need to charge extra to account for referral fees might well be part of the story. But, it is likely not the whole story. Most notably, settlement mills appear to charge higher-than-average contingency fees, even though they very rarely refer their large claims to more experienced providers.[231] Spital, for example, did refer some "major complex litigation" to fellow practitioners but more often kept even complicated claims in-house.[232] The argument that fees must be inflated to facilitate referrals thus falters.

3. *Collusion?*

Third, past work by Lester Brickman would add to the list of possible explanations for fee stickiness (if not why advertising lawyers appear to charge more), collusion among lawyers, or "coordinated efforts by lawyers to prevent competition."[233] "[C]ontingency fee lawyers maintain uniform pricing," he has written, "because they perceive that it is in their self-interest to do so and not deviate, even infrequently, from the standard fee."[234] "A law firm considering whether to undercut the standard price would recognize that if it successfully

---

229. *See* Charles Silver, *Does Civil Litigation Cost Too Much?*, 80 TEX. L. REV. 2073, 2088 (2002); *see also* Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 281 (2005).

230. *See supra* notes 215-216 and accompanying text (describing Sokolove's business model).

231. Engstrom, *supra* note 200, at 862-65; *see also* Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 356-58 (2010) (discussing the perception, shared by some plaintiffs' lawyers in Texas, that aggressive attorney advertisers do nothing but "adjust[] claims" and rarely "refer[] the better cases" (internal quotation marks omitted)).

232. Trial Transcript, *supra* note 219, at 2742-43 (testimony of Samuel E. Spital) (denying that the firm customarily referred complex cases out to other lawyers but stating that "major cases, major complex litigation" might be referred to an outside practitioner).

233. Brickman, *supra* note 188, at 70. By "collusive" Brickman says he is referring to the fact that

> lawyers act in the same manner as do gas stations owners on adjacent corners who recognize that if any of them lower the price, the others will respond by lowering their prices. The [subsequent] 'gas war' will lead to lower profits for all of the adjacent owners. To avoid such mutually destructive behavior, adjacent gas station owners consciously collude with each other by maintaining at least near price uniformity.

Id. at 99. In more recent work, Brickman has stepped back from this charge. *See* LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 78 (2011) (blaming uniform pricing on "concerted actions" rather than collusion).

234. Brickman, *supra* note 188, at 99.

did so, other firms would also lower their prices and that, as a consequence, both aggregate and individual income would fall."[235]

But this too raises questions. We *do* see and have seen price competition for other legal services—for bankruptcies, divorces, adoptions, and low-level criminal defense (such as DWIs). For a time, recall that you could get a divorce in Florida for $35.[236] Surely those specialties also have an incentive to collude to keep prices high. Why would PI specialists be different? Furthermore, the industry's market structure seems ill suited to price fixing. We expect to see collusive behavior in markets with few participants and high barriers to entry. But while the bar exam, law school graduation, and character and fitness requirements limit entry into the legal profession as a whole, no special barriers specifically restrict entry to PI practice. Moreover, there are tens of thousands of personal injury lawyers—which should make any anticompetitive agreement impossible to police.[237]

4. *Smaller or riskier cases?*

Finally, it might be that PI advertising lawyers charge higher fees than non-advertisers simply because the cases they accept warrant a higher percentage. Contingency fees, unlike fees for other legal services, are almost infinitely variable. Because contingency fee lawyers are paid a portion of each recovery, their effective hourly rates are affected, not just by the effort they exert (discussed above), but also, and less obviously, by the size and quality of the claims that they accept. Thus, it might be entirely *reasonable* for advertising personal injury lawyers to charge a higher fee, on a percentage basis, than non-advertising lawyers if the cases they accept have a lower expected value, either because they are consistently smaller or because they entail a higher risk of nonrecovery.

Bolstering the small case hypothesis, there is some evidence that, in the words of one heavy advertiser from Louisiana: "*Advertising gets small cases only*"—or at least primarily.[238] For example, American Bar Foundation researchers Stephen Daniels and Joanne Martin have broken the Texas plaintiffs' lawyers they have surveyed into categories, and the practitioners who accepted

---

235. Lester Brickman, *Making Lawyers Compete: Is the Market for Contingent Fee-Financed Tort Litigation Competitive?*, REGULATION, Summer 2004, at 30, 34.

236. *See supra* note 107 and accompanying text.

237. *See* Silver, *supra* note 229, at 2087 ("The number of attorneys seeking to handle personal injury cases . . . is so large that anticompetitive agreements must be impossible to police."); *cf.* Bruce M. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 947 n.108 (1977) ("Because of the large number of participants in the real estate brokers market, the market should be a prime candidate for competitive rather than collusive behavior.").

238. Engstrom, *supra* note 198, at 1522 (internal quotation marks omitted).

the smallest cases (the "bread and butter 1" or "BB1" lawyers, in their parlance) were also the most aggressive advertisers.[239]

Speaking to the question of risk, the Daniels-Martin survey noted above also found that BB1 lawyers accepted a higher proportion of callers as clients, as compared to the comparatively more choosy, more elite lawyers (the "heavy hitters").[240] Deploying that fact, one could conclude the cases advertisers accept are bound to be riskier, too.

From another perspective, though, the relationship between advertising and risk looks less straightforward. Though advertisers do not appear to screen as heavily as non-advertisers, the *type* of case many advertisers specialize in *is* low risk. That is, many aggressive advertisers represent those who have been injured in auto accidents. BB1 lawyers, for example, are auto accident specialists.[241] Spital, likewise, specialized in auto accident claims—as do settlement mills in general.[242] And auto accident cases, on the whole, pose far less risk (and are much more likely to result in some recovery) than other types of personal injuries (such as medical malpractice, product liability, and toxic torts).[243] All this means that, even though advertisers might *look* less choosy, the cases they accept might actually be less risky than the cases accepted by other practitioners. The relationship between risk and advertising is thus not entirely clear.

