

Competition and Contingency Fees

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A debate has long raged concerning whether the contingency fee market for legal services is or is not competitive. The debate has been fierce because its stakes are sky high. If the market is competitive, current efforts to cut or cap contingency fees are clearly wrong-headed. If the opposite, then at least some efforts to address the market failure probably make sense.

Leveraging the results of a novel empirical study and drawing from both classical and behavioral economics, this Article assembles the best evidence to date to resolve that age-old question. We find that, much like the market for brokerage services in residential real estate, the contingency fee market for personal injury (PI) representation is neither efficient nor competitive. The market for PI representation does not behave like a competitive market, and the preconditions for competition are lacking. Mirroring the brokerage market, fees are not salient to consumers of legal services, and stubborn informational asymmetries cloud consumer search.

Even so, contingency fee caps—many reformers’ reflexive fix—are not the answer. Price controls are generally harmful, and they are particularly counterproductive when deployed in this context. Rather than promoting access to legal services or reducing principal-agent problems, caps can be counted on to restrict access and skew attorney incentives. Perhaps worse, caps are regressive. Those who are already disadvantaged bear the brunt of this reform.

We have a better idea. Because the problems we identify are chiefly traceable to inadequate information, policymakers ought to use “closing statements” to get proper information into consumers’ hands.

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INTRODUCTION

Over the past half-century, the question of whether the contingency fee market is or is not competitive has been hotly—and perennially—debated.¹ Some insist that the market is “highly competitive,”² while others confidently declare the opposite.³

Scholarly interest has been so intense because a lot rides on the answer. The contingency fee, itself, is of tremendous public concern, as it fuels the tort liability system in the United States, a multi-billion-dollar enterprise and one of the nation’s chief sources of health and safety regulation.⁴ Without the contingency fee, much of the tort system—and much of the compensation, information, and deterrence that it provides—would simply vanish.⁵

Meanwhile, if the contingency fee market *is* competitive, judges and regulators probably ought to keep their hands off. There is, it follows, little justification for judicial control of fees in multi-

¹ See ABA Comm. on Ethics & Prof. Resp., Formal Op. 94-389 (1994) [hereinafter “Formal Op. 94-389”] (discussing the “intense public policy debate” surrounding the contingency fee and nodding to the debate’s “inflammatory and divisive” character).

² See, e.g., Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 766 (2011) (“The market for legal services is highly competitive.”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 138 (2010) (insisting that the market for personal injury representation is “highly competitive”); Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2088 (2002) (“Most empirical studies show that the market in which trial lawyers offer litigation-related services is highly competitive.”) [hereinafter Silver, *Cost Too Much*].

³ See, e.g., RICHARD L. ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 449 (2011) (explaining that a “problem” that bedevils the personal injury marketplace “is that all lawyers charge virtually identical percentages”); Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 126 (2003) [hereinafter Brickman, *Market*] (“The evidence and analysis presented in this article supports the thesis that the market for tort claiming services is not price competitive.”); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 664 (2003) (“[T]he market for contingent-fee-financed tort claims is not competitive[.]” [hereinafter Brickman, *Effective Hourly Rates*]; Lester Brickman, *Making Lawyers Compete*, 27 REGULATION 30, 30 (Summer 2004) [hereinafter Brickman, *Compete*] (“The market for tort claiming services is not price competitive. Lawyers assiduously maintain a uniform price—the ‘standard contingency fee’—irrespective of anticipated risk or commitment of time.”); Stephen D. Annand & Roberta F. Green, *Legislative and Judicial Controls of Contingency Fees in Tort Cases*, 99 W. VA. L. REV. 81, 83 (1996) (“It has been argued that market forces will control fees; however . . . such forces appear to be virtually nonexistent with regard to plaintiffs’ contingency fees in the typical tort case.”); Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with A Market for Legal Claims*, 101 IOWA L. REV. 1323, 1375 (2016) (“There is . . . little evidence that contingency fee lawyers compete on price at all.”); Jeffrey O’Connell & Evan Stephenson, *Binding Statutory Early Offers by Defendants, Not Plaintiffs, in Personal Injury Suits*, 54 DEPAUL L. REV. 233, 245 (2005) (“[T]he market for personal injury lawyers . . . is simply not price competitive.”).

⁴ For a discussion of the tort litigation system’s effects in promoting safety and regulation, see generally Nora Freeman Engstrom & Robert L. Rabin, *Promoting Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021).

⁵ See generally Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321 (1998) (setting forth a series of hypothetical outcomes that would arise were contingency fees banned).

district litigation (MDL),⁶ and we also ought to pump the brakes on the current flurry of legislative and ballot initiatives to cap contingency fees at increasingly draconian rates.⁷ On the other hand, if the market is not competitive, then *some* intervention conceivably makes sense, and we should be on the hunt for sensible ways to cure the market's inefficiencies.

Weaving together lessons from both classical and behavioral economics, and drawing from a novel empirical study of Internet advertising, this Article offers the best evidence to date to resolve this age-old question. We find that the contingency fee market is neither efficient nor competitive. The market for personal injury (PI) representation does not behave like a competitive market, and, perhaps more importantly, preconditions for such a market are lacking. The market is plagued by persistent informational asymmetries, as, prior to purchase, consumers of legal services can judge neither the likely cost of the representation nor its quality. Further, for numerous reasons, contingency fees are not salient to consumers of legal services, giving rise to what some economists call a behavioral market failure.⁸

Even so, contingency fee caps—like the drastic caps recently proposed in California and Nevada—are not the answer. Contingency fee caps, after all, are price ceilings, and economists generally agree that “government controls of prices . . . are usually harmful or even disastrous.”⁹ Ignoring the interaction of supply and demand, contingency fee caps garble typical resource allocations and often trigger shortages and welfare loss.¹⁰ Not merely theoretical, we’ll show that, consistent with expectations, where they’ve been imposed, contingency fee caps have distorted lawyers’ screening patterns and led to the rejection of meritorious claims.¹¹ These shortages cause harm. They deprive injured individuals of

⁶ *E.g.*, *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006) (capping fees in the Zyprexa MDL at 35%); *In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig.*, No. 05-1726, 2008 WL 4861693, at *1 (D. Minn. Nov. 10, 2008) (capping fees at “33 1/3 percent of the gross award allocated to the client”); *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d 549, 565 (E.D. La. 2009) (same at 32%).

⁷ As discussed *infra* at Part V.A., in recent years, tort reformers have sought to enact stringent contingency fee caps in California, Colorado, and Nevada.

⁸ A behavioral market failure is a market failure stemming from predictable human error. *See generally* OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012) (developing a theory of “behavioral market failure”); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 *YALE L.J.* 1826, 1842–1851 (2013) (identifying broad categories of “behavioral market failures” which include present bias and consumers’ tendency to ignore or discount non-salient attributes of goods and services).

⁹ Cass R. Sunstein, *Rules and Rulelessness* 31 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 27, 1994); *see also* Christopher Coyne & Rachel Coyne, *Foreword to FLAWS & CEILINGS, PRICE CONTROLS & THE DAMAGE THEY CAUSE* xiii (Christopher Coyne & Rachel Coyne eds., 2015) (recognizing the consensus among economists that price caps are “one of the worst forms of intervention in markets”); Chaim Fershtman & Arthur Fishman, *The ‘Perverse’ Effects of Wage and Price Controls in Search Markets*, 38 *EUR. ECON. REV.* 1099, 1099 (1994) (“There are few issues on which there is as broad a consensus of opinion among economists as with regard to the effects of price and wage controls.”). For a discussion of distinctions between the effects of price controls in monopolistic and non-monopolistic markets, *see infra* note 274.

¹⁰ *See* Fiona M. Scott Morton, *The Problems of Price Controls*, 2001 *REGULATION* 50, 50–51 (2001) (explaining these basic interactions between price controls and supply and demand); Coyne & Coyne, *supra* note 9, at 8, 16–17 (same, while adding that price ceilings can create and exacerbate shortages).

¹¹ *See infra* notes 275–283 and accompanying text.

compensation, blunt tort law’s deterrent and informational effects, and—given subrogation, which lets first-party-payors recoup their expenditures from tortfeasors—starve local, state, and federal governments of needed funds.¹²

With caps off the table, we show that, because the problem is chiefly traceable to inadequate information, instead of simply capping fees (a clumsy, counterproductive response to a complex problem), policymakers ought to get proper information into consumers’ hands.

The remainder of this Article proceeds in five Parts. Part I is foundational. It offers background on the contingency fee, the arrangement through which injured individuals in the United States secure qualified counsel. It also offers a primer on the bitter controversies that have long embroiled this particular payment mechanism.

Parts II and III amass evidence to show that the contingency fee market is not competitive. Part II examines outputs: the contingency fee’s observed behavior. If the contingency fee market were competitive, we would expect price fluctuation based on ebbs and flows in market conditions. Yet, the market exhibits surprising stubbornness. On a percentage basis, the contingency fee has changed little over time, even as claiming patterns have changed and damages have fluctuated. Similarly, if the contingency market were competitive, we would expect prices to change based on the character and quality of representation. Instead, lawyers of varying quality who litigate different types of cases appear to charge nearly the same percentage. Finally, if the contingency fee market were competitive, we would expect sellers to share cost savings with their consumers when those cost savings are achieved. But contingency fee lawyers—again and again, across time and space—have found ways to generate significant cost savings but, rather than sharing those savings with consumers in the form of price reductions, have, it seems, kept that savings for themselves.

Part III then examines inputs. Drawing on an original empirical examination of 500 PI lawyers’ websites, we explore *why* the contingency fee might be bucking economic expectations. We first find evidence of a conventional market failure. Neoclassical economics posits that a market will not operate efficiently if consumers lack adequate information about the market’s products or services.¹³ Against that backdrop, we find that the market for PI representation is plagued by glaring informational problems, as prospective clients can assess neither attorney cost nor quality. Indeed, our empirical investigation of law firm internet advertising reveals that only 4.4% of PI attorney websites provide *any* information about the attorney or firm’s typical contingency fee. We additionally find evidence of a behavioral market failure: Owing to the *uncertainty* of contingency fee payment (since payment is conditional on success), the *timing* of payment (far into the future),

¹² See *infra* note 286 and accompanying text. Subrogation allows an insurer that has paid health care claims under its policy to recoup that amount from a liable third-party. Stephen J. Spurr, *The Effects of Subrogation on Personal Injury Litigation and Deterrence of Tortfeasors*, 54 TORT TRIAL & INS. PRAC. L.J. 867, 868 (2019). Via subrogation, then, when Medicare, Medicaid, and other government-sponsored health insurance plans pay an injured party’s medical bills resulting from a tortious act, they can—and often do—recoup those payments. See *id.* at 871.

¹³ ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 625 (8th ed. 2013) (explaining that “the market system will not operate efficiently” if consumers lack sufficient information about product quality).

and the *manner* of payment (deducted not paid), contingency fees are not salient to consumers of legal services.¹⁴ This lack of salience is critically important because, when a contractual provision is not salient, the market cannot be counted on to ensure that that provision (here, the price term) is competitive.¹⁵

Furthermore, with broad implications, we demonstrate that the residential real estate market for brokerage services and the market for legal services *share these same basic attributes*.¹⁶ In the real estate realm, there is a robust consensus that “commission rates appear to be . . . insensitive to economic forces.”¹⁷ Yet, given the number of real estate agents who are licensed—and the ease of entry into the profession—many economists have long expressed bewilderment as to why this market failure persists.¹⁸ We help solve that mystery. Taken together, Parts II and III go a long way to informing two consequential debates that have swirled for decades.

Part IV offers a pair of caveats and clarifications regarding the nature of competition in the contingency fee market. These are crucial because this Article tackles a question that, to this point, has gotten bogged down in politicization and exaggeration. First, we emphasize that a lack of *price* competition does not imply that contingency fee lawyers do not compete. They do. In fact, we will show that competition in the PI arena is fierce, even though (mimicking the real estate brokerage marketplace) battles are chiefly waged on non-price variables. Second, we stress that, even though we identify a lack of price competition, it does not necessarily follow that contingency fee lawyers make more money relative to other

¹⁴ This discussion draws from and builds on Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 686–90 (2013).

¹⁵ As Russell Korobkin explains: “When a contract term is salient to purchasers, the market can be trusted to provide an efficient version of the term,” but “[w]hen a contract term is non-salient to most purchasers,” our faith in the market ought to be limited. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 (2003).

¹⁶ To the best of our knowledge, no one has ever surfaced the striking similarities between the two markets. One partial exception is Saul Levmore who, in 1993, recognized that certain markets share certain curious features and also zeroed in on the fact that real estate brokers seem to charge uniform rates. He theorized that perhaps “uniformity reduces conflicts among principals served by the same agent.” Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents’ Rewards*, 36 J.L. & ECON. 503, 507 (1993). In Levmore’s telling, if a real estate agent charges the same amount (on a percentage basis) to the sellers of homes A, B, and C, and if homes A, B, and C are of comparable value, seller C need not worry that her agent will be tempted to devote too much time to A or B. *See id.* In addition, in 2014, Nora Freeman Engstrom explained, in a lengthy footnote, that both the contingency fee PI marketplace and the real estate brokerage marketplace exhibit features associated with behavioral market failures. *See* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 413 n.150 (2014). Finally, in 2003, Lester Brickman compared real estate brokerage fees to contingency fees, but he focused on differences, rather than similarities. *See* Brickman, *Market*, *supra* note 3, at 86–88, 102–105.

¹⁷ Chang-Tai Hsieh & Enrico Moretti, *Can Free Entry Be Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry*, 111 J. POL. ECON. 1076, 1086 (2003); *id.* at 1081 (“The uniformity of commission rates is well established in the real estate literature.”). For further discussion, see *infra* notes 173-178 (collecting additional citations).

¹⁸ *See infra* note 180 and accompanying text; *see also* FED. TRADE COMM’N, THE RESIDENTIAL REAL EST. BROKERAGE INDUS. 11 (1983) [hereinafter FTC 1983 REPORT] (explaining that there is an “apparent paradox” in that there are many brokers and “ease of entry is so simple,” and yet “uniformity in commission rates is the general rule”); Hsieh & Moretti, *supra* note 17, at 1086 (dubbing the “apparent uniformity of commission rates” an “enormous puzzle”).

attorneys. Indeed, Part IV compiles new evidence to support the view, long championed by Professor Herbert Kritzer, that, on average and over time, PI contingency fee lawyers do not fare much better than their hourly-fee counterparts.¹⁹ In fact, it is possible that many PI lawyers charge *too little*, given the expertise they exhibit, effort they exert, and risk they bear.²⁰

Yet, we also explain that the contingency fee market failure does exact a welfare cost. Most notably, market inefficiencies prevent comparison-shopping and, in so doing, inhibit competition either as to price or certain non-price variables. Restricted competition also skews allocation, as consumers (prospective clients) are not matched with the most suitable provider. Perhaps worst of all: When providers do not compete on the basis of price, it appears they expend considerable resources competing ever-more-fiercely to obtain potential clients. In so doing, attorneys harm not only their clients, but themselves.²¹

Indeed, in the (eerily similar) market for residential real estate, academics have observed that “[i]n the absence of price competition,” more brokers enter the market, and these “brokers compete with one another on a non-price basis to acquire a larger share of available listings.”²² In time, “aggregate costs devoted to brokerage rise and welfare in the housing market is reduced.”²³ “[T]he end result,” per the FTC, “is industry overcapacity, low agent productivity (that is, a small number of sales per agent), and flat or falling wages for agents.”²⁴

Here too, because contingency fees are stuck around 33%, lawyers who could be helping people instead spend valuable time and resources vying for the most profitable clients. Certain injury victims with meritorious but high-risk claims who *need* resource-intensive representation get left behind.²⁵ And money that could flow to injured individuals, or at least build PI lawyers’ war chests,

¹⁹ See *infra* Table 4. Two of Professor Kritzer’s valuable contributions to this important debate include: Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U.L.Q. 477 (2004) [hereinafter Kritzer, *Rhetoric*]; Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998) [hereinafter Kritzer, *Wages of Risk*].

²⁰ See, e.g., David A. Hyman, Bernard Black, & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1596 (2015) (finding plaintiff’s lawyers fees declined or remained stable even while litigation expenses ticked upward). Some lawyers, we believe, charge “too little” because they are not permitted to charge more, given fee caps in many jurisdictions. For discussion, see *infra* Table 5.

²¹ For an example of this dynamic among real estate brokers, see Hsieh & Moretti, *supra* note 17, at 1078–79. For further discussion, see *infra* note 245 and accompanying text.

²² Thomas J. Miceli, *The Welfare Effects of Non-Price Competition Among Real Estate Brokers*, 20 J. OF AM. REAL EST. 519, 530–31 (1992). For further discussion in the residential real estate context, see Hsieh & Moretti, *supra* note 17, at 1117–18 (concluding that “higher commission fees in more expensive cities are dissipated”).

²³ Miceli, *supra* note 22, at 531.

²⁴ *The Changing Real Estate Market: Hearing Before the H. Subcomm. on Housing & Community Opportunity of the Committee on Financial Services*, 109 Cong. 25 (2006) (FTC Prepared Statement) [hereinafter 2006 House Hearing].

²⁵ As it stands, many would-be clients with time-consuming and complicated claims are unable to find counsel and, as a consequence, are locked out of the civil justice system entirely. See, e.g., Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017).

instead gets dissipated as lawyers pony up for ever more aggressive advertising.²⁶

In the face of this market failure, we are left with the knotty question of what to do. Drawing on a deep knowledge of the contingency fee's operation and a sophisticated understanding of contingency fee lawyers' day-to-day activities, Part V takes what some might view as a surprising turn. It argues that, even in the face of market imperfections, contingency fee caps—the reform *de jour*—are deeply misguided. Rather than helping accident victims, caps make it more difficult for prospective claimants to find counsel and, after retention (if counsel is found), exacerbate the principal-agent problems that inevitably plague attorney-client relationships. Arguably worse, caps are regressive.²⁷ They distort the market for legal services in a way that predictably restricts access for certain already-disadvantaged populations.²⁸ Instead, recognizing that the chief problem in the market for personal injury legal services is a lack of accurate and objective information, this Article offers a detailed blueprint for a sensible informational reform.²⁹

I. BACKGROUND ON CONTINGENCY FEES

As early as 1876, the Supreme Court declared that the legality of the contingent fee was “beyond legitimate controversy,”³⁰ and today, contingency fees are utilized to finance approximately 96% of the personal injury litigation in the United States.³¹ As one commentator put it: “[N]ext to marriage, the contingent fee is the commonest form of partnership in America today.”³²

Despite the contingency fee's historical pedigree and widespread use, the utility and propriety of contingency fees continue to generate heated debate.³³ Section A compiles the advantages of contingency fees, while Section B catalogs critics' chief complaints about this particular funding mechanism.

Before diving in, a note on coverage: here, and throughout, when we refer to “contingency fees,” we mean no-win, no-fee

²⁶ As it stands, PI lawyers' expenditures on attorney advertising are mind-boggling. Exhibit A: Out of the twenty most expensive Google keywords in the United States, *nineteen* involve PI representation. See *infra* note 197.

²⁷ PATRICIA MUNCH DANZON, CONTINGENT FEES FOR PERSONAL INJURY LITIGATION at vii, 39 (Rand 1980) (explaining why fee caps are regressive); accord STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE 224–25, 230 (2015) (documenting the regressive nature of tort reforms, generally).

²⁸ Danzon, *supra* note 27, at 39 (explaining how contingent fees “give[] those of relatively low means easier access to the judicial process.”).

²⁹ This reform proposal builds on a proposal first discussed in Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 865–84 (2011).

³⁰ *Stanton v. Embrey*, 93 U.S. 548, 556–57 (1876).

³¹ James D. Dana & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 8 J.L. ECON. & ORG. 349, 349 (1993) (reporting that 96% of individual plaintiffs paid their attorneys on a contingency fee basis); see also Winand Emons & Claude Fluet, *Why Plaintiffs' Attorneys Use Contingent and Defense Attorneys Fixed Fee Contracts*, 47 INT'L REV. L & ECON. 16, 16 (2016) (reporting that, in the United States, “92–98% of individual plaintiffs . . . retain their lawyer on a contingency basis”).

³² *Hearings on Standards for No-Fault Motor Vehicle Accident Benefits Act, S. Comm. on Commerce, Science, and Transp.* 95 Cong. 44 (1977) (Statement of Murray Teigh Bloom).

³³ As one ABA Formal Opinion puts it: “The term contingent fee evokes an almost instantaneous visceral response among lawyers.” Formal Op. 94-389, *supra* note 1, at 1.

agreements. We therefore omit discussion of many other types of contingency fees, including those paid by defendants in certain civil cases, those outside of the litigation arena, and those where a portion of the lawyer's fee is guaranteed, leaving only a portion that is variable.³⁴ Further, although *many* types of plaintiffs use the contingency fee, including corporate plaintiffs asserting commercial, contract, antitrust, and intellectual property claims, we focus on individual plaintiffs' (not class action plaintiffs') use of the contingency fee in PI litigation.³⁵ It is here that the contingency fee is most commonly used—and it is here that the contingency fee has stimulated the most significant controversy.³⁶

A. Advantages of the Contingency Fee

Contingency fees' champions find much to like. First, they stress that contingency fees provide a "key to the courthouse" for impecunious clients, offering the "the last bastion of hope for the injured and aggrieved"³⁷—a point that even the contingency fees' harshest critics grudgingly concede.³⁸

Contingency fees provide access, in part because the contingency fee contains three valuable benefits. Most obviously, contingency fees offer a tidy mechanism to pay attorneys for their time (i.e., professional services). But contingency fee lawyers additionally supply critical banking and insurance services.³⁹ Via the contingency fee, PI attorneys front the costs and expenses of litigation, which can easily reach five or six figures.⁴⁰ Absent the contingency fee, many clients would need to take out loans or mortgage their property to bear these costs. Additionally, via the contingency fee, PI attorneys insure the client against the risk of a

³⁴ For discussion of these other arrangements, see *id.* at 3.

³⁵ *Id.* ("Contingent fees are no longer, if ever they were, limited to personal injury cases. Nor are contingent fees limited to suits involving tortious conduct. Contingent fees are now commonly offered to plaintiff-clients in collections, civil rights, securities and anti-trust class actions, real estate tax appeals and even patent litigation."). For further discussion, see Declaration of Herbert Kritzer 15, *Uber Sexual Assault Survivors for Legal Accountability v. Uber Techs., Inc.*, No. 24-000561 (Nev. First Jud. Dist. Apr. 5, 2024).

³⁶ For an explanation of the controversy, see *supra* note 1 and accompanying text. For prevalence of contingency fees in the PI realm, see Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 821 (1989) (explaining that "it is extremely rare for personal injury cases to be handled by anything other than contingent [fee] contracts").

³⁷ Todd A. Twyman, *In Defense of the Contingent Fee*, W. VA. LAW. 12 (Dec. 1999); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG. 2, 4 (1976); see also *Richette v. Solomon*, 187 A.2d 910, 919 (Pa. 1963) ("If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors."); Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 953 (1990) ("The most often cited justification for the contingency fee is that it allows access to the courts to those who lack the means to pay a lawyer's hourly fees.").

³⁸ LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 19 (2011) ("In our civil justice system, the contingency fee is vital to the vindication of important legal rights.").

³⁹ See HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS* 14–15 (2004) ("[C]ontingency fee lawyers provide more than legal services to their clients; they also function as financier and insurer.").

