Can the legal services market become more competitive?

How Lawyers Compete

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Ester Brickman’s article (p. 30) establishes that the market for contingent-fee lawyers is unusual, perhaps even bizarre. Indeed, the market seems so unlike other markets for goods and services that readers may think Brickman adventurous for even using the word “market.” Just as law-and-economics scholars can use phrases like “marriage market” to signal that putatively nonmarket behavior may reflect economic logic, so too does Brickman’s use of the word emphasize that we cannot evaluate contingency fees merely by considering questions of ethics.

More than that, Brickman’s invocation of the word “market” suggests that we might be able to increase welfare by making contingency fees more like other markets. His analysis suggests that more efficient markets are attainable, at least in theory. By removing legal impediments to the solicitation of clients, by unleashing the capital markets to finance legal claims, and by allowing intermediaries to match client and counsel, we could produce competition. Lawyers would have the incentive to undercut other lawyers’ pricing and the take-it-or-take-it-from-someone-else nature of the contingency fee would be eliminated.

Brickman has convinced me that there is little competition in contingency fee markets, and that such markets could be much more competitive. But I am not sure there is as little competition as he thinks, or that the changes in legal regimes he proposes would be sufficient to make the markets more competitive.

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At the center of his case is the fact that contingency fees are generally uniform, with rare deviations from the standard in any particular jurisdiction. Brickman recognizes two mutually exclusive explanations for that uniformity: Either there is no price competition or the market is so efficient that it has equilibrated at a particular price. Brickman, as he explains in his article, accepts the former explanation.

There is at least one reason in addition to Brickman’s to prefer the former explanation to the latter. Even efficient markets that tend to have price uniformity, such as the market for wheat, do not have price constancy over time. Not only are contingency fees uniform at any given time, but they also tend to be uniform from month to month, even year to year. In part, this may be because legal fees are unaffected by factors like the weather. There exist, however, enough demand shocks to legal fee markets, such as the emergence of new tort litigation opportunities, that more volatility would be expected in a competitive market.

The absence of price competition, however, does not mean that there is no competition at all. Lawyers can compete on quality. Brickman is appropriately skeptical of the possibility that consumers of legal services will be able to make relevant quality distinctions. Indeed, even someone as knowledgeable as Brickman, one of the nation’s foremost experts on provision of legal services, might find it challenging to find an appropriate lawyer in a garden-variety tort case.

The task would be finding the lawyer who has achieved the highest settlements or judgments, controlling for the quality of cases the lawyer has handled. Data are not easily available, and the heterogeneity of legal claims would make statistical analysis difficult.

But Brickman would not be hopeless. He might do what I would do: Contact a friend familiar with lawyers in a particular jurisdiction and ask for a recommendation. My friend would size up my claim and identify a lawyer who might be suitable for it. Of course, Brickman and I are better connected than the average tort claimant. The six-degrees-of-separation
principle, however, suggests that few people will be far removed from someone who can make a reasonable sug-
gestion. Information in such markets will be muddy and
some clients will have the misfortune to end up hiring duds,
but the matching process will not be entirely random.

If price is effectively fixed, it might seem that everyone
would want the best lawyer, and some will simply be lucki-
er or better connected than others. But this objection mis-

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which lawyer quality is most important. Even a client with
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In an efficient market for lawyer services, clients would
mattered little.

It may be difficult, however, to identify the claims for
which lawyer quality is most important. Even a client with
a claim screaming out res ipsa loquitur might be ill-advised to
shop around for a cheaper lawyer if he is faced in a world in
which price shopping were possible. Suppose it were possi-
ble to obtain for such a profitable claim a lower quality
lawyer who charged 23 percent rather than 33 percent. Even
on a slam-dunk case, the skills of the higher-priced lawyer
might well produce more than a 10 percent return. Just by
virtue of reputation, a higher-priced lawyer might have a
more credible threat to take a case to trial or to win a large
judgment, accordingly pushing up the case’s settlement
value. Even experts might be ill-positioned to advise clients
about how to balance price/quality tradeoffs.

There is a more fundamental reason that clients might be
ill-advised to price shop, and Brickman identifies it direct-
ly: agency costs. The higher the contingency fee that a lawyer
receives, the harder that lawyer is likely to negotiate. Because
lawyers receive only a portion of the recovery, they may
have an incentive to work less as the contingency fee moves
lower. Brickman may be right that lawyers will not work

This solution may only remove the problem to a higher
level of abstraction: How do plaintiffs choose among differ-
ent brokerage services offering different contingency fees?
Maybe brokerage services choosing brokerage services is the
answer, and so on to infinite regress. The problem anyway
would be smaller one, and the market more efficient, to the
benefit of plaintiffs. Whether benefiting plaintiffs is in the
interest of society at large is a question for another day.