But, even if advertising lawyers' cases *do* tend to have a reduced expected value (due to either small size, high risk, or some combination), there are three additional—and I believe fatal—problems with the view that advertisers' current contingency fees can be *entirely* explained by these claim characteristics. First, when legal clinics Jacoby & Meyers and Cawley & Schmidt first started advertising in the 1970s, both firms advertised that they would represent some personal injury victims. For this representation, both announced they would charge a contingency fee of 25% if the case settled prior to the initiation of suit.[244] That 25% is a steep discount from the percentages some of today's ad-

---

239. As compared to other practitioners, BB1s were slightly more apt to advertise and far more likely to advertise on TV and obtain cases from their advertising efforts. Daniels & Martin, *supra* note 21, at 1786, 1788-90 & tbl.4.

240. *Id.* at 1786, 1789 tbl.4 (internal quotation marks omitted).

241. *Id.* at 1790 ("[T]he BB1 lawyer's practice is built on automobile accident cases.").

242. Trial Transcript, *supra* note 219, at 4076 (testimony of Walter Pinkerton) (testifying that 90% to 95% of the Spital firm's case inventory involved individuals injured in automobile accidents). For settlement mills' general focus on auto cases, see Engstrom, *supra* note 198, at 1500.

243. *See* LANGTON & COHEN, *supra* note 188, at 4 tbl.5.

244. Stuart Auerbach, *New Idea in Law: Legal Clinic Plan Offers Aid to Mass in the Middle*, WASH. POST, June 29, 1977, at B1 (showing Cawley's fee schedule); Charles E. Downey, *The State of the Art*, JURIS DR., Sept. 1977, at 22, 22 (showing Jacoby & Meyers's fee schedule). A higher contingency fee was charged if the case settled after suit was filed. Today, by contrast, Jacoby & Meyers's website says nothing about fees, save the following assurance: "Jacoby & Meyers will only charge a legal fee if we are successful in recovering

vertising lawyers customarily charge—even though there is no evidence that the cases the clinics accepted were substantially larger or stronger than claims handled by today's PI specialists.[245]

Second and more troubling, studies of contingency fee lawyers have *never* revealed any significant risk premium.[246] To the contrary, when one compares average contingency fees in very high-risk medical malpractice cases, where the chance of nonrecovery is substantial (indeed, plaintiffs win only about a quarter of all medical malpractice trials), and very low-risk automobile accident cases, where the chance of recovery is much higher (roughly 60% of auto accident trials result in some plaintiff recovery), fee percentages appear roughly the same.[247]

Finally, and most troubling for the hypothesis that PI advertisers' apparently inflated fees can be explained by case characteristics, the FTC study, which found that some advertising lawyers charged more than non-advertisers, specifically *controlled* for claim size and case risk. That is, the FTC's survey asked lawyers what they would charge in "an automobile accident where the driver of the other car has admitted responsibility and there is no permanent pain, disability, or lost earning capacity . . . if the case were settled before trial."[248] It was, in responding to that short vignette, rather than some open-ended question, that some advertising PI lawyers reported that they would charge significantly more than their non-advertising counterparts.[249] To be sure, this smaller claim

---

money for your claims." *New York Office*, JACOBY & MYERS LAW OFFICES, http://www.jacobymeyers.com/new-york-office.html (last visited Mar. 23, 2013).

245. *See* Engstrom, *supra* note 200, at 846 (reviewing the relatively high fees charged by a number of heavy-advertising practitioners). As the text suggests, an increased contingency fee percentage would theoretically make sense if recoveries (on a dollar basis) had shrunk. But in fact, when one looks to the auto accident context and compares contemporary recoveries to those in 1977, payments have grown. *See* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 5 fig.1-2 (1999) (revealing that, between 1977 and 1997, the average bodily injury payment rose faster than inflation, from $2666 to $7836).

246. *See* Special Subcomm., Def. Research Comm., Int'l Ass'n of Ins. Counsel, *A Study of Contingent Fees in the Prosecution of Personal Injury Claims*, 33 INS. COUNSEL J. 197, 199 (1966) ("[T]he amount of the percentage fixed as the basis of the contingent fee appears to be relatively standard and unvarying, regardless of the prospects of recovery."); *see also supra* note 191 and accompanying text (discussing the stickiness of contingency fees).

247. For the fact that the risk of nonrecovery in medical malpractice cases is higher than in auto accident litigation, see *supra* text accompanying note 243. For the fact that contingency fees in the two contexts are nevertheless nearly identical, on a percentage basis, compare FED. JUD. CTR., AUTOMOBILE ACCIDENT LITIGATION: A REPORT OF THE FEDERAL JUDICIAL CENTER TO THE DEPARTMENT OF TRANSPORTATION 7 (1970), with JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 41 (1986). Meanwhile, low-risk auto cases generate higher median effective hourly rates than high-risk medical malpractice cases. *See* Kritzer, *supra* note 188, at 294 ("[A]cross types of cases defined by area of law, the median [effective hourly rate] is highest for auto accident cases and lowest for medical malpractice.").

248. FTC STUDY, *supra* note 7, at 84.

249. *Id.* at 123-25.

size/greater claim risk hypothesis may be part of the story. I find it more plausible than the explanations above. But, as we have seen, it also has limits.

B. *More Plausible Explanations*

Having considered, and mostly discarded, four initial explanations for the apparent oddities in the contingency fee marketplace, we now turn to three additional (though overlapping) explanations I consider more plausible. These are: (1) PI advertising emphasizes quality rather than price; (2) some clients might mistakenly believe that, in hiring an advertiser, they get some kind of quality assurance; and (3) the contingency fee's distinctive characteristics (the uncertainty of payment, delay in payment, and manner of payment) blunt its salience.

1. *Ads emphasize quality rather than price*

One plausible explanation for why advertising's price effect might be different in the PI and clinic contexts is that the *advertisements themselves* differ considerably.