⁴⁰ See Engstrom, *supra* note 16, at 387 & n.39 (compiling evidence). The advent of third-party litigation doesn't fundamentally change this dynamic. Even if the lawyer takes out a loan to help finance the case, these loans tend to be recourse. This means that the lawyer remains responsible for repaying the principal on the loan, regardless of how the case unfolds. See *id.* at 392–94. For further discussion of third-party litigation finance, see *infra* Part II.B.4.

non-recovery. If the case is lost, the lawyer gets nothing—and also, generally, forgoes reimbursement for costs and expenses.⁴¹ Here again, if the contingency fee did not include this protection, clients would (presumably) need to separately obtain insurance to protect against this possibility.⁴²

Next, because a lawyer is paid only if she wins—and because non-meritorious claims often falter⁴³—contingency fees incentivize case screening.⁴⁴ By promoting the scrutiny of claims prior to acceptance, contingency fees drastically cut down on fraudulent and frivolous litigation, which would otherwise frustrate defendants and clog courts.⁴⁵ And, it is worth noting: contingency fee lawyers perform this valuable benefit at no cost to the public.

By tethering the fortunes of lawyer and client, contingency fees also reduce principal-agent conflicts. As Judge Frank Easterbrook has explained:

The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect But [an] imperfect-alignment of interests is better than a conflict of interests, which hourly fees may create.⁴⁶

In so doing, the contingency fee, some suggest, gives the client the sense that the lawyer is her “partner in interest,” which may promote the client’s satisfaction with the litigation process.⁴⁷ Without this

⁴¹ *Id.* at 388 (explaining that “if the case is lost, the lawyer typically absorbs the out-of-pocket investment”).

⁴² Not coincidentally, in certain countries where the contingency fee is not permitted, legal insurance—which buffers litigants from the risk of loss—is more widely utilized. See RICHARD W. PAINTER, *THE NEW AMERICAN RULE: A FIRST AMENDMENT TO THE CLIENT’S BILL OF RIGHTS 2* (2000) (explaining that, in Germany, litigation insurance essentially stands in for contingency fee financing); Warner Pfennigstorf, *Legal Expense Insurance*, 23 AM. J. COMP. L. 451, 462–63 (1975) (“The fact that in practically all European countries contingent fee arrangements are considered unethical . . . is probably the single most important factor explaining the successful operation of legal protection insurance in Europe and its slow start in the U.S.A.”).

⁴³ For evidence that non-meritorious claims are less likely to result in payment, see, for example, David M. Studdert et al., *Claims, Errors, & Compensation Payments in Medical Malpractice Litigation*, 354 NEJM 2024, 2031 (2006).

⁴⁴ See generally Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997).

⁴⁵ One recent study, for instance, found that attorneys turned down 53% of injured individuals who sought their services—and it appears that, over the past three decades, attorneys have become markedly more selective. James M. Anderson, Maya Buenaventura, Amy Mahler & Nicholas M. Pace, *Empirical Tort L. (and Theory)—An Essay in Honor of Deborah Hensler*, 17 J. EMPIRICAL TORT L. 97, 102 (2025) (remarking that the surveyed potential claimants were “much more likely to be turned away by the attorneys they contacted when compared to the ICJ-Hensler respondents of 1988–89 (53% turned away today vs. 22% turned away in the late 1980s)”). See also Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 664 (2017) (discussing screening). For further discussion of lawyers’ screening patterns, see KRITZER, *supra* note 39, at 67, 71–76; Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 185 (2014); Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1061–66 (2006).

⁴⁶ *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

⁴⁷ Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 LAW & CONTEMP. PROBS. 175, 179 (2001); see Kevin M. Clermont & John D. Currihan, *Improving the Contingent Fee*, 63 CORN. L. REV. 529, 567–68, 570 (1978); Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis*

alignment of interests, clients would need to monitor and supervise their lawyers' work—a tall order for those who are typically injured, untrained in law, and lack litigation experience.⁴⁸

Finally, by delaying attorney payment and expense reimbursement until case resolution, the contingency fee works to streamline and expedite litigation.⁴⁹ Whereas the contingency fee's chief rival—the hourly fee—encourages lawyers to drag their heels, the contingency fee promotes the aim of Federal Rule of Civil Procedure 1: “secur[ing] the speedy, and inexpensive determination of every action and proceeding.”⁵⁰

B. The Contingency Fee's Asserted Drawbacks

Opponents see matters differently. According to these critics, because the lawyer's payment is tied to the client's success, the contingency fee tempts the lawyer to go too far and say too much.⁵¹ Says Walter Olson, it “yoke[s] together lawyer and client in a perfectly harmonious and efficient assault on the general public.”⁵² Relatedly, critics charge, because the contingency fee ensures clients lose nothing if the claim falters, the contingency fee tempts some to “roll the dice,” and, in so doing, stokes frivolous and fraudulent litigation.⁵³ Next, critics correctly point out that, although the contingency fee aligns the interests of lawyer and client, the alignment is only partial.⁵⁴ The residual misalignment, critics

of the Contingent Fee in Personal-Injury Litigation, 22 STAN. L. REV. 1125, 1125 (1970).

⁴⁸ Compare Gross, *supra* note 5, at 336 (explaining that, if it weren't for the contingency fee, clients would need to “monitor their lawyers' time and effort”), with RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35, cmt. b (Am. L. Inst. 2000) (“[I]t remains true that contingent-fee clients are often unsophisticated and inexperienced users of legal services.”).

⁴⁹ Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 479, 503 (1994) (“Given the time value of the money the [contingent fee] attorney has invested in a case, he or she has a substantial incentive to reach a settlement and collect a contingency fee sooner rather than later.”). Yet, every rose has its thorn: rather than just incentivizing efficient settlements, in some cases, the contingency fee may tempt some lawyers to push their clients to accept hasty, low-ball settlements. *See infra* notes 54–55 and accompanying text.

⁵⁰ FED. R. CIV. P. 1; Birnholz, *supra* note 37, at 954 (explaining that, unlike the hourly fee, “the contingent fee encourages efficiency, economy, and speed”) (quotation marks omitted).

⁵¹ Inselbuch, *supra* note 47, at 179 (reporting that critics “claim . . . that contingent-fee contracts . . . mire industry and the judiciary in unwarranted, protracted, and expensive proceedings”); Emily R. Kubo, Comment, *Abandoning the Contingent Fee: Why Personal Injury Cases Should Move to Retainer Fee Agreements*, 16 J.L. ECON. & POL'Y 91, 93 (2021) (insisting that contingency fees “increase the possibility that vexatious and unfounded suits will be brought”).

⁵² WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 44–45 (1991). The concern, Olson explained, is that “[t]here are things lawyers will do when a fortune for themselves is on the line that they won't do when it's just a fortune for a client.” *Id.* at 45.

⁵³ Fotios “Fred” M. Burtzos, *Contingent Fees: You Bet Your Life*, 34 COLO. LAW. 123, 123 (2005) (“Common sense indicates that a plaintiff who is not required to pay a fee for legal services . . . has a great incentive to ‘roll the dice’ to try to get a large recovery in a case, no matter how unlikely that probability.”).

⁵⁴ *See supra* note 46 and accompanying text. The contingent fee arrangement can, for example, encourage lawyers to devote too few hours to a case. *See* Kathryn E. Spier & David Rosenberg, *A Game Changer for Attorney Fees: Benchmarking Against Settlement Offers* 1 (Harvard Pub. L., Working Paper No. 25-11, 2024) (explaining that, when paid via a contingency fee, “lawyers may spend too little time and effort fighting for their clients and may capitulate too easily in settlement negotiations”); Clermont & Currivan, *supra* note 47, at 536 (“The [contingency fee] lawyer's and the client's economic interests align only partially. Although

continue, tempts some lawyers to work too little and settle too soon, to the client's detriment.⁵⁵

Likewise, by giving a lawyer a portion of the client's *financial* recovery, the contingency fee channels claims to resolution on monetary terms.⁵⁶ If it weren't for the contingency fee, in other words, plaintiffs would be more likely to push the defendant to make a structural change, in lieu of—or in addition to—demanding that the defendant cough up a monetary sum. As it is, because a lawyer can't take one-third of a structural change, the currency of PI litigation is unduly economic. Finally, a common refrain is that the contingency fee is insufficiently sensitive to “anticipated effort and the litigation risk assumed,”⁵⁷ and, perhaps as a consequence, “lines the pockets of the claimants' lawyers with unwarranted and extravagant fees.”⁵⁸

II. CURIOSITIES AND CONTINGENCY FEES: EVIDENCE THAT CONTINGENCY FEES ARE NOT PRICE COMPETITIVE

Part I cataloged the contingency fees' principal virtues and alleged vices. Now, it is worth noting that some of the harshest critiques of the contingency fee don't hold water. For instance, although critics allege that the contingency fee promotes frivolous or fraudulent claiming, it is difficult to reconcile this charge with (1) evidence about the relatively low incidence of frivolous and fraudulent litigation within the tort system,⁵⁹ and (2) the fact that the

lawyer and client share a common interest in victory, misalignment exists with respect to the number of hours the lawyer should work.”); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 670–71 (1995) (“In some situations, a contingent fee may lead lawyers—who know that each additional hour worked comes at the expense of work on other cases—to work fewer hours on a case than a fully knowledgeable client paying an hourly rate would choose to have the lawyer work.”).

⁵⁵ Since the attorney is typically only entitled to a portion (roughly one-third) of the client's ultimate settlement or judgment, the attorney's optimal investment may be far below the investment desired by the client or needed to maximize the case's value. This misalignment has been dubbed “the chief agency problem posed by percentage contingent fees.” Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 393 (1998). For further discussion, see *supra* note 54.

⁵⁶ See generally Nora Freeman Engstrom & Lisa Qian, *The Injunctive Effect of Tort Law* (2025) (unpublished manuscript) (on file with author) (detailing how contingency fee arrangements can incentivize lawyers to channel claims toward a monetary resolution, even when clients have nonmonetary aims).

⁵⁷ BRICKMAN, *supra* note 38, at 59–60; see Eyal Zamir, Barak Medina & Uzi Segal, *Who Benefits from the Uniformity of Contingent Fee Rates?*, 9 REV. OF L. & ECON. 357, 358 (2013) (“A central criticism of the [contingency fee] practice focuses on the fact that [contingency fee] rates in the United States are distinctively, albeit not invariably, uniform.”).

⁵⁸ Inselbuch, *supra* note 47, at 175; see F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 139 (1964) (identifying, while not necessarily subscribing to, this critique); Jay, *supra* note 36, at 825 (“Surely the most frequently heard complaint about contingent fees is that they result in payments to attorneys that are disproportionate to the efforts expended on the case and the risks involved in the representation.”); Schneyer, *supra* note 55, at 372 (“Over the years, critics have tried to link contingent fees with a variety of evils, but today's critics focus on the charge that contingent fee contracts produce windfalls for lawyers, i.e. fees greater than necessary to induce lawyers to accept meritorious cases and pursue them competently.”).

⁵⁹ The best evidence suggests that such claims in the tort liability system are relatively rare. See, e.g., Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623, 1629 (2023) (compiling evidence).

contingency fee's no-win, no-pay structure incentivizes lawyers to vet claims carefully.⁶⁰ Likewise, although it is true, as critics claim, that the contingency fee imperfectly aligns the lawyer and client's interest, it is equally true that *all* fee generation mechanisms pose problems.⁶¹ Indeed, the contingency fee's chief rival, the hourly fee, does not align lawyer and client interests at all.⁶² Yet, there is at least one problem with the contingency fee that *is* well-supported: The contingency fee's apparent resistance to economic laws of gravity. That is the problem to which we now turn.

Below, Section A addresses initial curiosities. It shows that the contingency fee, on a percentage basis, has stayed relatively constant at around 33%, across time, context, case type, case size, and even attorney quality. Section B digs deeper. It offers further evidence that contingency fees are surprisingly stubborn. Even when contingency fee practitioners generate significant savings, it does not appear that those savings are passed along to clients.

A. Initial Curiosities: Stickiness Across Time, Context, and Quality

In a competitive market, one would expect contingency fees to fluctuate, based on predicted lawyer inputs and case outputs.⁶³ But, contingency fees defy that expectation. Contingency fees, on a percentage basis, appear to have changed little over time,⁶⁴ even as the risk of defeat and size of award have fluctuated.⁶⁵ And, on a percentage basis, contingency fees do not appear to vary

⁶⁰ See *supra* note 45 and accompanying text.

⁶¹ See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 977–80 (2000) (exploring how contingency fee and hourly fee structures “introduce[] an important deviation from the hypothetical perfectly competitive market”).

⁶² See Gross, *supra* note 5, at 335–36 (explaining that “[w]ith hourly fees . . . the lawyer and the client now have opposing interests in the amount of time the lawyer spends working on the case”).

⁶³ Zamir et al., *supra* note 57, at 358 (“[I]n a competitive market plaintiff lawyers would not charge the same [contingency fee] rate in small and large cases . . .”).

⁶⁴ Compare Expert Report of Professor William B. Rubenstein at 29, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-02323 (E.D. Pa. Dec. 11, 2017) (reporting that a survey of 617 available attorney agreements in the NFL Players' Concussion Injury Litigation revealed a median contingency fee of 30%, with a mean of 29%), with Hyman et al., *supra* note 20, at 1563 (reporting on a recent study of fees received by 124 plaintiff-side personal injury law firms in four states and finding “[a] one-third contingency fee is the most common arrangement”), with Eric Helland, Daniel Klerman, Brendan Dowling & Alexander Kappner, *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1976, 1992 (2017) (reporting on a study of New York retainer agreements from 2004 through 2013 which found that “attorneys’ fees are almost always one-third of [the client’s] net recovery”); with Kritzer, *Wages of Risk*, *supra* note 19, at 284–86 (reporting on a 1995–1996 survey of Wisconsin lawyers which found that most lawyers charged a fee of 33%), with MACKINNON, *supra* note 58, at 116 (suggesting, on the basis of a review of then-available data that, in 1964, the average contingency fee in the United States was roughly 33%), with Marc A. Franklin, Robert H. Chanin & Irving Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 9, 26 (1961) (reviewing a random sample of 3,000 closing statements from New York in 1957 and finding that, in “suits,” the contingency fee averaged 34%).

⁶⁵ In recent decades, win rates and tort damage awards have both fluctuated. It is possible various trends have canceled out, leading to the appearance of stability and inelasticity, even in the face of variability. For a discussion of declining damage awards and sharply dropping win rates within the tort system, see Nora Freeman Engstrom, *Supplying a Key Piece of the Tort Decline Puzzle*, JOTWELL (Mar. 30, 2020).

systematically based on lawyer quality, case type, claim size, or mode of client origination.⁶⁶

Now, this is not to suggest that there is no variation in the percentage that contingency fee lawyers charge. There is some.⁶⁷ Nor is it to suggest that all lawyers actually pocket a comparable *amount* per case. Far from it. Some cases are large and others are small; one-third of a huge award is a hefty sum, whereas one-third of a small award may be tiny. Nor is it to suggest that PI lawyers of different quality or in different practice areas actually pocket the same amount, whether on an hourly or annual basis—and new evidence we assemble in Part IV concerning annual attorney compensation confirms this common-sense conclusion.⁶⁸

Still, the fact that a lawyer who tasks nonlawyer negotiators with assembly-line car wreck claims charges roughly the same (on a percentage basis) as a lawyer who litigates *extremely* risky, complex, and resource-intensive medical malpractice claims is curious.⁶⁹

B. Further Curiosities: Savings Aren't Shared

Above, Section A offered initial evidence tending to show that contingency fees aren't competitive: On a percentage basis, contingency fees have fluctuated little across time, and they do not appear to fluctuate systematically based on case type or attorney quality, even though there is significant variation along both dimensions.

This Section offers further evidence. It is Economics 101 that, if a market is competitive, to the extent suppliers generate significant and predictable cost savings, those savings will be at least partly passed along to consumers.⁷⁰ Yet, past experience from four

⁶⁶ See Engstrom, *supra* note 14, at 667–69, 676–77, 681 (amassing evidence); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 279 (2007) (observing that the “price term in plaintiffs’-side personal injury retainers is remarkably sticky”); Gillian K. Hadfield, *Legal Markets*, 60 J. ECON. LIT. 1264, 1294 (2022) (“[D]espite the presence of dramatic differences in the quality of lawyering . . . contingency rates rarely depart from an industry standard of 33 percent.”) (citations omitted); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 739 (2005) (“Contingency fees are remarkably constant in particular geographic regions across lawyers, and there is thus no obvious relationship between fees and lawyer quality.”).

⁶⁷ See Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739, 758–61 (2002) (offering empirical evidence); Engstrom, *supra* note 29, at 845–49 (observing that so-called settlement mills seem to charge higher-than-typical contingency fees). Adding to this variation, as noted below, in some cases, PI lawyers choose to reduce their fees at the time of settlement by agreeing to take less than the retention agreement would allow. See *infra* note 191.

⁶⁸ Put another way, the market exhibits what economists call “positive assortative matching.” Zamir et al., *supra* note 57, at 359. Owing to referral markets and rigorous case screening, “top contingent fee lawyers end up with portfolios of better cases.” Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 368 (1998). For a discussion of referral markets, see generally DANIELS & MARTIN, *supra* note 27, at 176–204; Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs’ Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243 (2006).

⁶⁹ For a discussion of the extraordinary risk and cost associated with litigating medical malpractice claims, see David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1117–20 (2006) and *infra* note 287. For discussion of lawyers who assembly-line car wreck claims, see generally Engstrom *supra* note 65.

⁷⁰ Robert W. Hahn, Robert E. Litan & Jesse Gurman, *Bringing More Competition to Real Estate Brokerage*, 35 REAL ESTATE L.J. 86, 89 (2006) (“In a competitive

contexts—involving (1) referral fees, (2) efforts to streamline litigation, (3) the maturation of asbestos litigation, and (4) the advent of third-party litigation finance—indicate that this predicted cost saving is not materializing in the contingency fee marketplace.⁷¹

1. Referral Fees

Referral fees first help to illustrate contingency fee stubbornness. Because one-shot PI claimants have difficulty identifying high-quality lawyers on their own, a sophisticated referral market has developed.⁷² Via this referral market, large cases tend to be channeled from lower echelon practitioners to specialists, in exchange for a sizable fee, usually somewhere between one-quarter and one-half of the specialist's ultimate take.⁷³

Yet, some savvy clients retain specialists right off the bat, eliminating the intermediary. If fees fluctuated based on a lawyer's inputs and outputs, we might expect to see specialists reduce their contingency fees in such instances. But evidence does not indicate that such contingency fee cuts commonly occur.⁷⁴

The *Vioxx* litigation provides a case in point. In that litigation, one consortium of five plaintiffs' law firms handled approximately 2,000 cases.⁷⁵ In terms of origination, the consortium's cases were nearly equally split between direct retentions and practitioner referrals.⁷⁶ In the direct retentions, no referral fees were paid; in the latter, considerable sums (fees of 25%) went to the referring attorneys.⁷⁷ Yet, despite these differences, both groups of clients were charged the same fee, on a percentage basis.⁷⁸

2. The ABA's Action Commission to Reduce Court Costs and Delay

The second example is dated—but still instructive. In 1979, the American Bar Association (ABA) created the Action Commission to Reduce Court Costs and Delay, and it tasked the Commission with identifying ways to simplify, streamline, and

market, cost savings to brokers should be reflected in lower commission rates.”); Adriann Ten Kate & Gunnar Niels, *To What Extent are Cost Savings Passed on to Consumers? An Oligopoly Approach*, 20 EUR. J.L. & ECON 323, 324 (2005) (observing that “profit-maximizing firms can reasonably be expected to pass on at least part of their cost savings to consumers”).

⁷¹ The discussion below in Part II.B. is adapted from Engstrom, *supra* note 16, at 416–18.

⁷² For more on these networks, see generally Parikh, *supra* note 68. For why prospective claimants have difficulty identifying high-quality lawyers on their own, see *infra* notes 132–153 and accompanying text.

⁷³ See DEP'T OF RSCH. & ANALYSIS, STATE BAR OF TEX., TEXAS REFERRAL PRACTICES SURVEY REPORT 2 (2004) [hereinafter TEXAS REFERRAL SURVEY] (noting that referral fees average “30% of the attorney fee recovered”).

⁷⁴ See *id.* at 78 (reporting that the vast majority of lawyers (92.4%) in Texas do not typically increase their fee when a case originates with a referring lawyer).

⁷⁵ See Memorandum in Support of Motion for Reconsider/Revision of Order Capping Contingent and Alternatively for Entry of Judgment at 1, *In re Vioxx Prods. Liab. Litig.*, No. 05-01657 (E.D. La. Dec. 11, 2008).

⁷⁶ Affidavit of John Eddie Williams, Jr. at ¶ 8, *In re Vioxx Prods. Liab. Litig.*, No. 05-01657 (E.D. La. Dec. 11, 2008).

⁷⁷ *Id.*

⁷⁸ See *Id.* noting that the consortium charged 40% across the board and that half of these cases came via referrals).

expedite litigation.⁷⁹ In time, the Commission zeroed in on Kentucky; soon thereafter, with the Commission's help, Kentucky courts instituted a suite of reforms to simplify and expedite dispute resolution.⁸⁰

These reforms worked. "As a result of the new procedures," the Commission trumpeted in a 1984 report, "the average time from filing to disposition has been reduced from sixteen months to five months, cases involve less discovery and fewer motions, and attorneys spend less time on each case."⁸¹ Furthermore, "[t]hese reductions were achieved without apparent impact on the case outcome."⁸²

Yet, these enviable successes came with a caveat. The Commission had believed "that if delay were reduced and court procedures simplified, the time an attorney would spend on each case would be reduced and litigant costs would be reduced accordingly."⁸³ "Reduce that time," the Commission assumed, "and that reduction [would] be reflected in a reduced cost borne by the litigant."⁸⁴ Indeed, "[t]his assumed time-cost relationship" had been "at the heart" of the Commission's efforts.⁸⁵ But in assuming that lawyer savings would be shared, the Commission erred. More to the point: although clients who had retained lawyers on an hourly fee basis did see significant cost reductions—indeed, they saw reductions of approximately 24%—contingency fee clients didn't.⁸⁶ Even though lawyer inputs dropped, contingency fees remained the same, with the "net result," as the Commission wearily put it, "that with respect to these cases, lawyers are benefiting, but clients are not."⁸⁷

3. Asbestos Litigation

The third example comes from asbestos litigation. Over the years, asbestos litigation has undergone a profound transformation. In the 1970s, a plaintiffs' lawyer who wanted to hold an asbestos manufacturer responsible for the damage it inflicted faced a long road, full of twists and studded with obstacles. As Peter Schuck has explained, "[i]n its early years, asbestos litigation was so

⁷⁹ See generally Leonard S. Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323 (1979).

⁸⁰ ACTION COMM'N TO REDUCE COURT COSTS & DELAY, AM. BAR ASS'N, *ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT*, at 3–7 (1984) [hereinafter ACTION COMM'N REPORT]. For further discussion, see Joy A. Chapper, *Limiting Discovery*, 20 JUDGES J. 20, 23 (1981).

⁸¹ ACTION COMM'N REPORT, *supra* note 80, at vii.

⁸² *Id.* at 3; Michael D. Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 RUTGERS L. REV. 279, 285 (1985) ("These reductions were achieved without apparent impact on the case outcome.")

⁸³ ACTION COMM'N REPORT, *supra* note 80, at 60.

⁸⁴ Joy A. Chapper & Roger A. Hanson, *The Attorney Time Savings/Litigant Cost-Savings Hypothesis: Does Time Equal Money*, 8 JUST. SYS. J. 258, 259 (1983).

⁸⁵ ACTION COMM'N REPORT, *supra* note 80, at 60.

⁸⁶ *Id.* at ix, 66. This translated to roughly \$650 per case. *Id.* at ix.

