Can the legal services market become more competitive?

How Lawyers Compete

By Michael Abramowicz
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Lester 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.

HOW LAWYERS COMPETE

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

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principle, however, suggests that few people will be far removed from someone who can make a reasonable suggestion. 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 luckier or better connected than others. But this objection misses the primary means by which lawyers compete for quality: by turning down cases that seem less profitable than alternative opportunities. The higher the expected profit for whatever lawyer takes the claim, the better the lawyer that a client will be able to obtain.

Clients will have only limited means of distinguishing similar lawyers. But everyone knows the difference between the luxe interiors of the offices of the high-end plaintiffs' bar and the storefront offices of lawyers who may have barely passed the bar exam. And the best plaintiffs' lawyers seem to find ways of attracting many of the most profitable clients, even within the restrictions imposed by the bar.

The difference in quality among lawyers suggests that in the end there is price competition, at least indirectly. The price that lawyers quote is a percentage, and typically that price will work out to a greater absolute amount with higher-quality counsel than with other lawyers. Of course, with constant percentages, a client should always be happy to pay the highest price available, for the best lawyer will produce the best return. So clients seek the best lawyers they can, lawyers take the best clients they can, and the market at least approximately achieves allocative efficiency.

Just as airline deregulation proved that most customers would accept lower service if it meant lower prices, some clients might benefit from paying a lower fee even if that meant a lower-quality lawyer. Presumably, there are some claims for which lawyer quality would make only a small difference in the eventual payout, and other claims for which lawyer quality would make a substantial difference. In an efficient market for lawyer services, clients would spend less on the claims in which lawyer performance 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 we lived in a world in which price shopping were possible. Suppose it were possible 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 directly: 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 equally on all cases, but a higher contingency fee surely induces greater attorney effort, all else being equal. High contingency fees amount to an efficiency wage by which clients ensure greater attorney effort. Maybe we do not have lower contingency fees because virtually all clients want to motivate their lawyers.

The market thus may be more competitive than Brickman thinks, but a truly efficient market would not be nearly so crude. An efficient market might even have larger contingency fees, but only for recoveries over and above the amount that a plaintiff could obtain from an immediate settlement. Such a fee arrangement would provide attorneys incentives to negotiate at the margin, without providing windfalls when cases happened to fall into their laps. Even this mechanism has limitations; if investigation results in a determination that the claim will not be worth the minimum, the attorney might try to dump it without caring about the plaintiff's return. But more sophisticated measures surely could come closer to aligning the incentives of plaintiffs and their attorneys.

HOW TO CHOOSE?

How could we achieve a market that might encourage such arrangements? I am skeptical of Brickman's solutions. As I discuss in a forthcoming article in the *Yale Law Journal*, markets for legal claims are particularly likely to be beset by adverse selection, so even if it is entirely legal to sell claims, robust markets might not emerge.

Brokerage services might be a more promising antidote, but here too there are limitations. Brickman believes that allowing lawyers to pay brokerage services would improve market efficiency. Perhaps. If collusive behavior explains the uniformity of contingency fees, then provision of discounts might provide a loophole facilitating price competition. But such payments would only provide brokerage services an incentive to match clients with the cheapest lawyers, not those who would provide the best return.

Perhaps the most promising solution would be one that combines the sale of legal claims with a brokerage service. In particular, brokerage services might themselves charge contingency fees, perhaps 1 or 2 percent, based on the plaintiff's net return from a lawsuit. The brokerage service would then have an incentive to identify the lawyer with the best price-quality combination for a particular lawsuit and to accumulate information on which arrangements work best.

This solution may only remove the problem to a higher level of abstraction: How do plaintiffs choose among different 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 a 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. R