The first way in which PI ads differ from clinic ads—and break with the *Bates* template—regards price advertising. Recall that the *Bates* Court predicted that, "advertising will permit the comparison of rates among competitors"[250]—a view widely shared by commentators.[251] Recall, too, that when it came to price advertising, legal clinics generally fulfilled the Court's and commentators' expectations; clinics commonly (albeit not uniformly) publicized their prices.[252] PI lawyers don't.[253] Indeed, I recently reviewed thirteen cities'

---

250. Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977).

251. *See supra* note 113 (collecting sources).

252. *See supra* notes 114-116 and accompanying text.

253. There are a number of possibilities for why PI lawyers have, by and large, avoided price advertising. First, in a market where clients cannot themselves accurately assess quality, touting one's low fee might be interpreted as conveying one's inferior quality. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 738 (2005). Second, literature suggests:

> The nature of advertising will . . . reflect market conditions. Where goods are standardized, price will be the instrument of competition and the focus of advertising. In industries where goods or services vary in quality and/or other salient characteristics, advertisers are more likely to focus on the features of products.

Rizzo & Zeckhauser, *supra* note 173, at 382. In an almost circular way, then, the fact that PI services are not homogenous helps to explain why prices are not displayed. Third and relatedly, to the extent contingency fees *are* uniform, no firm has an incentive to advertise on the basis of price. Fourth, an ABA Formal Opinion has cautioned that ethical lawyers should not charge "the same percentage of recovery regardless of the particulars of a case." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389 (1994). Thus, publicizing a firm's "standard" percentage could conceivably trigger an accusation that the firm has improperly failed to consider, for each case, each factor contained in Model Rule 1.5(a). *See* William C. Becker, *Advertising Alert: New Court Decision Reexamines Advertising of Con-*

Yellow Pages advertisements from March 2007 through December 2008. The sample contained 518 quarter-page or larger advertisements for personal injury lawyers, only 9 of which (1.7%) specified any contingency fee percentage.[254]

Does this matter? Quite possibly. Many (though, to be sure, not all) of the studies of the price effect of advertising (cataloged earlier) probed situations where suppliers, in fact, engaged in price advertising.[255] And the most influen-

---

tingent Fees, OHIO LAW., July-Aug. 1998, at 12, 12 ("Few lawyers advertise specific rates and, indeed, a careful reading of DR 2-106 and ABA Formal Opinion 94-389 shows that using any single rate would be improper . . . ."). Fifth and finally, according to one attorney advertiser, for a while, in at least some states, Yellow Pages publishers themselves had rules forbidding (all) advertisers from advertising specific prices, since old Yellow Pages volumes remain in circulation even while prices change, potentially prompting consumer complaints. Telephone Interview with Van O'Steen, *supra* note 143.

254. I chose to review Yellow Pages ads because, though declining in importance, they still represent an important resource for prospective clients. *See* Malan, *supra* note 30 (quoting Avvo CEO Mark Britton as stating that "[m]ost people still search for lawyers in the Yellow Pages"); *Attorney Advertising*, FLA. BAR ASS'N, § IV, http://www.floridabar.org/divcom/pi/bips2001.nsf/1119bd38ae090a748525676f0053b606/4acd3c2f497de74b8525669e004f5c28 (last updated Oct. 20, 2008) (providing results of the Florida Bar's 2007 membership survey, which found that Yellow Pages were the most commonly-used ad medium; 73% of attorneys in private practice advertised in the Yellow Pages, whereas only 44% advertised on the Internet). I limited the sample to quarter-page or larger ads for three reasons. First, eye movement studies indicate that over 90% of Yellow Pages readers will notice an ad of that size. Gerald L. Lohse, *Consumer Eye Movement Patterns on Yellow Pages Advertising*, J. ADVERTISING, Spring 1997, at 61, 64-66. Second, this screen was practical; it yielded an ample, but not massive, dataset. Third, past attorney advertising studies have also taken this tack. *E.g.*, Daniel M. Filler, *Lawyers in the Yellow Pages*, 14 LAW & LITERATURE 169, 175 (2002).

In terms of city selection, I reviewed ads from: Boston; Chicago; Denver; Las Vegas; Lexington, Kentucky; Los Angeles; Manhattan; Philadelphia; Phoenix; Richmond, Virginia; San Francisco; Seattle; and Tampa. I selected these thirteen cities to provide geographic and legal diversity. As to the latter, I attempted to include some states with lenient and some states with stringent attorney ad restrictions. I also endeavored to include states with a range of auto accident compensation schemes. Thus, my sample includes some states that have retained traditional tort for the compensation of motor vehicle accidents—as well as states that have enacted auto no-fault, add-on legislation, and auto choice. Interestingly, in the sample, Phoenix was the outlier. Nearly 10% (4 of 42) quarter-page or larger PI ads in Phoenix specified some kind of contingency fee percentage.

My research largely updates a previous study of 1400 Yellow Page advertisements, which found virtually no advertising on the basis of price in the contingency fee marketplace. Instead, those authors found, "uniformly, when lawyers' personal injury advertisements address fees, they do so in a general and vague manner without offering any truly informative details." Jeffrey O'Connell et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs' Personal Injury Bar—And a Proposed Solution*, 6 CONN. INS. L.J. 423, 425 (2000).

255. *E.g.*, Feldman & Begun, *supra* note 160 (studying bans on price advertising). In fact, at least one optometry-focused study discussed previously distinguished between price and nonprice advertising and found that price advertising has a "possibly greater effect" on prices. BOND ET AL., *supra* note 118, at 50, 57. On the other hand, some studies (including those of cigarettes and breakfast cereal) have found that advertising exerts a competitive influence even in the absence of price information. *See supra* notes 170-171 (referencing relevant studies).

tial view for why legal advertising would serve to reduce prices relied on Stigler's advertising-as-information model, which assumes that by reducing search costs, price advertising can stimulate more comparison shopping and generate less price dispersion, to positive effect. Without price advertising, it is unclear the theory works. Thus, the relative absence of price advertising may go a long way toward explaining why the effect of PI lawyers' advertising might be different than supposed.