⁸⁷ *Id.* at 66; see also Planet, *supra* note 82, at 291 ("Over one-third of attorneys retained on both hourly and contingent fee arrangements reported reductions in time spent However, no attorneys retained on a contingent fee basis reported reductions in fees to their clients. Conversely, almost all of the hourly attorneys enjoying time savings reported lowering fees to their clients."); *id.* at 293 (explaining that, although hourly-fee clients enjoyed "reduced fees," contingency fee clients didn't; "interviews confirm[ed] that the contingent fee effectively bars the passing on of savings in attorney time in the form of reduced fees").

fragmented, chaotic, costly, and unpredictable that it resembled an unruly, erratic adolescent.”⁸⁸ To succeed, intrepid and imaginative plaintiffs’ lawyers needed to convince courts to apply a newly minted law of strict product liability, dodge a host of plausible defenses, make sense of a constellation of then-poorly understood diseases, and extract evidence from well-resourced, intransigent defendants.⁸⁹

But, in time, the scales of justice shifted. Asbestos litigation transformed as relevant facts became clear, governing law was worked out, and relevant diseases associated with asbestos exposure became well-documented.⁹⁰ By 1989, Francis McGovern reported that, in a typical asbestos case, “if exposure to a specific defendant’s product with resulting harm [could] be proved, the only question that remain[ed] is the amount of money to be awarded, not whether it will be awarded.”⁹¹

Over this period, PI lawyer inputs plummeted. Suits against asbestos manufacturers required less when it came to ingenuity, effort, scientific sophistication, financial investment, and luck.⁹² From the lawyer’s perspective, during this thirty-year period, the representation of asbestos victims became radically less burdensome, less expensive, and less chancy.⁹³

Logically, the savings *had* to be substantial. Yet, again, savings were not discernably shared with clients. As Rand researchers explained in a 2005 report:

We interviewed a number of individuals involved in asbestos litigation . . . including some of the nation’s leading asbestos plaintiff attorneys. None of the people we interviewed said they had seen any evidence that claimants’ attorney contingent fee rates had been reduced to reflect changes in the litigation. Plaintiff attorneys may have recognized savings from routinization of the litigation (e.g., the widespread use of administrative payment schedules). However, none of those we interviewed suggested that any of these savings have been passed on to claimants.⁹⁴

4. Third-Party Litigation Finance

The fourth curiosity comes from the advent—and growing popularity—of third-party litigation finance, and particularly what

⁸⁸ Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORN. L. REV. 941, 949 (1995).

⁸⁹ See generally PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

⁹⁰ See STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 23, 128 (2005) (tracing this maturation).

⁹¹ Francis E. McGovern, *Resolving Mature Mass Tort Litig.*, 69 B.U. L. REV. 659, 689 (1989).

⁹² See generally *id.* at 688–94 (describing how economies of scale lead to lessened workloads for mass tort plaintiffs’ attorneys, including in the asbestos litigation).

⁹³ Interestingly, it seems that the pendulum has swung back. Today, because so many asbestos manufacturers are gone (because of bankruptcy or otherwise), and because, for many plaintiffs, the time between exposure and disease manifestation dims memories, representing asbestos victims is again quite dicey and difficult. See generally Sallie B. Kraus, *Looking Back and Forward on Asbestos Claims*, 27 ENV’T CLAIMS J. 149 (2015).

⁹⁴ CARROLL ET AL., *supra* note 90, at 103.

one of us calls “lawyer lending,” that is, loans to PI lawyers to help cover the costs and expenses of litigation.⁹⁵

As noted above, currently, the contingency fee compensates PI lawyers for three discrete services: (1) professional services (actual lawyering), (2) banking services (to cover the costs and expenses of litigation), and (3) insurance services (insuring the value of professional services and costs and expenses of litigation against the risk of a non- or an inadequate recovery).⁹⁶ Yet, certain lawyer lending arrangements permit PI attorneys to offload some or much of the out-of-pocket cost of case preparation (i.e., banking services) and the risk of non- or inadequate recovery (i.e., insurance services) onto lenders.⁹⁷ Essentially then, whereas the traditional contingency fee compensated lawyers for a trio of services, if a lawyer partakes of lawyer lending and passes the costs of that lending on to the client as another cost of litigation (as states allow—and it appears many lawyers do), the bundle of services covered by the contingency fee shrinks.⁹⁸ Lawyer lending, with interest pass-throughs, essentially *disaggregates* the services provided by the contingency fee; in this iteration, the contingency fee still covers professional services and *some* insurance services—but not much beyond that.

If the market were efficient, we would expect this disaggregation to be accompanied by a drop in contingency fee percentages.⁹⁹ But once again, existing evidence suggests otherwise. Though available information is admittedly limited, we can find no indication that lawyers who partake of lawyer lending and pass financing charges to their clients are cutting their contingency fees as a consequence.¹⁰⁰ Instead, in the words of a testimonial for one lender, once the cost of lawyer lending is passed on to clients, clients inevitably start “paying more.”¹⁰¹ Or, in the words of another: “If you get a good result for your client, they’re going to be happy regardless of whether they’re paying a little extra interest on it.”¹⁰²

⁹⁵ Engstrom, *supra* note 16, at 377. The third-party litigation finance industry has grown considerably over the past decade. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105210, THIRD PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 2, 8–11 (2022).

⁹⁶ See *supra* notes 40–42 and accompanying text.

⁹⁷ See Engstrom, *supra* note 16, at 409–10.

⁹⁸ See *id.* at 399 n.96.

⁹⁹ See *supra* note 70 and accompanying text (explaining that, in an efficient market, a provider’s savings are passed to, or at least shared with, the provider’s client).

¹⁰⁰ In January 2025, we carefully reviewed the websites of four large lawyer lenders: Advocate Capital, Amicus Capital Group, LLC, LawCash, and Counsel Financial. Some funders indicated that lawyers could pass financing costs on to clients. None discussed that, as a consequence, lawyers could or would reduce their contingency fees. See *Case Cost Financing*, ADVOCATE CAPITAL, <https://www.advocatecapital.com/case-expense-financing/> [<https://perma.cc/P5H5-HCSP>] (last visited Sep. 21, 2025); *Amicus Capital Group: Law Firm Loans Tailored to Your Practice’s Needs*, AMICUS CAP. GRP., <https://amicuscapitalgroup.com/law-firm-loans/> [<https://perma.cc/6KNW-3PDC>] (last visited Sep. 21, 2025); *What Is Legal Funding?*, LAWCASH, <https://lawcash.com/how-funding-works/> [<https://perma.cc/4SKN-AS45>] (last visited Sep. 21, 2025); *Law Firm Loans: Empower your Law Firm with Strategic Financing*, COUNSEL FIN., <https://counselfinancial.com/law-firms> [<https://perma.cc/G3KR-TL34>] (last visited Sep. 21, 2025).

¹⁰¹ Engstrom, *supra* note 16, at 414 n.151 (quoting an Advocate Capital testimonial).

¹⁰² Advocate Capital Inc., *Advocate Capital, Inc. Client Kay Van Wey*, at 2:40 (YOUTUBE, Apr. 1, 2015), <https://perma.cc/4ERG-DZFU>. In the words of another

Above, we see that contingency fees defy an economic law of gravity. In a competitive market, we would expect that, to the extent suppliers enjoy significant savings, those savings will be shared with consumers. We show, however, that, in the contingency fee context, even as inputs and outputs have changed, contingency fee percentages have stayed relatively static. Thus, the contingency fee does not appear to behave like an efficient or competitive market.

We stress, however: It doesn't necessarily follow that contingency fees are "too high." In many circumstances, existing fees (or even higher fees) may be entirely appropriate. Our claim is more subtle: There's a market failure, and this market failure results in various inefficiencies, including poor consumer matching and a race to Hoover up the most profitable claims.

III. WHY MIGHT THE CONTINGENCY FEE MARKET NOT BE COMPETITIVE?

The evidence above suggests that contingency fees appear surprisingly resistant to changes in market conditions and insensitive to attorney quality. This Part asks why. Some suggest that "the uniform pricing which prevails is a product of collusive behavior by contingency-fee lawyers to generate rents."¹⁰³ In our view, other—more innocent—explanations are more convincing.¹⁰⁴ Close inspection of the contingency fee marketplace reveals both evidence of a traditional market failure (discussed in Section A) and a behavioral market failure (discussed in Section B). Then, in Section C, we show that the contingency fee marketplace closely resembles the real estate brokerage marketplace, where, at least until recently, non-competitive prices reigned.

A. Traditional Market Failure: Market Plagued by Informational Problems

"A foundation for an efficient market is the ability of market participants to consider and compare the alternatives available in the marketplace."¹⁰⁵ This is crucial because when selecting a PI lawyer, clients can assess neither side of the cost-quality coin.

of Advocate Capital's attorney clients: Due to these practices "costs are no doubt increased to a certain extent." Advocate Capital Inc., *Advocate Capital, Inc. Client Lance Cooper*, at 1:59 (YOUTUBE, May 20, 2015), <https://perma.cc/UAV5-W6VD>.

¹⁰³ Brickman, *Effective Hourly Rates*, *supra* note 3, at 664; *see also* Brickman, *Market*, *supra* note 3, at 126 (insisting that "lawyers act collusively to maintain a uniform price").

¹⁰⁴ *See* Engstrom, *supra* note 14, at 678–79 (offering a detailed rebuttal to Brickman's collusion argument).

¹⁰⁵ Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 799 (2001); *see also* PINDYCK & RUBINFELD, *supra* note 13, at 625 (explaining that "the market system will not operate efficiently" if consumers lack sufficient information about product quality); Jim Hawkins, *Exploiting Advertising*, 80 LAW & CONTEMP. PROBS. 43, 44–45 (2017) ("Market failure occurs under a variety of conditions, including where consumers possess imperfect information about the attributes of products and services."). To this, some argue that problems will be mitigated so long as there is an "informed minority" to discipline the market. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 144–45 (8th ed. 2011); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979). Even assuming that's right, it is not clear that the "informed minority" can exist, or exert sufficient control, in this particular marketplace. Nor is it clear that the tastes and

1. The (Non)Availability of Price Information

First, PI lawyers do not advertise on the basis of price. This means that a prospective client is unlikely to know what the lawyer will charge until the prospective client is well on her way to retention.

Three past studies have assessed whether PI lawyers engage in price advertising. All found they do not. Jeffrey O’Connell, Carlos Brown, and Michael Smith conducted the first study.¹⁰⁶ Analyzing 1,425 Yellow Pages advertisements across twelve metropolitan areas from the spring of 1997, the researchers found that only seven (0.49%) specified the attorney’s precise fee percentage.¹⁰⁷ In their words, the “results of the survey reveal that the overwhelming majority of lawyers who advertise that they engage in [PI] litigation do not address at all the terms of their fees.”¹⁰⁸

Nora Freeman Engstrom then followed up on the O’Connell study. She assessed 518 quarter-page or larger Yellow Page ads for PI lawyers from thirteen cities from March 2007 through December 2008.¹⁰⁹ Engstrom found that, of those 518 PI attorney advertisements, only nine (1.7%) specified a contingency fee percentage.¹¹⁰

In 2009, Jim Hawkins and Renee Knake conducted the first major study of attorneys’ online advertising, as opposed to print ads.¹¹¹ This study, one might assume, would reveal a shift in advertising behavior because, in Yellow Pages, lawyers are space constrained. Larger ads are much more expensive than smaller ads, and, when an ad is small, editorial discretion must be utilized; some useful information, logically, must be left on the cutting-room floor. A lawyer engaged in web advertising, by contrast, has more flexibility; she need not fit her message into a pre-ordained space. Logic would suggest that, in internet advertising, then, lawyers can more easily share detailed information with prospective clients.¹¹²

Seemingly consistent with this intuition, the Hawkins-Knake study found that a full 18.59% of attorneys stated their fees online.¹¹³ Yet, there was a twist. The Hawkins-Knake study did not separately assess the advertising behavior of *PI attorneys* (who charge contingency fees) as against *criminal defense attorneys* (who don’t)—and, for our current purposes, that omission clouded their

preferences of the “informed” segment of the PI market align with the market generally. For a critique of the “informed minority model,” see BAR-GILL, *supra* note 8, at 30; Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 736–54 (2008).

¹⁰⁶ Jeffrey O’Connell, Carlos M. Brown & Michael D. Smith, *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs’ Personal Injury Bar—and a Proposed Solution*, 6 CONN. INS. L.J. 424, 425 n.6 (1999).

¹⁰⁷ *Id.* at 427.

¹⁰⁸ *Id.* at 430.

¹⁰⁹ Engstrom, *supra* note 14, at 639 n.23, 682.

¹¹⁰ *Id.* at 682–83.

¹¹¹ See generally Jim Hawkins & Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 U. ILL. L. REV. 1005.

¹¹² See, e.g., *Digital Marketing vs. Traditional Law Firm Advertising*, OAMII (Dec. 12, 2022), <https://www.oamii.com/digital-marketing-vs-traditional-lawyer-advertising> [<https://perma.cc/V5XV-NTJ8>] (noting that attorneys can tailor content on their websites to ensure it is “helpful and educational”).

¹¹³ Hawkins & Knake, *supra* note 111, at 1020–21.

study's utility.¹¹⁴ Indeed, we have now *separately* analyzed the Hawkins-Knake data, and our analysis of their raw data (specifically assessing the advertising behavior of PI lawyers) reveals that only five of 350 studied PI attorneys (1.42%) advertised a specific contingency fee on their individual or firm website—a finding strikingly similar to Engstrom's yellow pages study.¹¹⁵

Yet, over fifteen years have passed since the Hawkins-Knake study, and so, in the summer and fall of 2024, we engaged in a fresh round of inquiry. We and a team of trained student researchers reviewed 500 plaintiffs' attorney firm websites to see whether the firms advertised their contingency fees. We identified the 500 firms (ten from each state) using a random number generator, drawing from a public member directory of the American Association for Justice (AAJ), the leading trade organization for plaintiffs' lawyers.¹¹⁶

We visited each firm's website for four minutes—far longer than the average user spends on a given website.¹¹⁷ During those four minutes, we did our best to find the specific contingency fee percentage each firm charged, navigating intuitively from the firm's homepage to the webpages that appeared most likely to advertise the firm's contingency fee.

When coding whether a firm advertised its contingency fee, we erred on the side of inclusivity. If, for instance, a firm stated that its "home" jurisdiction had capped contingency fees at a certain percentage, we coded the firm as "specifying" its fee.¹¹⁸ By the same token, if a firm stated that "most attorneys" in the relevant jurisdiction charged a specific percentage—without expressly clarifying that it too charged that percentage—we coded that as a specification.¹¹⁹ Nor did it matter *where* on the website the specific

¹¹⁴ See generally *id.* Indeed, criminal defense lawyers are prohibited from charging contingency fees. See MODEL RULES OF PRO. CONDUCT r. 1.5(d)(2) (A.B.A. 2020).

¹¹⁵ We are very grateful to Jim Hawkins and Renee Knake-Jefferson for sharing this data with us, and to Othman Bensouda Koraichi for analyzing it. Specifically, relying on Hawkins' and Knake's initial coding methodology, Bensouda Koraichi of the Rhode Center at Stanford Law School, a trained computer scientist, identified attorneys in the Hawkins-Knake dataset that practiced either (a) personal injury law or (b) personal injury law and DWI defense (350 attorneys in total). Out of this dataset, he then identified the attorneys that provided a specific contingency fee percentage on their website (five of the 350 attorneys).

¹¹⁶ Where the link provided in the AAJ's directory was not functioning, we used the random number generator to select a replacement. If more than one of the ten attorneys identified in a given state worked at the same firm, we generated a new number and selected an alternative attorney.

¹¹⁷ Jakob Nielsen, *How Long Do Users Stay on Web Pages?*, NN/G NIELSON NORMAL GRP. (Sep. 12, 2011), <https://www.nngroup.com/articles/how-long-do-users-stay-on-web-pages/> [<https://perma.cc/PD2N-JXD7>] ("The average page visit lasts a little less than a minute.").

¹¹⁸ E.g., *Medical Malpractice Attorney FAQ*, CLIFFORD LAW OFFS., <https://www.cliffordlaw.com/medical-malpractice-faq/> [<https://perma.cc/PX5J-AHWM>] (last visited Sep. 20, 2025) ("In January, 2013, a new law was signed by the Governor in Illinois that caps attorneys' fees at one third."); *Contingency Fee: No Payments Until You Win - You Can Afford an Experienced New York Attorney*, PASTERNAK TILKER ZIEGLER WALSH STANTON & ROMANO, <https://www.workerslaw.com/contingency-fee/> [<https://perma.cc/VNM3-VDKA>] (last visited Sep. 20, 2025) ("The New York State Workers' Compensation Law Judge sets the amount of the fee, which generally is between 10 and 15 percent of the award."). In this Section, all law firm websites were last visited on Nov. 5, 2024, unless otherwise noted.

¹¹⁹ See, e.g., *Car Accidents*, WELTS, WHITE & FONTAINE, <https://www.lawyersnh.com/practice-areas/personal-injury-law/motor-vehicle->

fee was mentioned: Whether featured on the firm website’s page devoted to discussion of fees,¹²⁰ or buried in an answer to a “Frequently Asked Question,”¹²¹ we coded the website as specifying the fee. On the other hand, if the website included only vague information regarding the firm’s fee—for instance, if the website merely specified that the firm charged a “low” fee, or that it took a “portion” of the client’s recovery—we coded the firm as a non-fee advertiser.

The results? Out of the 500 websites, only twenty-two (4.4%) advertised a specific contingent fee percentage. Furthermore, all but one of the twenty-two firms advertised approximately the same contingency fee percentage: about one-third of the plaintiffs’ ultimate recovery.¹²² One firm that specializes in workers’ compensation cases, where fees are judicially restricted, was an outlier.¹²³ This similarity is striking given that the twenty-two “price advertising” firms were headquartered in nineteen different states, were different sizes, and featured attorneys with varying levels of experience and subject matter expertise.¹²⁴ Perhaps most notable: Out of the five hundred firms we analyzed, only *one* expressly advertised that it charged lower fees than its competitors.¹²⁵

accidents/ [https://perma.cc/X4QZ-NQ3T] (last visited Sep. 20, 2025) (“For most car crash cases, a reputable law firm will charge a 1/3 contingency fee. That amount could increase to 40% if the injury is very minor, or the case is unusually difficult.”); *Michigan Brain Injury Lawyer*, MICH. AUTO LAW, AUTO ACCIDENT INJURY LAWYERS IN MICH., <https://www.michiganautolaw.com/brain-injury-lawyer/> [https://perma.cc/K2EG-957C] (last visited Sep. 20, 2025) (“A one-third (1/3) contingency fee is the fee arrangement that most auto accident attorneys will charge. An attorney cannot charge a contingency fee in excess of 1/3 or 33%.”).

¹²⁰ See, e.g., *Accident Lawyer Feest*, PETERSON LAW OFFICES, <https://www.injurylaworegon.com/fees> (last visited Oct. 7, 2025) (“Fees are contingent upon settlement and are 1/3 of the settlement often after medical bills are paid . . .”).

¹²¹ See, e.g., *FAQS*, LAW OFFICE OF MAURICE I. BURNSTEIN, <https://bursteinlegal.com/frequently-asked-questions/> [https://perma.cc/3PZD-Q7QH] (last visited Sep. 20, 2025) (answering the questions, “How much will it cost me to hire a lawyer?,” with a lengthy response that includes the following: “The lawyer’s fee is 1/3 of the recovery before suit and 40% after suit.”).

¹²² See, e.g., *Mass Tort and Class Action Cases*, BRYANT LAW CTR., <https://www.bryantpsc.com/mass-tort-and-class-action-cases/> [https://perma.cc/6MRT-EJJQ] (last visited Sep. 21, 2025) (“The contingency fee is usually a percentage of the total amount recovered (e.g., 33%), and it is agreed upon between the lawyer and the client before the legal representation begins.”); *Frequently Asked Questions*, PITMAN, KALKHOFF, SICULA & DENTICE, <https://www.pksd.com/faqs.html> [https://perma.cc/JXH9-6CDA] (last visited Sep. 21, 2025) (“Our fee is 1/3 of the recovery plus the costs incurred in the prosecution of your case.”); *Contingency Fee*, ELROD POPE ACCIDENT & INJURY ATT’YS, <https://elrodpope.com/personal-injury-resources/contingency-fee/> [https://perma.cc/LE28-GEK5] (last visited Sep. 21, 2025) (“A typical contingency fee is 33.33%. With a sliding scale arrangement, the contingency fee may range from 25% to 40%, for example.”).

¹²³ PASTERNAK, TILKER, ZIEGLER, WALSH, STANTON & ROMANO, *supra* note 118 (explaining that “[t]he New York State Workers’ Compensation Law Judge sets the amount of the fee, which generally is between 10 and 15 percent of the award”).

¹²⁴ While each of the websites advertised some sort of PI practice, the types of claims each handled differed: some handled mass torts, some handled maritime claims, some handled dog bites, and more.

¹²⁵ The website for Nagle & Associates, headquartered in North Carolina, states “[o]ur legal fee is 1/4 or 25% of any settlement, which is far less than the 1/3 or 33 1/3% that most firms charge. With our experience and reputation, we seek to increase your settlement payments sufficiently to cover our legal fees. If a trial is necessary to secure compensation, our litigation fee is 1/3, which is also far less than the 40-44% fee that most personal injury lawyers charge in litigation cases.”

In sum, when taken together, past studies of PI attorney advertising—conducted at different times and using different methodologies—paint a strikingly similar portrait.

Table 1: Empirical Studies of Contingency Fee Advertising

	O’Connell (1999) ¹²⁶	Data from Hawkins & Knake (2009)	Engstrom (2013) ¹²⁷	Engstrom & Holland-Stergar (2025)
Type of Advertisement Surveyed	PI Attorneys’ Yellow Page Ads	PI Attorneys’ Websites	PI Attorneys’ Yellow Page Ads	PI Attorney/Firm Websites
Number of Advertisements	1,425	350	518	500
Geographic Coverage	12 metropolitan areas	3 metropolitan areas	13 metropolitan areas	50-state survey (10 attorneys/firms from each state)
Number of Ads that Specify Contingency Fee Percentage	7 (0.49%)	5 (1.42%)	9 (1.7%)	22 (4.6%)
Mean Contingency Fee Percentage Advertised	30.6%	33.6%	[data not collected]	32.8% ¹²⁸

Taken together, these studies indicate that contingency fee pricing remains remarkably opaque, even in the digital age. While consumers can instantly compare prices for dog-sitters,¹²⁹ plumbers,¹³⁰ and even certain medical providers,¹³¹ they are out of luck when it comes to comparing prices for plaintiffs’ PI attorneys.

2. The (Non)Availability of Quality Information

Quality information is similarly elusive. Lawyer quality varies.¹³² Some lawyers are inventive and dogged, while others,

Home, NAGLE & ASSOCS, <https://www.naglefirm.com/> (last visited Sep. 23, 2025).

¹²⁶ O’Connell et al., *supra* note 106, at 426–27.

¹²⁷ Engstrom, *supra* note 14, at 682–83 & n.254.

¹²⁸ Where firms specified a range of possible contingency fees, we calculated the mean of the range (e.g., for fees ranging from 25% to 40%, we used a fee of \$32.5%). The above mean includes the outlier worker’s compensation firm that advertised it followed New York state law’s typical 10-15% fee award. *See* PASTERNAK, TILKER, ZIEGLER, WALSH, STANTON & ROMANO, *supra* note 118. Without that outlier, the mean fee is 33.5%.

¹²⁹ *E.g.*, ROVER, <https://www.rover.com/> [<https://perma.cc/BZF9-DCLS>] (last visited Sep. 23, 2025).

¹³⁰ *E.g.*, ANGI, <https://www.angi.com/> [<https://perma.cc/9R42-B6VK>] (last visited Sep. 23, 2025).

¹³¹ Starting January 1, 2021, each U.S. hospital became obligated “to provide clear, accessible pricing information online about the items and services they provide.” *Hospital Price Transparency*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/priorities/key-initiatives/hospital-price-transparency> [<https://perma.cc/XU6J-5E8T>] (last visited Sep. 23, 2025).

