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SUNLIGHT AND SETTLEMENT MILLS

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Accident compensation, and particularly auto accident compensation, is typically thought to take one of two dichotomous forms: either no-fault or traditional tort. Further, conventional wisdom holds that while pure no-fault may be an option in theory, it is not one in practice. No pure no-fault auto regime has ever been enacted in the United States, and states these days are repealing, rather than enacting, modified no-fault legislation. Yet something peculiar is happening on the ground. Far out of the light of day, high-volume personal injury firms that I call “settlement mills” are quietly achieving many of no-fault’s objectives—speeding recoveries, lowering systemic costs, and delivering relatively standardized sums to an apparently expanded set of clients—while ostensibly operating within traditional tort. What settlement mills are accomplishing, then, is in some respects astonishing—and certainly commendable. Yet, the fact settlement mills’ distinctive operations are out of the light of day and rarely revealed to clients is problematic, raising profound issues of informed consent and highlighting severe information deficiencies in the market for legal services. A well-designed disclosure regime can preserve settlement mills’ substantial benefits, ameliorate their unique costs, and, more broadly, improve the tort system’s operation and address the vexing problem of attorney choice.

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- INTRODUCTION 807
- I. SETTLEMENT MILLS AS A DISTINCT COMPENSATION MECHANISM 814
 - A. *The Usual Dichotomy: No-Fault Versus Traditional Tort* 814
 - B. *Settlement Mills as a Blended Mechanism* 816
 - 1. *The Texas Law Firm of Joe W. Weiss* 817
 - 2. *The California Law Firm of Jim Rogers* 821
- II. COSTS AND BENEFITS 824
 - A. *Settlement Mills in Substance* 824
 - 1. *Transaction Costs* 824
 - 2. *Delay* 825
 - 3. *Court Congestion* 826
 - 4. *The Litigation Lottery* 827
 - 5. *Access to Justice* 829
 - 6. *Fabricated or Exaggerated Claims* 833
 - B. *Settlement Mills in Form: The Mill Masquerade* 835
 - 1. *Settling for Less: The Under-Compensation of the Most Seriously Hurt* 838
 - 2. *Unauthorized Practice of Law* 841
 - 3. *The Matter of Fees* 845
- III. THE NEED FOR REFORM 849
 - A. *Disparate Justice, Déjà vu* 850
 - B. *The Trouble with the Current Regulatory Architecture* 854
 - 1. *Disciplinary Controls* 854
 - 2. *Liability Controls* 856
 - 3. *Institutional Controls* 858
 - 4. *Informal Controls: The Reputational Imperative* 858
 - C. *The “Pin-the-Tail-on-the-Donkey” Problem of Attorney Choice* 859
 - 1. *Market Forces: Existing Inefficiencies and Inefficiencies* 860
 - 2. *Practitioner Referral Networks: An Illustration of a Broken Market* 862
- IV. A PROPOSAL FOR REFORM 865
 - A. *Mandatory, Public Closing Statements* 866
 - B. *Facilitating Client Use* 868
 - C. *Predictable Effects* 871
 - 1. *How Would Lawyers and Law Firms Change Their Conduct?* 874
 - 2. *How Would Settlement Mills Fare?* 878

D. *Some Pitfalls* 880

 1. *Singling Out Contingency Fee Practitioners* 880

 2. *Eroded Confidentiality of Settlements* 882

 3. *Undue Reliance on Gross Recoveries* 883

CONCLUSION 884

“Let me tell you, so much goes on in a law firm that settles cases, and it’s all out of the light of day.”¹

INTRODUCTION

In 1938, Karl Llewellyn wrote: “[S]pecialized work, mass-production, cheapened production, advertising and *selling*—finding the customer who does not know he wants it, and *making* him want it: these are the characteristics of the age. Not, yet, of the Bar.”² Over a half-century has elapsed since Llewellyn’s writing, and in these years, the Bar, or at least a segment of it, has made up for lost time. Here, I refer to firms that I have previously labeled “settlement mills.”³ These firms, on the far end of a continuum of contemporary personal injury practice, advertise aggressively and settle what are usually low-stakes personal injury claims in high volumes, typically with little attorney-client interaction and without initiating lawsuits—much less taking claims to trial. At these firms, mass-production methods are indeed employed and law is unabashedly sold—even hawked on big-city billboards and daytime TV. Settlement mills thus represent, and in some ways typify, a rapid and profound shift in the delivery of legal services in the United States. Whether the shift is for the better or the worse is less clear and is the issue this Article begins to address.

The Article proceeds in four parts. Part I begins by introducing settlement mills as providers of a relatively distinct, long overlooked, and poorly understood form of accident compensation. Accident compensation, and particularly auto accident compensation (in which settlement mills specialize and which comprises the bulk of contemporary tort litigation),⁴ is typically thought to take one of two separate and contrasting forms: no-fault or traditional tort. Debate over the

¹ Telephone Interview with E.C. (Apr. 22, 2008). For the majority of interview citations, initials are used in lieu of names in order to preserve source confidentiality; sources’ real initials are used only with permission.

² K.N. Llewellyn, *The Bar’s Troubles, and Poulitices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 115 (1938).

³ Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1486 & n.2 (2009).

⁴ Automobile accidents account for two-thirds of all personal injury claims and three-fourths of all personal injury damage payouts. JAMES M. ANDERSON ET AL., RAND, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 1 (2010).

merits and demerits of each has raged for nearly a century.⁵ Moreover, conventional wisdom holds that while pure auto no-fault continues to be discussed, its chances of enactment are bleak and getting bleaker. No pure no-fault auto regime has *ever* been enacted in the United States.⁶ And though there was a flurry of legislative activity in the 1970s as roughly two dozen states enacted “modified” or “add-on” no-fault legislation, no new state has implemented a no-fault regime since 1976; a handful of states have repealed their modified no-fault legislation; and on California’s ballot in 1988 and 1996, it was resoundingly defeated both times.⁷ In short, the no-fault movement has, it is said, “breathed its last breath,” while traditional tort has triumphed.⁸

⁵ From the early days of the automobile, various academics and policy makers have criticized the tort system and advocated plans to replace it with some type of no-fault compensation scheme. A few of these proposals include STAFF OF JOINT ECON. COMM., 108TH CONG., CHOICE IN AUTO INSURANCE: UPDATED SAVINGS ESTIMATES FOR AUTO CHOICE 11 (Comm. Print 2003), COLUMBIA UNIV. COUNCIL FOR RESEARCH IN THE SOC. SCI., REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 216–17 (1932), ROBERT E. KEETON & JEFFREY O’CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 34–69 (1965), and Weld A. Rollins, Letter to the Editor, *A Proposal To Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392, 395 (1919).

⁶ Pure no-fault regimes are in effect elsewhere, including Israel, New Zealand, Sweden, Finland, and the Canadian provinces of Quebec, Manitoba, and Saskatchewan. ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW § 1:1, at 1-22 (2d ed. 2002).

⁷ Modified no-fault (sometimes called “partial” no-fault) retains a tort possibility (and, with it, the possibility of non-economic damages) for the most seriously injured. States identify seriously injured claimants in one of two ways. Some (notably New York and Michigan) have a “verbal threshold,” meaning a claimant can seek compensation in tort if his injury meets a statutory definition—if he suffers “permanent serious disfigurement,” for example. MICH. COMP. LAWS ANN. § 500.3135 (West 2002); *cf.* N.Y. INS. LAW § 5102(d) (Consol. 2001) (providing statutory definition of “serious injury”). Other states impose “dollar” or “monetary” thresholds, meaning that a claimant can seek compensation in tort if his medical bills exceed a particular sum. ANDERSON ET AL., *supra* note 4, at 12. A second, even more partial, type of no-fault plan is an “add-on” plan, which simply provides limited no-fault benefits without restricting tort access. *Id.* at 14–15. For information about the California initiatives and no-fault’s repeal in various states, see Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 75 n.15, 83–86 (1998). Arizona voters also rejected a no-fault ballot measure in 1990, with 85% of voters opposed. *Final Election Results: Alabama through Hawaii*, USA TODAY, Nov. 8, 1990, at A6. The explanation for no-fault’s unpopularity is, of course, complicated, but prime culprits include the fact that no-fault, as implemented in the United States, is associated with significantly higher insurance premiums and arguably higher accident rates. *See, e.g., Auto Insurance Reform: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 19–84 (1999) (statement of Ralph Nader, Consumer Advocate, Ctr. for Responsive Law); ANDERSON ET AL., *supra* note 4, at xiii–xvi.

⁸ KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 100 (2008); *see also* ANDERSON ET AL., *supra* note 4, at 2–3, 59 (tracing no-fault’s “rise and fall”); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 725 (2005) (observing that no-fault has

Yet something peculiar is happening on the ground. Beyond the gaze of academics and policy makers, at least one corner of the legal services industry, while ostensibly operating within traditional tort, has quietly and improbably achieved many of no-fault's benefits, delivering to accident victims fairly certain and standardized sums at relatively low systemic cost.⁹ Drawing on extensive documentary evidence (primarily records from disciplinary and malpractice proceedings) and interviews with numerous former attorneys and non-attorney employees, I use case studies of two law firms—Joe Weiss of Texas and Jim Rogers of California—to illustrate and analyze settlement mill operations in detail.¹⁰

Part II considers some of the advantages and disadvantages of the settlement mill paradigm by evaluating mills first in substance and then in form. As noted, in substance, settlement mills have managed to shed a number of tort's most maligned attributes and achieve many of no-fault's laudable goals: They arguably expand access to compensation, reduce court congestion, and offer their clients relative speed, predictability, and certainty, all at fairly low systemic cost. On the other hand, at least one problem that plagues traditional tort—fraud—seems to be exacerbated, perhaps significantly. Settlement mills, in substance, thus get an imperfect, but passing, grade.

The form settlement mills take is far less satisfactory. Straddling traditional tort and no-fault, settlement mills represent a blended form of accident compensation, where, rather than being refined and granular, cases are processed using “[v]ery systematized”¹¹ or

become something of “a dead letter”); Rosenfield, *supra* note 7, at 86 (documenting no-fault's “demise”).

⁹ The prevalence of settlement mill representation is an important question that merits further inquiry, although there are some indications that settlement mills represent a non-trivial number of claimants throughout the United States. See Engstrom, *supra* note 3, at 1517–21 (discussing settlement mills' prevalence).

¹⁰ See *infra* notes 43 and 67 (regarding Weiss sources and Rogers sources, respectively). I have conducted thirty-two additional telephone interviews of current and former settlement mill attorneys and non-attorney employees, which inform the conclusions drawn herein. Initials are used in lieu of names in order to preserve source confidentiality; sources' real initials are used only with permission. As with any interview survey (and particularly given this non-random source sample), the descriptions below should be viewed with some skepticism since individuals' recollections may be outdated, colored by incomplete recall, or tainted by any number of additional biases. In addition, different sources sometimes painted very different portraits of law firm operations. In a few instances, I made credibility determinations (while noting the disagreement); more commonly, I simply pointed out the contested nature of the assertion. A final note is that the generalizability of the data is uncertain because it comes from a limited number of sources and firms.

¹¹ Telephone Interview with F.M. (Apr. 29, 2008).

“cookie-cutter”¹² procedures. At these firms, sources report: “There’s too many clients and you can’t really give them individual attention,”¹³ and “[m]ost of the process is very mechanical in terms of what goes out and what goes in.”¹⁴ Clients are rarely met; lawsuits are rarely filed; facts are rarely investigated; and settlement values are often calculated using formulaic going rates, which only very roughly correlate to the actual gravity of injury the claimant has sustained. Settlement mills’ “assembly-line” resolution of claims thus represents quite a departure from the intimate, individualized, and fact-intensive process thought to underlie traditional tort.¹⁵ Some settlement mill clients, however, do not seem to know that they are signing up for anything other than old-fashioned conventional counsel, raising profound issues of fairness and informed consent.

This plays out in three principal ways. First, clients with minor, routine injuries appear to be reasonably well served by settlement mills’ mechanistic processing, where some compensation is all but assured and is relatively quickly and predictably obtained.¹⁶ But some clients with serious injuries sign up for settlement mills’ services, and these clients are, for a host of reasons, almost undoubtedly short-changed. Second, settlement mills delegate extensively to non-attorney personnel, sometimes without clients’ blessing and perhaps to clients’ detriment. Third, settlement mill fees are—on a percentage basis—as high as or higher than those charged by conventional counsel, even though the service provided is decidedly low risk, no-frills, and sometimes even provided by non-lawyer personnel, suggesting the collection of unlawful rents.

In sum, settlement mills offer a service. It is, I believe, a valuable service. But it is, in many respects, a *different* service than that offered

¹² Transcript of Record at 335, *In re Sledge*, 859 So. 2d 671 (La. 2001) (No. 00-DB-135) [hereinafter *Sledge Disciplinary Transcript*] (testimony of Lawrence David Sledge at hearing before Louisiana Attorney Disciplinary Board).

¹³ Sworn Statement of S.S. 58 (Aug. 19, 1998).

¹⁴ Telephone Interview with T.H. (Apr. 15, 2008). “The whole idea is volume,” another former settlement mill lawyer explained, “not necessarily one particular case.” Telephone Interview with N.M. (June 3, 2008).

¹⁵ Compare Telephone Interview with R.J. (Apr. 8, 2008) (“I might as well have been working on an assembly line.”), with PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 263 (1987) (describing traditional tort’s individual attorney-client relationship as one of “intimate contact and consultation” where “lawyers . . . educate their clients, respond to their wishes, and litigate faithfully and vigorously”).

¹⁶ This observation echoes Jerry Van Hoy’s observation concerning franchise law firms, which resemble settlement mills in important respects. See Jerry Van Hoy, *Selling and Processing Law: Legal Work at Franchise Law Firms*, 29 *LAW & SOC’Y REV.* 703, 727 (1995) (“[C]lients whose problems fit into the production systems appear to be well served by franchise law firms.”). For a comparison of settlement mills and franchise law firms, see Engstrom *supra* note 3, at 1491 n.19.

by conventional counsel, and there is little reason to believe that settlement mill clients—particularly unsophisticated clients with high-value claims—have intentionally selected or consented to this alternative regime.