The second area where PI practice differs from the clinic context—and breaks with the *Bates* template—is quality advertising. When legal clinics first advertised, the "products" they sold were more or less fungible. Clinics specialized in wills, uncontested divorces, name changes, real estate closings, and personal bankruptcies. And, as one clinic operator pointed out at the time: "It's very difficult to represent that the quality of your name change is better than someone else's."[256] Touting the better quality of one's name change or other routine service would sound absurd, and clinics, by and large, refrained from doing it.[257]

But again, PI advertising is different. When it comes to personal injury representation, attorney quality does matter. Better lawyers do, in fact, tend to achieve better results.[258] And recognizing that fact, most PI lawyers make quality claims in their advertisements. In fact, in my sample of 518 Yellow Pages ads, a full 65% (339) of PI advertisers made some kind of quality claim—and some lawyers' quality claims were extravagant. Indeed, my canvass of Yellow Pages ads reveals boasts such as "GET THE MAXIMUM POSSIBLE SETTLEMENT,"[259] "MAXIMUM RECOVERY,"[260] "MAXIMUM LEGAL POWER,"[261] "More experience in the courtroom,"[262] "Exceptional Lawyers,"[263] and "WE ARE THE BEST"[264]—and that's a sampling just from one city.

256. Falk, *supra* note 103 (internal quotation marks omitted).

257. Roberts, *supra* note 29; *accord* David A. Bradlow, *Positioning the Law Firm*, 26 LAW OFF. ECON. & MGMT. 329, 331 (1985) ("Jacoby & Meyers have grown . . . by . . . emphasizing price and value. Hyatt Legal Services has followed a similar strategy.").

258. *See* Engstrom, *supra* note 200, at 860 n.260 (collecting sources).

259. LAS VEGAS YELLOW PAGES: JANUARY-JULY 2008, at 183 (2008) (advertisement for Jerry A. Wiese II "Jaws").

260. *Id.* at 178 (advertisement of Rodney K. Okano); *see also id.* at 147 (advertisement of Robert Koenig stating "Get the Maximum Recovery you are Entitled!!!*").

261. *Id.* at 120 (advertisement of Benson Bertoldo Baker & Carter).

262. *Id.* at 127 (advertisement of Christiansen Law Offices).

263. *Id.* at 138 (advertisement of Harris Schwartz).

264. *Id.* at 157, 181 (advertisement of West Seegmiller); *see also id.* at 148-49 (advertisement of Henness & Haight Injury Attorneys stating "Simply the Best Personal Injury Attorneys . . . It's All We Do!" and "Nevada's Premier Injury Firm!"). Notably, Nevada's ethics rules bar lawyers from making "a false or misleading communication about the lawyer or the lawyer's services" and provide that a "communication is false or misleading if it . . . (c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." NEV. RULES OF PROF'L CONDUCT R. 7.1 (2011). This language

This too has theoretical implications. Just as Stigler's model assumes there will be price advertising, Stigler's model also assumes a market for a homogenous commodity.[265] Furthermore, modern theorists point out: "Advertising can serve either to insulate one firm from its rivals by differentiating its products or . . . bring rivals into closer proximity by providing information with which consumers can more easily comparison shop."[266] It seems that when displaying price information and eschewing quality claims, clinics did the latter. But in their ads, PI firms appear to *differentiate* their product from rivals, *reducing the elasticity* of demand.

2. *Clients might mistakenly think advertisers are of higher quality*

Above, I considered and largely discarded the notion that advertisers' high fees can be explained by the *genuinely* superior quality of their representation. Another and more troubling possibility exists, however: clients may *think* that advertising personal injury attorneys are of superior quality and, under this misapprehension, may be willing to pay a premium for the services these seemingly superior practitioners provide.

There is some evidence that prospective clients overestimate attorney advertisers' quality. Notably, a 1992 New Mexico survey, specifically studying the public's perception of direct-mail advertisers, found that some survey respondents (namely, those who were poor and less-educated) believed that attorney advertisers *were* of higher quality than non-advertisers and inclined to give a better deal.[267] Some respondents also overestimated the stringency of regulations that govern attorney advertisements. Namely, 77% of the least educated respondents believed that advertising lawyers are legally required to be "experienced in the trial" of cases in the substantive area in which they advertise.[268] A 1990 Nevada survey found much the same. Of those who had not completed high school, 67% of respondents incorrectly believed "that lawyers who advertise for certain types of cases necessarily have specialized

has been effective since May 2006. *See Table of Changes to Nevada Rules of Professional Conduct*, NEV. RULES PROF'L CONDUCT, https://www.leg.state.nv.us/CourtRules/RPC.html (current through Sept. 30, 2011).

265. *See* Cox, *supra* note 164, at 146 ("The critical assumption of Stigler's model is product homogeneity.").

266. Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 964; *see also* Rizzo, *supra* note 172, at 89-90 ("[N]on-price advertising may limit competition by differentiating products and increasing brand loyalty.").

267. *See* Petition for Writ of Certiorari app. at 51-52, Members of the Disciplinary Bd. v. Revo, 521 U.S. 1121 (1997) (No. 96-1780), 1996 WL 33438980 (appending a December 1992 survey of Albuquerque adults' responses to direct mail advertisements).

268. *Id.* app. at 52.

knowledge, training, and skills in handling those types of cases."[269] It is well established that less affluent, less educated individuals are the individuals most apt to select a lawyer on the basis of attorney advertising.[270] The Spital firm's typical client, for example, was often unemployed and "less than middle class."[271] If, as these two Bar-sponsored surveys suggest, clients who pick advertising lawyers *think* that choosing an advertiser includes some experience or quality guarantee, that might at least partially explain the above anomalies.