¹³² *See* Howard G. Schutz, Katherine V. Diaz-Knauf & Debra S. Judge, *Lawyers’ Perceptions of Consumers’ Attitudes: Satisfaction, Quality, and Selection Criteria*, 12 J. LEGAL PROF. 87, 95 (1987) (reporting on the results of a mail

unfortunately, aren't.¹³³ Lawyer quality also *matters*: sophisticated studies of lawyers generally—and of PI lawyers in particular—show that better lawyers achieve markedly better results.¹³⁴ But, a prospective client approaching the PI marketplace has virtually no way to tell one from the other.¹³⁵

Indeed, most clients have great difficulty judging the quality of legal services, even after the services have been rendered.¹³⁶ As such, attorney's services are what economists call "credence" goods.¹³⁷ Unlike "search" and "experience" goods, where the buyer can assess quality either before purchase or after use, buyers of credence goods can never be certain of the quality of the goods or services they have obtained, even after the fact.¹³⁸

The client, to be sure, will be able to judge some things, such as whether the lawyer's office looked shabby or nice, whether the lawyer was chilly or warm, or whether her telephone calls went unanswered or were promptly returned. But try as they might, most clients—even if they are engaged and curious—won't ever be able to know much beyond that. If a client loses her claim, she will never

survey of 500 Sacramento lawyers, 97% of whom agreed or strongly agreed that there was great variability among legal service providers).

¹³³ To be sure, some insist that lawyer regulation cabins quality variability by ensuring that all lawyers are of reasonably high quality. See Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 844 (1986) ("[B]y raising training levels, licensing reduces the marginal cost of quality and promotes the provision of quality service"). However, there are serious questions as to how well professional license requirements screen out sub-par practitioners. See, e.g., Rebecca Haw Allensworth, *The Hypocrisy of Attorney Licensing*, in RETHINKING THE LAWYERS' MONOPOLY: ACCESS TO JUSTICE AND THE FUTURE OF LEGAL SERVICES 65 (David Freeman Engstrom & Nora Freeman Engstrom eds., 2025) (positing that the current lawyer licensing system keeps "unethical and incompetent lawyers in the profession and allow market forces to push them towards the neediest clients"); accord Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1272 (1995) ("Many commentators have observed that the legal profession is not particularly effective at ensuring that lawyers provide honest or competent representation.").

¹³⁴ In particular, studies demonstrate both (1) that some attorneys consistently achieve better results than their similarly situated peers; and (2) that subject matter specialists tend to obtain better results for their clients than non-specialists. Engstrom, *supra* note 29, at 859 n.260 (collecting citations). For more on the value that comes from attorney specialization, see Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 94 & n.134–39 (2019) (collecting studies).

¹³⁵ Engstrom, *supra* note 29, at 860 ("In the market for personal legal services, there is a startling lack of objective, verifiable information available concerning an attorney's malpractice and disciplinary history and record of failure or success."); accord DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 140 (1993) ("Most potential clients know very few lawyers and have no way of judging their abilities.").

¹³⁶ Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 892 (1990) (noting that clients "have difficulty determining the quality of the services *even after they are rendered*"); Michael J. Saks & Alice R. Benedict, *Evaluation and Quality Assurance of Legal Services: Concepts and Research*, 1 LAW & HUM. BEHAV. 373, 378 (1977) ("[C]lients frequently praise services that are shoddy by most other measures.").

¹³⁷ Hadfield, *supra* note 61, at 969 ("Legal services are credence goods. The sheer complexity of law makes it difficult for clients to judge the service they are receiving.").

¹³⁸ "Buyers of credence goods are unable to assess how much of the good or service they need; nor can they assess whether or not the service was performed or how well." *Id.* at 968.

know whether the loss was justified. Or, if the client settles her claim or even wins at trial, she will never know if she recovered a generous sum. She will be stymied because *no central repository compiles judgments or settlements*.¹³⁹ There is no benchmark against which the client (or even the client’s lawyer) can compare her judgment or settlement to judgments or settlements obtained by others. Unlike in other comparable areas, there is, quite simply, no objective, verifiable data—gathered by some private or governmental entity—to guide clients in their search.¹⁴⁰

But, one might counter, there is *some* information out there—whether compiled by private suppliers (like Martindale-Hubbell, Best Lawyers in America, or Avvo) or by state bars. True, but both this privately- and publicly-compiled information is incomplete and deficient.

As to the privately curated information: the creators of these websites are in the same boat as the rest of us. Without objective, verifiable information on which to draw, they are left to cobble together the scant information that is available, which tends to consist of very rough proxies for quality (such as attorney background and pedigree) or voluntarily submitted peer or client reviews.¹⁴¹

Neither offers much actionable information. A lawyer’s “pedigree” sheds little light on the lawyer’s work ethic, competence, integrity, or loyalty.¹⁴² Likewise, client reviews are of limited utility, since (as noted above) even well-meaning clients lack the capacity to assess the quality of the services they have received.¹⁴³ Worse, some “ratings” services fail to ensure that reviews come from *actual* past clients,¹⁴⁴ while some other entities that purport to offer awards or accolades to stellar practitioners are merely marketing gimmicks (or worse).¹⁴⁵ Indeed, one former marketing director of a prominent attorney rating service successfully ushered his child’s pet chicken through the service’s vetting process by submitting a fake nomination, email address, and link to a non-existent firm website.¹⁴⁶

¹³⁹ See MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, *TORT LAW AND ALTERNATIVES* 734 (11th ed. 2021) (recognizing that “only partial information about past verdicts and settlements is currently available”).

¹⁴⁰ See Engstrom, *supra* note 29, at 812 (explaining that such repositories exist when it comes to evaluating restaurants, airlines, public schools, investments in public companies, and physicians—just not lawyers).

¹⁴¹ See *id.* at 859–62 (discussing these challenges, including the incomplete information provided by private suppliers like Martindale-Hubbell, Best Lawyers in America, and Avvo).

¹⁴² See Benjamin P. Cooper, *Attorney Self-Disclosure*, 79 U. CIN. L. REV. 697, 707 (2010) (discussing various deficiencies).

¹⁴³ See Gilson, *supra* note 136, at 892; Saks & Benedict, *supra* note 136, at 378.

¹⁴⁴ See Engstrom, *supra* note 29, at 861.

¹⁴⁵ William W. Yavinsky, Note, *Evaluative Rankings in Attorney Advertising*, 20 GEO. J. L. ETHICS 969, 971–72 (2007) (echoing criticisms).

¹⁴⁶ Jenna Greene, *It’s Official: Lawyer Awards (At Least Some of Them) Are Scams*, REUTERS (Dec. 21, 2021, 14:25), <https://www.reuters.com/legal/legalindustry/its-official-lawyer-awards-least-some-them-are-scams-2021-12-22>; see also Emily Wu, *Consumer Alert: Look Beyond the Award when You Hire a Lawyer*, FTC, <https://consumer.ftc.gov/look-beyond-award-when-you-hire-lawyer> [<https://perma.cc/P3EK-E5DE>] (last visited Sep. 23, 2025) (warning consumers not to rely on “fancy-looking seals and badges” on attorneys’ websites).

Meanwhile, state bars publish some information about attorneys' disciplinary history, but this bar-supplied information is extraordinarily thin.¹⁴⁷ For starters, state bars tend to limit disclosures to those lawyers who have been *publicly* disciplined, and the likelihood that even a lousy lawyer will ever be publicly disciplined is exceedingly low: Only one-fifth of 1% of practicing attorneys were publicly disciplined for misconduct in 2019.¹⁴⁸ Often, disciplinary authorities admonish attorneys only through private discipline, and when private discipline is meted out, the public is kept in the dark.¹⁴⁹ Meanwhile, even when a lawyer is publicly disciplined, the odds that a prospective client will find out about that blot on the lawyer's record are fairly long.¹⁵⁰ And, more broadly, an attorneys' disciplinary record is a poor proxy for the overall quality of her services: As previously noted, most clients lack the wherewithal to identify whether an attorney's conduct warrants a complaint in the first place.¹⁵¹

The upshot of all the above is that the market for legal services is marked by a near total absence of objective information bearing on provider quality. Given these gaps and deficiencies: “[C]onsumers—and unsophisticated users of legal services in particular—are generally unable to find out critical information about prospective lawyers even if they appreciate the need to seek out this information.”¹⁵² As a consequence, a vital precondition to a competitive market is lacking.¹⁵³

3. The Realities of Retention

Then, although consumers generally get smarter about complex purchases “through trial and error,” here, that “interpersonal learning” is unlikely to provide a benefit.¹⁵⁴ Most PI

¹⁴⁷ Cf., Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosures*, 74 WASH. & LEE L. REV. 1457, 1493 (2017) (“State bars may improve consumer decisions by publishing information about attorney discipline because previously disciplined attorneys may be more likely to have future misconduct.”).

¹⁴⁸ AM. BAR ASS'N., ABA PROFILE OF THE LEGAL PROFESSION 103 (2023).

¹⁴⁹ Jon Lee, *Private Sanctions, Public Harm*, 48 BYU L. REV. 1255, 1260 (2023) (noting that where a disciplinary authority issues private sanctions, it will “neither publicize the private sanction nor disclose the sanction to the lawyer's current clients”).

¹⁵⁰ Depending on the state, information regarding public discipline can be hard to access. See Jacquelyn M. Desch, *Attorney Discipline Online*, 29 GEO. J. L. ETHICS 921, 925–37 (2016) (surveying access to attorney disciplinary records in all 50 states and concluding that “there is a wide spectrum of the availability of such information . . . ranging from nonexistent to easily accessible”); Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. L. ETHICS 1, 20 (2007) (“[I]n some states, consumers can only learn about the past [public] disciplinary history of lawyers by making a telephone call to the court or a disciplinary agency.”).

¹⁵¹ See Allensworth, *supra* note 133, at 71 (explaining that clients are “unlikely to complain about lawyer misconduct for the simple reason that they do not know misconduct when they see it”).

¹⁵² Cooper, *supra* note 142, at 701.

¹⁵³ See Hadfield, *supra* note 137, at 970 (“There is no way for ordinary competitive mechanisms to operate effectively when it is difficult to assess and therefore compare the services offered by competing providers.”).

¹⁵⁴ Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 N.W. UNIV. L. REV. 1033, 1070–71 (2012) (“Effective decisionmaking is acquired through trial and error.”) Of course, some may counter that, even if consumers don't *themselves* learn from past mistakes, they will learn from others, as relevant information is shared among friends. See Richard A. Epstein, *Behavioral Economics: Human*

clients only retain a contingency fee lawyer once in their lives; as a consequence, they are unlikely to learn from past mistakes.¹⁵⁵ In addition, research indicates that most accident victims look for an attorney soon after they are hurt, when, presumably, wounds are still raw.¹⁵⁶ So, rather than shopping around on the basis of price or otherwise, most PI clients tend to retain the first attorney who offers representation.¹⁵⁷ Finally, as one would expect given the vulnerable nature of PI victims who, as noted above, tend to be uninformed, unsophisticated, inexperienced, and still hurting, evidence suggests that it is rare for PI clients to negotiate over the terms of their representation—including price terms. Most PI clients agree to whatever terms the lawyer suggests.¹⁵⁸

B. Behavioral Market Failure: Contingency Fees' Features Blunt Their Salience

On top of all the above, there is evidence of a behavioral market failure, which is to say a nonstandard market failure that derives from predictable human error.¹⁵⁹ In particular, three contingency fee features—(1) the uncertainty of payment, (2) the extended time delay between retention and payment (assuming there is a payment), and (3) the fact the contingency fee is deducted not paid—all combine to strip fees of salience.¹⁶⁰

Errors and Market Corrections, 73 U. CHI. L. REV. 111, 120 (2006) (discussing these information flows). Yet, as Oren Bar-Gill points out, while such “interpersonal learning” may be counted on to correct market misperceptions when it comes to standardized products, learning is stunted when products and services are (like legal services) not standardized. BAR-GILL, *supra* note 8, at 27; Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 756 (2008).

¹⁵⁵ See Engstrom, *supra* note 29, at 860 (“Information deficits are . . . significantly exacerbated when one considers the practical position of personal injury victims especially poor, comparatively uneducated victims—often searching for a lawyer for the first time in their lives . . .”).

¹⁵⁶ See INS. RSCH. COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 37 (2004) (reporting that 52% of auto accident claimants who retained counsel did so within one week of their accident).

¹⁵⁷ See DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO’S IN CHARGE 64–65 (1974) (reporting that, in a sample of sixty Manhattan personal injury claimants, every single claimant “accepted the first lawyer who accepted them”); see also DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 134 tbl.5.9 (1991) (reporting that 69% of those seeking legal representation in the aftermath of an accidental injury contacted only one attorney, while only 5% contacted more than three attorneys).

¹⁵⁸ See Vonde M. Smith Hitch, Comment, *Ethics and the Reasonableness of Contingency Fees: A Survey of State and Federal Law Addressing the Reasonableness of Costs as They Relate to Contingency Fee Arrangements*, 29 LAND & WATER L. REV. 215, 245 (1994) (observing that “[o]ften clients accept whatever agreement an attorney suggests”); Eric M. Rhein, Comment, *Judicial Regulation of Contingent Fee Contracts*, 48 J. AIR L. & COM. 151, 167 (1982) (“Usually . . . there is little negotiation over the terms of the fee contract.”). For why clients tend to accede to contractual terms of their representation without extended discussion or negotiation, see Engstrom, *supra* note 16, at 420.

¹⁵⁹ See Hawkins, *supra* note 105, at 45 (explaining that a behavioral market failure exists if “people make bad decisions because . . . they do not recognize the importance of an attribute”). For further discussion, see *supra* note 8.

¹⁶⁰ For more on salience, see generally Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, *Salience Theory of Choice Under Risk*, 127 Q. J. ECON. 1243 (2012). For discussion of how “[a] lack of salience can be a serious kind of behavioral market failure,” see CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM 40 (2014).

The contingency fee is first unique because, unlike other attorney fee generation mechanisms, payment is uncertain rather than certain. Unlike a client who agrees to pay her lawyer via hourly or flat fees, a contingency fee client knows she might never actually owe the lawyer a penny. This feature of contingency fees plays into consumers' tendency to overweight *certain* outcomes over *possible* ones.¹⁶¹ And, indeed, it appears that clients so discount the possibility of payment that, in some experiments, subjects preferred contingency fees over flat fees even when the former yielded an expected fee that was two or three times higher.¹⁶²

The timing of contingency fee payment is also relevant. Lawyers paid via flat fees tend to bill clients up front, while hourly-fee lawyers often charge initial retainers and then transmit invoices at regular intervals.¹⁶³ By contrast, while the percentage of a contingency fee is set at the outset of a representation, actual payment, as well as the precise calculation of that payment, is deferred to the time of recovery (assuming there is a recovery), which, given the delays that attend the tort liability system, is apt to be months or years away.¹⁶⁴

This time lapse is also significant. Cognitive psychology literature reveals what is sometimes called a “present” bias—meaning that people discount future events (and payments) more than they reasonably should.¹⁶⁵ In the contingency fee context, present bias means that, when clients contract for legal services, they are likely to be irrationally insensitive to fees that they will have to pay in the distant future, if at all. As a consequence, higher prices may prevail.¹⁶⁶

Finally, contingency fees are distinctive because they are deducted, not paid. Most legal fees (flat and hourly) are *paid*. Money moves from a client to lawyer predictably and in discrete sums. The contingency fee realm is different. When a PI claim is settled or otherwise satisfactorily resolved, a defendant (or, more often, its insurer) will send a check to the plaintiff's lawyer. The lawyer will then disburse to the client the client's portion of the ultimate recovery, after discharging any liens and deducting the lawyer's costs and fee.¹⁶⁷

¹⁶¹ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 265 (1979).

¹⁶² See Zamir & Ritov, *supra* note **Error! Bookmark not defined.**, at 268, 273; Eyal Zamir & Ilana Ritov, *Notions of Fairness and Contingent Fees*, 74 *LAW & CONTEMP. PROBS* 1, 2–3 (2011). This result held even for experienced tort lawyers. *Id.*

¹⁶³ See Kritzer, *Wages of Risk*, *supra* note 19, at 270.

¹⁶⁴ Most PI specialists have clients sign a retainer agreement at the first in-person meeting. See KRITZER, *supra* note 39, at 114. The average time from the filing of a tort complaint to a judgment or verdict is roughly 16.2 months. See PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 29 tbl.9 (2015).

¹⁶⁵ For more on present bias, see BAR GILL, *supra* note 8, at 21–22; SUNSTEIN, *supra* note 160, at 35–39; George Loewenstein & Drazen Prelec, *Anomalies in Intertemporal Choice: Evidence and Interpretation*, in *CHOICE OVER TIME* 119–45 (George Loewenstein & Jon Elster eds., 1992).

¹⁶⁶ See 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, 196 (2006) (“Perhaps the simplest way to reduce the pain of paying is to delay the payment into the future.”).

¹⁶⁷ See Engstrom, *supra* note 14, at 688 (discussing the impact of payment via deduction on client perception of cost).

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. Social scientists have found that people react to losses and gains differently, exhibiting what is often called "loss aversion."¹⁶⁸ That is, "[f]oregone gains are less painful than perceived losses," which means that foregone gains are stripped of some salience.¹⁶⁹

Then, via what are called "framing effects," attorney conduct can (whether wittingly or unwittingly) emphasize the above contingency fee features.¹⁷⁰ There is some evidence, for instance, that at the time of retention some lawyers take pains to underscore (and perhaps even exaggerate) the risk of nonrecovery.¹⁷¹ Likewise, after resolution, when disbursing a check to the client, some lawyers expressly emphasize not the total settlement amount but, rather, the gain—i.e., what the client is poised to net after the lawyer has deducted fees and expenses and paid the various entities (such as first-party insurers) that have exercised a right of subrogation.¹⁷²

C. Analogy to Residential Real Estate

But do the above market conditions really lead to non-competitive market conditions? To answer that question, the residential real estate market holds clues. This Section explores the striking similarities between the market for PI legal services and residential real estate brokerage services to help untangle a mystery that has long confounded academics studying both domains.

For decades, broker commission rates have "persisted in the same range—roughly 5% to 7% of a property's sale price"—which is split between the buyer's broker and seller's broker, meaning between 2.5% to 3.5% to each.¹⁷³ The rates have been stubborn; they have remained at roughly 5 to 7% "over long periods, regardless of local market conditions, housing prices, or the cost or effort required to sell different properties."¹⁷⁴ The rates are comparatively huge—

¹⁶⁸ 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*, 106 Q.J. ECON. 1039 (1991).

¹⁶⁹ Daniel Kahneman, Jack T. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193, 203 (1991).

¹⁷⁰ For a discussion of "framing effects," see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 684–87 (1999).

¹⁷¹ See KRITZER, *supra* note 39, at 124 (discussing lawyers' emphasis on the possibility of non-recovery); see also Herbert M. Kritzer, *Contingent-Fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 802 (1998) (explaining that, at the time of retention, some lawyers "emphasiz[e] uncertainty").

¹⁷² See KRITZER, *supra* note 39, at 171; Kritzer, *supra* note 164, at 808.

¹⁷³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-947, REAL ESTATE BROKERAGE: FACTORS THAT MAY AFFECT PRICE COMPETITION 3, 5 (2005) [hereinafter GAO BROKERAGE REPORT]. No one—not even the GAO—knows for sure what rates prevail as "there are no comprehensive data on brokerage fees." *Id.* There are no comprehensive data on contingency fees, either. See *supra* notes 64–65 (compiling available evidence regarding contingency fee percentages charged by PI attorneys, which presents only partial snapshots of the overall state of contingency fees charged).

¹⁷⁴ *Id.* at 3; see also James S. Bradbury, *Revenge of the Realtors: The Procompetitive Case for Consolidating Multiple Listing Services*, 90 U. COLO. L.

more than double the rates in other developed countries.¹⁷⁵ Even as housing costs have skyrocketed, broker commission rates, on a percentage basis, have stayed more or less firm.¹⁷⁶ Even brokers with different levels of experience charge comparable rates.¹⁷⁷ And finally, even when brokers generate cost savings (by utilizing technology or otherwise), it does not appear that brokers share those savings with their home-buying or home-selling clients.¹⁷⁸

Reflecting on these dynamics, a bevy of scholars have long observed that “commission rates appear to be . . . insensitive to economic forces.”¹⁷⁹ Or, in the words of the FTC: brokers “compete less on price than would be expected in a competitive market.”¹⁸⁰ Yet, while many had come to agree that *something* strange is going on in the residential real estate market, many have also expressed bewilderment concerning the observed oddities, particularly since the basic ingredients for competition are all accounted for.¹⁸¹ There

REV. 267, 314 (2019) (“[T]he average commission hovers around 5–6 percent and has changed little over the past few decades.”); Mark S. Nadel, *Obstacles to Price Competition in the Residential Real Estate Brokerage Market*, 18 BERKELEY BUS. L.J. 90, 91–92 (2021) (observing that brokerage rates have largely remained the same since 1990). Cf. Robert W. Hahn, Robert E. Litan & Jesse Gurman, AEI-Brookings Joint Center for Regulatory Studies, Public Comment, REW-0408 (Oct. 31, 2005) (“From 1991 to 2004, average commission rates have declined nationally from about 6.1% to 5.1%.”); 2006 House Hearing, *supra* note 24, at 20 (testimony of Bruce J. McDonald, Antitrust Division, DOJ) (explaining that, “in the last few years,” the “percentage commission has dropped slightly . . . from the traditional 6 or so percent to something between five- and five-and-a-half percent.”).

¹⁷⁵ Greg Buchak, Gregor Matvos, Tomasz Piskorski & Amit Seru, *NAR Settlement, House Prices, and Consumer Welfare 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 32855, 2024).

¹⁷⁶ PANLE JIA BARWICK & MAISY WONG, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY: A CRITICAL REVIEW 5, 7 (2019) (explaining that, given that commission rates have held steady, even as home prices have ticked sharply upward, “national average commission fees over the past couple of decades have doubled”).

¹⁷⁷ *Id.* at 9.

¹⁷⁸ Hahn et al., *supra* note 70, at 89 (“In a competitive market, cost savings to brokers should be reflected in lower commission rates, but this does not appear to be happening yet on a wide scale.”).

¹⁷⁹ Hsieh & Moretti, *supra* note 17, at 1086; *see also id.* at 1081 (“The uniformity of commission rates is well established in the real estate literature.”) (collecting additional citations); Hahn et al., *supra* note 70, at 89 (observing that market conditions appear to not impact broker commission rates).

¹⁸⁰ FED. TRADE COMM’N & U.S. DEPT. OF JUST., COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY 30 (2007).

¹⁸¹ Capturing prevailing sentiment, the head of the Consumer Federation of America has called the whole thing “cockamamie.” 2006 House Hearing, *supra* note 24, at 35 (testimony of Stephen Brobeck). *See, e.g.*, BARWICK & WONG, *supra* note 176, at 5 & 9 (expressing befuddlement over the stability of real estate commissions); Panle Jia Barwick & Parag A. Pathak, *The Costs of Free Entry: An Empirical Study of Real Estate Agents in Greater Boston*, 46 RAND J. OF ECON. 103, 103 (2015) (“The structure of the US real estate brokerage industry puzzles economists”); Oz Shy, *Real Estate Brokers and Commission: Theory and Calibrations*, 45 J. REAL EST. FIN. & ECON. 982, 984 (2012) (describing the “puzzle” of commission rates remaining at 6% despite the prevalence of similarly discounted services in other sectors); John William Hatfield, Scott Duke Kominers & Richard Lowery, *Collusion in Brokered Markets* 1–2 (Harvard Bus. Sch., Working Paper No. 20-023, 2020) (describing how stable brokerage fees are confusing given changes in technology and low barriers to entry).

are more than a million brokers,¹⁸² they advertise aggressively,¹⁸³ and few barriers prevent new brokers from joining their ranks.¹⁸⁴

What others have not appreciated, however, is that the market for broker commissions shares many attributes with the market for contingency fees—another realm where fees are surprisingly sticky. This realization provides an insight into how a market’s features can conspire to affect competition, to the point where providers furiously compete—but not on price.