Part III addresses the need for reform. The organized Bar has traditionally relied on disciplinary, liability, and institutional mechanisms to assure adequate attorney quality. These three formal controls are, however, extraordinarily ill-equipped to counter the problems settlement mills pose. Augmenting and potentially eclipsing those formal mechanisms, the Bar has traditionally placed great faith in an informal control—namely, reputation—to restrain lawyers' selfish impulses. "The most worthy and effective advertisement possible, even for a young lawyer," Canon 27 initially advised, "is the establishment of a well-merited reputation for professional capacity and fidelity to trust."¹⁷ This informal control—what I call the "reputational imperative"—is typically quite potent because most lawyers, and particularly personal injury lawyers (due to the one-shot nature of clients' complaints), cannot survive or succeed unless they sign new clients; to sign new clients, most lawyers rely heavily on referrals from fellow practitioners; and a good reputation is usually a prerequisite to referral receipt.¹⁸ The reputational imperative, when it works, thus deters self-dealing in individual cases and, over time, ensures that the practices of lawyers with a reputation for hard work and ethical conduct flourish, while the practices of lawyers with a reputation for shirking on preparation and shortchanging clients founder.¹⁹

The problem, though, is that the Supreme Court's 1977 opinion in *Bates v. State Bar of Arizona*,²⁰ by outlawing bans on lawyer advertising as incompatible with the First Amendment, permits mass

¹⁷ CANONS OF PROF'L ETHICS Canon 27 (1908).

¹⁸ Lawyer referrals are many plaintiffs' lawyers' most important source of business. See, e.g., Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest": How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients, 21 LAW & POL'Y 377, 383 tbl.3 (1999). Attaining referrals, meanwhile, requires a reputation for excellence and success. See *id.* at 386–87 (describing lawyer referrals as requiring a reputation among one's peers for being able to finance and win substantial cases); Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 247, 271–72, 283 (2006) (highlighting how attorney referral markets promote and reward attorney quality); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 777 (1997) ("To attract cases, lawyers who rely on referrals for income need to cultivate reputations for superior performance.").

¹⁹ See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 66–67 (2004) ("A lawyer who settles cases too cheaply will have trouble maintaining the reputation necessary to create the flow of potential clients that is in the lawyer's long-term interest.").

²⁰ 433 U.S. 350 (1977).

advertisers to make an end-run around reputationally based business. As one Louisiana settlement mill partner (whose firm reportedly settled some 30,000 claims during its fifteen-year existence) has explained, “I always thought it was crazy to have a referral system where you’re relying on Aunt Nussy’s neighbor’s postman’s baker to send you a case [when instead] I get on television, I tell people to call me, and they do.”²¹ Blunting the reputational imperative, aggressive advertising creates a gaping hole in the regulatory architecture—which some settlement mills artfully exploit.

As settlement mills help to illustrate, there are many kinds of personal injury lawyers. Clients must choose among them. And the *type* of representation a client will receive—and even, studies suggest, the *size* of recovery she will obtain—hangs precariously in the balance.²² Choosing a lawyer wisely is thus extremely important. It is also, as we will see, extremely difficult. While data are available to help patients pick doctors, investors pick stocks, parents choose schools, passengers select airlines, and diners choose restaurants, even the most basic information on attorney quality remains stubbornly elusive.²³ When coupled with the advent of aggressive attorney advertising, this means that prospective personal injury clients are bombarded with lawyers’ often self-serving (and, as we will see, sometimes misleading) claims without any objective, verifiable data to sort through the chatter.²⁴

²¹ Penny Font, *Disbarred, But Not Disbranded*, BUSINESSREPORT.COM (May 18, 2009), <http://www.businessreport.com/news/2009/may/18/disbarred-not-disbranded-1g1/> (quoting E. Eric Guirard).

²² These problems are somewhat ameliorated by practitioner referral networks, discussed *infra* at Part III.C.2. But, as discussed below, the literature may overstate the networks’ reliability, and, even if they do generally channel the best cases to the most able practitioners, much value is lost along the way.

²³ Air travelers can consult on-time arrival, baggage handling, and safety records when purchasing airline tickets; parents can peruse public school report cards when buying a home; diners can review hygiene grading systems when selecting a restaurant; investors can study quarterly and annual reports when picking stocks; and patients, in some states, can review practitioner profiles when entrusting their care to a particular physician. Admittedly, this information sometimes varies in quality and utility. See, for example, David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL’Y ANALYSIS & MGMT. 155, 159 (2006) and *infra* notes 25 and 299 for information regarding transparency efforts in health care.

²⁴ See *Crowe v. Tull*, 126 P.3d 196, 209 (Colo. 2006) (en banc) (“In many cases, the unsophisticated consumer will have only an attorney’s or law firm’s own representations of the quality of services with which to decide whether or not to retain that attorney or firm.”); Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and “Disclosure Advertising”*: *Towards a New Ethos*, 72 N.C. L. REV. 351, 383 (1994) (“In selecting a lawyer, the only data concerning quality that is functionally available to most prospective client-consumers comes from the self-serving advertising of lawyer-vendors and from the general practice of lawyer licensing by the courts.”).

To ameliorate many of the problems settlement mills present and to improve attorney selection in the personal injury arena more generally, I propose in Part IV a reform measure loosely patterned on a rule adopted in parts of New York and similar to some recently enacted reforms in the health care industry.²⁵ Specifically, I propose that state supreme courts require contingency fee practitioners to file closing statements at the conclusion of each representation where personal injury or wrongful death claims are asserted. These closing statements would then be made public on the Internet, where they would be searchable by lawyer, law firm, or other selected criteria (median gross recovery attained, for example). The public availability of closing statements would help to empower individual personal injury clients by allowing them to become more sophisticated consumers of legal services. Over time, this reform measure has the potential not only to help individual clients choose lawyers more wisely, but also to improve the civil justice system more broadly by, among other things, helping to level the playing field between sophisticated and unsophisticated claimants, deterring the assertion of fraudulent and exaggerated claims, limiting deceptive attorney advertising, and helping researchers and policy makers devise and evaluate more thoughtful policy reforms. Last, but not least, closing statements have the potential to curb settlement mills' worst abuses, while preserving their core advantages.

When allowing attorney advertising more than three decades ago, the *Bates* Court cautioned, "If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."²⁶ So far, the Bar has unfortunately failed at this task. As a consequence, clients—especially low-income clients without lawyers in their social and familial networks—are left to choose personal injury lawyers more or less at random. And as Llewellyn pointed out many years ago, if a client picks a lawyer at random, "it means chancing it" because "the conditions of metropolitan legal business make it no simple thing to reach into the grab-bag and pull out a lawyer who is able."²⁷ If clients are picking lawyers based on information presented in the marketplace, as at least some are, it is incumbent on the legal profession to ensure that at least some objective, credible information about lawyer quality

²⁵ See Kristin Madison, *The Law and Policy of Health Care Quality Reporting*, 31 CAMPBELL L. REV. 215, 216–21 (2009) (discussing the recent transparency revolution in the health care industry).

²⁶ 433 U.S. 350, 375 (1977).

²⁷ Llewellyn, *supra* note 2, at 116.

exists therein. The risk of harm is obvious and the existence of settlement mills—or, more precisely, certain of their practices—shows that the harm has come to pass.

I

SETTLEMENT MILLS AS A DISTINCT COMPENSATION MECHANISM

A. *The Usual Dichotomy: No-Fault Versus Traditional Tort*

As noted above, accident compensation is typically thought to take one of two contrasting forms: no-fault or traditional tort.²⁸ The traditional tort approach (the fault approach) relies on a case-by-case determination of liability and damages and is the most familiar. Traditional tort is, at least formally, individualized—grounded in “the primacy of the individual claimant.”²⁹ This individualization has obvious advantages, but it has well-documented drawbacks too. The fault system, for starters, requires a third party actually to *be* at fault—a feature that leaves many accident victims uncompensated. Next, even

²⁸ Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1602 (2004) (“[T]he literature on automobile accidents has been largely preoccupied with the contrast between such public no-fault compensation systems and the law of tort.”).

²⁹ SCHUCK, *supra* note 15, at 263. For the classic description of the traditional tort approach, see *id.* at 262–68. The above description is admittedly stylized, and I am not the first to observe that, particularly when claims are plentiful and stakes are small, traditional tort’s formal commitment to fault and individualized justice tends to yield—and, quite critically, settlement mill practitioners are not the only practitioners for whom this is true. Others also doubt the extent to which tort law in action displays the commitment to individualism emphasized by formal doctrine. See, e.g., H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 134–35 (1970) (noting that the individual treatment of insurance claims is inefficient and unmanageable); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 526 (studying non-class collective representation); Issacharoff & Witt, *supra* note 28, at 1618–34 (amassing and analyzing historical data involving “mature torts”); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 268–69 (2007) (introducing the “convergence thesis”); see also MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 255 (1996) (“It is no secret to those even modestly familiar with the personal injury system that the ideal of individualized adjudication, with respect for and attention to the details of the claim, faithful attorney-agents reflecting the interests and desires of the clients, and arbiters listening carefully and respectfully to the claims and stories of the parties is a myth.”); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 11 (2005) (noting that “tort law in action” is often “less focused on the individual fault of individual defendants than tort law on the books,” and that “greater . . . stakes” increase the likelihood that law in action will involve “particularized assessments that formal tort doctrine requires”). See generally Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 (canvassing the empirical literature on mass torts).

if a defendant *is* at fault, amassing evidence to prove it often requires a long and tedious investigation, and some calls are close and hotly contested, meaning that compensation via traditional tort is, almost by definition, slow, costly, cumbersome, and unpredictable. In addition, traditional tort retains as a central tenet the notion that “each individual possesses an absolute right to the integrity of his or her personhood” and, when injured, ought to be made whole (returned to his or her *ex ante* position).³⁰ This is important for achieving corrective justice and maintaining adequate deterrence, but doing so requires the payment of non-economic damages (principally for “pain and suffering”), the *award* of which thrusts the fact-finder into nebulous, fact-intensive damage calculations (exacerbating tort’s unpredictability problem), and the *promise* of which tempts some claimants into dishonesty and fraud.³¹

Impatient with traditional tort’s shortcomings, scholars, theorists, and politicians have, since the early years of the last century, devised and debated plans to speed payments and inject more predictability, horizontal equity, and certainty into the delivery of automobile accident compensation in the United States.³² Sometimes explicitly patterned on workers’ compensation, these proposals have typically advocated the elimination of fault-based compensation in lieu of automatic, widespread, rapid, and *limited* relief, often provided by the first-party (the victim’s own) insurer.³³ Advantages and disadvantages of such plans are largely the reverse of those above. Abolishing fault as a prerequisite to payment reduces delay, trims transaction costs, removes these cases from the court system (thus alleviating court congestion), and dramatically expands the pool of compensated claimants. Limiting damages to economic loss, meanwhile, achieves consistency and predictability in damage payouts and, by eliminating the potential to profit from one’s misfortune, helps to prevent fraud. But, in so doing, no-fault regimes necessarily and inevitably sacrifice

³⁰ SCHUCK, *supra* note 15, at 263; *see also* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1 (2001) (“The most important manifest function of torts is to restore plaintiffs to the position they were in prior to the injury by awarding monetary damages.”).

³¹ *See generally* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006) (offering a broad critique of non-economic damages); Jeffrey O’Connell, *A Proposal To Abolish Defendants’ Payment for Pain and Suffering in Return for Payment of Claimants’ Attorneys’ Fees*, 1981 U. ILL. L. REV. 333 (same).

³² *See supra* note 5 (listing various no-fault proposals that have been developed and debated over the past century).

³³ *See, e.g.*, COLUMBIA UNIV. COUNCIL FOR RESEARCH IN THE SOC. SCI., *supra* note 5, at 217 (calling for a “plan of compensation . . . without regard to fault, analogous to that of the workmen’s compensation laws”).

the individualized treatment of claims, deprive victims of compensation for their pain and suffering, and sacrifice tort's twin aims of promoting optimal deterrence and providing corrective justice or moral redress.³⁴

B. *Settlement Mills as a Blended Mechanism*

Settlement mills can be viewed as providing a third, blended form of accident compensation, straddling no-fault and traditional tort. Before discussing the pros and cons of settlement mill practice, however, it is useful to have a clear picture of what such a practice entails.

Settlement mills, situated on the far end of a continuum of contemporary personal injury practices, are distinctive in many important respects. First, settlement mills advertise more aggressively than other personal injury lawyers, and, unlike other practitioners, the majority or vast majority of their cases come from these advertising efforts.³⁵ Second, they maintain unusually high claim volumes. While studies suggest that most personal injury attorneys have somewhere between sixty and seventy open files at any one time and serve on the order of 110 clients per year, settlement mill attorneys (or non-attorney negotiators) often triple that—juggling 200 to 300 open files on any given day and serving 300 to 400 clients annually.³⁶ Third, settlement mills

³⁴ Some question the power and validity of deterrence and corrective justice in the auto context, where compulsory liability insurance already mutes individual liability; civil and criminal penalties, as well as simple self-preservation, already provide powerful incentives for safety; and negligent conduct, typically characterized by a momentary lapse of attention, is notoriously hard to curtail. *See, e.g.*, STATE OF N.Y. INS. DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?: A REPORT TO GOVERNOR NELSON A. ROCKEFELLER 12–13 (1970) (“Individual, last-moment driver mistakes—undeterred by fear of death, injury, imprisonment, fine or loss of license—surely cannot be deterred by fear of civil liability against which one is insured.”). It is unclear whether no-fault legislation leads to higher accident or fatality rates. Some studies suggest it does. *See* ANDERSON ET AL., *supra* note 4, at 80–82 (providing summary of eight empirical studies, half of which show that no-fault increases fatality rates, and half of which show no effect).

³⁵ Engstrom, *supra* note 3, at 1492. In contrast, a recent study found that, even among those Texas lawyers with the highest volume of relatively low-dollar claims, only 13% advertised on TV. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1788–89 & n.19 (2002).