3. *Clients are uniquely insensitive to contingency fee percentages*

Third and finally, drawing on literature from the fields of behavioral economics and cognitive psychology, I observe that clients are uniquely insensitive to contingency fee percentages. Specifically, three unique contingency fee features—(1) the uncertainty of payment, (2) the delay between retention and payment, and (3) the fact the contingency fee is deducted, not paid—combine to strip fees of salience.[272]

a. *Possible, not certain*

The contingency fee is first unique because payment is uncertain rather than certain. When it comes to legal fees, three arrangements are most common: flat fees, payment by the hour, and contingency fees. For the first two, payment is assured. If you ask a lawyer to write a will, and that lawyer quotes a fee of $200 for the will, you will have to pay $200 once the will is written. Similarly, if a lawyer who charges $100 an hour spends two hours to write a will, $200 will be charged. By contrast, because there is no fee if there is no re-

---

269. John DeWitt, *Report of Findings: Nevada Lawyers' Advertising Survey*, INTER ALIA, Apr. 1990, at 11, 16.

270. AM. BAR ASS'N, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994) (reporting that the poor are significantly more likely to choose a lawyer on the basis of attorney advertising as compared to their wealthier counterparts); Michael G. Parkinson & Sabrina Neeley, *Attorney Advertising: Does It Meet Its Objective?*, 24 SERVICES MARKETING Q. 17, no. 3, 2003, at 17, 24-26 (finding, based on a survey of more than 1500 respondents, that attorney "advertising is most likely to attract lower income and lower education non-Caucasian clients").

271. Trial Transcript, *supra* note 219, at 3114-15 (capitalization altered) (testimony of Lo Roane Schwaeber).

272. Previously, I drew parallels between price stickiness in the contingency fee marketplace and the long-observed price stickiness in the home sale marketplace, where brokerage fees are often 6% of the home's value. *See supra* note 237. Interestingly, all of the features identified below (delayed and indefinite timing of payment, payment that's possible rather than certain, and fees that are deducted rather than paid) also obtain in the home brokerage context. There, a home may sell days, weeks, months, or even years after it is placed on the market—or theoretically, not at all—and, if the house is sold, the home seller will pay the brokerage fee indirectly by having the fee deducted from the sale's proceeds. This Article's insights may thus inform commentary in that analogous context.

covery, paying a contingency fee lawyer is a mere *possibility*, which mutes its significance. As Daniel Kahneman and Amos Tversky have explained, "people overweight outcomes that are considered certain, relative to outcomes which are merely probable."[273] Elaborating on this point, Chris Guthrie provides the following example: "[P]eople . . . will opt to face a 50% chance at having to pay a $2,000 fine over having to pay a definite $1,000 fine."[274] Possible payments weigh much less heavily than definite payments in an individual's calculus. And, indeed, it appears that clients so discount the possibility of payment that, in recent experiments, subjects preferred contingency fees over flat fees even when the former yielded an expected fee that was two or three times higher.[275] Moreover, in the real world, a natural focus on uncertainty (discernible in experiments) might be inflated by the lawyer's conduct at the time of retention. As one former trial lawyer has explained:

> They are simply told that it is customary to handle these cases on a "contingent fee" basis, with the usual explanation that the lawyer will receive nothing in the event there is no recovery. Emphasis is usually placed on this "contingent" aspect of the arrangement rather than on the large percentage of the recovery the client is committing himself to pay.[276]

b. *Delayed, not immediate*

The timing of contingency fee payment is also distinctive—and relevant. Lawyers who are paid a flat fee (for example, $200 for a will) bill clients upfront—or at least establish what the payment will be early on. Lawyers who are paid by the hour often charge upfront retainers and then transmit bills to clients at regular intervals. By contrast, while the percentage of a contingency fee is established at the beginning of a representation, actual payment, and even the precise calculation of that payment, is deferred to the time of recovery (if there ever is a recovery), which is months or years away.[277] This time lag is also significant. Cognitive psychology and behavioral economics literature reveals what is sometimes called a "myopia bias," namely "people value the avoidance of immediate or nearly immediate losses far more strongly than the avoidance

---

273. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 265 (1979).

274. Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1118 (2003).

275. Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 258-68 (2010). This result held even for experienced tort lawyers.

276. John F. Grady, *Some Ethical Questions About Percentage Fees*, LITIGATION, Summer 1976, at 20, 25.

277. According to Kritzer, 65% of PI specialists have clients sign a retainer agreement at the first in-person meeting. *See* KRITZER, *supra* note 21, at 114. The average time from the filing of a complaint to a jury verdict is 26.5 months. LANGTON & COHEN, *supra* note 188, at 8 tbl.9.

of losses even in the not-too-distant future."[278] Affected by this myopia bias, when contracting for legal services, a client is likely to be uniquely insensitive to a far-down-the-road payment, meaning, from the sellers' perspective, higher prices may prevail.[279]

c. *Deducted, not paid*

Finally, contingency fees are deducted, not paid. Most legal fees (flat and hourly) are *paid*, typically by check or credit card. Money thus moves from a client to her lawyer directly, explicitly, and in clear sums. Contingency fees are, once again, distinctive. When a personal injury claim is settled or otherwise satisfactorily resolved, a defendant (or, more often, its insurer) will send a check *to the plaintiff's lawyer*. The plaintiff's lawyer will then invite the client to her office, where the lawyer will disburse to the client the client's portion of the ultimate recovery, after discharging any liens and deducting the lawyer's costs and fee.[280] Money moves from the lawyer to the client, rather than the other way around.

---

278. David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1324-25 (2003); *accord* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 222 (1995) ("Actors systematically give too little weight to future benefits and costs as compared to present benefits and costs."). *See generally* George Loewenstein & Drazen Prelec, *Anomalies in Intertemporal Choice: Evidence and Interpretation*, *in* CHOICE OVER TIME 119-45 (George Loewenstein & Jon Elster eds., 1992).