To start, both the residential real estate brokerage market and the market for PI representation feature sharp informational asymmetries. Like PI lawyers, real estate brokers have long resisted price advertising.¹⁸⁵ One 2019 study, for instance, found that only 4% of 263 realtors’ websites across four major urban areas disclosed “any” commission information.¹⁸⁶ Indeed, even “phone inquiries to real estate firms usually do not elicit information about commission levels.”¹⁸⁷ Like a prospective PI client, a prospective home buyer or seller also has little access to quality information. As the FTC has summarized: “the subjective ‘quality’ of the broker, like that of other infrequently used professionals, is generally beyond the ability of the consumer to judge.”¹⁸⁸

Second, both markets feature inexperienced consumers and clients. As noted, people only hire a PI attorney once.¹⁸⁹ Likewise, most Americans purchase—at most—only three or four homes over the course of a lifetime.¹⁹⁰

¹⁸² Nadel, *supra* note 174, at 91 (estimating that, as of 2021, there are “between 1.4 and 2 million active real estate agents”); accord 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 competition. . .”).

¹⁸³ For more on real estate agents’ fierce competition for clients, see Michael Barbaro, *The Housing Market Has New Rules. Realtors Are Evading Them.*, N.Y. TIMES THE DAILY (Apr. 29, 2025) (statement of Debra Kamin) [hereinafter THE DAILY] (stating that the real estate market is “cutthroat” with “more agents than listings” such that “[t]here are not enough houses to go around”); *FTC-DOJ Workshop: What’s New in Residential Real Estate* (June 5, 2018) [hereinafter FTC-DOJ Workshop], Segment 1 (statement of Glenn Kelman, CEO of Redfin) (“At this point, there are real estate agents paying \$5,000, \$6,000 a month to meet consumers, and the average agent is making \$40,000 a year.”); Thomas M. Stevens, National Association of Realtors, Public Comment, REW-0392 (Nov. 28, 2005) (“Real estate professionals compete fiercely for listings . . .”).

¹⁸⁴ GAO BROKERAGE REPORT, *supra* note 173, at 8 (“[T]he industry has no significant barriers to entry, since obtaining a license to engage in real estate is relatively easy and the capital requirements are relatively small.”).

¹⁸⁵ See 2006 House Hearing, *supra* note 24, at 71 (testimony of Stephen Brobeck, Executive Director, Consumer Federation of America) (“None of the dominant firms in the industry advertises commission rates or ancillary fees. . . . There is no other important service in America here it is so difficult to learn about costs.”).

¹⁸⁶ STEPHEN BROBECK, HIDDEN REAL ESTATE COMMISSIONS: CONSUMER COSTS AND IMPROVED TRANSPARENCY, CONSUMER FED’N OF AM. 2–4 (2019).

¹⁸⁷ *Id.* at 1.

¹⁸⁸ FTC 1983 REPORT, *supra* note 18, at 41.

¹⁸⁹ Victor E. Schwartz, Mark A. Behrens, Cary Silverman & Rochelle M. Tedesco, *Consumer Protection in the Legal Marketplace: A Legal Consumer’s Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1, 3 (2002) (“[M]ost personal injury victims and their families have no experience using the legal system and probably will not be repeat customers.”).

¹⁹⁰ As of 2018, the median duration of homeownership in the United States was approximately thirteen years. See AM. CENSUS BUR., AM. COMM. SURVEY, tbl.

Third, like in the PI context, most home buyers and sellers do not negotiate the commissions they will pay.¹⁹¹ It appears that, at least until very recently, many home buyers believed that commissions were “officially” set, and, indeed, some realtors actively fostered this misperception.¹⁹² In addition, in both markets, even if a client or seller *were* to recognize that rates could be negotiated, there might be a natural inclination to forbear for fear of souring the budding relationship or a worry that, if one is the least profitable client or seller in the agent’s portfolio, the agent might be inclined to give them short shrift.¹⁹³

Fourth, like in the PI context, payment to the broker is possible rather than certain, and the agreement to pay the broker’s commission and the actual payment of the broker’s commission are separated in time. Just like a PI claim may be won or lost, and just like a PI claim may take months or years to resolve, a home may sell days, weeks, months, or even years after it is placed on the market—or theoretically not at all.

Fifth, like the PI context, where the lawyer deducts her fee before disbursing net settlement proceeds to the client, in the brokerage context, commissions come in a form of gain reduction, rather than affirmative payment. But, one might ask, how can a *home buyer* effect such a reverse payment? *Home buyers* have no money coming in; there is no gain to reduce. The answer is that, until very recently, as a result of the so-called “Buyer-Broker Commission Rule,” *both* the buyer *and* seller’s brokers’ commissions were typically paid by the home seller out of the proceeds of the sale.¹⁹⁴ Given this payment mechanism, as one commentator observed as early as 2007: “Most home buyers have

B25039 (2018); *see also* Nadia Evangelou, *How Long Do Homeowners Stay in their Homes*, NAT’L ASS’N OF REALTORS: ECONOMISTS’ OUTLOOK (Jan. 8, 2020), <https://www.nar.realtor/blogs/economists-outlook/how-long-do-homeowners-stay-in-their-homes> [<https://perma.cc/356Q-ZEHL>]. The median age of a first-time home buyer is thirty-eight. NAT’L ASS’N OF REALTORS, PROFILE OF HOME BUYERS AND SELLERS 6 (2024).

¹⁹¹ For non-negotiation in the PI realm, *see supra* note 158. This does not mean that lawyers and brokers do not chip in money at the time of settlement or closing, respectively. It seems that, in both realms, these eleventh-hour discounts to get the deal done are actually quite common. *Compare* FTC-DOJ Workshop, *supra* note 183, Segment 1 (statement of Glenn Kelman, CEO of Redfin) (explaining that it has become common, in the real estate context, for the agent to “contribut[e] money at closing or giv[e] the customer a discount”), *with* RICHARD MOORHEAD & PETER HURST, “IMPROVING ACCESS TO JUSTICE”: CONTINGENCY FEES, A STUDY OF THEIR OPERATION IN THE UNITED STATES OF AMERICA 25 (2008) (observing that contingency fee lawyers tend to reduce their contingency fees “when, for example, subrogation threatens the lion’s share of the claimant’s compensation”); Kritzer, *supra* note 67, at 761 (“[I]t is not at all uncommon for lawyers to reduce the percentage that they are entitled to under the retainer agreement.”), *and* Hyman et al., *supra* note 20, at 1599 (reporting that, in their sample, “lawyers routinely collect fees that are lower than those provided for in their retainer agreements”).

¹⁹² Nadel, *supra* note 174, at 94–95 (reporting on a “2007 survey [which] found that 58 percent of recent home buyers and sellers thought that commissions were set by the industry, by the agents, or by the government”); *see also* Transcript of Trial at 283:5–6; 292:11–17, *Burnett v. Nat’l Ass’n of Realtors et al.*, No. 19-cv-00332 (D. W. Mo. Oct. 18, 2023), ECF No. 1324 (testimony of Rhonda Burnett) [hereinafter “Burnett Testimony”] (testifying, as plaintiff in a class action challenging real estate practices, that her realtor told her she could not negotiate commission rates).

¹⁹³ *See* Levmore, *supra* note 16, at 505 (“Uniformity in rewards mitigates the problem of conflicts among principles . . .”).

¹⁹⁴ Melissa Stewart, Comment, *Buyer Beware: Who Is Paying the Home Buyer’s Real Estate Agent?*, 30 U. MIA. BUS. L. REV. 73, 74–75 (2021).

accepted the pervasive myth that their brokers’ services cost them nothing.”¹⁹⁵

Sixth, both markets feature intense competition for clients. PI lawyers are among the nation’s most aggressive advertisers. As Table 2 reveals, out of the five Internet keywords with the highest cost per click on Google nationwide, all five involve personal injury legal services.

Table 2: Highest “Cost Per Click” Keywords on Google Nationwide as of Sep. 4, 2025¹⁹⁶

Keyword	Cost Per Click
motorcycle injury lawyer	\$210
motorcycle injury attorney	\$190
spinal cord attorney	\$160
birth injury attorney	\$160
auto accident injury attorney	\$155

And, out of the twenty-five most expensive keywords in the United States, *nineteen* involve PI representation.¹⁹⁷ In the real estate realm, too, significant effort is spent “prospecting for clients.”¹⁹⁸ Again, to quote the FTC: “While price competition generally is not considered a useful method of competing in this industry, non-price competition for an increased share of the business being done in the market is intense.”¹⁹⁹

This is not to say that the two markets are identical. Most notably, compared to the PI market, the residential real estate brokerage market is more centrally organized. PI lawyers may belong to various groups, including the ABA and AAJ, and PI lawyers (like all lawyers) must abide by various rules. But lawyers are largely free agents. In the brokerage market, by contrast, a powerful organization, the National Association of Realtors (NAR), establishes strict rules for broker conduct; brokers have historically been required to comply with some of those rules in order to access

¹⁹⁵ Mark S. Nadel, *A Critical Assessment of the Traditional Residential Real Estate Broker Commission Rate Structure (Abridged)*, 5 CORN. REAL ESTATE REV. 26, 42 (2006).

¹⁹⁶ Mike Schrabo, *The Most Expensive Keywords for Google Ads in 2025*, FRAUDBLOCKER (Sep. 4, 2025), <https://fraudblocker.com/articles/the-most-expensive-google-ads-keywords> [<https://perma.cc/C9J2-9NRD>] (reporting data from January 2024, with results for the cost per click for Google search terms with a minimum of 750 searches per month, excluding local results). Cost per click measures the amount an advertiser is charged each time someone clicks on their advertisement; put another way, an advertiser’s maximum cost per click is “the highest amount [an advertiser] is willing to pay for a click” on an advertiser’s ad on a website. *Cost per click*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/cost-per-click> (last visited Sep. 24, 2025). Beyond direct advertising, lead generators have also cropped up. These entities advertise and charge lawyers for bona fide “leads.” For discussion, see Conrad Saam, *The Impact of Lead Generation*, LAW PRAC. 40, 41–43 (2021).

¹⁹⁷ Mike Schrabo, *The Most Expensive Keywords for 2022*, PPC HERO (Mar. 7, 2022), <https://www.ppchero.com/the-most-expensive-keywords-for-2022/> [<https://perma.cc/T5AU-ZUF3>] (listing the most expensive search keywords searched at least 1,000 times per month on Google).

¹⁹⁸ Nadel, *supra* note 174, at 97.

¹⁹⁹ FTC 1983 REPORT, *supra* note 18, at 42.

key real estate databases: Multiple Listing Services (“MLSs”).²⁰⁰ Indeed, until recently, any broker who broke with the Buyer-Broker Commission Rule was locked out of their regional MLS for relevant listings.²⁰¹ In addition, due to the NAR’s lobbying, numerous states have enacted “anti-rebate and/or minimum service laws,” which make it harder for discount brokers to compete.²⁰²

Further, in the real estate sphere, transactions are bilateral (involving a seller and a buyer), whereas in the PI realm, a lawyer can, to a greater extent, call her own tune.²⁰³ The bilateral nature of real estate transactions—and the fact that a buying agent can steer clients toward or away from this or that selling agent (and, by extension, this or that home)—may more naturally keep “maverick” agents (who might be inclined to offer discount services) in line.²⁰⁴ In other words, because agents *must* work together and, in fact, the same agents *repeatedly* work with one another—sometimes representing buyers, and sometimes representing sellers—a commission “disruptor” may be particularly vulnerable to collective punishment by her conformist peers.²⁰⁵

Nevertheless, even with the above caveats, as Table 3 demonstrates, the similarities between the two markets are startling.

Table 3: Similarities Between the Personal Injury Marketplace and the Residential Real Estate Marketplace.

	Personal Injury Marketplace – for Lawyers	Residential Real Estate Marketplace – for Brokers
Aggressive advertising.	√	√
Almost no advertising on the basis of price.	√	√
Provider quality very difficult to objectively measure or assess.	√	√
Pervasive client/consumer inexperience (many entering market for first time).	√	√

²⁰⁰ See Debra Kamin, *National Association of Realtors Faces Competition from New Group*, N.Y. TIMES (Jan. 26, 2024), <https://www.nytimes.com/2024/01/23/realestate/american-real-estate-association-nar.html>.

²⁰¹ See NAT’L ASS’N OF REALTORS®, CODE OF ETHICS AND ARBITRATION MANUAL 3 (2019).

²⁰² 2006 House Hearing, *supra* note 24, at 35, 73 (testimony of Stephen Brobeck) (describing these enactments and charging that their “goal” is “to restrict competitors who transact business over the Internet or who offer limited services for a lower price”).

²⁰³ It is possible, however, that co-counsel relationships and referral networks may complicate this dynamic, as “discount” PI lawyers may have difficulty forging co-counsel relationships or obtaining referral partners. Cf. DANIELS & MARTIN, *supra* note 27, at 113 (explaining that plaintiffs’ lawyers must abide by a series of informal rules, and, if they don’t, they risk “being ostracized or functionally shunned within the community of plaintiffs’ lawyers”).

²⁰⁴ See FTC 1983 REPORT, *supra* note 18, at 11–12, 22, 38–40 (discussing this dynamic); Hsieh & Moretti, *supra* note 17, at 1086 (similar); Nadel, *supra* note 174, at 96 (similar).

²⁰⁵ See Hatfield et al., *supra* note 181, at 3 (describing this mechanism).

Almost no negotiation concerning fees.	√	√
Payment of the fee uncertain at time of retention.	√	√
Time lapse between one's agreement to pay a fee and one's actual payment.	√	√
Fee is deducted, not paid.	√	√
Fee is calculated on a percentage basis.	√	√

Recently, however, the real estate brokerage market has (at least formally) changed. In 2019, a putative class of Missouri home sellers sued a group of national brokerages and the NAR alleging they had conspired to inflate commissions in violation of federal and state antitrust law.²⁰⁶ After several years of litigation, in April 2022, the U.S. District Court for the Western District of Missouri certified a broad class of “all persons” who had, in the previous seven years, “paid a commission to the buyer’s broker in connection with the sale of the home” listed on a Missouri MLS by one of the defendant-brokers’ agents—about 500,000 individuals in all.²⁰⁷ Eight months later, the court denied the defendants’ motion for summary judgment, and, in October 2023, a trial began.²⁰⁸

At trial, numerous witnesses testified regarding the lack of competition in the market for real estate commissions. Information asymmetries and the lack of transparency featured prominently: Home sellers testified that they lacked basic information about the commission structure, including that they “never knew” that commissions were negotiable,²⁰⁹ and, in some cases, were actively misled.²¹⁰

The jury, it seems, was overwhelmingly convinced. After deliberating for less than three hours, jurors awarded plaintiffs a whopping \$1.785 billion.²¹¹ Within minutes of the verdict’s entry,

²⁰⁶ See generally Complaint, *Sitzer v. Nat’l Ass’n of Realtors*, No. 19-cv-00332 (W.D. Mo. Apr. 29, 2019), ECF No. 1 (asserting violations of Section 1 of the Sherman Antitrust Act and the Missouri Merchandising Practices Act against NAR plus Realogy Holdings Corp., Homeservices of America, Inc., Re/Max Holdings, Inc., and Keller Williams Realty, Inc.).

²⁰⁷ Order, *Burnett v. Nat’l Ass’n of Realtors* No. 19-cv-00332 (W.D. Mo. Apr. 22, 2022), ECF No. 741; Debra Kamin, *The Homeowners Who Beat the National Association of Realtors*, N.Y. TIMES (Mar. 27, 2024), <https://www.nytimes.com/2024/03/27/realestate/national-association-realtors-lawsuit-homeowners.html>.

²⁰⁸ Order, *Burnett v. Nat’l Ass’n of Realtors* No. 19-cv-00332 (W. D. Mo. Dec. 16, 2022), ECF No. 1019 (denying defendants’ motion for summary judgment).

²⁰⁹ Transcript of Trial at 215:18, 231:22–232:2, *Burnett v. Nat’l Ass’n of Realtors et al.*, No. 19-cv-00332 (D. W. Mo. Oct. 18, 2023), ECF No. 1324 (testimony of Hollee Ellis); see also *id.* at 327:3–4, 332:25–333:3 (testimony of Jeremy Keel) (same).

²¹⁰ See *Burnett Testimony*, *supra* note 192, at 283:5–6; 292:11–17 (explaining that her realtor told her she could not negotiate commission rates).

²¹¹ Debra Kamin, *Home Sellers Win \$1.8 Billion After Jury Finds Conspiracy Among Realtors*, N.Y. TIMES (Oct. 31, 2023), <https://www.nytimes.com/2023/10/31/realestate/nar-antitrust-lawsuit.html>; *Burnett Testimony*, *supra* note 192, at 2371:17–20, ECF No. 1332; *id.* at 2518:1–2, ECF No. 1333 (jury verdict).

lawyers for the plaintiffs filed another antitrust class action,²¹² and other lawyers soon joined the fray.²¹³

Sensing the writing on the wall, the NAR and defendant brokerages transitioned to settlement mode. On March 22, 2024, they entered into a \$418 million class settlement that effectively resolved all pending claims.²¹⁴ The settlement has been called a “sea change” to the real estate industry because, beyond coughing up \$418 million, the agreement compels the NAR and defendant brokerages to take a number of steps to promote competition.²¹⁵ Among other concessions, the NAR agreed to ditch the Buyer-Broker Commission rule,²¹⁶ buyer-brokers must now “specify and conspicuously disclose” commission rates before a potential buyer tours a home,²¹⁷ and brokers also have to disclose that “commissions are not set by law and are fully negotiable.”²¹⁸

It is too soon to evaluate the settlement’s impact—in part because it appears that some real estate agents are, at least temporarily, evading its various constraints.²¹⁹ For our purposes,

²¹² See Complaint, *Gibson v. Nat’l Ass’n of Realtors*, No. 4:23-00788 (W.D. Mo. Oct. 31, 2023), ECF No. 1; Kamin, *supra* note 211.

²¹³ See generally, e.g., Complaint, *Umpa v. Nat’l Ass’n of Realtors*, No. 4:23-cv-00945 (W.D. Mo. Dec. 27, 2023), ECF No. 1; Complaint, *Batton v. Compass Inc.*, No. 23-cv-15618 (N.D. Ill. Nov. 2, 2023), ECF No. 1; Complaint, *Burton v. Nat’l Ass’n of Realtors*, No. 23-cv-05666 (D. S.C. Nov. 6, 2023), ECF No. 1; see also Commission Lawsuits: Latest News and Insights, HOUSINGWIRE, <https://www.housingwire.com/commission-lawsuits/> [https://perma.cc/SF7E-E5P7] (last visited Sep. 26, 2025) (listing over a dozen lawsuits filed in the wake of the *Burnett* verdict).

²¹⁴ Laura Kusisto & Nicole Friedman, *Realtors Reach Settlement That Will Change How Americans Buy and Sell Homes*, WALL ST. J. (Mar. 15, 2024), https://www.wsj.com/real-estate/realtors-settlement-change-buy-sell-homes-da45eb23?reflink=desktopwebshare_permalink. The court approved the settlement on November 27, 2024. Order, *Burnett v. Nat’l Ass’n of Realtors*, No. 19-cv-00332, *2, 6 (W.D. Mo. Nov. 27, 2024), ECF No. 1622.

²¹⁵ See, e.g., Adhiti Bandlamudi, *‘This Is a Sea Change’: Bay Area Realtors React as NAR Settlement Goes into Effect*, KQED (Aug. 17, 2024), <https://www.kqed.org/news/12000623/this-is-a-sea-change-bay-area-realtors-react-as-nar-settlement-goes-into-effect> [https://perma.cc/XQP2-3Z4Y]; Polly Davis Doig, *As Big Changes Take Effect, Realtors Brace*, NEWSER (Aug. 17, 2024), <https://www.newser.com/story/354320/big-changes-arrive-for-the-way-we-sell-homes.html> [https://perma.cc/GQK6-2LNX]; see also THE DAILY, *supra* note 183 (statement of Debra Kamin) (stating, of the settlement: “The expectations were sky high” and observing that the settlement was described as “Earth-shattering, watershed, landmark, [and] the greatest change of the real estate industry since the New Deal.”).

²¹⁶ Debra Kamin, *Judge Approves \$418 Million Settlement that Will Change Real Estate Commissions*, N.Y. TIMES, Apr. 23, 2024, <https://www.nytimes.com/2024/04/23/realestate/nar-settlement-realtors-commission.html>; Corrected Settlement Agreement, *Burnett v. Nat’l Ass’n of Realtors*, No. 19-cv-00332, at *27–30 (W.D. Mo. Apr. 19, 2024) ECF No. 1458-1, [hereinafter “NAR Settlement Agreement”]; see also Julian Mark, Aaron Gregg, & Rachel Kurzius, *Realtors’ Settlement Could Dramatically Change Cost of Housing Sales*, WASH. POST (Mar. 15, 2024), <https://washingtonpost.com/business/2024/03/15/nar-real-estate-commissions-settlement/>.

²¹⁷ NAR Settlement Agreement, *supra* note 216, at 29.

²¹⁸ *Id.* at 29–30.

²¹⁹ Compare Dana Anderson, *The Typical Buyer’s Agent Earns 2.55% in Commission, a Rate That Has Declined Since the NAR Settlement Was Announced in March*, REDFIN NEWS (Aug. 2, 2024), <https://www.redfin.com/news/buyers-agent-commission-july-2024/> [https://perma.cc/JU24-UD36] (reporting that commissions had fallen by approximately 0.07% between January 2024 and August 2024 following the NAR settlement announced in March 2024, possibly because “news of the settlement made consumers more aware they can offer any

though, the point is simple and inescapable: In a market that exhibited striking similarities to the contingency fee marketplace, at least for a time, noncompetitive fees reigned.

IV. UNDERSTANDING THE ARGUMENT

Above, Parts II and III assembled evidence demonstrating that the market for contingency fees is not competitive. Here, we offer two key qualifications, lest the thrust of our argument be mangled or misunderstood. First, a lack of price competition is not the same as a lack of competition, full stop. Second, although there is a lack of price competition in the contingency fee marketplace, it does not necessarily follow that plaintiffs' lawyers make "too much." We address each in turn.

A. A Lack of Price Competition Is Not the Same as a Lack of Competition

First and critically, we do not suggest that there is a complete absence of competition in the PI marketplace. Indeed, as noted above, as in the real estate context, competition for PI clients is fierce.²²⁰

PI firms compete in other ways, too: they specialize. They find new ways to improve the client experience, including by offering at-home sign-ups, ensuring calls are promptly returned, and offering referrals to medical providers. And they look for new and inventive ways to cut costs, including by routinizing tasks, deploying ever-more-sophisticated technology, and assigning responsibilities to nonlawyer assistants.²²¹

Nor do we suggest that there is *no* price competition. There clearly is some. After all, in our review of PI attorney websites, 4.6% of lawyers specified a contingency fee percentage and thus competed (on some level, at least) on the basis of price.²²² Our claim is more subtle: Just like real estate brokers, PI lawyers compete, but they compete primarily on dimensions other than price.

B. It Does Not Necessarily Follow That Plaintiffs' Lawyers Make "Too Much"

Nor do we claim that contingency fee lawyers make "too much." We do not purport to evaluate fair compensation for plaintiffs' lawyers—or for attorneys, more generally. But the available evidence, though fragmentary, generally undercuts any assertion that contingency fee lawyers are wildly overcompensated.

commission to a buyer's agent or none at all"), *with* Jefferson Duarte & David Zhang, *Measuring the Impact of the NAR Settlement* (June 3, 2025) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5279352 (finding that commission rates "remain approximately unchanged" in the wake of the NAR settlement, although, following the settlement, some buyers were more likely to forego the use of an agent altogether), *and* THE DAILY, *supra* note 183 (statement of Debra Kamin) (describing the "great real estate workaround"); *id.* ("If you talk to economists and analysts in the industry, they will say the settlement was a massive breakthrough moment. If you talk to agents, many of them will say the settlement changed nothing.").