³⁶ *See* Daniels & Martin, *supra* note 35, at 1789 tbl.4 (reporting that lower-echelon attorneys in Texas had a median of forty-five cases at any one time, while higher-echelon attorneys had significantly fewer); Parikh, *supra* note 18, at 247 (reporting that Chicago plaintiffs' lawyers surveyed in 1995 served an average of 142 clients per year (citing JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005))); Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* 73 (May 10, 2001) (unpublished Ph.D. thesis, University of Illinois at Chicago) (on file with the New York University Law Review) (reporting that lower-echelon personal injury practitioners in Chicago served an average of seventy-nine clients per year).

do not function as traditional gatekeepers: They do not expend significant resources vetting cases, and they reportedly accept most would-be litigants that their ads attract. As a consequence, settlement mills' portfolios tend to consist largely of soft-tissue-injury claims (sprains, strains, contusions, and whiplash) sustained in automobile accidents—cases that, as we will see, most practitioners eschew.³⁷ Fourth, settlement mills tend not to prioritize meaningful lawyer-client interaction. In his study of Wisconsin contingent fee lawyers, for example, Herbert Kritzer found that face-to-face meetings were relatively rare, but they did bookend a typical case: Clients met with lawyers when the retainer was signed at the beginning of the representation and when the settlement check was delivered at the end.³⁸ In contrast, clients of settlement mills often meet with lawyers when the settlement check is disbursed—or not at all.³⁹ Fifth, as compared to conventional counsel, settlement mills tend to delegate more extensively to non-attorney personnel.⁴⁰ At a Louisiana firm, in fact, delegation was taken to such lengths that it was a “regular practice” for clients to have their cases settled without any attorney involvement whatsoever.⁴¹ Finally, and most importantly, settlement mills do not emphasize traditional litigation or old-fashioned lawyering but rather emphasize *settlement*. Research is rarely conducted; lawsuits are rarely filed; and trials are exceptional.⁴² To further illustrate the settlement mill paradigm, two case studies are offered below.

1. *The Texas Law Firm of Joe W. Weiss*

We first consider the law firm of Joe W. Weiss, which operated in San Antonio, Texas from the late 1970s until Weiss's disbarment in

³⁷ For a description of settlement mills' cursory case screening practices, see Engstrom, *supra* note 3, at 1498–500 and *infra* notes 137–39 and accompanying text. Most personal injury lawyers screen cases fairly rigorously. See KRITZER, *supra* note 19, at 67, 71–76 (providing acceptance rates by case volume); Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, WIS. LAW., Mar. 1997, at 10, 13 (finding that lawyers who fielded 1000 or more calls per year accepted an average of only 10% to 15% of callers as clients), and *infra* note 323 and accompanying text (describing cherry-picking by high-echelon firms). For information on many lawyers' reluctance to accept small soft-tissue cases, see *infra* note 124 and accompanying text.

³⁸ KRITZER, *supra* note 19, at 113.

³⁹ Engstrom, *supra* note 3, at 1500–01.

⁴⁰ *Id.* at 1494–95.

⁴¹ Sledge Disciplinary Transcript, *supra* note 12, at 67–68 (testimony of Wendy LeBleau).

⁴² Engstrom, *supra* note 3, at 1495–97, 1502–03. Settlement mills are also notable for their entrepreneurial, rather than professional, orientation; for charging tiered (or “graduated”) contingency fees for their services; for spurring negotiators to settle cases using mandatory quotas or by offering negotiators awards or fee-based compensation; and for resolving cases comparatively quickly. See *id.* at 1492–503.

1996.⁴³ According to a press report, Weiss was, for a time, “San Antonio’s most recognizable personal injury lawyer,”⁴⁴ and the firm he founded was a bustling place with more than a half-dozen attorneys, roughly thirty non-attorney personnel, and—true to the settlement mill paradigm—an “amazing” number of clients.⁴⁵ In his ads, Weiss dubbed himself “The Lawyer More People Call,” and, at some point, Weiss may well have been the most sought-after lawyer in all of South Texas.⁴⁶ Fueled by the firm’s dominant television and print advertising, the firm settled thousands of personal injury cases per year.⁴⁷ These cases were not large, typically involving soft-tissue injuries sustained in automobile accidents, with values ranging from \$5000 to \$20,000.⁴⁸

Consistent with the settlement mill paradigm, the firm *very* rarely filed lawsuits and, according to numerous sources, at least in the 1990s, did not conduct a single jury trial.⁴⁹ The job of a lawyer was,

⁴³ Information on the Weiss firm comes from four former Weiss attorneys and one non-attorney employee, press reports, and documents from a 1996 bar disciplinary proceeding. Weiss was disbarred at the proceeding’s conclusion for, *inter alia*, threatening a former client with criminal prosecution and knowingly making a false statement to a tribunal. *Weiss v. Comm’n for Lawyer Discipline*, 981 S.W.2d 8, 12 (Tex. App. 1998).

⁴⁴ Bruce Vincent, *Taped Threat Leads to PI Lawyer’s Disbarment*, TEX. LAW., Feb. 12, 1996, at 4.

⁴⁵ Telephone Interview with F.M. (Apr. 29, 2008); see Transcript of Record at 10, *Comm’n for Lawyer Discipline v. Weiss*, No. 94-CI-18282 (Tex. Dist. Ct. Feb. 1, 1996) [hereinafter *Weiss Disciplinary Transcript*] (testimony of Joe W. Weiss) (testifying that, in his twenty-year practice, he had represented “thousands and thousands of accident victims”); *id.* at 11, 21 (discussing case volume); *id.* at 257 (discussing personnel).

⁴⁶ Brenda Sapino Jeffreys, *Poet, Pilot, Phone Book King*, TEX. LAW., Jan. 13, 1997, at 3.

⁴⁷ For information concerning advertising, see, for example, Telephone Interview with F.M. (Apr. 29, 2008), where, when asked “[w]hat percentage of cases came from advertising,” the interviewee responded, “All of them.” For information concerning case volume, see *Weiss Disciplinary Transcript*, *supra* note 45, at 21 (Feb. 1, 1996), in which Joe W. Weiss stated, “I handle thousands and thousands of cases for people.” See also Telephone Interview with F.M. (Apr. 29, 2008) (estimating that firm settled 8000 to 10,000 cases per year).

⁴⁸ See Telephone Interview with A.M. (May 14, 2008) (stating that, initially, cases would settle for \$10,000 to \$20,000 but that, as years went by, case values declined considerably); Telephone Interview with E.C. (Apr. 22, 2008) (“[C]ases at a minimum were soft tissue and auto—almost all was auto.”); Telephone Interview with F.M. (Apr. 29, 2008) (recalling that a “tiny” proportion of cases were non-auto and that the average case ranged in value from \$5000 to \$10,000).

⁴⁹ Lawsuits were exceedingly rare. See, e.g., Telephone Interview with E.C. (Apr. 22, 2008) (“[A]ll the associates there did pre-litigation.”); Telephone Interview with F.M. (Apr. 29, 2008) (stating that no lawsuits were filed in-house); *cf.* Telephone Interview with A.M. (May 14, 2008) (“I personally initiated several [lawsuits] because I talked my boss into letting me do that.”). Trials were even rarer. See *id.* (noting that, even when lawsuits were filed, cases were settled prior to trial); Telephone Interview with E.C. (Apr. 22, 2008) (noting the absence of trials); Telephone Interview with F.M. (Apr. 29, 2008) (same); see also *Weiss Disciplinary Transcript*, *supra* note 45, at 290 (Jan. 31, 1996) (testimony of Joe W. Weiss) (Q: “[H]ave you ever even tried a jury case before?” A: “No, sir.”).

instead, to “[s]ettle cases. Set ‘em up and settle them.”⁵⁰ In fact, rather than mere settlement, *quick* settlement was the goal, and it was often achieved. Though studies suggest that claims of represented auto accident victims often take more than a year to resolve, sources report that, at Weiss, cases were often settled within a mere 90 to 180 days.⁵¹ Reflecting on the quick turnaround, one former attorney remarked: “[W]ith Joe, they got speed. I don’t think anybody has ever matched the speed with which he settled cases.”⁵² If a case could not settle at all or if the insurer refused to offer no more than a “ridiculous”⁵³ or “unfair”⁵⁴ sum, the case would be referred to outside counsel for litigation. Often, these cases involved disputed liability, extremely serious injury, or wrongful death.⁵⁵ These outside referrals, however, were apparently rare. One lawyer explained that, in his recollection, “5% or less of cases were referred out,”⁵⁶ and, in his 1996 disciplinary proceeding, Weiss himself explained that the firm was able to broker a settlement agreement 99% of the time.⁵⁷

A striking—and perhaps defining—characteristic of the Weiss firm was its entrepreneurial (rather than professional) orientation. “He was a businessman,” a former attorney recalled, “[h]e would tell you that right off the bat.”⁵⁸ Weiss’s philosophy, another explained, was “to treat this like an insurance company, and each person will

⁵⁰ Telephone Interview with E.C. (Apr. 22, 2008).

⁵¹ *Compare* INS. RESEARCH COUNCIL, AUTO INJURY INSURANCE CLAIMS: COUNTRY-WIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 67 (2008) (showing that 54% of represented claimants had to wait over one year for payment, even when eventual payments were small (\$1 to \$500), and that only 8% of represented claimants with small claims received payment within 90 days), *with* Telephone Interview with F.M. (Apr. 29, 2008) (estimating that cases would be resolved within 90 to 180 days), *and* Telephone Interview with E.C. (Apr. 22, 2008) (estimating that typical soft-tissue-injury cases would settle within three to four months after an accident). *But cf.* Telephone Interview with K.R. (May 1, 2008) (“I saw many that were nine months old, many that were more than a year.”).

⁵² Telephone Interview with F.M. (Apr. 29, 2008).

⁵³ Telephone Interview with A.M. (May 14, 2008).

⁵⁴ Telephone Interview with E.C. (Apr. 22, 2008).

⁵⁵ Telephone Interview with K.R. (May 1, 2008). It also appears that the firm did not even attempt to settle cases involving medical malpractice or product liability claims in-house. Instead, it immediately referred those cases to specialists. *See* Telephone Interview with A.M. (May 14, 2008).

⁵⁶ Telephone Interview with F.M. (Apr. 29, 2008); *see also* Telephone Interview with K.R. (May 1, 2008) (recalling that 10% or less of cases were referred out). *But cf.* Telephone Interview with A.M. (May 14, 2008) (stating that, during his years at firm, hundreds of cases were referred out for litigation).

⁵⁷ Weiss Disciplinary Transcript, *supra* note 45, at 262 (Jan. 31, 1996) (testimony of Joe W. Weiss).

⁵⁸ Telephone Interview with E.C. (Apr. 22, 2008); *see also* Weiss Disciplinary Transcript, *supra* note 45, at 19 (Feb. 1, 1996) (testimony of Joe W. Weiss) (“I do my best to conduct my business as best I can.”); Telephone Interview with F.M. (Apr. 29, 2008) (“He was an amazing business man.”).

have a large volume of claims and settle them and work through the process.”⁵⁹ He continued:

We joked because in Joe’s office, there was no law library. You know . . . the law firms I had always worked at, you would have your law library for research. In Joe’s office, you walk into your office and it was very spartan because your desk had your pen, your notepad, and your adding machine. . . . That was it.⁶⁰

Although many would find fault with the firm’s entrepreneurial focus, it apparently led to an institutional culture that valued client—or, as Weiss might say, “customer”—satisfaction. As one former lawyer put it, “[A] lot of law firms forget that they are a business, and they need to treat clients like customers. . . . And that was Joe’s strength, for better or worse.”⁶¹ Unlike some settlement mills, where lawyers and clients never personally meet, the firm worked hard to ensure clients met with their attorneys at the beginning of the representation, even if that meeting was largely pro forma.⁶² Attorneys wore beepers so they could be reached by clients (and prospective clients) even during off-hours.⁶³ And, to guard against delay, Weiss maintained detailed systems to track the pace of case resolution.⁶⁴ Finally, at the conclusion of each representation, the firm would send each client a detailed satisfaction survey, and lawyers were required to review client responses and make adjustments when necessary.⁶⁵ After having years to reflect, some of the firm’s former lawyers tempered criticism of certain firm practices with grudging respect:

[N]ot to focus on the negative with Joe because I could spend hours on that. The positive side of it is, and the justification of it is, with Joe, his cases were settled so fast and the client got their money so fast. Even though they may have gotten a little bit less, they got it a lot faster. . . . But his premise, and he was very blunt about it, is exactly that. ‘Yeah, my clients might get a little bit less. Yeah, we might not litigate these cases. But we get them the money quicker, and there’s a value to that,’ and it’s true.⁶⁶

⁵⁹ Telephone Interview with F.M. (Apr. 29, 2008).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² As one former lawyer put it, “I would come by and just shake their hand.” Telephone Interview with E.C. (Apr. 22, 2008); *see also* Telephone Interview with A.M. (May 14, 2008) (stating that meeting clients was important “for good public relations”).

⁶³ Telephone Interview with K.R. (May 1, 2008).

⁶⁴ Telephone Interview with F.M. (Apr. 29, 2008).

⁶⁵ Telephone Interview with A.M. (May 14, 2008).

⁶⁶ Telephone Interview with F.M. (Apr. 29, 2008).

2. *The California Law Firm of Jim Rogers*

A second exemplar is the law firm of Jim Rogers of Northern California.⁶⁷ In his ads, Rogers called himself the “People’s Lawyer,” and, in his prime, he was arguably the most famous (some may say most notorious) personal injury attorney in the San Francisco Bay Area.⁶⁸ Rogers owed his fame to his extensive television advertising, which generated the bulk of the firm’s business, and by the time he voluntarily surrendered his law license in 2006 with disciplinary charges pending, he had been a “ubiquitous” figure on late-night TV for just over two decades.⁶⁹

In its heyday, the Rogers firm, like that of Weiss, was a busy place, with approximately 1500 open cases at any one time.⁷⁰ These cases mostly involved soft-tissue injuries sustained in auto accidents with settlement values ranging from \$1000 to \$9000, and they were processed by a staff of approximately three lawyers and five paralegals.⁷¹ Typical of settlement mills, which tend to delegate significant tasks to non-attorney personnel, these paralegals performed much of the office’s work, including initial case screening and, in many cases, the actual negotiation of claims.⁷²

⁶⁷ The portrait below is drawn from telephone interviews with Jim Rogers (J.R.) and seven of his former attorneys and non-attorney employees, as well as a review of various public records, including press reports, disciplinary files, and documents from a 2002 malpractice proceeding. I refer to Sherman Rothman (S.R.) as an attorney though he was never licensed in California. However, before working for Rogers as a paralegal, he had been a personal injury lawyer in New York for some three decades.