279. George Loewenstein & Ted O'Donoghue, *"We Can Do This the Easy Way or the Hard Way": Negative Emotions, Self Regulation, and the Law*, 73 U. CHI. L. REV. 183, 189 (2006) (observing that people "generally have a hard time fully attending to future consequences"); *id.* at 196 ("Perhaps the simplest way to reduce the pain of paying is to delay the payment into the future."); Dilip Soman, *The Illusion of Delayed Incentives: Evaluating Future Effort-Money Transactions*, 25 J. MARKETING RES. 427, 435 (1998) (showing that the presence of a significant temporal delay influences choice behavior).

280. Kritzer, *supra* note 188, at 270 n.13 ("[T]he actual collection of the [contingency] fee is usually not a problem because the lawyer typically receives the defendant's payment on behalf of the client, and then deducts fees and expenses before disbursing funds to the client."). Others have also recognized, albeit in passing, that the manner of payment may impact plaintiff price sensitivity. *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 569 (1978) ("When the fee is set in advance and made contingent upon recovery, a promise to pay a sizable fee may not seem unreasonable to the eager and inexperienced plaintiff. A certain [non-contingent] fee has the relative advantage of encouraging greater client attentiveness and assertiveness when the fee is set."); Gross, *supra* note 191, at 336 ("[S]ince the plaintiff's lawyer is paid from the recovery, and paid only if there is a recovery, it may seem that the fee is paid by the defendant and won by the plaintiff's attorney."); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 956 (1990) ("[B]ecause contingent fee arrangements mean that large fees occur only when there are large awards and because it is common in tort cases for the plaintiff to receive a net award from which the lawyer has already subtracted fees and costs, the absolute cost of the litigation might have less impact on tort plaintiffs than would be the case under other billing arrangements.").

This too is consequential. Clients are apt to treat attorneys' fees *deducted* from the final recovery as a reduction in the size of a gain, rather than as a loss, and social scientists have found that people react to losses and gains differently, exhibiting what is often called "loss aversion."[281] That is, people consistently attach more disutility to losing a sum of money than failing to gain even an identical sum, even controlling for wealth effects.[282] To illustrate, one can consider payments to Uncle Sam. Contingency fees operate a little like income taxes; money is deducted from an accident victim's recovery (or, in the case of taxes, a worker's income) before it is ever pocketed. And, this type of tax, George Loewenstein and Ted O'Donoghue have observed, "cause[es] less pain," and is less "salient," as compared to a tax whereby citizens would have to affirmatively write a check to the government.[283] Losses sting much more than reductions in the size of gains—and are likely, therefore, to elicit greater price sensitivity.

This is particularly true given that, at the initial interview, some lawyers intentionally emphasize case risk to lower client expectations. As one lawyer explained to Kritzer: "I always tell them that it is worth less than what I think I'm going to get, and then when I get the settlement they are ecstatic, I look good, and everybody is happy."[284] Furthermore, in settlement discussion, Kritzer (who spent time embedded in plaintiffs' lawyers' offices) also found:

> [O]ften the emphasis to the client was not on the settlement amount but on what the client would net after fees, expenses, and the payment of subrogated claims. In fact, typically the lawyer, when presenting a settlement offer to a client, would emphasize the bottom line for the client, not the total settlement amount.[285]

---

281. As Russell Korobkin explains: "Loss aversion suggests that losses from a reference point will be valued more highly than equivalent gains." Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1274 (2003). *See generally* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 107 Q.J. ECON. 1039 (1991).

282. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193; Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1874 (1994); Kent W. Smith & Karyl A. Kinsey, *Understanding Taxpaying Behavior: A Conceptual Framework with Implications for Research*, 21 LAW & SOC'Y REV. 639, 648 (1987).

283. Loewenstein & O'Donoghue, *supra* note 279, at 199; *see also* Guthrie, *supra* note 274, at 1143 ("Taxpayers who anticipate receiving a refund from the IRS are in a 'gains' frame. . . . By contrast, taxpayers who anticipate owing taxes to the IRS are in a 'losses' frame."); Smith & Kinsey, *supra* note 282, at 649 ("[A]ny savings through legal or illegal tax-reducing activities that would result in a refund are framed as gains, while taxes paid out of one's own pocket are framed as losses. Therefore, at filing time we would anticipate more planning and risk taking to reduce money owed than to increase refunds, even when the total tax obligation would be the same under either circumstance.").

284. KRITZER, *supra* note 21, at 124 (internal quotation mark omitted).

285. *Id.* at 171.

The focus is—and by lawyers' conduct, remains—on the *gain*. The loss, meaning the deduction for the lawyer, is, in clients' calculus, distinctly secondary.

In sum, the thought of having to pay $5000 in legal fees for a will or divorce will cause a prospective client far more consternation, and elicit greater price sensitivity, than the thought of having a 33% contingency fee deducted from a likely $15,000 claim—particularly, if that payment is uncertain, in the distant future, and comes in the form of deduction from a more-generous-than-anticipated five-figure check. Or, as a lawyer put it in the *California State Bar Journal* some years ago: "When you are handing a client a check for a substantial sum of money, often in the six figure range, the clients do not begrudge you a fee at all."[286]

* * *

All of the above is conjectural, of course, but there is empirical support. As noted in Part III, in the late 1980s, John Rizzo and Richard Zeckhauser examined the impact of advertising on the cost of primary care physician services.[287] They first acknowledged that "conventional wisdom among economists is that physician advertising should lead to lower prices."[288] But they also highlighted what should be now-familiar reasons for why that conventional wisdom might not hold. For one, they found that physicians "rarely include price information" in their advertisements, focusing instead on other attributes.[289] In addition, they observed, medical care is inherently nonstandardized, and patients care about its quality a great deal.[290] Here, Rizzo and Zeckhauser theorized: "[I]f consumers have significant concerns about quality, but are unable to observe quality directly, they may be more responsive to physician ads that focus on or provide indicators of high quality. Demand for such physicians' services may become less elastic, so that advertising enables them to charge higher prices."[291] Adding to that effect, the researchers observed that, unlike the (well-studied) market for optometric services, where sizable out-of-pocket payments are customary, most Americans have health insurance, and health insurance reduces out-of-pocket payments for doctor visits, often to nominal sums.[292] This, they

286. E. Robert Wallach, . . . *And in Response*, 50 CAL. ST. B.J. 273, 275 (1975).

287. Rizzo & Zeckhauser, *supra* note 173, at 382. Roughly 22% of primary care physicians in the sample advertised. *Id.* at 396.