²²⁰ See *supra* Table 2; *accord* Mnookin, *supra* note 68, at 367 ("Competition among plaintiffs' lawyers does not usually take the form of offering to handle a case for a lower percentage; instead, competition takes a different form in which potential plaintiffs compete for the attention of more skilled lawyers.").

²²¹ See Silver, *Cost Too Much*, *supra* note 2, at 2089 (explaining how lawyers compete by "cut[ting] costs and risks").

²²² See *supra* Table 1.

One way to assess whether contingency fee lawyers make “too much” is to compare contingency fee lawyers’ “effective hourly rate” (derived by dividing a lawyer’s ultimate fee in each case by the number of hours worked) to the wages earned by their hourly fee counterparts. Herbert Kritzer has undertaken a number of such studies, using a number of datasets. In a series of publications, he has shown that, *in general*, contingency fee attorneys earn, on an hourly basis, about the same amount as their defense-side counterparts. For example, based on a study of 878 cases handled by Wisconsin contingency fee practitioners in the late 1990s, Kritzer calculated that the median effective hourly rate for contingency fee work was \$167 per hour, while the mean was \$345 an hour.²²³ Adjusted for inflation to 2025 dollars, that is approximately \$362 and \$749, respectively.²²⁴ By contrast, Kritzer found that hourly-fee lawyers earned something between \$125 and \$140 per hour, during the relevant period (between approximately \$271 and \$304 in today’s dollars).²²⁵

The similarity between median hourly rates between contingency fee and non-contingency fee practitioners is striking because a sophisticated observer would never expect those rates to march in lockstep. This disjunction should arise because, as noted above, the contingency fee compensates PI lawyers for three discrete services: (1) professional services, (2) banking services, *and* (3) insurance services.²²⁶ And, it has also always been understood that contingency fee lawyers do—and should—earn higher effective hourly rates because of the extra services they provide.²²⁷

Nor does it appear that plaintiffs’ lawyers’ compensation outstrips defense-side competition, even in marquee cases.²²⁸ In the *Vioxx* litigation, for instance, there is evidence that Merck spent roughly \$2 billion on its counsel.²²⁹ Yet, given the 32% contingency

²²³ KRITZER, *supra* note 39, at 32, 190, 192. The mean exceeds the median because a small number of cases yielded particularly large payouts. *See id.* at 189–190, 296 n.16.

²²⁴ Here and throughout, we adjusted values for inflation using the Bureau of Labor Statistics, *CPI Inflation Calculator*, <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/9976-3PVE>] (last visited Sep. 27, 2025).

²²⁵ KRITZER, *supra* note 39, at 187–88. Kritzer has also considered other data to see whether his results are peculiar to Wisconsin practitioners. Available evidence suggests “this is not the case.” Kritzer, *supra* note 67, at 760, 769–72. In a series of articles, Lester Brickman has sought to cast doubt on Kritzer’s conclusions. *See, e.g.*, Brickman, *Effective Hourly Rates*, *supra* note 3, at 664, 670–73. Kritzer has painstakingly rebutted Brickman’s criticism. *See generally* Kritzer, *Rhetoric*, *supra* note 19 (replying to Brickman’s criticisms).

²²⁶ *See* Engstrom, *supra* note 16, at 411.

²²⁷ *Id.* at 411–12.

²²⁸ There are numerous possible comparators when it comes to evaluating PI attorney fees. *See* Kritzer, *supra* note 67, at 764–65 (listing possible points of comparison). Like Kritzer, we believe that it one particularly apt comparison is between PI attorneys’ fees and fees charged by hourly fee lawyers with “comparable training and experience”—namely, insurance and personal injury defense practitioners. *Id.* at 764. This comparison proves particularly useful given that PI plaintiffs’ attorneys and PI defense and insurance attorneys square off, and (admittedly, dated) evidence suggests that they expend similar amounts of time and resources per case. *See* David M. Trubek, Austin Sarat, William L.F. Felstiner & Herbert M. Kritzer, *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 108 (1983) (comparing hours spent per case between contingency fee attorneys and hourly fee attorneys and finding no statistically significant difference in the vast majority of cases).

²²⁹ *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 320 (2011) (estimating that Merck incurred “roughly \$2 billion for defense litigation fees”).

fee cap that Judge Fallon imposed, plaintiffs’ counsels’ compensation was limited to \$1.8 billion (32% of \$4.85 billion).²³⁰ Thus, it appears—somewhat inexplicably—that, even though defense counsel bore no appreciable risk, and even though plaintiffs certainly performed well vis-à-vis their defense-side counterparts (a \$4.85 billion settlement is not small potatoes), the two sides walked away with comparable amounts. (Indeed, it seems possible that, somewhat inexplicably, defense counsel made more.)

The above conclusions are bolstered by more recent state bar studies that, using self-reports, compile the mean and median annual incomes of PI litigators who represent plaintiffs and defendants, respectively. We compile these studies below.²³¹

Table 4: State Bar Reports: Annual Attorney Incomes

State	Year	Plaintiffs’ Lawyers	Defense Lawyers
Arizona ²³²	2022	Median: \$120,783 Mean: \$154,102 (*Litigating/civil practice: plaintiff*)	Median: \$138,333 Mean: \$169,952 (*Litigation/civil practice: defense*)
Colorado ²³³	2017	Median: \$135,000 (*personal injury*)	Median: \$111,000 (*insurance defense*)
Iowa ²³⁴	2023	Mean: \$303,959 (*Litigation Plaintiff*)	Mean: \$224,842 (*Litigation Defense*)
Kansas ²³⁵	2016	Median: \$175,000 Mean: \$312,583 (*Personal Injury, Plaintiff*)	Median: \$90,000 Mean: \$96,025 (*Personal Injury Defendant*) Median: \$205,000 Mean: \$271,750 (*Medical Malpractice Defendant*)

²³⁰ See Dan Slater, *In \$4.85 Billion Vioxx Settlement, Judge Caps Fees at 32%*, WALL ST. J. (Aug. 28, 2008), https://www.wsj.com/articles/BL-LB-6389?reflink=desktopwebshare_permalink.

²³¹ Details of each of the surveys’ methodologies are summarized in the accompanying footnotes. When possible, the figures in the below table offer the income for plaintiffs’ and defense lawyers engaged in full-time PI work. When that information is unavailable, we provide the closest analogs.

²³² STATE BAR OF ARIZ., *ECONOMICS OF LAW PRACTICE IN ARIZONA 24* (2022) (summarizing self-reported “annual base salary” data from 2,381 of the Arizona Bar’s 25,291 members (a 10.2% response rate)).

²³³ CO. BAR ASS’N, *ECONOMICS OF LAW PRACTICE SURVEY 2*, tbl. 001, 2 (2017) (summarizing self-reported “income” from 1,694 of the Colorado Bar’s 25,253 licensed attorneys (a 6.7% response rate)).

²³⁴ IOWA ST. BAR ASS’N, *SALARY AND ECONOMIC SURVEY 2*, 17 (2023) (summarizing the self-reported “income” of 4,716 of 7,008 active members of the Iowa Bar (a 67% response rate)).

²³⁵ KAN. BAR ASS’N: *A FLASH REPORT ON THE 2017 ECONOMICS OF LAW PRACTICE SURVEY IN KANSAS 1–2*, 9 (2017) (summarizing the self-reported “taxable income” from 935 of the “approximately 10,000” active in-state attorneys, “regardless of KBA membership status” (a 9.3% response rate)).

Michigan ²³⁶	2023	Median: \$493,784 Mean: \$300,000 (“personal injury, plaintiff”)	Median: \$150,000 Mean: \$281,351 (“personal injury, defendant”)
Missouri ²³⁷	2018	Median: \$125,000 (“personal injury”)	Median: \$142,981 (“civil trial”) Median: \$112,000 (“insurance defense practice”)
Oregon ²³⁸	2021	Median: \$180,000 Mean: \$284,941 (“civil litigation – plaintiff (personal injury”)	Median: \$145,000 Mean: \$183,881 (“civil litigation-insurance defense”)

In five of the above seven states, plaintiffs’ attorneys’ median incomes modestly outstripped their defense-side counterparts, while (as in Kritzer’s work) means tend to reflect greater divergence, suggesting some high-end plaintiff-side outliers. But, the sharp variability we observe, the fact that these surveys compile only “self-reports,” and the exclusion of some locations where defense lawyers tend to make very large salaries are unrepresented, muddies any firm conclusion. Indeed, given Table 4’s exclusion of New York City, Los Angeles, San Francisco, Chicago, Boston, and Washington, D.C.—and the fact that top defense firms tend to be concentrated in urban areas while top plaintiffs’ firms tend to be geographically dispersed²³⁹—our hunch

²³⁶ ST. BAR OF MICHIGAN, ECONOMICS OF LAW REPORT 4, 17–18 (2023). (summarizing the self-reported “gross income” of 3,819 of the 41,065 members of the Michigan Bar (a 20.9% response rate)).

²³⁷ MISSOURI BAR, ECONOMIC REPORT, Section III at 1, 30 tbl.3.29 (2019) (summarizing the self-reported income of 681 members of the Missouri Bar engaged in full-time employment in private practice).

²³⁸ OREGON ST. BAR, ECONOMIC SURVEY: REPORT OF FINDINGS 8, 34–35 tbl. 28 (2022) (summarizing the self-report “compensation” of “over 4,500 members” who responded to the survey, while reporting an “overall response rate of 33.7%”).

²³⁹ A quick glance at Vault Law’s well-established list of the country’s 100 “most prestigious firms” reveals that top defense-side firms are almost all uniformly located in a handful of major U.S. cities, including those noted above. *See Vault Law 100*, VAULT, <https://vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings> [<https://perma.cc/Q338-EK9U>] (last visited Sep. 27, 2025). Cravath, Swaine and Moore LLP, ranked first on that list, has U.S. offices in only New York and Washington, D.C. *Offices*, CRAVATH, <https://www.cravath.com/locations/index.html> [<https://perma.cc/9PXJ-E2MW>] (last visited Sep. 27, 2025). Coming in at number two on the Vault 100, Wachtell, Lipton, Rosen & Katz has a single office in New York City. *Contact Us*, WACHTELL, LIPTON, ROSEN & KATZ, <https://www.wlrk.com/contact/> (last visited Sep. 27, 2025). By contrast, successful plaintiffs’ firms exist throughout the United States. For instance, top plaintiffs’ firm Motley Rice boasts offices in South Carolina, Rhode Island, Connecticut, New York, West Virginia, Washington D.C., New Jersey, and Pennsylvania. *See Offices*, MOTLEY RICE, <https://www.motleyrice.com/location> [<https://perma.cc/YR2T-N5TH>] (last visited Sep. 27, 2025).

is that Table 4 probably overstates income gaps across the country.²⁴⁰

What is clear, though, is that Table 4, like the data that Kritzer has painstakingly compiled, undercuts the notion that PI attorneys, as a rule, receive disproportionate compensation.²⁴¹ According to available data, in other words, PI attorneys—in the aggregate—may make a bit more, whether hourly or annually, than their defense-side counterparts, but any disparity appears to be modest, not extreme.

C. But Still, The Stickiness Exacts a Welfare Cost

At the same time, the oddities we identify do exact a welfare cost. In particular, informational asymmetries prevent comparison-shopping and, in so doing, stunt competition as to price and non-price variables.²⁴² Informational asymmetries also trigger inefficiencies in allocation, as consumers (prospective clients) have trouble identifying suitable providers.²⁴³ Perhaps worst of all: the absence of price competition appears to unleash a socially wasteful hunt for the most profitable clients.

In the (analogous) residential housing market, the FTC has explained that similar dynamics have given rise to a system where, as commissions have risen alongside housing prices, too many brokers flood the market, “each broker (on average) handles fewer transactions,” and brokers “may spend more time and resources competing for each listing.”²⁴⁴ The grim result is “low agent productivity (that is, a small number of sales per agent), and flat or falling wages for agents, [even] while consumers pay more for brokerage services.”²⁴⁵

²⁴⁰ See, e.g., Cara Lombardo, *On Wall Street, Lawyers Make More than Bankers Now*, WALL ST. J. (June 22, 2023), https://www.wsj.com/finance/on-wall-street-lawyers-make-more-than-bankers-now-ae8070a7?reflink=desktopwebshare_permalink (explaining that elite partners at some firms like Kirkland & Ellis and Paul, Weiss, Rifkind, Wharton & Garrison “earn[] north of \$15 million” annually).

²⁴¹ See, e.g., Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers Symposium: Fairness to Whom—Perspectives on the Class Action Forgiveness Act of 2005*, 156 U. PA. L. REV. 1593, 1602 n.46 (2008) (quoting class action attorney Jerome Ringler in commenting on the “grave misconception” that “plaintiffs’ attorneys make too much money”).

²⁴² See, e.g., Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981) (“Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer.”).

²⁴³ See *id.*

²⁴⁴ FTC 1983 REPORT, *supra* note 18, at 61.

²⁴⁵ See 2006 House Hearing, *supra* note 24, at 125 (FTC Prepared Statement). For empirical evidence of this dynamic, see Hsieh & Moretti, *supra* note 17, at 1078–79.

The PI market, we suggest, exhibits similar distortions.²⁴⁶ Unable to compete over price,²⁴⁷ PI lawyers compete for the “best” clients—a category that, based on Google keyword costs, apparently encompasses those injured in motorcycle and motor vehicle accidents, those with spinal cord injuries, and those injured at birth.²⁴⁸ On a percentage basis, those clients pay somewhat more than they should, while certain clients (injured in different ways or via different mechanisms) presumably pay less than they should, while many others find themselves locked out of the justice system entirely.²⁴⁹

V. PATH FORWARD: NOT CAPS, CLOSING STATEMENTS

We now turn to the question of prescription: In light of the market imperfections identified above, is some legal intervention warranted, and, if so, what kind of intervention is desirable?

Before diving in, it is important to note that any *additional* intervention would be layered on top of two significant (longstanding) constraints. Owing to these constraints, even without further tinkering, contingency fees are already more heavily regulated than other attorney compensation mechanisms.²⁵⁰

First, ABA Model Rule of Professional Conduct 1.5, adopted in some form in every state, demands that all fees (contingency fees included) be reasonable.²⁵¹ It further specifies that contingency fee agreements in particular “shall be in a writing signed by the client and shall state the method by which the fee is to be determined.”²⁵² It obligates the contingency fee lawyer to specify the “litigation and other expenses to be deducted from the recovery” and also whether those deductions will be made “before or after the contingent fee is calculated.”²⁵³ And, at the conclusion of the matter, it requires contingency fee lawyers (and these lawyers only) to supply closing statements, i.e., “written statement[s] stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.”²⁵⁴

²⁴⁶ For an early effort to model these dynamics, see George J. Stigler, *Price and Non-Price Competition*, 76 J. OF POL. THEORY, 149, 151–52 (1968). We note that, unlike the real estate market, attorneys face relatively high barriers to entry (namely, the need to pass the bar exam and, in most states, obtain a J.D.). However, nationally, there are more than 1.3 million lawyers—and, once a person becomes a lawyer, that person can, in theory, freely change specialties. See AM. BAR ASS’N., *Demographics*, in PROFILE OF THE LEGAL PROFESSION 2024 (2024), <https://www.americanbar.org/news/profile-legal-profession/demographics/> (counting 1,322,649 active lawyers in the U.S. as of January 1, 2024).

²⁴⁷ We recognize that there is an open question whether lawyers can compete over price and choose not to—or whether they are unable to. For reasons we explain in Part V, we believe it is the latter. Our hunch is that PI lawyers would advertise on the basis of price, if they could also offer reliable evidence of quality.

²⁴⁸ See *supra* Table 2 (identifying the five most expensive Google keywords, as of September 2024).

²⁴⁹ For discussion of the many injury victims who are locked out, see Engstrom, *supra* note 25.

²⁵⁰ See Lynn A. Baker, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985, 1992 (2002) (“[T]he existing rules quite explicitly treat contingent fee arrangements differently—as more deserving of regulation—than other fee arrangements.”).

²⁵¹ MODEL RULES OF PROF. CONDUCT r. 1.5(a), (c) (A.B.A. 2020).

²⁵² *Id.* r. 1.5(c).

²⁵³ *Id.*

²⁵⁴ *Id.*

Second, it is well established that courts, pursuant to their inherent authority, can review contingency fee contracts to guard against attorney abuse. Courts can thus void or modify “unreasonable” contingency fees—and, in practice, “[j]udicial tolerance of fee percentages seems to end at 50 percent.”²⁵⁵ This longstanding supervisory power provides a vehicle to ensure that, as one court once put it, a “self-serving” attorney does not “ignore the best interests of the courts and his clients.”²⁵⁶

A. Contingency Fee Caps Are Popular But Misguided

On top of the above constraints, as Table 5 synthesizes, numerous states have enacted various restrictions to cap fees at pre-ordained levels. In particular, thirteen states limit the cap to fees in medical malpractice cases, often via tiered fee schedules that get progressively stricter as the plaintiff’s recovery ticks upward. Connecticut and New Jersey, for their part, impose tiered fee caps on PI claims, and Oregon imposes a fee cap only on the portion of a plaintiffs’ recovery consisting of punitive damages. Two additional states, Michigan and Oklahoma, impose flat, across-the-board caps on all contingent fee contracts (33.3% and 50%, respectively).

Table 5: State Contingency Fee Caps²⁵⁷

State	Citation	Claim Type	Fee Cap
California	CAL. BUS. & PROF. CODE § 6146	Medical Malpractice	25% if settlement reached prior to complaint being filed; 33% following complaint’s filing
Connecticut	CONN. GEN. STAT. § 52-251c	“[P]ersonal [I]njury, [W]rongful [D]eath or [D]amage to [P]roperty.”	33.3% first \$300,000; 25% next \$300,000; 20% next \$300,000; 15% next \$300,000; 10% over \$1.2 million
Delaware	DEL. CODE. tit. 18, § 6865	Medical Malpractice	35% first \$100,000; 25% next \$100,000; 10% of balance of any awarded damages
Florida	FLA. CONST. art. 1, § 26	Medical Malpractice	30% first \$250,000; 10% over \$250,000
Illinois	735 ILL. COMP. STAT. 5/2-1114	Medical Malpractice	33.3% cap

²⁵⁵ ROBERT H. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 92–93 (1981); JOHN W. TOOTHMAN & WILLIAM G. ROSS, LEGAL FEES: LAW AND MANAGEMENT 178 (2003) (“Courts are particularly loath to uphold the reasonableness of any fee that exceeds fifty percent.”). For the imposition of caps, see *supra* note 6 (collecting citations).

²⁵⁶ *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983), abrogated on other grounds by *Venegas v. Mitchell*, 495 U.S. 82 (1990).

²⁵⁷ Table 5 excludes various targeted restrictions, including those on workers’ compensation claims, those that apply when the plaintiff is suing a governmental entity, and so-called “Private Attorney Retention Sunshine Acts,” which restrict public entities’ retention of outside counsel. In addition, states have enacted other tort reforms that *indirectly* limit attorneys’ fees. Most prominently, many states cap plaintiffs’ damages; because contingent fees comprise a percentage of that recovery, damages caps effectively restrict the fee an attorney can collect. In compiling Table 5, we benefited from RONAN AVRAHAM, DATABASE OF STATE TORT LAW REFORMS (2021).

Indiana	IND. CODE § 34-18-18-1	Medical Malpractice	32% cap
Maine	ME. REV. STAT. tit. 24, § 2961	"Professional Negligence"	33.3% first \$100,000; 25% next \$100,000; 20% over \$200,000
Massachusetts	MASS. GEN. LAWS ch. 231, § 601	Medical Malpractice	40% first \$150,000; 33.3% next \$150,000; 30% next \$200,000; 25% for any recovery exceeding \$500,000
Michigan	MICH. CT. R. 8.121	All Claims	33.3% cap
Nevada	NEV. REV. STAT. § 7.095	Medical Malpractice	35% cap
New Hampshire	N.H. REV. STAT. § 507- C:8	Medical Malpractice	50% first \$1,000; 40% next \$2,000; 33.3% next \$97,000; 20% for all recoveries in excess of \$100,000
New Jersey	N.J. CT. R. 1:21-7	All claims "based upon the alleged tortious conduct of another" (excluding statutorily based discrimination and employment claims)	33.3% first \$750,000; 30% next \$750,000; 25% next \$750,000; 20% next \$750,000
New York	N.Y. JUD. LAW § 474-a	Medical Malpractice	30% first \$250,000; 25% next \$250,000; 20% next \$500,000; 15% next \$250,000; 10% > \$1.25 million
Oklahoma	OKLA. STAT. tit. 5, § 7	All Claims	50% cap
Oregon	OR. REV. STAT. § 31.735	Punitive Damages Awards	20% of punitive damages
Tennessee	TENN. CODE ANN. § 29- 26-120	Medical Malpractice	33.3% cap
Utah	UTAH CODE ANN. § 78B- 3-411	Medical Malpractice	33.3% cap
Wisconsin	WISC. STAT. ANN. § 655.013	Medical Malpractice	33.3% first \$1 million; 20% on any amount greater than \$1 million (with further detail if liability is quickly stipulated)

More states may soon join the fray. In recent years, tort reformers in a number of states have sought to enact ever-more-draconian restrictions. In 2022, the Civil Justice Association of California—a corporate interest group dedicated “to fight[ing] excessive and abusive litigation”—floated a California ballot

initiative that would have capped contingency fees at 20%.²⁵⁸ In 2024, a Colorado initiative to cap fees at 25% failed to make it onto the ballot.²⁵⁹ Even more recently, Uber—facing over 1,000 lawsuits by plaintiff-passengers who allege they were sexually assaulted in the rideshare company’s vehicles²⁶⁰—championed a Nevada ballot initiative to cap all contingency fees at a mere 20% of the plaintiff’s recovery.²⁶¹ On January 27, 2025, the Nevada Supreme Court blocked Uber’s initiative, preventing it from appearing on the ballot (at least for now).²⁶² But, following their defeat, Uber’s tort reformers vowed that we had not yet seen “the end of [their] efforts.”²⁶³

And indeed, what happened in Vegas did not stay in Vegas. On October 3, 2025, Uber submitted a proposed California ballot initiative that would, if passed, limit contingency fees to only 25% for attorneys representing individuals injured in automobile accidents.²⁶⁴ Should the initiative pass, California PI attorneys will face the steepest fee cap currently in effect in the United States. And,

²⁵⁸ Cheryl Miller, *Business Group Proposes California Contingency-Fee Cap Ballot Measure*, RECORDER, Oct. 7, 2021; INITIATIVE 21-0031, CAL. SEC. ST. (Dec. 14, 2021). For more on the Civil Justice Association of California, see CIVIL JUSTICE ASS’N OF CAL., OVERVIEW BOOKLET, https://www.cjac.org/sites/main/files/file-attachments/cjac_overview_booklet_082023.pdf?1734645846 (last accessed Sep. 28, 2025);

²⁵⁹ See *Colorado Attorney Contingency Fee Cap Initiative (2024)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Atorney_Contingency_Fee_Cap_Initiative_%282024%29 [https://perma.cc/BF46-TEU8] (last visited Sep. 28, 2025); *2023-2024 Initiative Filings, Agendas & Results*, COLO. SEC’Y OF STATE, <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html> [https://perma.cc/W975-WPNM] (last visited Sep. 28, 2025) (noting that the ballot initiative was “withdrawn”).