⁶⁸ Will Harper, *Time’s Up, Bub*, EAST BAY EXPRESS (Apr. 21, 2004), <http://www.eastbayexpress.com/eastbay/times-up-bub/Content?oid=1073562>.

⁶⁹ Will Harper, *Settling for Less*, EAST BAY EXPRESS (Jan. 8, 2003), <http://www.eastbayexpress.com/eastbay/settling-for-less/Content?oid=1069091>. The majority of clients came to the firm as a result of advertising. Telephone Interview with J.R. (July 28, 2008) (suggesting that 70% to 80% of his clients sought the firm because of advertising). Deposition of James M. Rogers at 16–17, *Wilson v. Law Offices of James M. Rogers*, No. 823761-7 (Cal. App. Dep’t Super. Ct. Aug. 23, 2000) [hereinafter Rogers Deposition] (testifying that he started advertising on television in 1986). For Jim Rogers’s bar resignation information, see *Attorney Search: James Martin Rogers-#95990*, ST. BAR CAL., http://members.calbar.ca.gov/search/member_detail.aspx?x=95990 (last visited Aug. 11, 2011).

⁷⁰ Todd Woody, *Small Claims, Big Problems*, RECORDER, Jan. 21, 1997, at 1, available at 1997 WLNR 7086099 (quoting Rogers as saying, “I have 1,500 clients at any given time”); see also Stipulation re Facts, Conclusions of Law and Disposition and Order Approving at 8, *Rogers*, No. 94-0-11226 (Cal. Bar Ct. Aug. 1, 1997) (approved for private reproval) (“He is a busy practitioner who handles a large volume personal injury practice with thousands of clients.”).

⁷¹ For information on case size and type, see Telephone Interview with J.R. (July 28, 2008), in which Rogers recalled that 60% to 70% of cases involved soft-tissue injuries sustained in auto accidents and that cases were typically settled for \$9000 or less. For information on staffing, see Telephone Interview with S.R. (Mar. 27, 2008).

⁷² Telephone Interview with N.M. (June 3, 2008); Telephone Interview with S.R. (Mar. 27, 2008); see also Willy Morris, *A ‘People’s Lawyer’ on the Defense*, CONTRA COSTA

By most accounts, the Rogers firm was a place where any connection to the formal law was highly tenuous—a fact vividly illustrated by the firm’s method of case valuation. Rather than relying on past trial experience or published jury verdict reports, both of which were in short supply,⁷³ negotiators reportedly calculated “demands” (the sum demanded of the defendant’s insurer on the client’s behalf) by simply multiplying the client’s out-of-pocket expenses by a seemingly arbitrary coefficient, often five.⁷⁴ Then, when actually settling claims, Rogers would set “targets” for his non-lawyer negotiators, while attorney negotiators devised their own systems.⁷⁵ One attorney explained his approach: “Multiply your specials [medical bills] and add in your verifiable lost wages. If you got two times your specials plus your lost wages, you were doing pretty darn good. If you got three times, you were hitting a home run.”⁷⁶ All of this did not take long. Claims were often settled within two to twelve months of the accident and, according to two sources, after less than a day of attorney *or* paralegal time.⁷⁷

TIMES, Feb. 3, 1997, at A3, available at 1997 WLNR 2056546 (reporting that “most of the day-to-day work is handled by paralegals with periodic review by Rogers and the other attorneys”).

⁷³ It does not appear that the office even subscribed to relevant jury verdict reports. See, e.g., Telephone Interview with J.J. (Apr. 24, 2008) (explaining that cases were evaluated based on past experience rather than jury verdict reports). As for trial experience, sources indicate that, with one exception, firm attorneys had little or no trial experience, as many were hired fresh out of law school. Telephone Interview with S.R. (Mar. 27, 2008) (recalling that, with one exception, firm attorneys were inexperienced); see Telephone Interview with T.R. (Apr. 16, 2008) (“I can say this with confidence: None of the people that worked there had a lot of significant trial experience.”).

⁷⁴ Telephone Interview with J.J. (Apr. 24, 2008) (“There was pretty much a formula . . . Demand five times the specials. Expect three times the specials.”); Telephone Interview with N.M. (June 3, 2008) (recalling similar formula); cf. Telephone Interview with J.R. (July 28, 2008) (stating that formula of five-times specials was sometimes, but not always, utilized).

⁷⁵ Telephone Interview with N.M. (June 3, 2008).

⁷⁶ Telephone Interview with L.J. (Apr. 17, 2008). Settlement mills, of course, are not the only firms where lawyers rely on “going rates” or multiply economic loss by an arbitrary coefficient to estimate general damages. However, settlement mills—largely because of their high volumes, limited attorney-client contact, frequent delegation to non-attorney personnel, and cursory case development—appear to lean more heavily on formulas than most other firms. Compare DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO’S IN CHARGE 36 (1974) (referring to “going values” for tort liability claims), and Daniels & Martin, *supra* note 35, at 1796, 1804 (describing “going rates” for claims), with Engstrom, *supra* note 3, at 1532–35 (describing settlement mills’ very heavy reliance on going rates).

⁷⁷ See Telephone Interview with J.J. (Apr. 24, 2008) (noting that cases took four to five hours to resolve); Telephone Interview with T.H. (Apr. 15, 2008) (describing that cases would typically settle after five hours of employee effort, from retention to release). As for case duration, interview sources were asked, “For the typical soft tissue injury case, how long between the accident and settlement?” Answers varied. See Telephone Interview with J.J. (Apr. 24, 2008) (estimating six months); Telephone Interview with N.M. (June 3, 2008)

The firm's tenuous link to the formal law is further illustrated by how little traditional "lawyering" was done and the infrequency or absence of trials.⁷⁸ As for the former, one lawyer recalled that "no one did any research,"⁷⁹ while another bemoaned the fact that, while there, he "wasn't practicing law."⁸⁰ As for the latter, though the firm did help some clients represent *themselves* in small claims court, the firm only very rarely went to trial in the traditional sense.⁸¹ "All I know is at any cost—any cost—they did not go to trial,"⁸² an attorney explained, while a paralegal concurred that "[t]hey weren't interested in going to court."⁸³ Indeed, in 2000, Rogers testified in a deposition that despite the flood of cases flowing through the office, no one at the firm had tried a case in the previous five to seven years and, in a recent interview with me, acknowledged that the firm did not conduct any jury trials in the six years that followed.⁸⁴

(estimating "a few" months); Telephone Interview with S.R. (Mar. 27, 2008) (estimating six or seven months); Telephone Interview with T.R. (Apr. 16, 2008) (estimating two to four months); *cf.* Telephone Interview with J.R. (July 28, 2008) (estimating that most cases were resolved within nine to twelve months of accidents). There was also no consensus as to what proportion of prospective clients who called the office seeking legal representation were ultimately accepted as clients. *Compare* Telephone Interview with J.J. (Apr. 24, 2008) (stating that "at least 75%" of callers were accepted), *with* Telephone Interview with J.R. (July 28, 2008) (suggesting that office accepted only between 10% and 50% of prospective clients).

⁷⁸ Lawsuits, it turns out, were not that infrequently filed. However, after a bench trial, a trial court concluded that, at least sometimes, the Rogers firm "[c]ommenc[ed] lawsuits to increase attorneys' fees to 40% after reaching settlements," meaning that the filing of suit did not necessarily reflect an intent to litigate. *Wilson v. Law Offices of James M. Rogers*, No. 823761-7 at 4 (Cal. Super. Ct. July 17, 2002), *withdrawn*, (Oct. 15, 2002); *see also* Telephone Interview with S.R. (Mar. 27, 2008) (recalling being asked to postpone settlement until the summons was served).

⁷⁹ Telephone Interview with S.R. (Mar. 27, 2008).

⁸⁰ Telephone Interview with T.R. (Apr. 16, 2008).

⁸¹ In small claims court in California, a lawyer cannot appear on a client's behalf and recovery is capped at \$7500. *Self-Help Center: Small Claims Basics*, JUDICIAL COUNCIL OF CAL., <http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm#whocansue> (last visited Aug. 11, 2011). Nevertheless, for a time, approximately 20% of Rogers's clients were channeled to that venue. Telephone Interview with J.R. (July 28, 2008).

⁸² Telephone Interview with S.R. (Mar. 27, 2008); *see also* Telephone Interview with L.J. (Apr. 17, 2008) (Q: "Did the Rogers firm conduct any trials during your tenure?" A: "No, and that was amazing. I don't know if they ever conducted a trial.").

⁸³ Telephone Interview with N.M. (June 3, 2008).

⁸⁴ *See* Rogers Deposition, *supra* note 69, at 11 (Q: "When is the last time there has been a trial in your office?" A: "I am not sure exactly. Probably five or six, seven years ago."); Telephone Interview with J.R. (July 28, 2008). *But see* Telephone Interview with B.G. (Apr. 16, 2008) (recalling that the firm conducted four or five trials); Telephone Interview with J.J. (Apr. 24, 2008) (stating that between five and ten cases were taken to trial each year). Referrals were also infrequent. *See infra* notes 276–77 and accompanying text. This, of course, begs the question of what happened to the firm's "big" claims. There are some suggestions that even sizable claims were simply settled. *See Wilson v. Law Offices of James M. Rogers*, No. 823761-7 at 8 (Cal. Super. Ct. July 17, 2002), *withdrawn*, (Oct. 15,

II COSTS AND BENEFITS

Settlement mills are relatively distinct providers of legal services and, not surprisingly, they bring with them certain distinct costs and benefits. Below, I evaluate some of the advantages and disadvantages of settlement mill practice, considering mills first in substance and then in form.

A. *Settlement Mills in Substance*

No-fault proponents deride the traditional tort system for, *inter alia*, (1) maintaining high transaction costs, (2) delaying compensation, (3) clogging courts, (4) delivering unpredictable lottery-like awards, (5) denying compensation to many needy claimants, and (6) providing compensation to those with fraudulent and exaggerated claims. Indeed, these are six of the problems that no-fault legislation was specifically designed to combat.⁸⁵ As we see below, though officially operating in the realm of traditional tort, settlement mills mitigate all but the last of these concerns.

1. *Transaction Costs*

The first goal of no-fault is to reduce costs, as no-fault proponents criticize the tort system for being “inordinately expensive to administer,”⁸⁶ with transaction costs consuming roughly half of every dollar.⁸⁷ Settlement mills are notable, then, for delivering compensation more cheaply. This savings is largely traceable to the fact that settlement mills file lawsuits far less frequently than most other, even high-volume, personal injury practitioners.⁸⁸ No lawsuit, of course, means that defense counsel need not be retained and also that court

2002) (discussing case settled by the Rogers firm where reasonable jury verdict would have resulted in an additional \$300,200 in damages for the plaintiff); Telephone Interview with S.R. (Mar. 27, 2008) (recalling the settlement of sizable claims).

⁸⁵ See *supra* note 5 (listing various no-fault plans).

⁸⁶ ELI P. BERNZWEIG, *BY ACCIDENT NOT DESIGN: THE CASE FOR COMPREHENSIVE INJURY REPARATIONS* 85 (1980).

⁸⁷ See DEBORAH R. HENSLER ET AL., *RAND, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 29 tbl.4.1 (1987) (reporting that, in auto cases, defendant and plaintiff legal fees consumed forty-five cents of every dollar expended); JAMES S. KAKALIK & NICHOLAS M. PACE, *RAND, COSTS AND COMPENSATION PAID IN TORT LITIGATION* 70 (1986) (reporting that, in auto cases, plaintiffs’ net compensation as a percentage of total expenditure was 52%); STATE OF N.Y. INS. DEP’T, *supra* note 34, at 34–35 (finding that transaction costs consumed fifty-six cents of every premium dollar). In contrast, according to one study, a true no-fault regime would consume only about seven cents of every dollar. STEPHEN J. CARROLL ET AL., *RAND, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS* xvi, 19 (1991).

⁸⁸ Engstrom, *supra* note 3, at 1502–03.

costs, deposition costs, and expert witness fees need not accrue. RAND researchers estimate that such costs often consume about 3% of the plaintiff's ultimate recovery,⁸⁹ and, when auto accident victims *do* file lawsuits, defense attorneys' fees and costs average roughly \$9900.⁹⁰ This means that, by rarely filing suit, settlement mills generate significant savings.

2. Delay

The second goal of no-fault is to speed compensation, as the tort system is typically bedeviled by long delays.⁹¹ Although waits vary by case type and by jurisdiction, tort cases typically take over two years to litigate to a judgment or verdict, and studies suggest that delays are often substantial, even in seemingly straightforward auto cases and even in the absence of trial.⁹²

Settlement mills, then, are next notable for delivering compensation more quickly—usually within two to eight months.⁹³ Part of this rapid resolution, perhaps a large part, flows naturally from the fact that settlement mill claimants' injuries tend to be modest, and modest claims tend to be more rapidly resolved. Big claims involving big sums and serious injuries, in contrast, require more thorough and time-consuming investigations by insurers prior to payment and tend to involve longer uncertainty as to the scope of impairment, which slows resolution.⁹⁴ Still, even accounting for claim size, it appears that

⁸⁹ KAKALIK & PACE, *supra* note 87, at 39.

⁹⁰ In 1985, RAND researchers estimated that defendants paid an average of \$4900 to defend each auto tort lawsuit. *Id.* at 51. Adjusted for inflation, that \$4900 is roughly \$9930. Inflation was calculated pursuant to CPI INFLATION CALCULATOR, <http://data.bls.gov/cgi-bin/cpicalc.pl?> (last visited Aug. 11, 2011).