288. *Id.* at 389.

289. *Id.* at 388-90.

290. Judith H. Hibbard & Edward C. Weeks, *Does the Dissemination of Comparative Data on Physician Fees Affect Consumer Use of Services?*, 27 MED. CARE 1167, 1173 (1989) ("Quality . . . is the primary factor of interest to consumers in selecting health care providers.").

291. Rizzo & Zeckhauser, *supra* note 173, at 408.

292. *Id.* at 409. Roughly 85% of Americans have health insurance. *See* NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, EARLY RELEASE OF

surmised, might make patients insensitive to the cost of medical services, which might further dampen consumer incentives to search for the lowest cost provider.[293]

To test their provocative hypothesis, Rizzo and Zeckhauser gathered data from two American Medical Association surveys, conducted in 1987 and 1988. Using a refined model, they found that "advertising leads to *significantly higher* prices" for office visits, for both new and established patients.[294] In a market where prices are not advertised, where quality matters yet cannot be judged, and where individuals are not particularly attuned to the costs they incur, advertising, they concluded, increases consumer costs.

CONCLUSION

Many, including the Supreme Court, the FTC, and the ABA, have come to accept the beneficial economic effect of attorney advertising: attorney advertising is supposed to bring down the cost of legal services. And some, in fact, have accepted attorney advertising explicitly *because* of this economic benefit. But above I show that, while advertising probably did bring down the cost of routine legal services in the years immediately following the *Bates* opinion, there is scant evidence that advertising drives down prices in the context where it's now most common. These days, attorney advertising is mostly the province of the personal injury bar. And there is some evidence that PI advertisers charge *more*, on a percentage basis, than their non-advertising counterparts.

It is a discovery that's unexpected, as it goes against the grain of conventional scholarship. But it is not a fluke. Part V.B shows that economic literature *predicts* that advertisers might charge more than non-advertisers where: price advertising is vanishingly rare, quality varies and also matters but is simultaneously impossible to discern, and clients are, for a host of reasons, uniquely insensitive to the prices they pay. Those factors obtain in the primary care physician context, where Rizzo and Zeckhauser found that advertisers charge more than non-advertisers, and they also, I submit, obtain in the personal injury context. But they do not obtain in the routine legal service/clinic context, where attorney advertising *does* appear to have had a salutary price effect. The implications of this discovery are fourfold.

First, the 1984 FTC study should no longer be cited for the general proposition that attorney advertisers charge less than non-advertisers.[295] This Article

SELECTED ESTIMATES BASED ON DATA FROM THE JANUARY-JUNE 2012 NATIONAL HEALTH INTERVIEW SURVEY: LACK OF HEALTH INSURANCE AND TYPE OF COVERAGE 1 & fig.1.1 (2012), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/earlyrelease201212_01.pdf.

293. Rizzo & Zeckhauser, *supra* note 173, at 390.

294. *Id.* at 408; *id.* at 414 ("[A]dvertisers find their elasticities diminished, and charge higher prices than nonadvertisers . . . .").

295. *See supra* note 10.

shows that, for the biggest slice of attorney advertisers, that proposition is not supported by the 1984 study—and, indeed, has never been established. At the same time, *this* Article's limits must be clear. This Article does not *prove* that PI advertisers charge more than non-advertisers. To prove or disprove that proposition, a new, sophisticated, large-scale empirical study must be undertaken.[296] Based on what we already know, from the FTC's long-overlooked finding, from Kritzer's work in Wisconsin, and from my own research on settlement mill practitioners, I'm doubtful that advertising's advocates will like what they learn. But the FTC, Kritzer, and settlement mill evidence is also, I concede, dated, partial, and fragmentary. Just as it is too late to rely on advertising studies that were conducted on now-defunct legal clinics; it is far too early to rule out the possibility that contingency fees have dropped—or consumers have benefited—in unexpected ways.[297] The time is ripe, instead, for additional analysis.

Second, this Article identifies an important—and heretofore overlooked—feature of the personal injury marketplace. For years, commentators have observed that contingency fees are remarkably sticky, hovering around 33%. Commentators have, for just as long, tried to explain this apparent price uniformity, blaming it on everything from lawyer's collusive behavior to claims' inalienability.[298] This Article contributes fresh insights to that burgeoning literature: contingency fee clients are, for a number of reasons, uniquely insensitive to the prices they pay. Much like health insurance appears to blunt patients' sensitivity to the cost of medical care, clients' contingency fee insensitivity may help to explain the long-identified oddities of the personal injury marketplace.

Third, the empirical claim about the price effect of attorney advertising that this Article challenges is deeply embedded in advertising's judicial justification. In sanctioning attorney advertising, the *Bates* Court assumed that attorney advertising would reduce the cost of legal services. Subsequent to *Bates*, Justice O'Connor wrote that "elementary economic principles" supplied "[t]he

296. For a description of what such a study might look like, see Part IV, above.

297. Notably, even a definitive finding that advertising PI lawyers charge more than non-advertising PI lawyers would not *preclude* the possibility that *Bates* has had a salutary price effect. In other words, even if it is true that advertisers charge more than their non-advertising counterparts, it is theoretically possible that the presence of advertising still exerts some kind of downward pressure on contingency fees. Moreover, even if is true that there is no *economic* justification for advertising, advertising still might be justified on other grounds. *See infra* note 301 and accompanying text (discussing advertising's access-to-justice rationale).