²⁶⁰ As of August 1, 2025, 2,513 such cases had been consolidated in an MDL. See MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (updated Aug. 1, 2025).

²⁶¹ Tia White, INITIATIVE PETITION – STATEWIDE STATUTORY MEASURE, NEV. SEC’Y OF STATE (Mar. 18, 2024), <https://www.nvsos.gov/sos/home/showpublisheddocument/13249/638464437749770000>; see also Jessica Silver-Greenberg, *Uber, Facing Sexual-Assault Litigation, Pushes Plan That May Curb Suits*, N.Y. TIMES (Aug. 12, 2024), <https://www.nytimes.com/2024/08/12/business/uber-nevada-referendum.html>.

²⁶² In April 2024, plaintiffs sued Uber and its political action group “Nevadans for Fair Recovery,” alleging that the proposed initiative failed to satisfy relevant procedural requirements. Complaint at 6, *Uber Sexual Assault Survivors for Legal Accountability v. Uber Techn., Inc.*, No. 24-00056 1B (Nev. 1st Dist. Apr. 5, 2024) (hereinafter, *Nevada Uber Challenge*). The district court ruled that Uber’s initiative passed muster, and the plaintiffs appealed. The case made its way to the Nevada Supreme Court, and, on January 27, 2025, the court sided with plaintiffs, ruling that the proposed ballot initiative’s “description of effect” was “deceptive and misleading.” *Uber Sexual Assault Survivors for Legal Accountability v. Uber Techn., Inc.*, 2025 WL 314211, at * 2 (Nev. 2025).

²⁶³ Indeed, a group backing the ballot initiative reacted to the Nevada Supreme Court’s decision by asserting: “Today’s verdict is not the end of our efforts.” David Thomas, *Nevada Supreme Court Rejects Uber Bid to Cap Lawyer Fees*, REUTERS, (Jan. 27, 2025), <https://www.reuters.com/legal/government/nevada-supreme-court-rejects-uber-bid-cap-lawyer-fees-2025-01-27/>.

²⁶⁴ Letter from Kurt R. Oneto to the Hon. Rob Bonta, Attorney General of California, Re: Request for Title and Summary for Proposed Initiative Constitutional Amendment (Oct. 3, 2025), https://oag.ca.gov/system/files/initiatives/pdfs/25-0022%20Self%20Dealing%20Attorneys%29_0.pdf; Cheryl Miller, *Uber Proposes Contingency Fee Cap Initiative in California*, LAW.COM (Oct. 6, 2025; 5:55 PM), <https://www.law.com/2025/10/06/uber-proposes-contingency-fee-cap-initiative-in-california/>.

as they say, “[a]s California goes, so goes the nation”²⁶⁵—if Uber is successful in California, chances are, more states will soon follow.

So, are contingency fee caps a wise answer to the problems we identify? The short answer is no. True, contingency fee caps have certain advantages: They are transparent and easy to administer.²⁶⁶ Like all rules (rather than standards), they are predictable and clear. And, they are marketable: Proponents of caps have long capitalized on their bumper-sticker quality: the common-sense notion that capped fees mean more money for individual plaintiffs.²⁶⁷

On the other hand, contingency fee caps are a government-administered price control, and, like other government price controls, contingency fee caps have serious drawbacks.

1. Initial Problems with Caps

First and most obviously, contingency fee caps are heavy-handed, paternalistic, and interfere with peoples’ freedom of contract.²⁶⁸ Generally, the law strongly favors the enforcement of contracts between consenting adults; caps interfere with that baseline principle.²⁶⁹ Then, in an ironic twist, rather than promoting competition, caps inhibit it by generating arbitrary “price stickiness.”²⁷⁰ Finally, and perhaps worst of all, to the extent that policymakers really want to help injured plaintiffs recover more money by imposing caps (as they claim), the effort is bound to backfire.²⁷¹ As we explain below, caps actually disadvantage clients by: (1) making it harder (and sometimes, impossible) for prospective clients to find qualified counsel and (2) exacerbating principal-agent problems.

²⁶⁵ See, e.g., Ronald Brownstein, *As California Goes, So Goes the Nation*, *Alas*, L.A. TIMES (Apr. 30, 1989),

²⁶⁶ See Schneyer, *supra* note 55, at 410 (“The court or disciplinary agency that cannot decide swiftly and reliably whether a contractual fee is ‘reasonable’ in hindsight can readily determine whether the same fee exceeds a crude one-third or forty percent fee cap.”); Hyman et al., *supra* note 20, at 1597 (“Tort reform advocates promote fee caps as a simple ‘fix’ for high attorney fees.”).

²⁶⁷ E.g., Michael Johnson, *Rebuttal to Argument Against Proposition 202*, in VOTER INFORMATION GUIDE FOR 1996 PRIMARY ELECTION, at 53 (Cal. Sec’y of State 1996) (arguing that Proposition 202 “mean[t] more money in victims’ pockets, less for personal injury lawyers”); Tom McClintock, Alan F. Shugart & John Flemming, *Argument in Favor of Proposition 106*, in VOTER INFORMATION GUIDE FOR 1988 GENERAL ELECTION, at 112 (Cal. Sec’y of State 1988) (asserting that Proposition 106 would “channel[] more money to victims and less to attorneys”).

²⁶⁸ For the fact fee caps interfere with parties’ freedom of contract, see PAINTER, *supra* note 42, at 3 (“[A]n externally imposed contingent-fee cap. . . interferes with both the lawyer’s and client’s freedom of contract.”). For the fact that caps are heavy-handed and crude, see Schneyer, *supra* note 55, at 410 (observing that caps are “inherently overbroad and underbroad”); Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y. L. SCH. L. REV. 773, 806 (2009/10) (“[T]o the extent that caps are insensitive to the risk involved or effort required in a particular case, they are crude[.]”).

²⁶⁹ See, e.g., *Billie Knitwear v. New York Life Ins. Co.*, 22 N.Y.S.2d 324, 325 (N.Y. Sup. Ct. 1940) (explaining that “the exercise of legislative authority to abridge [the freedom of contract] can be justified only by the existence of exceptional circumstances.”).

²⁷⁰ Coyne & Coyne, *supra* note 9, at xiv.

²⁷¹ Supporters (perhaps cynically) couch fee caps as a mechanism to promote the welfare of vulnerable plaintiffs. See *supra* note 267, and *infra* note 282.

2. Caps Limit Access to Qualified Practitioners

Government price controls generally distort incentives, skew the allocation of resources, and limit production.²⁷² Because price controls tend to limit production, when price controls are imposed, shortages often follow. We've seen this time and again: "Below-market rent controls create a housing shortage, below-market interest ceilings a credit shortage, and below-market gasoline price controls a gasoline shortage."²⁷³

Applied to the contingency fee realm, one would predict that contingency fee caps (which are price controls) will (further) reduce attorney supply and trigger (further) shortages in the market.²⁷⁴ The limited evidence available generally supports this hypothesis.²⁷⁵

Most notably, in 2009, Steven Garber and others of RAND surveyed nearly 3,000 personal injury lawyers from forty-two states plus the District of Columbia, probing respondents' stated willingness to take certain hypothetical cases under particular fee arrangements.²⁷⁶ The researchers found that attorney fee limits

²⁷² Hugh Rockoff, *Price Controls*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 409 (David R. Henderson ed., 2008) ("The reason most economists are skeptical about price controls is that they distort the allocation of resources."). For further discussion, see also *supra* note 10 (collecting sources).

²⁷³ John D. Mueller, *How Does Fiscal Policy Affect the American Worker?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 563, 589 (2006); see also *supra* note 10 (collecting citations).

²⁷⁴ To be sure, the above is not inevitably true. When the market is monopolistic, for instance, price controls may have salutary effects. See David Colander, *Galbraith and the Theory of Price Control*, 7 J. POST KEYNESIAN ECON., 30, 41 (1984) ("[A]ssuming the correct 'price' is chosen, price controls reduce the level of monopoly in the economy and thereby both lower price and increase output."). The market for PI attorneys, however, is not monopolistic. A monopoly "is an enterprise that is the only seller of a good or service." George J. Stigler, *Monopoly*, ECONLIB, <https://www.econlib.org/library/Enc/Monopoly.html> [<https://perma.cc/B5BH-GY2Y>] (last visited Sep. 28, 2025). There is no single seller or producer of PI attorney services. Rather, as we have explained, PI attorneys operate independently and compete vehemently. Their lack of price competition does not stem from monopolistic pricing power; it is rooted in informational asymmetries and the fact that contingency fees are not salient to consumers of legal services. See Part III *supra*.

²⁷⁵ MOORHEAD & HURST, *supra* note 191, at 9 ("There is relatively clear evidence that imposing caps on contingency fees . . . reduc[es] access to justice for claimants."); Kritzer, *Wages of Risk*, *supra* note 19, at 309 ("Typically, limitations on legal fees have served to reduce the availability of legal representation."). One now-dated study by Patricia Danzon found that contingency fee limitations did not have "any systematic impact on claim frequency." Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 78 (1986). As Danzon has acknowledged, however, that study suffered from a glaring limitation, as it grouped all contingency fee caps together and considered them en masse. See *id.* at 81 (showing that Danzon treated contingency fee limits as a binary variable, meaning that she considered all contingency fee caps together irrespective of how high the caps were set). Yet certain contingency fee caps are set so high that they impose no effective restraint. See, e.g., OKLA. STAT. ANN. Tit. 5, § 7 (limiting contingency fees to 50% of the plaintiffs' net recovery). Danzon's choice to treat contingency fee caps as a binary variable was problematic as a price cap, set much higher than typical prices, won't tend to affect prices and, thus—logically—won't predictably affect supply. See Patricia M. Danzon, *The Effects of Tort Reform on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 414 (1987) (conceding that this methodological decision may have skewed her findings). For further discussion, see Casey L. Dwyer, *An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes*, 56 DUKE L.J. 611, 627–28 (2006).

“reduce the [stated] likelihood that a particular plaintiffs’ attorney will agree to represent a victim of medical negligence.”²⁷⁷ Another Rand study from 2004 bolsters that conclusion. Examining the effect of California’s 1975 tort reform initiative, researchers found that California’s sliding-scale contingency fee cap led to a 46% reduction in attorneys’ fees.²⁷⁸ This wage cut, the researchers surmised, would make lawyers “even more selective” when accepting new clients.²⁷⁹ More recently, numerous Nevada attorneys similarly attested that, if the proposed 20% cap were enacted, its effect would be to significantly curtail their ability to take on meritorious, but low value, claims.²⁸⁰

A 2006 survey of damages caps in medical malpractice cases, which effectively cap the amount an attorney can recover in a given case, since that’s the pool from which attorneys’ fees are paid, found the same: Damage caps led to a “meaningful” reduction in the number of lawyers who expressed a willingness to take hypothetical claims.²⁸¹ Thus, though some supporters of contingency fee caps insist that these restrictions “preserv[e] for plaintiffs the access to the civil justice system that the contingent fee system provides,” available evidence suggests otherwise.²⁸²

Troubling, too: individuals from underserved populations predictably bear the brunt of this reform. There is some evidence that caps have a disproportionate impact on groups that already struggle to find legal representation, including women, persons of color, children, and the elderly.²⁸³

²⁷⁶ Steven Garber, Michael D. Greenberg, Hilary Rhodes, Xiaohui Zhuo & John L. Adams, *Do Noneconomic Damage Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?*, 6 J. EMPIRICAL LEGAL STUD. 637, 639 (2009).

²⁷⁷ Garber et al., *supra* note 276, at 681. One might answer that plaintiffs unable to find lawyers may successfully go it alone. But the evidence convincingly shows that this is not a feasible option. Indeed, one study of medical malpractice claims found that a measly .1% of claims that result in payment are initiated pro se. *See* Hyman & Silver, *supra* note 69, at 1094.

²⁷⁸ NICHOLAS M. PACE, DANIELA GOLINELLI & LAURA ZAKARAS, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 36–37 (Rand 2004). When coupled with the law’s \$250,000 noneconomic damage cap, the effect was even steeper (coming in at 60%). *Id.*

²⁷⁹ *Id.* at 51.

²⁸⁰ *See* Declaration of David Boehrer 2, Nevada Uber Challenge (Mar. 29, 2024) (“If passed, this initiative would completely prevent me from helping most of my clients.”); Declaration of Jason Mills 6, Nevada Uber Challenge (Apr. 1, 2024) (“If the initiative were to pass . . . [my firm] could no longer handle the bulk of its . . . caseload . . .”).

²⁸¹ Stephen Daniels & Joanne Martin, “*The Juice Simply Isn’t Worth the Squeeze in those Cases Anymore*”: *Damage Caps, ‘Hidden Victims,’ and the Declining Interest in Medical Malpractice Cases* 50–52 (Am. Bar Found. Rsch. Paper No. 09-01) (2009). For the fact that damage caps “are effectively a limit on fees,” see DANIELS & MARTIN, *supra* note 27, at 230.

²⁸² AM. TORT REFORM ASS’N, *Contingent Fee Reform*, <https://www.atra.org/issue/contingent-fee/> [<https://perma.cc/8KFG-9QC8>] (last visited Sep. 28, 2025). Others admit that the reforms they champion will have a different effect. *E.g.*, BRICKMAN, *supra* note 38, at 121 (“Most tort reforms will deprive some number of claimants of access to courts, and some of these claimants would have prevailed had their cases gone to trial. That, of course, is precisely the purpose of tort reform: to curtail tort litigation.”).

²⁸³ As the ABA Tort Trial and Insurance Practice Section noted: “[S]ignificant constraints on contingent fees would make legal assistance available only to those injured persons who are wealthy. The poor, the retired, African Americans, and

The downstream impacts of the above can radiate beyond the attorney-client relationship.²⁸⁴ When meritorious cases are not brought, deterrence is compromised, and tort law’s information-forcing effect is sidelined.²⁸⁵ Even state treasuries are affected, as state and local governments are deprived of millions of dollars in funds they would otherwise recover through subrogation.²⁸⁶

One final coda: Given the above realities, the very last place where policymakers should impose caps is the medical malpractice arena because, logically, in that domain, the effort demanded, risk assumed, and costs shouldered justify a high contingency fee.²⁸⁷ But in a perverse twist, as Table 5 demonstrates, that’s been the site of most reform.

3. Caps Exacerbate Principal-Agent Problems

Even if a client is lucky enough to find qualified counsel, caps may *still* work to her detriment by exacerbating principal-agent problems and disincentivizing her lawyer from fighting for every dollar.

As noted previously, even in an uncapped environment, the contingency fee can create temptations for lawyers to skim on case preparation.²⁸⁸ By restricting the fees lawyers can charge, flat caps can exacerbate this dynamic.²⁸⁹ Indeed, a lawyer entitled to 40% of client’s recovery will logically be justified in investing \$300,000 in a client’s \$1 million case; a lawyer entitled to only 20% of the client’s hypothetical \$1 million recovery would view such an investment as the sure road to ruin.²⁹⁰

Further, if flat caps are troubling from an agency cost perspective, those on a sliding scale, where a lawyer’s take decreases as the plaintiff’s monetary recovery increases, are

women especially will suffer.” JAMES K. CARROLL ET AL., TASK FORCE ON CONTINGENT FEES, ABA TORT TRIAL & INS. PRAC. SECTION, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION 32 (2004).

²⁸⁴ See DANZON, *supra* note 27, at viii (explaining that contingency fee caps will “produce a suboptimal investment in litigation and hence suboptimal deterrence and compensation”).

²⁸⁵ For more on the information-forcing function of tort law, see Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Auston Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 161–63 (2024).

²⁸⁶ See, e.g., Declaration of Jon L. Sasser & Jonathan C. Norman 13–14, Nevada Uber Challenge (Apr. 8, 2024) (predicting that, by affecting subrogation, a 20% fee cap could deprive Nevada of about \$3.8 million per year); Letter from Gabriel Petek, Legislative Analyst, and Keely Martin Bosler, Director of Finance, to Hon. Rob Bonta (Nov. 29, 2021), <https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report%2821-0030A1%29.pdf> [<https://perma.cc/9LZA-PX4C>] (assessing the effect of a proposed 20% contingency fee cap and concluding that such a cap “could result in increased costs to the state and local governments for Medi-Cal (the state’s Medicaid program)”).

²⁸⁷ For effort, see Carroll et al., *supra* note 283, at 30. For risk, see Declaration of Herbert Kritzer, *supra* note 35, at 9 (reporting that a full 42.9% of medical malpractice cases resulted in no fee, compared to 3% of auto accident cases). For costs, see Shepherd, *supra* note 45, at 184–85.

²⁸⁸ See *supra* notes 54–55 and accompanying text.

²⁸⁹ See DANZON, *supra* note 27, at 29 (“A binding fee ceiling is expected to reduce the number of hours an attorney is willing to spend on a case, and thus reduce both gross and net recovery.”).

²⁹⁰ See Michael McKee, Rudy Santore & Joel Shelton, *Contingent Fees, Moral Hazard, and Attorney Rents: A Laboratory Experiment*, 36 J. LEGAL STUD. 253, 267–68 (2007) (showing in laboratory setting that lawyer effort increases as contingent fees rise).

arguably worse. As Richard Birnholz has explained: “If the lawyer’s fee is limited to ten percent of amounts recovered in excess of \$100,000, the attorney’s interest in obtaining a recovery over that amount is cut dramatically, whereas the client’s interest in that additional recovery is increased tremendously.”²⁹¹ And, by uncoupling the lawyer’s and client’s interest, sliding scale caps “may act as a wedge dividing the interests of the lawyer and those of the client at a very basic level.”²⁹²

Then, once such a “wedge” is pushed between the lawyer and client, defendants can capitalize on the division.²⁹³ Again, to quote Birnholz: “If the plaintiff’s attorney’s fee is capped, the defense can stand firm behind a settlement offer, knowing that it will not be economical for the plaintiff’s attorney to spend the time and press for a higher award or to bring the case to trial.”²⁹⁴ Even the American Tort Reform Association concurs: “[a] sliding scale removes some of the incentive for lawyers to seek . . . jury awards.”²⁹⁵

B. Given That Informational Deficits Are the Primary Problem, Information, in the Form of Closing Statements, Ought to Be the Cure

Above, we addressed—and mostly dismissed—one possible fix to the market failures we have identified. Contingency fee caps, we explained, are bound to pervert incentives, distort the allocation of resources, and limit clients’ access to qualified counsel.

We have a better idea. Because this market failure is traceable, in large part, to informational asymmetries, to address it, we advocate the provision of accurate information.²⁹⁶ We believe that the proposal we sketch below can improve client welfare and give lawyers a new capacity—and incentive—to compete, including on the basis of price.

This proposal takes as its point of departure “closing statements,” long mandatory in parts of New York. For over half-a-century, certain New York PI practitioners have had to file confidential “closing statements” at each claim’s conclusion.²⁹⁷ These statements show, among other things, whether the PI or wrongful death claim was closed with or without suit; whether it was settled, abandoned, or resolved by court judgment; the gross amount

²⁹¹ Birnholz, *supra* note 37, at 981.

²⁹² *Id.*

²⁹³ See Editorial, *The Contingent Fee Rule: A Conflict of Interest*, N.J. L.J., May 28, 1981, at 4 (discussing how contingency fee caps drive a wedge between lawyer and client, while observing: “No defense attorney will deny that insurance companies recognize the advantages of the situation and substantially reduce major settlement figures because of it.”).

²⁹⁴ Birnholz, *supra* note 37, at 984.

²⁹⁵ AM. TORT REFORM ASS’N, *supra* note 282.

²⁹⁶ This reform proposal is drawn from, and builds on, Engstrom, *supra* note 29, at 865–84.

²⁹⁷ The requirement additionally applies in “connection with any claim in condemnation or change of grade proceedings.” N.Y. COMP. CODES R. & REGS. tit. 22, § 603.25(a)–(b). For the history of this requirement, see Helland et al., *supra* note 64, at 1972–76. The New York obligation differs from the typical obligation (imposed by A.B.A. Model Rule 1.5(c)) in that the statement must be filed with the court (not merely furnished to the plaintiff), and more detailed information must be provided. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.25(b); MODEL RULE OF PROF’L CONDUCT r. 1.5(c) (A.B.A. 2020). Alaska imposes a somewhat similar requirement. See ALASKA STAT. § 09.68.130.

of recovery (even if zero); an “[i]temized statement of payments made for hospital, medical care or treatments . . . which have been charged against the client’s share of the recovery”; and the net amounts paid to client and attorney or, if there was more than one attorney, the amount paid to each.²⁹⁸ In New York, however, neither the closing statements themselves nor any information they contain are public.²⁹⁹ Instead, the idea has been that lawyers will file these reports and judges will somehow review them to ensure that “clients received their proper share.”³⁰⁰

Building on the above, we propose that lawyers paid via contingent fees to represent clients asserting PI or wrongful death claims ought to be required to file a closing statement with the state bar (or other competent authority) at the conclusion of each representation, except where a class action is certified.³⁰¹ As in New York, lawyers who fail to supply accurate information should be subject to discipline.³⁰² Similar to closing statements in New York, these filings should, at least initially, specify:

- (1) The name and address of the client, plaintiff’s counsel, and the name of his or her law firm;
- (2) The name and address of defendant(s) and defense counsel and insurance carrier (if any);
- (3) Whether the claim involves (a) an automobile accident, (b) a product liability claim, (c) medical malpractice claim, (d) slip-and-fall, or (e) other;
- (4) Whether suit was initiated, and if suit was initiated, whether the suit was terminated by voluntary dismissal, involuntary dismissal, pretrial judgment, consensual settlement, or trial/post-trial verdict;
- (5) The time elapsed between the accident/injury or the discovery of the accident/injury (if the latter is later) and the claim’s resolution (whether the resolution is by dismissal, final judgment, settlement, or otherwise);
- (6) Plaintiff’s total claimed economic loss (calculated by adding medical bills, lost wages, and other past and estimated future expenditures), if any;

²⁹⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 603.25(b).

²⁹⁹ Helland et al., *supra* note 64, at 1976.

³⁰⁰ *Id.* at 1974.

³⁰¹ The proposal exempts class counsel because assembling the material for all class members would be unjustifiably onerous, and Federal Rule of Civil Procedure 23(e) and (g) already provide some analogous protections. *See* FED. R. CIV. P. 23(e), (g). It also probably makes sense to exempt MDL plaintiffs, given that it would be difficult to assign “credit” to the various counsel who assist in the prosecution of those claims. *See generally* Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469 (2020) (analyzing difficulties that arise from the many lawyers involved in MDL litigation).

³⁰² *See, e.g., In re Garcia*, 874 N.Y.S.2d 513, 516–17 (N.Y. App. Div. 2009) (per curiam) (suspending respondent from practice of law for, inter alia, failing to file closing statements). To promote accuracy, clients, defendants, and (if applicable) defense counsel and insurers should also be sent a copy of the closing statement as it was filed. All recipients should be compelled to bring any material errors or omissions to the attention of relevant authorities. Like their plaintiff-side counterparts, defense lawyers should be sanctioned for any willful failure to comply with this requirement.

- (7) Total recovery (even if zero);
- (8) Whether the recovery included a non-monetary term, and, if so, a brief description of that term; and
- (9) Sum paid to the client and client's attorney, respectively (if more than one attorney, the amount paid to each).³⁰³

Then, once closing statements are filed, information extracted from the statements should be aggregated and published on the Internet. Crucially, these statistics should be published in a searchable format, so that a researcher can compare and assess lawyers or law firms based on name, category, or combination of categories. The closing statements *themselves*, which contain sensitive identifying information, should be confidential, just as they are in New York, and, when creating summary statistics, simple steps should be taken to prevent the disclosure of private or sensitive information.³⁰⁴

Because closing statement data will be searchable, the resource will facilitate both side-by-side comparison shopping and the close inspection of particular providers.³⁰⁵ Crucially, it would also allow prospective clients to target providers that would best serve their specific litigation priorities: Those who seek a speedy settlement, for instance, could identify firms that resolve cases on a tight timeline. Those hoping to maximize their monetary recovery could find firms with consistently high “net recoveries” (calculated by subtracting claimed economic loss from total recoveries). Those who want the defendant to make a structural change, lest the same misfortune befall another, can find counsel who regularly obtain non-monetary relief. And, of course, a cost-sensitive client would be able to easily identify quality lawyers who charge lower fees. In doing so, closing statement data would provide the raw material to remedy the information asymmetries that have long plagued the PI contingency fee market.