⁹¹ See Philip A. Hart, *National No-Fault Auto Insurance: The People Need It Now*, 21 CATH. U. L. REV. 259, 297 (1972) (deriding the tort system for its "sickeningly slow procedures for delivering funds"). No-fault plans speed compensation by eliminating fights over fault and by replacing lump sum with periodic payments, which permit compensation to commence even before the extent of impairment is established.

⁹² Compare THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES: 2001, at 8 (2004) (estimating that cases take roughly 25.6 months to reach judgment or verdict), *with infra* note 93 and accompanying text (noting that, according to most reports, settlement mills typically resolve claims within two to eight months).

⁹³ Engstrom, *supra* note 3, at 1502.

⁹⁴ ROSS, *supra* note 29, at 224–25, 247; *see infra* note 106 (noting that part of the increase in compensation speed may also be attributable to the fact that settlement mill negotiators and insurance claims adjusters interact with one another frequently). *See generally* Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002) (finding that frequent interaction is correlated with faster claim resolution). Also relevant is the fact that, because settlement mills rarely file lawsuits, defense counsel is not typically retained. When defense lawyers, often paid by the hour, *are* retained, they have a "natural incentive . . . to extend

settlement mills resolve claims with relative speed—and this is no small feat.⁹⁵ Almost half a century ago, one leading observer of the tort system wrote, “The speeding up of settlements . . . would do more to relieve the distress of injury victims than any other conceivable change in tort law administration.”⁹⁶ By delivering relatively prompt compensation, settlement mills undoubtedly spare clients, many of whom lack adequate first-party protection and maintain only thin financial cushions, significant financial and emotional distress.

3. Court Congestion

Third, no-fault proponents point to the fact that “automobile litigation is the major cause of court congestion” and seek to remove such cases from the formal legal system in order to free courts “from their bondage to the automobile.”⁹⁷ Settlement mills, by rarely filing lawsuits, accomplish much the same. And, of course, to the extent that settlement mills siphon disputes from the court system, society also saves (at least financially).⁹⁸ The average public expenditure per case filed is roughly \$1000, and the average public expenditure per trial probably reaches five figures.⁹⁹

cases in order to produce more revenue.” ABRAHAM, *supra* note 8, at 89; cf. ROSS, *supra* note 29, at 19, 60, 235 (explaining that insurance adjusters are under intense pressure to close claims quickly).

⁹⁵ Compare Engstrom, *supra* note 3, at 1502 (noting that settlement mills typically settle claims within two to eight months of accidents), with ROSS, *supra* note 29, at 226 (reporting that, even of those with “[t]otally subjective” injuries, an average of 378 days elapsed prior to payment).

⁹⁶ Alfred F. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 315 (1964).

⁹⁷ STATE OF N.Y. INS. DEP’T, *supra* note 34, at 22, 123; accord KEETON & O’CONNELL, *supra* note 5, at 13 (asserting that “traffic victims’ attempts to gain compensation” have had a “crushing” effect on courts).

⁹⁸ Two caveats are warranted. The first is that a portion of any savings will be offset to the extent settlement mills inspire more claimants to seek compensation. The second is that channeling dispute resolution from the public realm to the private sphere, while generating financial savings, also entails the loss of various public benefits, although one may debate the extent to which these benefits attend the small, routine claims settlement mills typically resolve. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–28 (1995) (suggesting that civil adjudication is a public good because it produces precedents and legal rules, helps to develop attorneys’ advocacy skills, and expresses and elaborates public values).

⁹⁹ For the average expenditure per case, see Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 149 tbl.4 (2010), which estimates that each case filed consumes roughly \$1049 in public funds. In 1985, Chief Justice Burger stated that the average jury trial costs taxpayers \$8300. Warren E. Burger, *Opening Remarks*, 62 A.L.I. PROC. 32, 36 (1985). Adjusted to today’s dollars, this equals roughly \$16,300. Inflation was calculated pursuant to CPI INFLATION CALCULATOR, *supra* note 90. For the average cost of case disposition, including jury trial, in various jurisdictions, see J.S. KAKALIK & R.L.

4. *The Litigation Lottery*

Fourth, no-fault proponents deride the tort system as a “litigation lottery”: a haphazard and unpredictable “game of chance,” where “[o]ne seriously injured party may recover nothing at all . . . while another similarly injured receives an award far in excess of his actual loss.”¹⁰⁰ And though the indictment is often overblown,¹⁰¹ it is true that the tort system is known to compensate claimants with similar injuries quite differently. Sometimes differences are based on illegitimate criteria—the claimant’s race or physical attractiveness has been known to affect her recovery, for example¹⁰²—and sometimes they are based on criteria (like fault itself) that is wholly legitimate from a legal perspective but that might nevertheless smack a casual observer as arbitrary. For various reasons, this unpredictability is problematic. It is troubling from a theoretical perspective, as it is contrary to horizontal equity—the elemental notion of justice that like victims should be treated in a like fashion.¹⁰³ It creates legal and practical difficulties for defendants, as it is difficult to invest in the “right” level of precaution or obtain adequate insurance *ex ante* without some estimate of the liability in store *ex post*.¹⁰⁴ And the practical consequences for the seriously injured plaintiff who receives nothing after mounting a protracted court challenge may be nothing short of dire.

Against this backdrop, settlement mills provide relative certainty—less than no-fault, to be sure, but far more than traditional tort. Partly traceable to small claim size (which, at least in the short run, makes it cheaper for the insurer to pay something as opposed to

ROSS, RAND, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES 69 tbl.4.30 (1983).

¹⁰⁰ JEFFREY O’CONNELL & C. BRIAN KELLY, *THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE* xi (1987).

¹⁰¹ See, e.g., Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1213 (1992) (“The allegation that the tort system is an erratic lottery is exaggerated.”). See generally Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783 (2007) (reviewing sizable body of empirical scholarship to show that, in the medical malpractice context, settlement outcomes are driven by case strength).

¹⁰² U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF DISABILITY, AGING AND LONG-TERM CARE POLICY, *ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE* 15 (2003) (reporting that, on average, attractive patients recover more than others in medical malpractice lawsuits).

¹⁰³ Rabin, *supra* note 8, at 722 (discussing horizontal equity).

¹⁰⁴ See ERIC HELLAND & ALEXANDER TABARROK, *JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL* 20 (2006) (“Deterrence doesn’t work well if . . . defendants cannot predict who will be punished.”).

contesting liability),¹⁰⁵ and partly traceable to repeat-play dynamics (since settlement mills' high case volumes ensure frequent adjuster-negotiator interaction),¹⁰⁶ even cases with serious liability issues are often amicably resolved. Insurers will offer *something* (as opposed to an outright denial) for nearly every claim.¹⁰⁷ As a non-lawyer negotiator from a Louisiana firm explained, "If it was a real legal dispute, sometimes, you know, [the insurance adjuster] would mention that fact or say, 'Well, look, just to make this thing go away, I'm still willing to give you \$5,000, \$6,000.'"¹⁰⁸ A negotiator from the Rogers firm meanwhile recalled:

I remember getting a file from one of the paralegals, the statute [of limitations] had run like two days over. I knew the adjuster very, very well. Had dealt with him on several other cases. I asked him to do me—it wasn't my case—to do me a big favor, let's settle this as three days earlier before the statute ran, and he did.¹⁰⁹

It is not just that settlement mills are apt to provide *something* as opposed to nothing. As the Rogers firm's reference to multipliers helps to illustrate, settlement *values* are also relatively predictable. Settlement mills tend to settle cases for formulaic "going rates"—i.e., values worked out over time between the settlement mill and insurance adjuster, often calculated based on the medical bills the claimant has accumulated.¹¹⁰ Guided by going rates, according to one settlement mill negotiator, "you know going in and [the adjusters] know going in about the value of this case."¹¹¹ "[S]omebody who gets a whiplash," another explained, "they're all the same, almost the same. I mean, if somebody has a two-month whiplash or a three-month

¹⁰⁵ U.S. DEP'T OF TRANSP., *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* 37 (1971) ("[I]nsurance companies are usually willing, particularly with small claims . . . to settle a questionable claim, or in insurance parlance, to 'buy' the claim.").

¹⁰⁶ Settlement mill negotiators very frequently negotiate with the same pool of insurance adjusters. Engstrom, *supra* note 3, at 1529 n.286.

¹⁰⁷ Though some cases are dropped prior to negotiation, very few cases that proceed to negotiation result in no offer from the insurance company. See Engstrom, *supra* note 3, at 1517 n.207 (collecting sources); Telephone Interview with F.M. (Apr. 29, 2008) (recalling "[v]ery tiny" number of no-offer cases while at the Weiss firm); Telephone Interview with T.R. (Apr. 16, 2008) (recalling only one or two no-offer cases while working at the Rogers firm). *But see* Telephone Interview with H.L. (Apr. 7, 2008) (disputing the notion that insurance adjusters will tender offers when liability is questionable, although agreeing that "very, very few cases" resulted in no offer).

¹⁰⁸ Sledge Disciplinary Transcript, *supra* note 12, at 128 (testimony of Lillian Higginbotham Lalumandier).

¹⁰⁹ Telephone Interview with S.R. (Mar. 27, 2008).

¹¹⁰ Engstrom, *supra* note 3, at 1532–42 (discussing going rates); *see also supra* note 76 (same).

¹¹¹ Sledge Disciplinary Transcript, *supra* note 12, at 128 (testimony of Lillian Higginbotham Lalumandier).

whiplash and they get well, it has a certain value.”¹¹² The combined effect of settlement mills’ ability to (1) virtually assure *some* payment and also (2) roughly *predict* the amount of that payment means that, much like no-fault, settlement mills are able to smooth the peaks and valleys of recovery, increasing the likelihood that, at least intra-firm, similar claims will be treated similarly. The litigation lottery concern that so troubles no-fault proponents, in short, is largely solved.

5. *Access to Justice*

Fifth, no-fault proponents criticize the tort system for leaving so many accident victims uncompensated and seek to expand the pool of compensated claimants.¹¹³ In their own unique way, settlement mills might fulfill this objective as well.¹¹⁴

The first way settlement mills might expand the delivery of compensation is by funding advertising campaigns that encourage more individuals to file claims and retain counsel following an accidental injury. These ads, meanwhile, might be hitting their mark. Just as personal injury attorney advertising has exploded and just as settlement mill representation has become more prevalent, auto accident victims *have* become more likely to file third-party claims and to seek the assistance of counsel.¹¹⁵ Or, as the Insurance Research Council put it,

¹¹² *Id.* at 423 (testimony of Lawrence David Sledge).

¹¹³ Mark M. Hager, *No-Fault Drives Again: A Contemporary Primer*, 52 U. MIAMI L. REV. 793, 807 (1998) (“[A] basic purpose of no-fault is to widen the delivery of compensation”); Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 622 (2000) (“No-fault rests on the premise that all auto accident victims should be compensated for their economic losses.”).

¹¹⁴ In so doing, settlement mills also arguably fulfill their responsibilities under Model Code EC 2-1 to “assist in making legal services fully available” and EC 2-2 to “assist laypersons to recognize legal problems.” MODEL CODE OF PROF’L RESPONSIBILITY EC 2-1, 2-2 (1980). Granted, whether increased claiming—or increased claiming with the assistance of counsel—is itself desirable or undesirable is a matter of debate, and though no-fault proponents would like all accident victims to achieve *some* compensation, they might view more victims seeking compensation through tort as cause for consternation, not celebration.

¹¹⁵ For information on the explosion of personal injury attorney advertising, see Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315, 321 tbl.1 (1998) and Maria Aspan, *Getting Law Firms To Like Commercials*, N.Y. TIMES, June 19, 2007, at C5. For information on settlement mill prevalence, see Engstrom, *supra* note 3, at 1517–21. Studies show an increase in claiming during the 1980s. See STEPHEN J. CARROLL ET AL., RAND, THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 2 (1995) (comparing data from 1980 and 1991 and finding “[d]rivers who have accidents are more prone to submit claims”); INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN AUTO INJURY CLAIMS: PUSHING THE LIMITS OF THE AUTO INSURANCE SYSTEM 25 (1996) [hereinafter INS. RESEARCH COUNCIL, FRAUD AND BUILDUP] (noting “steady increase[.]” in bodily injury liability claim frequency from 1980 to 1993). Likewise, studies show an increase in attorney retention. See INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO

after comparing claim data from 1980 (when attorney television advertising had yet to take off) to 1993 (when it was an almost \$126 million industry): “[A] major shift has occurred in the way that accident victims have learned to interpret their situations and respond to economic incentives”¹¹⁶ This evidence is hardly conclusive, and other changes in the legal services industry—including the profession’s explosive growth—have also probably played a part.¹¹⁷ But existing data are consistent with the view that attorney advertising, in some part funded by settlement mills, is increasing the American public’s propensity to retain lawyers and file claims.¹¹⁸ And because claimants who take such steps are substantially more likely to recover as compared to those who do not, settlement mills are arguably expanding the pool of compensated claimants.¹¹⁹

Before one dismisses increased claiming as wasteful or counterproductive, it must be emphasized that claiming has an often-overlooked distributive dimension. Some studies suggest that low-income individuals have been traditionally less likely to seek redress

INSURANCE CLAIMS 7 fig.1-5 (1999) (showing significant increase in attorney retention between 1977 and 1997); INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 36 fig.5-1 (2004) [hereinafter INS. RESEARCH COUNCIL, AUTO INJURIES] (noting dramatic increase in percentage of respondents who report hiring an attorney, from 19% in 1977 to 43% in 2002); cf. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., REPORT ON THE SURVEY OF LEGAL CLINICS AND ADVERTISING LAW FIRMS 21 (1990) (concluding, on basis of very limited data, “that advertising law firms, as a whole, are not causing increased lawyer use in the general population”).

¹¹⁶ INS. RESEARCH COUNCIL, FRAUD AND BUILDUP, *supra* note 115, at 25; *see also* Cebula, *supra* note 115, at 321 tbl.1 (reporting that, by 1993, television attorney advertising was an almost \$126 million industry).