298. *See, e.g.*, BRICKMAN, *supra* note 233, at 18, 93 (suggesting that rules forbidding the outright sale of claims insulate contingency fee lawyers from market competition); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 664 (2003) ("I conclude that the market for contingent-fee financed tort claims is not competitive and that the uniform pricing which prevails is a product of collusive behavior by contingency-fee lawyers to generate rents.").

best arguments in favor of rules permitting attorneys to advertise."[299] And, in a 1982 case, the Court acknowledged that its "commercial speech doctrine" was "based in part on certain empirical assumptions as to the benefits of advertising."[300] This Article unsettles the empirical foundation on which the entire doctrine of attorney advertising heavily rests. It should thus prompt a searching reevaluation of the law as it has developed.

How should the law be changed? Though any number of options are theoretically available, from banning attorney advertising altogether to retaining the status quo, my own view is that a middle course should be charted. As to the former, I suggest some attorney advertising is still justified. Though it's not proven, ads might level the playing field between haves and have-nots, when it comes to counsel retention and claim initiation.[301] As a doctrinal matter, it would be anomalous to create a world where physicians could advertise to patients, accountants could advertise to clients, and pharmaceutical companies could advertise directly to consumers—but attorneys' hands were tied. Finally, as a practical matter, it would be impossible to enforce anything like the Model Code's old ban on public "self-laudatory" comments in the Internet age.[302] Banning, it thus seems to me, is not the answer.

That said, I believe this Article should prompt action. Specifically, by raising serious doubts about attorney advertising's salutary price effect, this Article should prompt a recalculation of attorney advertising's costs and benefits. That, in turn, should cause policymakers to search for new ways to increase attorney advertising's net utility. In past work, I have called for implementation of a transparency reform mechanism loosely patterned on a rule adopted in parts of New York and similar to some recently enacted reforms in the health care industry.[303] Specifically, I have called for state supreme courts to require that contingency fee practitioners file public closing statements at the conclusion of each representation where PI claims are asserted. Data drawn from these closing statements would then be made public on the Internet, where they would be searchable by lawyer, law firm, or other selected criteria (average contingency

---

299. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 488 (1988) (O'Connor, J., dissenting).

300. *In re* R.M.J., 455 U.S. 191, 200 n.11 (1982).

301. Prior to *Bates*, there is some evidence that individuals with a low socioeconomic status were less likely to seek compensation following accidental injury, as compared to their wealthier counterparts. *See* Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1083, 1088 & n.28 (2011) (collecting sources). In the decades since *Bates*, there is some reason to believe these disparities have diminished. *Id.* at 1090. But drawing the causal arrow between *Bates* and increased counsel retention and claim initiation—much less proving that *Bates* has broadly democratized the civil justice system—is extremely difficult.

302. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(A) (1980) (prohibiting a lawyer from making any "public communication containing a . . . self-laudatory . . . statement or claim").

303. For a detailed description of this transparency measure, see Engstrom, *supra* note 200, at 865-84.

fee charged, for example). If implemented, these closing statements would: make prices transparent and comparable (which should, at long last, inject at least some price competition into the contingency fee marketplace), give prospective clients a benchmark to compare the services offered by various practitioners, and improve the content of ads themselves by deterring the dissemination of false and misleading advertisements.[304] While admittedly not a panacea, mandatory disclosures would go a long way toward curing the problems that plague the PI marketplace.

Finally, this Article illustrates a broad, generalizable, and critically important point. Courts and commentators must be alert to the assumptions that underpin their assertions. Courts and commentators must keep abreast of factual developments. And courts and commentators must stand ready to question their assumptions if a situation unfolds in unexpected ways.

All studies measuring the price effect of attorney advertising were conducted in the first decade after *Bates*, when the world was quite different. Clinics were common, and the services advertised were routine. Yet, as legal clinics were shuttered and personal injury ads filled the airwaves, courts and commentators might have asked whether those studies—conducted in a different time, on a different population, for different legal services—were still predictive. Back in 1983, the influential Hazard, Pearce, and Stemple law review article (which incorrectly predicted that individualized service providers would not advertise) made one prescient point. "[L]egal services are of two types," the authors observed, "and the effect of advertising on the legal services market will vary with the type of service involved."[305] They were right. Context matters. The effect of advertising on the contingency fee marketplace is likely not the same as the effect of advertising on the routine service marketplace. When the context changes, when the unexpected happens, and when predictions are prov-

304. For why and how these goals could be achieved, see *id.* at 871-74. For theoretical background, see J. Howard Beales III, *Health Related Claims, the Market for Information, and the First Amendment*, 21 HEALTH MATRIX 7 (2011). As to the last point—deterring misleading advertisements—though deceptive advertising is verboten, there is good reason to believe a nontrivial portion of attorney advertisements, in fact, contain inaccuracies. Engstrom, *supra* note 200, at 837 & n.151. Providing information on how law firms *actually* operate would give bar counsel (and, in some states, consumers, empowered to act under state consumer protection acts), the ability to identify—and hold accountable—those lawyers who make false representations. To concretize the point, consider the following: My Yellow Pages review turned up a slew of quality claims which may well be inaccurate. Does the Christiansen Law Office of Las Vegas really have "More experience in the courtroom" as it claims? *See supra* note 262 and accompanying text. Perhaps—but we, prospective clients, and frankly, firm lawyers themselves, cannot possibly say without knowing something about the firm's trial experience *and* how that experience compares to the trial experience of other area law firms. Yet, *no one* has the information needed to make such interfirm comparisons.

305. Hazard et al., *supra* note 4, at 1084; *see also* Rizzo & Zeckhauser, *supra* note 173, at 382 ("Since the effects of advertising will vary by industry, by measures of competition, and by the type of advertising involved, analyses that treat advertising as a relatively homogenous phenomenon are unlikely to be very meaningful.").

en wrong, courts and commentators must stand ready to rethink their assumptions and, if needed, start anew.