1. Facilitating Client Use

The next question is, would newly-available information make its way into client's hands? We're cautiously optimistic it would. Of course, we harbor no illusions that consumers themselves would pore over closing statements. Most wouldn't. But we bet that, just as in the medical context, non-profit and for-profit intermediaries would eagerly translate the data for easy consumer comprehension.³⁰⁶

³⁰³ As in New York, a joint closing statement should be filed if multiple attorneys are retained. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(b)(3).

³⁰⁴ These may include concealing the identity of the plaintiff, defendant, and insurer; concealing the dates of the accident and settlement; and revealing details of any non-monetary settlement term only at the plaintiff's election. In addition, while closing statements should be filed within a short time (perhaps thirty days) of the claim's conclusion, data drawn therefrom should only be “published” on a semi-annual basis to obscure any effort to associate a particular closing statement with a particular client or controversy. If concerned about confidentiality, states could also vest judges with discretion to exempt (by court order) specific claims from the disclosure requirement upon a showing of good cause.

³⁰⁵ The insights that follow are drawn, in part, from Engstrom, *supra* note 29, at 868.

³⁰⁶ According to Michelle Mello and co-authors, in the medical sphere, “[a] number of influential nongovernmental organizations, such as *U.S. News and World Report* and the Leapfrog Group have . . . stepped up efforts to display, rank,

Currently, prospective clients cast about for attorney information. Lawyer rating service Avvo.com, for instance, boasts over 8 million website visits per month,³⁰⁷ while Martindale-Hubbell, together with partners, boasts 15 million monthly visitors.³⁰⁸ It is not a stretch to believe that Avvo.com, Martindale-Hubbell, and other online rating and ranking services would readily incorporate pertinent closing statement information into lawyer profiles. Similarly, the popular press might update the lawyer information it already offers.³⁰⁹ Non-profits devoted to access to justice would, most likely, supply streamlined and personalized information to low-income claimants. And academics—who currently go to great lengths to surface pertinent attorney information—would likely digest the information for others’ use.³¹⁰

A further question, of course, is not just whether price and quality data would be made available; it is whether consumers would draw from that information, in the course of attorney selection. Here, too, though the evidence is concededly mixed, there is reason for optimism. Numerous studies, conducted at different times, using different methodologies, and studying different disclosure mechanisms, indicate that, when reliable cost and quality information is made available, consumers consult it, and ultimately, shift toward lower-cost and higher-quality providers.³¹¹

or otherwise recognize health care organizations based on performance on various metrics.” Michelle M. Mello, David M. Studdert, Brahmajee K. Nallamothu & Allen Kachalia, *The Role of Transparency in Patient Safety Improvement*, in *TRANSPARENCY IN HEALTH AND HEALTH CARE IN THE UNITED STATES: LAW AND ETHICS* 245 (Holly Fernandez Lynch et al. eds., 2019).

³⁰⁷ *Why claim your Avvo Profile?*, AVVO, <https://www.avvo.com/for-lawyers> (last visited Sep. 28, 2025).

³⁰⁸ *About Martindale-Hubbell*, MARTINDALE-HUBBELL, <https://www.martindale.com/about-martindale-hubbell/> [<https://perma.cc/D8XN-AAEN>] (last visited Sep. 28 2025).

³⁰⁹ Magazines already publish such lists, albeit without the benefit of objective, verifiable information. *See, e.g., Top 40 Under 40*, DAILY J. (Sept. 25, 2024) (listing the best California lawyers under 40); Katrina Dewey, *The 2025 Lawdragon 500 Leading Corporate Employment Lawyers*, LAWDAGON (Sept. 20, 2024), <https://www.lawdragon.com/guides/2024-09-20-the-2025-lawdragon-500-leading-corporate-employment-lawyers> [<https://perma.cc/N2XV-5G6M>].

³¹⁰ *E.g.,* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1287, 1299 tbl. 4 (2012) (offering empirical information on the lawyers who represent relators in qui tam litigation, gleaned by obtaining, via a FOIA request, “more than 4,000 unsealed qui tam lawsuits filed since 1986”).

³¹¹ *See* Engstrom, *supra* note 14, at 669–71 (compiling authority). One particularly encouraging note comes from health care. Since January 2021, the Centers for Medicare & Medicaid Services (CMS) has compelled U.S. hospitals furnish certain price information. In 2023, academics analyzed that effort. The results were remarkably positive:

Consumers have accessed prices to shop for care and save money; researchers and industry experts have uncovered potential savings . . . and innovators have identified and aggregated the hospital price data for consumers to make more meaningful comparisons. As interested parties continue to identify value in this pricing data . . . the full potential is likely beyond what we previously imagined.

Meena Seshamani & Douglas Jacobs, *Hospital Price Transparency: Progress and Commitment to Achieving Its Potential*, HEALTH AFFAIRS (Feb. 14, 2023), <https://www.healthaffairs.org/content/forefront/hospital-price-transparency-progress-and-commitment-achieving-its-potential>.

To be sure, not all transparency efforts have worked.³¹² Some haven't.³¹³ But often, when efforts fizzle, post-mortems indicate that the transparency reform fell short of expectations because the mandated disclosure (often dripping with jargon) was competing with *other* sources of quality information already in the marketplace. When choosing between a mandated, hard-to-decipher disclosure and existing tailored advice from a trusted source, consumers logically choose the latter.³¹⁴ In the words of Omri Ben-Shahar and Carl Schneider: “[P]eople ignore disclosures because they can get information—sometimes better information—elsewhere.”³¹⁵

Normally, that fact should give policymakers pause. Yet, for all the reasons discussed above, *this market is different*. Here, we are not saying: “Clients should consult closing statements, not existing, reliable, curated quality information by Consumer Reports, Wirecutter, or another trusted resource.” Nor are we saying that closing statements, considered in isolation, will generate *comprehensive* information on lawyer quality. We agree that even with closing statements, gaps will persist.³¹⁶ But we *are* saying that closing statements would represent an enormous improvement over the status quo and would, predictably, *catalyze the creation of*

³¹² While some studies laud the positive outcomes stemming from the availability of healthcare information, see Seshamani & Jacobs, *supra* note 311, other studies’ results are more mixed. See, e.g., Kristin Madison, *Health Care Quality Reporting: A Failed Form of Mandated Disclosure?*, 13 IND. HEALTH L. REV. 310, 331–32 (2016) (analyzing a number of studies, some of which suggest that quality data have no effect on patient choice and others that paint a rosier portrait, while concluding “it is likely that at least under some conditions, report cards can influence patients’ choice of providers”). Yet, there are good reasons to believe that prospective clients would be *more* influenced by quality information than their healthcare-seeking counterparts. See Engstrom, *supra* note 29, at 869 n.300 (detailing numerous reasons to believe that, as compared to patients, prospective clients are more likely to be swayed by quality data). In the health care context, for instance, “[h]ealth insurance plans often limit patients’ choices about where to obtain care,” and “[c]linical circumstances also act as a constraint: patients in need of emergency or urgent care for conditions like chest pain are unlikely to compare performance metrics before seeking medical attention.” Mello et al., *supra* note 306, at 246.

³¹³ That said, before we cast judgment on a transparency measure, we ideally would have some shared perspective concerning the relevant metric(s), on which the measure should be judged, including “how many people must be helped in order for a disclosure to count as a success.” See Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 338–39 (2013). Yet, even when researchers confidently declare measures a failure, the answer to that preliminary question tends to be unspecified. See *id.* at 338.

³¹⁴ OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 13, 185 (2014).

³¹⁵ *Id.* at 13.

³¹⁶ Of course, it is difficult to know what, exactly, those gaps would be, given the complexities of identifying metrics by which to measure attorney quality. See, e.g., William H. Simon, *Where is the “Quality Movement” in Law Practice?*, 2012 WIS. L. REV. 387, 402–06 (2012) (listing obstacles to measure and improve attorney quality). But, as one straightforward example, even with closing statements, prospective clients would not have a window into an attorney’s disciplinary record, since that information is not typically available. See *supra* notes 147–150 and accompanying text. Likewise, we might agree that a marker of attorney quality is the attorney’s ability to listen to her client and make her client feel heard and seen. By all accounts, these skills are important; “people are remarkably sensitive to the process and procedures they experience in encounters with the law.” E. Allan Lind, Robert J. Maccoun, Patricia A. Ebener & William L. F. Felstiner, *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 957 (1990). But they, too, will not show up in the objective data that closing statements make available.

reliable, curated quality information—information that, currently, does not exist.³¹⁷

And, even if consumers did not consult the quality information, it is likely fellow lawyers would. Because many cases currently move through the system via referral networks, and referral networks run on reputation, lawyers' access to closing statement data—even standing alone—would be a significant victory.³¹⁸

2. Predictable Effects

If implemented, the proposal above would have a number of salutary effects.

First, the reform would improve attorney advertising. Currently, attorney advertisers cannot say much about quality, and particularly comparative quality, because these claims are impossible to substantiate; unsubstantiated comparative claims are apt to be misleading; and lawyers who engage in misleading advertising are, per ABA Model Rule 7.1, subject to professional discipline.³¹⁹ Closing statements could change that. Armed with information generated by closing statements, for the first time, attorneys could make objective, verifiable claims regarding the reported metrics. Indeed, attorneys themselves would, for the first time, learn how they stack up against their fellow practitioners.

Furthermore, it has long been thought that some PI lawyers might *want* to offer discount services. But the lack of quality information has been an impediment.³²⁰ After all, touting a low price, without any accompanying discussion of quality, would likely backfire.³²¹ As Charlie Silver has quipped: “Picking the cheapest contingency fee lawyer might seem excessively risky, like picking the cheapest surgeon.”³²² Clients would likely perceive discount lawyers as offering bargain-basement services and, in the absence of objective quality information, that perception (or misperception)

³¹⁷ See, e.g., Engstrom, *supra* note 29, at 860–62. We stress that the market for legal services is different than most other markets. In most markets, as Ben-Shahar and Schneider emphasize, “intermediaries can usually get [key quality and price information] without a mandate.” Ben-Shahar & Schneider, *supra* note 314 at 188. By contrast, in the PI marketplace, absent a mandate, accurate price and quality information is not available. See *supra* Part III.A.2.

Furthermore, even if we are wrong about all the above, closing statements could *still* be salutary. As we have seen, the legal profession lags behind medicine and other professions when it comes to identifying benchmarks that reflect the quality of legal services. In law, it's not just that we currently fail to assess attorney quality; we don't even know what it is, exactly, we should be assessing. By highlighting and empirically assessing PI lawyers' performance along certain key dimensions, closing statements would mark a first step toward bridging this gap, which could, in turn, potentially jumpstart an overdue “quality movement.” Simon, *supra* note 316, at 390, 392 (explaining that objective “performance measurement” is a necessary prerequisite to improving provider quality).

³¹⁸ For a discussion of referral markets, see *supra* note 68 and accompanying text. For the fact that “[r]eputation is . . . the most important criterion for the lawyers referring medical malpractice cases, auto accident cases, and product liability cases,” see DANIELS & MARTIN, *supra* note 27, at 190.

³¹⁹ See MODEL RULE OF PRO. CONDUCT r. 7.1 (A.B.A. 2025).

³²⁰ See Brickman, *Compete*, *supra* note 3, at 35 (“[L]awyers who may wish to undercut the standard rate are deterred from doing so because clients would likely perceive a cut rate price offer as signaling that the lawyer is inferior in quality to price maintainers.”).

³²¹ See *id.*

³²² Silver, *Cost Too Much?*, *supra* note 2, at 2091–92.

would be impossible for even the best and most ethical lawyer to rebut. With closing statement data, that concern fades—paving the way for price advertising.

Closing statements may promote price competition in another way, too. Specifically, closing statements permit the easy calculation of net recoveries, which an intermediary can generate by subtracting an attorney’s fee and a client’s claimed economic loss from a client’s gross recovery.³²³ So calculated, high fees and hefty medical bills take a big bite out of net recoveries, meaning net recoveries are apt to be low when fees are high. Publicizing net recoveries, then, could encourage lawyers to reduce the fees they charge.

Thus, closing statements have the potential to bridge many of the informational gaps that have long plagued the contingency fee market—and stunted meaningful competition. In providing objective and verifiable information to prospective clients of legal services, closing statements would address the root causes of the lack of competition in the contingency fee market. Cudgel-like contingency fee caps, as we have explained, do not.

3. Addressing Drawbacks

Above, we sketch a reform and outline a few of its likely salutary effects. We concede, however, that every reform idea has drawbacks. Here, we address four.³²⁴

a. Gaming, Including by Changing Screening Patterns

First, since outputs are affected by inputs, the above reform can be counted on to have what Richard Craswell calls “dynamic effects.”³²⁵ One such effect is that closing statements will predictably affect case screening, with consequences for both the strength and size of claims lawyers will accept. In particular, by mandating the disclosure of abandoned claims, nuisance-value settlements, and adverse judgments, closing statements are likely to discourage firms from accepting clients with shaky or unmeritorious claims.³²⁶ Notably, the screening practices of high-echelon firms would be relatively unaffected; those firms already vet cases carefully and select those with the highest odds of success.³²⁷ Firms that do not currently invest much in assessment would, however, have a new and powerful reason to redouble their screening efforts.

³²³ This, of course, is a rough and imperfect calculation because clients will actually net more if, inter alia, some of the claimed economic loss is covered by a claimant’s first-party health or disability insurer (and there is no or only partial subrogation). See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1488, 1541–42 (discussing these and other possibilities).

³²⁴ Additional concerns include, but are not limited to, the possibility that closing statements will make it harder for new practitioners to find their footing, thus entrenching existing hierarchies within the plaintiffs’ bar; the eroded confidentiality of otherwise secret settlements; the difficulty in deciding how to apportion credit in a case involving multiple lawyers; and the possibility that reporting dropped cases will deter lawyers from withdrawing from representation, even when a withdrawal is warranted. For further discussion of these and other drawbacks, see Engstrom, *supra* note 29, at 880–84.

³²⁵ Craswell contrasts dynamic disclosures with static disclosures, which “take a consumer’s existing range of choices as more or less given, and aim merely to improve a consumers choice from among the existing choice set.” Craswell, *supra* note 313, at 334.

³²⁶ See Engstrom, *supra* note 29, at 874–75 (discussing how closing statements will affect attorney screening practices).

³²⁷ See *supra* note 45 and accompanying text.

We concede, however, that enhanced screening could have unintended—and negative—consequences, including that it might deter lawyers from undertaking long-shot but socially valuable litigation. Medical malpractice claims, for instance, face notoriously long odds. Already, according to Joanna Shepherd, the majority of medical malpractice lawyers reject between 95% and 99% of the cases they evaluate.³²⁸ It is possible that data from closing statements, if read out of context, could systematically penalize medical malpractice practitioners, and that, in turn, could further deter lawyers from taking claims of this type.

Nevertheless, the fact that screening is *generally* salutary distinguishes the PI context from other arenas where screening is more problematic. It is, in other words, clearly a bad thing when doctors, worried about rankings, start strategically screening patients based on “risk profile.”³²⁹ That kind of screening—to weed out the sickest and most apt to die—is hard to justify. This kind of screening—in favor of those who are badly hurt and have genuine and meritorious claims—is an entirely different story.

b. Singling Out Contingency Fee Practitioners

Second, the proposal requires disclosures from *only* certain contingency fee practitioners. What justifies this special treatment?

In our view, special treatment is not warranted because PI lawyers are more likely to engage in misconduct than others. We do not believe they are.³³⁰ But rather, different segments of the bar face

³²⁸ See Shepherd, *supra* note 45, at 185 and accompanying text. For further discussion of med mal screening patterns, see LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS INTERNAL MED. 792, 796 (1994) (reporting that 730 calls seeking legal representation for alleged medical injury yielded only twenty-four filed lawsuits).

³²⁹ Rachel M. Werner & David A. Asch, *The Unintended Consequences of Publicly Reporting Quality Information*, 293 JAMA 1239, 1241 (2005) (discussing evidence of selection of patients based on “risk profile”); Mello et al., *supra* note 306, at 248–49 (noting that transparency efforts “can create disincentives for physicians and hospitals to care for the sickest patients who are at special risk for poor outcomes”); see also *infra* note 337, and accompanying text (discussing the problem of employing closing statements in the criminal context, since such an application would encourage practitioners to screen criminal defendants for innocence). *But cf.* David A. Hyman & Charles Silver, *You Get What You Pay For: Result-Based Compensation for Health Care*, 58 WASH. & LEE L. REV. 1427, 1468 (2001) (arguing that risk-based care assessments (i.e., screening by patient risk profile) could lead to a more efficient and effective medical system, including because risk-based assessments “frame in cold numerical terms the reality that some medical interventions are inefficient and should not be performed”).

³³⁰ Evidence suggests that, as compared to most other lawyers, PI lawyers are particularly apt to be disciplined and also sued. See Kyle Rozema, *Professional Discipline & the Labor Market: Evidence from Lawyers* 67 J. L. & ECON. 371, 384 fig. B (2024) (finding, in an empirical study of attorneys in thirty-six states and Washington, D.C., that PI attorneys were the third most frequently disciplined type of attorney by practice area); HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* 72–73 (2018) (presenting evidence suggesting that PI attorneys are sued for malpractice at higher rates than other attorneys).

But those figures may not reflect disproportionately high rates of *actual* misconduct. It could be that PI clients lodge disproportionate numbers of grievances against their attorneys. Or it could be that when grievances are filed, disciplinary counsel is more likely to investigate or find misconduct. Furthermore, certain rules, by their nature, are more likely to ensnare lawyers who need to attract a high volume of clients. See, e.g., MODEL RULE OF PRO. CONDUCT r. 7.3 (A.B.A. 2019) (outlawing most live person-to-person solicitation). It is hardly surprising, then, that those with a high volume of clients tend to more frequently face discipline. See Engstrom, *supra* note 323, at 1492 (“[P]laintiffs’ personal

different ethical challenges and thus need regulatory mechanisms tailored to the particular challenges they face. Indeed, the ABA already at least implicitly agrees. As noted previously, Model Rule 1.5 already imposes special obligations on contingency fee practitioners, including the obligation to prepare a closing statement.³³¹

Closing statement reforms are apt to be most useful when (1) we worry that lawyers will under-identify (rather than over-identify) with clients; (2) information deficits thwart informed attorney selection; (3) the representation has fairly clear objectives (thus producing fairly identifiable wins and losses); (4) attorney quality matters (i.e., the attorney is offering a non-routine legal service); and (5) client screening is likely to be beneficial.³³² For PI cases, these criteria are at least arguably met. In most others, they aren't.³³³

The reform is, for instance, glaringly ill-suited to the corporate law context. There, we worry about *over*-identification between lawyer and client, and when hiring outside counsel, in-house counsel can ably overcome informational symmetries.³³⁴ Our proposal would also be a bad fit for, say, family law, where it is often difficult to ascertain what constitutes a “win.”³³⁵ Expansion to routine practice areas (such as simple bankruptcies, adoptions, real estate closings, or name changes) would not make sense, as, in those practice areas, it is not clear that practitioner quality varies or much matters (your name change is as good as mine)—and, likely as a consequence, there is already some price competition.³³⁶ Finally, expansion into the criminal defense context would be problematic, as—given the screening incentive discussed above—closing statements would encourage the evaluation of prospective clients for innocence.³³⁷

Further, contingency fee attorneys are *already* in the crosshairs: Contingency fee caps, the darling of today's tort reformers, target PI attorneys, just as closing statements would. If we assume *some* reform will inevitably be enacted, closing statements would preserve those attorneys' autonomy when it comes to setting fees. Contingency caps would not.

c. Record-Keeping Burden

Third, a common objection to any mandatory disclosure regimen is that these reforms impose a “disclosure cost” in that they burden those compelled to make the disclosures.³³⁸ Further, in a

injury lawyers are known to have sizable caseloads as compared to others within the profession . . .”).

³³¹ See *supra* notes 252–254 and accompanying text.

³³² See Engstrom, *supra* note 29, at 881; see also generally, Engstrom, *supra* note 14 (discussing, throughout, the distinctive characteristics of routine legal services).

³³³ Engstrom, *supra* note 29 at 881.

³³⁴ *Id.*

³³⁵ Douglas E. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257, 264 (1976) (pointing out that, aside from personal injury and criminal practice, “relatively few types of legal practice . . . produce clear-cut wins or losses”).

³³⁶ For a detailed discussion of advertising for “routine” legal services, see Engstrom, *supra* note 14, at 655, 657, 665–67, 684.

³³⁷ See Karlan, *supra* note 329, at 629–31 (discussing the problem of screening for client innocence).

³³⁸ See Edwards, *supra* note 147, at 1509–10 (discussing these “disclosure costs”).

competitive market, we would expect that that burden (i.e., the costs practitioners incur) would be passed to and ultimately borne by consumers. Beyond that, some point out that a general problem with mandatory disclosures is, if sellers are compelled to share information, they may be deterred from collecting that information in the first instance.³³⁹

Again, these objections are valid, but here, they have limited bite. As noted above, Model Rule 1.5(c) already requires counsel to prepare a written statement for clients “[u]pon the conclusion of a contingent fee matter” containing much of the information required.³⁴⁰ And attorneys routinely collect other information necessary for a closing statement in the course of their representation.

d. A Wrench into Referral Markets

Fourth, a skeptic might note that, by promoting price competition, closing statements will predictably interfere with referral markets. “The uniformity of [contingency fee] rates,” some scholars argue, “fosters the referral system by assuring clients that they will not have to pay a higher fee if their case is transferred to a more suitable lawyer.”³⁴¹ In the absence of contingency fee uniformity, referral markets might run amok.

Again, there is a ready answer to this concern. It is true that, if implemented, the proposal would upset referral markets. In a competitive market, it would be harder to move bigger cases up the food chain to more competent providers. But, in a world with closing statements, *there is little need for referrals*. The referral market exists because PI clients cannot find suitable lawyers themselves. As Eyal Zamir and co-authors acknowledge: “The *raison d’être* of the referral mechanism is to compensate for the typical client’s lack of knowledge about lawyers and the value of her own case.”³⁴² The multi-billion-dollar referral market, in other words, is a pricy, clunky, unwieldy monument to a broken system. If our closing statement proposal works, far more clients could find the right lawyer themselves, and the extraordinarily expensive system that matches lawyers and clients could crumble.

CONCLUSION

The market for PI legal services is not competitive. The preconditions to an efficient market are lacking: There is a stunning lack of information regarding both attorney price and quality, and contingency fees are not salient to consumers of legal services. Nor does the market for PI legal services behave like an efficient market. Fees are surprisingly sticky, and there is price inelasticity in the face of highly variable production costs and rewards.

The question, then, is which solution targets, and corrects, this market failure? We show that contingency fee caps—a heavy-handed, meat-cleaver solution—are not the answer. Indeed, they would reduce access to justice and further distort attorney incentives. Instead, we argue, reformers should arm consumers with necessary information. We offer a blueprint for simple reform that

³³⁹ See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 13–14 (1987).

³⁴⁰ MODEL RULES OF PROF. CONDUCT r. 1.5(c) (AM. BAR ASS’N 2020).

³⁴¹ Zamir et al., *supra* note 57, at 375.

³⁴² *Id.*

would address the information asymmetries that have, for so many decades, kept consumers in the dark.