¹¹⁷ *See* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 80–81 (2010) (highlighting the near-quadrupling in the size of legal profession from 1970 to 2009).

¹¹⁸ *See* JOHN D. STUCKEMEYER, WASH. LEGAL FOUND., “EXTRAORDINARY HOW POTENT CHEAP MUSIC IS”: THE CASE FOR REFORMING LAWYER ADVERTISING 2–7 (1993) (attributing increase in auto accident claiming to increase in attorney advertising); Joost, *supra* note 6, § 10:11 (attributing increase in attorney retention to increase in attorney advertising).

¹¹⁹ Though it is hard to tell whether the relationship is causal, or merely correlative, it appears that represented claimants are far more likely to get *something* as opposed to an outright denial. *See, e.g.*, Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 13 (1961) (“In those cases in which the claimant is represented by an attorney the frequency of recovery is 90 per cent, while in those cases in which the claimant acts for himself the rate of recovery is only 65 per cent.”); Clarence Morris & James C.N. Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 924 (1962) (“[R]etention of a lawyer greatly increases the prospect . . . of an award”); Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* 6–7 (Am. Bar Found., Working Paper No. 9210, 1993) (suggesting that represented medical malpractice claimants were far more likely to secure payment, as compared to those who were unrepresented).

following accidental injury, as compared to their wealthier counterparts.¹²⁰ This failure to initiate claims, meanwhile, seems attributable not to a lack of financial need but rather to a lack of information concerning rights and potential remedies and also a lack of knowledge about and contact with lawyers. These are two obstacles that settlement mills and their advertisements, some of which are specifically targeted to appeal to “[p]eople who might not otherwise be aware of their legal options,”¹²¹ should logically help low-income individuals overcome.¹²²

Settlement mills might expand access to legal services along a second dimension as well, by giving the minimally injured—a group Steven Croley has dubbed “an important set of underrepresented civil litigants”—access to counsel that they might otherwise lack.¹²³ Rele-

¹²⁰ For example, a 1957 study of auto accident claimants in New York found that following a minor car accident, “over one fourth (27 percent) of those with low [socio-economic status (SES) took] no action at all, but practically no one (2 percent) with high SES fail[ed] to take action.” ROGER BRYANT HUNTING & GLORIA S. NEUWIRTH, *WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS* 98 (1962); accord ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* 257 (1964) (“[S]eriously injured individuals who did not file a suit tend to have lower incomes and are more likely to be in nonprofessional occupations.”); 1 U.S. DEP’T OF TRANSP., *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 3 (1970) (“The ratio of reparations to loss was 0.38 for low income families and 0.61 for high income families.”); Helen R. Burstin et al., *Do the Poor Sue More? A Case-Control Study of Malpractice Claims and Socioeconomic Status*, 270 JAMA 1697, 1699 (1993) (finding that poor and uninsured patients were significantly less likely to file malpractice claims, after controlling for injury severity). *But cf.* ABA, CONSORTIUM ON LEGAL SERVS. AND THE PUBLIC, *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS* 20 fig.6 (1994) (finding no meaningful difference in claiming rates of low- and moderate-income individuals); Frederick C. Dunbar & Faten Sabry, *The Propensity To Sue: Why Do People Seek Legal Actions?*, BUS. ECON., Apr. 2007, at 31 (analyzing RAND data from 1988–1989 and concluding that income “tend[s] not to have a robust effect on propensity to claim or sue”).

¹²¹ Telephone Interview with T.T. (Aug. 14, 2008).

¹²² See HUNTING & NEUWIRTH, *supra* note 120, at 99 (speculating that low-SES individuals often fail to claim because of, inter alia, their “lack of understanding of what their rights may be” and their “lack of contact with lawyers”).

¹²³ Steven Croley observed: “[T]ort plaintiffs in low-damage cases constitute an important set of underrepresented civil litigants: given the costs of litigation, and the attendant difficulties of finding legal representation for cases involving modest damages, tort plaintiffs with strong liability claims but not exorbitant damages have little access to justice.” Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 LOY. L.A. L. REV. 1585, 1587 (2008); see also PETER A. BELL & JEFFREY O’CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* 10 (1997) (describing difficulty some claimants face finding counsel if they have “significant but not crushing injuries”); BERNZWEIG, *supra* note 86, at 83 (“[I]njured claimants whose out-of-pocket losses are relatively small . . . are often denied legal assistance”); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 966 (2004) (discussing “a huge number of claims [priced] out of the litigation market”).

vant here is a survey of Texas plaintiffs' lawyers conducted by Stephen Daniels and Joanne Martin. They found that the majority (59.2%) would not accept a hypothetical case involving "a simple car wreck," clear liability, adequate insurance, and "soft tissue injuries worth \$3000."¹²⁴ Are settlement mills, in regularly accepting such low-dollar claims, increasing the availability of representation? It is difficult to say for sure, but the same 1995 Insurance Research Council study quoted above also found that "Americans are increasingly willing *and able* to pursue claims for minor injuries."¹²⁵ And settlement mill lawyers themselves certainly report fulfilling this role. According to one settlement mill partner, "[W]e frequently have clients come in who have been turned down by other attorneys because their case is too small; they can't find an attorney easily to take their case."¹²⁶ Likewise, a former Rogers firm attorney, echoing a sentiment shared by a number of his colleagues, explained, "I think the law firm—firms like Jim's—do certainly [perform] a service for a certain portion of society where a number of other firms would not be interested in taking their cases, either because they may be less than desirable clients and/or their cases are not big enough."¹²⁷

Additional empirical evidence is needed to (1) determine whether the above relationships are causal, rather than merely correlative; (2) pinpoint settlement mills' precise contributions to these dynamics; and also (3) gauge to what extent increased claiming involves compensation-seeking for legitimate, rather than fabricated or exaggerated, injuries.¹²⁸ But fragmentary data suggest that, just as

¹²⁴ Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1256 & tbl.8 (2004); accord ABA COMM'N ON NONLAWYER PRACTICE, NON-LAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 81 (1995) (documenting witnesses' testimony that "few lawyers will handle automobile or other property damage claims of a few hundred (or even a few thousand) dollars").

¹²⁵ INS. RESEARCH COUNCIL, FRAUD AND BUILDUP, *supra* note 115, at 25 (emphasis added).

¹²⁶ Transcript of Record at 112, Zang, No. SB-86-0014-D (Special Local Admin. Comm. of the State Bar of Ariz. Mar. 21, 1984) (testimony of Peter Whitmer before Arizona Disciplinary Board); see also Telephone Interview with Lillian Lalumandier (Aug. 13, 2007) (stating that a significant proportion of Sledge's clients could not have found representation elsewhere); Telephone Interview with L.T. (Mar. 6, 2008) ("[A] lot of attorneys won't handle the cases that we're willing to handle.").

¹²⁷ Telephone Interview with J.J. (Apr. 24, 2008); see also Telephone Interview with A.M. (May 14, 2008) (stating that, prior to coming to his firm, clients had "tried to deal with the insurance company themselves and just got nowhere"); Telephone Interview with L.J. (Apr. 17, 2008) (stating that clients could not have gotten representation if it were not for Rogers and adding, "let me tell you, these insurance companies were out for themselves").

¹²⁸ See generally STUCKEMEYER, *supra* note 118, at 2–7 (alleging that many claims that result from increased attorney advertising are fraudulent).

no-fault endeavors to expand access to compensation, settlement mills, in their own unique way, might be doing much the same.

6. *Fabricated or Exaggerated Claims*

A sixth and, for our purposes, final critique is that the tort system, by virtue of payment for non-economic loss, is “marred by temptations to dishonesty that lure into their snares a stunning percentage of drivers and victims.”¹²⁹ By abolishing payment for pain and suffering, no-fault was explicitly designed to eliminate such temptations.¹³⁰ But here, far from alleviating this problem of traditional tort, settlement mills very likely exacerbate it, perhaps substantially.

The tort system first rewards plaintiffs who seek extra, unnecessary medical treatment because, as the Rogers case study illustrates, a plaintiff’s economic loss (“special damages”) is often multiplied in order to calculate her total recovery.¹³¹ As a former Rogers attorney explained, “If a person goes to a chiropractor and gets some treatment, gets some medical specials, all of a sudden instead of having a case that’s worth \$1500, you have a case that’s worth \$3500.”¹³² Often called “medical buildup,” this perverse incentive structure has been called “one of the central weaknesses of the current tort system”¹³³ and is estimated to cost insurers and their policyholders billions of dollars per year.¹³⁴

Insurance Research Council statistics hint at the problem’s magnitude: Attorney-represented claimants with sprains and strains as their most serious injury report economic losses nearly three times higher, on average, than their non-represented counterparts (\$7229

¹²⁹ KEETON & O’CONNELL, *supra* note 5, at 3; *see also* STAFF OF JOINT ECON. COMM., *supra* note 5, at 11 (“Fraud and abuse of the system are endemic, driven in large measure by the incentives of the tort system.”).

¹³⁰ Ironically, modified no-fault, especially with monetary thresholds, might exacerbate, rather than alleviate, the fraud concern. *See* INS. RESEARCH COUNCIL, FRAUD AND BUILDUP, *supra* note 115, at 55 (“A monetary threshold does not seem to reduce the appearance of fraud and buildup and may encourage claim enhancement.”); *Auto Choice Reform Act of 1997: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 105th Cong. 83 (1997) (statement of Tim Ryles, former Ins. Comm’r, State of Georgia) (“[N]o-fault is to insurance fraud what octane level is to gasoline; the more no-fault you have, the greater the fraud.”).

¹³¹ *See supra* notes 73–76 and accompanying text.

¹³² Telephone Interview with L.J. (Apr. 17, 2008).

¹³³ STAFF OF JOINT ECON. COMM., 104TH CONG., IMPROVING THE AMERICAN LEGAL SYSTEM: THE ECONOMIC BENEFITS OF TORT REFORM 17 (Comm. Print 1996).

¹³⁴ INS. RESEARCH COUNCIL, FRAUD AND BUILDUP, *supra* note 115, at 2 fig.1-1, 23 (concluding that approximately 36% of all paid bodily injury claims appear to involve fraud or buildup and estimating that excess injury payments in 1995 totaled \$5.2 to \$6.3 billion); *see* CARROLL ET AL., *supra* note 115, at 3 (reporting that “35–42 percent of medical costs claimed by auto accident victims appear to be excess”).

versus \$2436).¹³⁵ To be sure, there are some wholly benign explanations for this gap. For instance, represented claimants are more likely to have the confidence to seek necessary but costly medical treatment, that they would otherwise forego (physical therapy, for example), in order to facilitate more rapid or complete recoveries, and they are also better equipped to identify, document, and seek payment for the full range of compensable expenses. But pervasive medical buildup is probably part of the story. And, because settlement mills often maintain unusually close relationships with doctors and chiropractors (who also benefit handsomely when patients seek extra medical care), they likely exacerbate the medical buildup concern.¹³⁶

Aside from medical buildup, the mere possibility of payment for non-economic damages (and thus, the fact that filing a claim will put money in one's pocket) creates an incentive to feign or grossly exaggerate injuries—and here too, settlement mills may be particularly susceptible to falling on the wrong side of the ethical line. Most obviously, in contrast to more conventional counsel who spend significant resources vetting clients and cases prior to acceptance, as noted previously, settlement mills do not tend to engage in rigorous pre-retention review.¹³⁷ At one Florida settlement mill, for example, an attorney recalled that the “modus operandi was to sign everything up.”¹³⁸ And at a Louisiana firm, statistics suggest that in some years, roughly 95% of those who called the firm seeking representation following an auto accident were, at least initially, signed up as clients.¹³⁹ Such open-door policies are unlikely to weed out fraudsters or malingerers, particularly since, as also noted previously, settlement mills commonly represent claimants with soft-tissue injuries, a class of injuries

¹³⁵ INS. RESEARCH COUNCIL, *supra* note 51, at 59–60 & fig.4-8.

¹³⁶ See Telephone Interview with G.V. (Apr. 7, 2008) (“In most cases, you would develop relationships with chiropractors who were trained and educated to believe that even soft tissue injuries could result in permanent injury, given the type of accident it was.”); Telephone Interview with S.R. (Mar. 27, 2008) (stating that “[i]t was a given” that some clients received treatment they did not need). Indeed, one of Rogers’s ads reportedly included the following: “Your doctor doesn’t believe you’re really injured. Call the People’s Lawyer at 444-4441 for a lawyer and a doctor who are on your side, who will wait until the case settles to get paid, who know that people really do get hurt in car accidents.” Harper, *supra* note 69.

¹³⁷ See *supra* note 37 and accompanying text (contending that settlement mills’ cursory screening is distinctive).

¹³⁸ Telephone Interview with D.R. (Mar. 4, 2008); see also Telephone Interview with G.V. (Apr. 7, 2008) (Q: “What percentage of callers seeking legal representation were accepted as clients?” A: “Pretty much everyone.”).

¹³⁹ Transcript of Record at 138–39, *In re* Guirard, No. 04-DB-005 (La. Sept. 23, 2004) (testimony of E. Eric Guirard before Louisiana Attorney Disciplinary Board) [hereinafter Guirard Disciplinary Transcript] (stating that 2204 calls were received in 2000 and that 2107 of those callers were signed up as clients).

notoriously difficult to verify and thus easily—and, studies suggest, often—feigned.¹⁴⁰

More broadly, adherence to ethical obligations is bound to suffer in view of settlement mills' persistent focus on profitability, coupled with the fact that work at these firms is almost entirely unmonitored, for reasons explained in Part III. As one former Weiss attorney explained, "Let me tell you, so much goes on in a law firm that settles cases, and it's all out of the light of day. If you don't have a moral center, and you're willing to slide and slip around, you can do all sorts of things because you're never going to be caught."¹⁴¹ Accurately gauging to what extent settlement mills encourage medical buildup or represent claimants with wholly non-meritorious claims is not possible, and, it is vital to stress, the number will also vary considerably *between* settlement mills, as some appear far more unscrupulous than others.¹⁴² But there are indications that settlement mills may, more often than most, blur ethical boundaries and bend to the temptations of fraud.

B. *Settlement Mills in Form: The Mill Masquerade*

As seen above, in substance, settlement mills do many things well. They offer their clients relative speed and predictability, while sparing their clients from litigation's emotional entanglements and bruising ordeals. Yet speed, predictability, simplicity, and certainty are fundamentally incompatible with the idiosyncratic, fact-intensive, case-by-case determinations that undergird traditional tort. So, along the way, there is an implicit trade. Even in the absence of aggregation, and even though clients are complaining of damage to their bodies (which tort law has long conceptualized as particularly personal),

¹⁴⁰ A 2001 study concluded that approximately 42% of reported soft-tissue-injury claims (defined, quite narrowly, as sprains and strains to the neck and back) in dollar-threshold no-fault states and tort states are for nonexistent or preexistent injuries. Stephen Carroll & Allan Abrahamse, *The Frequency of Excess Auto Personal Injury Claims*, 3 AM. L. & ECON. REV. 228, 228, 248 (2001); see also Herbert I. Weisberg & Richard A. Derrig, *Fraud and Automobile Insurance: A Report on Bodily Injury Liability Claims in Massachusetts*, 9 J. INS. REG. 497, 537 (1991) (highlighting the frequency with which claims for only sprains and strains involve apparent fraud).

¹⁴¹ Telephone Interview with E.C. (Apr. 22, 2008).

¹⁴² Compare Telephone Interview with A.M. (May 14, 2008) ("In my entire time there, I never signed up a client that I thought was not in a bona fide accident or did not have bona fide injuries."), with Telephone Interview with T.R. (Apr. 16, 2008) ("A lot of these people aren't hurt. . . . [Y]ou should have screened the malingerers from the people who had legitimate injuries.").

settlement mills resolve individual claims on something resembling a wholesale basis.¹⁴³

The trade, while not uncontroversial, is quite reasonable.¹⁴⁴ And settlement mills are hardly alone in brokering it. It has long been said that traditional tort's commitment to individualized justice is more mythical than real.¹⁴⁵ In fact, a number of *formal* mechanisms—from class actions, to the workers' compensation regime, to the September 11th Victim Compensation Fund—dispense with it altogether.¹⁴⁶ More than that, if given the choice, many settlement mill claimants would surely select just this system. “[M]embers of the public,” it has been said, “want routes that are quick, cheap, and relatively stress-free.”¹⁴⁷

The problem, though, is that while some, and perhaps most, accident victims want justice served simply—and some have claims too small to make the full-dress litigation envisioned by traditional tort practically feasible, no matter their desire—others have sizable claims and “go to law” with other, more amorphous or more complicated, aspirations.¹⁴⁸ And for these individuals, settlement mill representation may be disaster.

¹⁴³ See Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 815 (1995) (describing auto accidents as “the paradigm case of . . . traditional tort”); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 923 (1995) (“Tort law had conceptualized injuries done to an individual’s body as specific and personal.”).

¹⁴⁴ To be sure, some oppose *any* corrosion of the individualized ideal, and some opposition to class resolution of personal injury claims stems from class treatment’s fundamental incompatibility therewith. See, e.g., Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 17 (1991) (“One source of distress about and hostility toward class actions in general arose from a view of lawsuits—and particularly of tort actions—as being quintessentially cases involving individuals.”); accord Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 384 (2007) (“One tragic aspect of mass torts is that individual harm becomes routinized.”).

¹⁴⁵ See *supra* note 29 (cataloging number of studies suggesting that, particularly when stakes are small and volumes are high, case-by-case adjudication often yields to routinization and rules of thumb).

¹⁴⁶ For brief background information on the wholesale treatment of claims in the New York workers’ compensation system and the September 11th Victim Compensation Fund, see MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 834–35, 866–69 (8th ed. 2006). Class actions are also aggregative, by their very design. See, e.g., FED. R. CIV. P. 23 (delineating rules for federal class actions).

¹⁴⁷ HAZEL GENN ET AL., *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 254–55 (1999); see also HUNTING & NEUWIRTH, *supra* note 120, at 9 (reporting that surveyed auto accident victims preferred reasonable settlement to be “made simply, more or less mechanically, and without too much argument on the part of the insurers”); ROSS, *supra* note 29, at 241 (“[M]ost claimants seem to prefer a definite settlement for a lower amount of money to the gamble of trial for a higher amount of money.”).

¹⁴⁸ For some, having the opportunity to hold a tortfeasor publicly accountable, or simply to tell one’s story, matches, or even eclipses, any desire to maximize the economic recovery

The crux of the issue is that while clients affirmatively trade individualized justice for routinized relief in some contexts (as in the September 11th Victim Compensation Fund), and while the trade is some mix of obvious and unavoidable when tort law has been formally supplanted (as in the case of workers' compensation or after certification of a mandatory class),¹⁴⁹ at settlement mills, it is neither.¹⁵⁰ Clients, that is, sometimes sign up for settlement mill services without knowing that a distinct form of legal service is on offer, and worse, sometimes in the shadow of ads that actively cultivate a contrary impression.¹⁵¹ This, in turn, means that while *settlement mills* have traded traditional tort for a streamlined form of compensation resting on routine and rules-of-thumb, not all settlement mill *clients* have agreed to—or are

attained. See Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 364 (1996) (“Research on litigants, particularly in the context of tort law, reveals a group of individuals who seek something in addition to money.”); see, e.g., Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 157–62 (Austin Sarat et al. eds., 1998); Abel, *supra* note 31, at 259–66; John M. Conley & William M. O’Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS. 181, 186 (1988). For more on the proportion of mill clients with large claims, see *infra* note 155. For more on litigants’ non-monetary objectives, see *infra* note 334.

¹⁴⁹ Workers’ compensation has long replaced the tort remedy with a no-fault compensation scheme. FRANKLIN ET AL., *supra* note 146, at 828. Similarly, claimants who received funds from the September 11th Victim Compensation Fund explicitly “waiv[ed] the right to file a civil action.” 49 U.S.C. § 40101 note sec. 405(c)(3)(B)(i) (2006). For information on class actions, see FED. R. CIV. P. 23(b)(1)–(2).

¹⁵⁰ Settlement mills are not the only providers for whom this is true. There are a number of important parallels, for example, between mills and non-class collective representation, where the departure from the traditional attorney-client relationship is also profound and all too often obscured. In both contexts, lawyers work in high volume, seek to maximize aggregate recoveries, and have little personal involvement with individual clients. See generally Erichson, *supra* note 29, at 524–26.

¹⁵¹ Some settlement mills, to their credit, are quite candid about the contours of the representation. See *infra* note 181 (explaining that clients were aware that cases were handled by non-lawyers). Others, unfortunately, are not. See *infra* note 344 and accompanying text (describing potentially misleading Weiss ad); see also *In re Zang*, 741 P.2d 267, 274 (Ariz. 1987) (en banc) (finding that Zang and Whitmer “scrupulously avoided” taking cases to trial even though firm’s ads portrayed firm as “willing and able” to do so); Transcript of Record at 3177, *May v. Bloomfield*, No. D019136 (Cal. Ct. App. 1993) [hereinafter Spital Transcript] (introducing transcript of Spital law firm ad boasting, “We encourage a close attorney-client relationship. . . . [W]e treat each client as if he or she were our only client.”); John Accola, *A Twist for ‘Strong Arm’: Suit Reinstated*, ROCKY MOUNTAIN NEWS, Jan. 10, 2006, at 1B (recounting ads in which firm’s named partner referred to himself as “Strong Arm” and boasted, “I can get you more money!”); Telephone Interview with J.K. (May 15, 2008) (A: “What I don’t like is when an attorney advertises heavily on TV like he’s some tough, smart, you-deserve-respect-and-justice-type attorney, and the fact of the matter is, he doesn’t handle any cases, and he’s never litigated a case. That bothers me.” Q: “That’s what you felt like [your employer] was doing?” A: “Yeah, I did.”); accord Telephone Interview with S.R. (Mar. 27, 2008) (suggesting disconnect between service offered and received).

even aware of—the exchange. In the rueful words of one former settlement mill attorney, “It really was very formulaic. Everybody saw it that way, except for the client, who actually thought of themselves as an individual.”¹⁵²

Thus, while settlements mills, in *substance*, get a passing grade, settlement mills, in *form*—particularly as they create and exploit a troubling disconnect between the type of legal service apparently, and actually, on offer—are less satisfactory. Below, I explore the ramifications of this disconnect vis-à-vis the representation of claimants with serious injuries, the delegation of settlement negotiations to non-lawyer personnel, and the fees the firms charge.

1. *Settling for Less: The Under-Compensation of the Most Seriously Hurt*

The first and most obvious problem occurs when the seriously injured, those most in need of attentive, individualized representation and who would have no trouble securing conventional counsel, nevertheless seek settlement mills’ services.¹⁵³ A former Weiss attorney explained:

My perception was then, and it is now, for these high volume firms, that if you have small injuries that are not very permanent [and] that are well documented, he settles quick, he settles fast, and gets you full value. If you have very, very serious injuries that require long-term treatment, then you get the short end of the stick.¹⁵⁴

To be sure, most settlement mill clients have indeed sustained only minor injuries and are bound to be quite satisfied. But some fraction have sustained serious injuries and thus have potentially

¹⁵² Telephone Interview with K.N. (Nov. 8, 2007); *accord* Spital Transcript, *supra* note 151, at 3329 (testimony of Jerry W. May) (stating that, as a client of the Spital firm, he expected personalized, individualized attention, as promised in firm’s ads, but, in fact: “[I]t wasn’t personal at all. And [Spital] didn’t know me. He didn’t know my name.”).

¹⁵³ Granted, the most seriously injured fare poorly, as compared to the least seriously injured, even in traditional tort. *See* Alfred F. Conard, *Insurance Rates and Regulations*, U. MICH. L. QUADRANGLE NOTES, Fall 1970, at 14 (“If there is one thing which the surveys have shown conclusively, it is that the tort system overpays the small claimants who need it least, and underpays the large claimants who need it most.”). Indeed, this over- and under-compensation is another flaw of traditional tort that no-fault proponents often point to, yet no-fault *proposals* typically fail to address. *See* U.S. DEP’T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 5 (1985) (noting that no-fault plans, like traditional tort, “fall short of the needs of catastrophically injured victims”).

¹⁵⁴ Telephone Interview with K.R. (May 1, 2008); *accord* Telephone Interview with L.J. (Apr. 17, 2008) (“If you needed a good lawyer, [the Rogers firm] was not the place to be.”).

sizable claims.¹⁵⁵ And these luckless souls, it is fair to say, are not well served.

Many of the attributes that distinguish settlement mills from conventional counsel also serve to artificially depress claim value. First, settlement mills settle cases quickly, and, although speed has undeniable benefits, fast settlements tend to depress the value of claims. Or, as Alfred Conard concluded after his comprehensive study of auto claim compensation, “the man who has a severe injury is likely to settle for it quickly only if he settles for a relatively small amount.”¹⁵⁶ Second and relatedly, settlement mills commonly impose incentives or quotas on negotiators, rewarding or requiring the settling of a given number or dollar value of claims within a specified time period.¹⁵⁷ Under this system, negotiators are compensated or evaluated based on their *aggregate* recoveries, or simply based on their ability to close claims, creating a temptation, as one settlement mill negotiator put it, to “[g]et the first offer from the insurance company and move on.”¹⁵⁸ Third, settlement mills rarely file lawsuits and a number of studies show that the act of not filing is correlated with (although not necessarily causally related to) reduced recoveries.¹⁵⁹ Fourth, insurance

¹⁵⁵ See Sledge Disciplinary Transcript, *supra* note 12, at 121 (testimony of Lillian Higginbotham Lalumandier) (recalling that as a non-lawyer she settled “several” cases for more than \$100,000); Telephone Interview with C.R. (Apr. 1, 2008) (recalling million dollar settlement); Telephone Interview with S.R. (Mar. 27, 2008) (estimating that 10% of cases at the Rogers firm involved either fractures or permanent injury). Testimony involving the San Diego firm of Sam Spital, which flourished in the late 1980s and early 1990s, is also instructive (although perhaps not generalizable since that firm, unlike some others, specifically sought out large and complicated cases). Spital Transcript, *supra* note 151, at 3214–15 (testimony of Samuel E. Spital). In sworn testimony, Spital estimated that 5% of his office’s caseload involved cases “over the \$30,000 level.” *Id.* at 4707.

¹⁵⁶ CONARD ET AL., *supra* note 120, at 222; see also HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* 106 (1987) (“[I]f a plaintiff holds out against an insurance company and rejects initial offers, he will receive more money at the end of the day.”); ROSENTHAL, *supra* note 76, at 36 (“[T]he longer the client holds out, the larger the settlement he will be able to bargain out of the insurer.”); John R. Foutty, *The Evaluation and Settlement of Personal Injury Claims*, 492 *INS. L.J.* 5, 7 (1964) (“[T]he value of a personal injury claim often increases in proportion to the time elapsed since the date of the injury.”).

¹⁵⁷ Engstrom, *supra* note 3, at 1501 (describing quotas).

¹⁵⁸ Telephone Interview with J.K. (May 15, 2008); see also Telephone Interview with D.W. (May 8, 2008) (describing “convenience store attitude” at firm, where “[the] [q]uicker you can move something, [the] better off you are”); Telephone Interview with R.J. (Apr. 8, 2008) (“I was expected to meet quotas and settle cases, and there was very little interest in litigating the cases that needed to be litigated and settling the cases that needed to be settled.”).

¹⁵⁹ See CONARD ET AL., *supra* note 120, at 157 fig.4-5 (showing that average settlement amounts increased after suit was filed); *id.* at 270 (“The serious injury subjects who sued fared better than the serious injury subjects who did not.”); Franklin et al., *supra* note 119, at 17 & n.86 (“The average suit recovered \$1,464; the average claim recovered \$675.”); Maurice Rosenberg & Michael I. Sovern, *Delay and the Dynamics of Personal Injury*

adjusters appear to vary their offers based on the perceived risk of litigation.¹⁶⁰ Because settlement mills have a reputation for avoiding trial, they have less credibility in their dealings with insurers and are, it seems, less likely to obtain top dollar.¹⁶¹ Fifth and finally, settlement mills often employ inexperienced attorneys or non-attorney personnel to evaluate claims and negotiate settlements.¹⁶² For the run-of-the-mill soft-tissue case, these individuals, often skilled at negotiating (if not the traditional practice of law), may do just fine—an issue I will return to below. But it takes someone with patience, sophistication, talent, and time to see complexity embedded in the routine.¹⁶³ Identifying that obscure deep pocket or crafting a novel but winning argument might mean the difference between a meager settlement and a substantial recovery, and that is something settlement mills, given both the personnel they hire and the constraints they impose, are quite poorly equipped to do.

And indeed, it is noteworthy that various settlement mill negotiators report that some case values were compromised. One attorney stated, “I am personally aware of cases I think [were] settled for \$10,000, \$15,000, \$20,000 less [because insurance adjusters knew the attorney handling the case] wasn’t going to actually try the case and

Litigation, 59 COLUM. L. REV. 1115, 1128–29 (1959) (showing that suits settled for higher average value than mere claims, although rejecting notion that “simply putting a case into suit could raise its value enough to account for the enormous differences reflected”); cf. 1 U.S. DEP’T OF TRANSP., AUTOMOBILE PERSONAL INJURY CLAIMS 64 tbl.V-21 (1970) (showing same ratio of economic loss to final settlement, regardless of whether suit was filed).

¹⁶⁰ See Brandon Ortiz, *Former Casualty Manager Testifies Against Allstate*, LEXINGTON HERALD-LEADER, Oct. 5, 2007, at A1 (summarizing the testimony of a former Allstate casualty manager, who noted that “Allstate kept a log of plaintiff attorneys, noting which ones were aggressive and which ones caved in”).

¹⁶¹ As one former settlement mill lawyer put it, “If the figure was no good, [insurers] were not worried he would go to trial because he wouldn’t.” Telephone Interview with S.R. (Mar. 27, 2008); see also Telephone Interview with D.W. (May 8, 2008) (“If you’re not a trial lawyer, you got—that’s your only weapon. If you don’t show up in that court room, you’ve got no bargaining power. If you don’t have a gun, you can’t participate in a gun fight.”); Telephone Interview with G.V. (Apr. 7, 2008) (Q: “You think reputation matters in terms of the offers you’re given?” A: “I know it matters.”); Telephone Interview with S.S. (May 30, 2007) (stating that insurance adjusters “knew it was a joke” and, when she would protest that offers were too low, would respond by asking, “What are you going to do about it?”).

¹⁶² See, e.g., Telephone Interview with S.R. (Mar. 27, 2008) (stating that, at the Rogers firm, “[t]he lawyers . . . had no clue what they were doing”).

¹⁶³ Compare *Vince v. Wilson*, 561 A.2d 103, 104 (Vt. 1989) (permitting a negligent entrustment action against a negligent driver’s great aunt who had supplied funds for her grandnephew to purchase the vehicle, which had struck the plaintiff), with Telephone Interview with A.M. (May 14, 2008) (suggesting that attorneys would spend the *least* amount of time—merely two or three hours—settling cases when a claimant had sustained serious injuries because those could be easily settled for policy limits).

tee it up.”¹⁶⁴ Another confessed that he and his colleagues sometimes yielded to the financial incentives associated with settling cases quickly, rather than at full value.¹⁶⁵ A third described at his firm a “stack ‘em deep and settle ‘em cheap” mentality.¹⁶⁶ A fourth characterized the size of his firm’s settlements as “terrible,”¹⁶⁷ while a fifth put it this way:

I think the expectation of the firm is these are just widgets. Get them in. Get them out. Let’s make some money and move on. You could miss some really good cases or miss some things that would lead to your client getting their due result by not taking the time.¹⁶⁸

2. *Unauthorized Practice of Law*

Second, some settlement mills (including the Rogers firm) have non-attorneys negotiate settlements of third-party personal injury claims in apparent violation of Model Rule of Professional Conduct 5.5.¹⁶⁹ For routine cases, this delegation, unto itself, may not fairly warrant condemnation.¹⁷⁰ But like much else about the settlement mill paradigm, its under-the-table status is cause for grave concern.

¹⁶⁴ Telephone Interview with C.R. (Apr. 1, 2008).

¹⁶⁵ Telephone Interview with G.V. (Apr. 7, 2008).

¹⁶⁶ Telephone Interview with J.K. (May 15, 2008) (“[T]here seemed to be kind of a mentality of churning and burning, you know, almost like stack ‘em deep and settle ‘em cheap.”).

¹⁶⁷ Telephone Interview with S.R. (Mar. 26, 2008); *see also* Telephone Interview with S.R. (Mar. 27, 2008) (“They settle at ludicrous, absolutely ludicrous, cost.”).

¹⁶⁸ Telephone Interview with R.J. (Apr. 8, 2008); *accord* Spital Transcript, *supra* note 151, at 3061–62 (testimony of Shawn M. Sornson) (testifying that, while working as an attorney for Sam Spital, he does not believe that he was able to obtain every dollar to which each client was entitled); *see also* Will Harper, *800-XLAWYER: Embattled People’s Lawyer Quits Profession*, EAST BAY EXPRESS (Sept. 27, 2006), <http://www.eastbayexpress.com/eastbay/800-xlawyer/Content?oid=1081909> (describing the *Wilson* case, where “Rogers pressured Wilson to accept an \$85,000 settlement for what a judge later figured was a million-dollar case . . .”).

¹⁶⁹ MODEL RULES OF PROF’L CONDUCT R. 5.5 (2007) (outlawing unauthorized practice of law). For examples of firms where the settlement of claims was (at least sometimes) delegated to non-lawyers, *see* Engstrom, *supra* note 3, at 1505, 1506 n.115, 1512 and *supra* note 72 and accompanying text.

¹⁷⁰ *See* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 778–79 (2002) (advocating that non-lawyers settle routine claims for reduced contingency fees). A rich literature has developed that broadly questions the wisdom of unauthorized practice provisions. *See generally* HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); Richard L. Abel, *How the Plaintiffs’ Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 349, 375–76 (2006); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 707–12 (1977); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 75–80 (1981).

Courts routinely hold that non-lawyers may not negotiate the settlements of third-party personal injury claims on behalf of claimants; when they do, it constitutes the unauthorized practice of law.¹⁷¹ Because “[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence,” courts must implicitly find, then, that lawyers necessarily settle third-party personal injury claims more competently or with more integrity than do non-lawyer personnel.¹⁷² But this conclusion is somewhat dubious. When claims are routine and the negotiation hinges, as it often does, not on legal merit but on the slippery question of “quantum” (i.e., the proper compensation for the claimant’s injury),¹⁷³ it is not self-evident that formal legal training is necessary or even helpful.¹⁷⁴

Meanwhile, courts’ line drawing is awfully fine. While injury victims cannot retain lay negotiators, insurance companies can and commonly do.¹⁷⁵ Indeed, these non-lawyer insurance adjusters are the individuals with whom settlement mill negotiators typically bargain, and some settlement mill negotiators have experience in insurance company ranks—which all tends to undermine any blanket assertion

¹⁷¹ See, e.g., *Idaho State Bar v. Villegas*, 879 P.2d 1124, 1126 (Idaho 1994) (“[N]egotiating legal positions and issues also clearly involve[s] the practice of law.”); *Utah State Bar v. Summerhayes & Hayden, Pub. Adjusters*, 905 P.2d 867, 869–70 (Utah 1995) (concluding that “third-party adjusting” by non-lawyers constitutes the unauthorized practice of law).

¹⁷² MODEL CODE OF PROF’L RESPONSIBILITY EC 3-1 (1980); see Rhode, *supra* note 170, at 74–96 (considering EC 3-1 and questioning whether the ban on lay representation furthers state’s articulated interests).

¹⁷³ Sledge Disciplinary Transcript, *supra* note 12, at 123–24 (testimony of Lillian Higginbotham Lalumandier) (testifying that, when settling routine claims, she did not argue law but instead argued “quantum,” which was “what the case is worth”); *accord* Telephone Interview with L.T. (Mar. 6, 2008) (recalling that negotiations focused on “[v]alue issues”); see also HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 143 (1990) (“[I]n many disputes there is little or no difference of opinion over whether something is owed to the plaintiff; instead, the question to be resolved is *how much* should be paid.”). *But see* JEFFREY O’CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 12–13 (1971) (reporting that, prior to the widespread adoption of comparative negligence, fault was the “principal” issue in auto negotiations); Telephone Interview with H.G. (Apr. 29, 2008) (stating that “most cases” were contested).

¹⁷⁴ Indeed, studies show that even experienced practitioners assign markedly different values to particular injuries. See, e.g., GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 5–7 (1983).

¹⁷⁵ See, e.g., *Liberty Mut. Ins. Co. v. Jones*, 130 S.W.2d 945, 961–62 (Mo. 1939) (distinguishing between adjusters who represent claimants and adjusters employed by insurers and finding that only the former practice law unlawfully); LEE R. RUSS, *COUCH ON INSURANCE* § 48:65 (3d ed. 2010) (“An adjuster who represents himself or herself to the public as able to . . . settle claims generally, is engaged in practice of law . . . while an adjuster in the regular employ of an insurance or casualty company is obviously in a different category.”).

of incompetence.¹⁷⁶ (It is fair to assume that, if non-lawyers *were* necessarily bad negotiators, insurance companies would have, by now, wised up.)

Nor is the non-lawyer settlement of claims, even on behalf of individuals, particularly exceptional. Most states permit licensed “public adjusters” to represent clients in *property* damage negotiations with their *own* (“first-party” as opposed to “third-party”) insurers.¹⁷⁷ Non-lawyer “claims assessors” lawfully settle personal injury claims for clients in the United Kingdom, with some apparent success.¹⁷⁸ And, up until the 1930s (when Depression-era unauthorized practice crackdowns put the brakes on such activity), non-lawyers routinely settled injury claims,¹⁷⁹ as did lay negotiators at auto clubs for their dues-paying members.¹⁸⁰

But even if the current ban *is* misguided, mills’ delegation, in the face of the formal proscription, is still problematic, raising three principal concerns. First, as long as the lay settlement of third-party claims is formally proscribed, the non-lawyer substitution is likely to take place without the client’s informed consent and, worse, sometimes in the shadow of ads or documents falsely suggesting that an actual lawyer-client relationship is in the offing.¹⁸¹ Second, this lack of transparency is apt to lead to over-charging. Some settlement mills, as I will next discuss, appear to charge a premium for services performed by a licensed attorney while depriving clients the full benefit of the bar-

¹⁷⁶ See, e.g., Telephone Interview with S.S. (May 30, 2007) (explaining that all of her negotiations were with lay adjusters, rather than with defense counsel).

¹⁷⁷ E.g., S.C. CODE §§ 38-48-40, -70, -100 (1976) (regulating public adjusters).

¹⁷⁸ See BLACKWELL COMMITTEE, THE INVESTIGATION OF NON-LEGALLY QUALIFIED CLAIMS ASSESSORS AND EMPLOYMENT ADVISERS WHO ACT FOR REWARD 30–31, 48 (2000) (noting lack of “any measurable public concern about, or widespread problem with” claims assessors’ activities).

¹⁷⁹ Corinne Lathrop Gilb, Self-Regulating Professions and the Public Welfare: A Case Study of the California Bar 233 (May, 1956) (unpublished Ph.D. thesis, Radcliffe College) (on file with the New York University Law Review).

¹⁸⁰ E.g., *Am. Auto. Ass’n v. Merrick*, 117 F.2d 23, 23–25 (D.C. Cir. 1940) (discussing claims settlement activities of 29,000-member District of Columbia Motor Club). For a discussion of Depression-era unauthorized practice crackdowns, see RICHARD L. ABEL, AMERICAN LAWYERS 7 (1989).

¹⁸¹ See, e.g., Telephone Interview with A.E. (Aug. 16, 2007) (stating that clients were left under the false impression that their settlements had been negotiated by office’s named partner). *But see* Sledge Disciplinary Transcript, *supra* note 12, at 125 (testimony of Lillian Higginbotham Lalumandier) (confirming that, when she settled cases for Lawrence Sledge, everybody knew she was not a lawyer); Supplemental Submission Re: Lawrence D. Sledge from Schiff Law Corporation to Donna L. Roberts, Bd. Adm’r, La. Att’y Disciplinary Bd., at LDS-0003 (Apr. 16, 2001) (on file with the New York University Law Review) [hereinafter Sledge Submission] (letter to clients) (“If you are selected as a client, your file will be transferred to the paralegal handling your case for settlement.”).

gain.¹⁸² Finally, precisely because the non-lawyer settlement of third-party claims is unlawful, it is unregulated. One former settlement mill attorney explained:

I want you to understand, too, when you are a non-lawyer working in pre-lit and you can settle claims, there is no code of ethics. There's no code of professional responsibility. What are you going to do, take their drivers' license away? Seriously. . . . What are you going to do? Not let them go to lunch? Ethical concerns they don't have. They don't have *any* concerns.¹⁸³

In comparison, there *are* typically licensing requirements and regulatory safeguards when non-lawyers press claims before tribunals that explicitly permit lay advocacy. The U.S. Patent and Trademark Office (PTO), for example, allows lay representation, finding “no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct.”¹⁸⁴ But, in order to represent clients, patent agents must fulfill certain college coursework requirements, pass a one-day examination, and, once practicing, are subject to the PTO's detailed rules of conduct.¹⁸⁵ Likewise, the Social Security Administration permits lay advocacy and a review, even of *litigated* social security appeals, found only a limited gap between the success rates of lawyer and non-lawyer personnel.¹⁸⁶ But, as at the PTO, non-attorney social security representatives are at least loosely regulated.¹⁸⁷

¹⁸² For a discussion of the “licensure premium,” see generally MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 59, 60 tbl.3.3 (2006), which estimates that licensure premium, for all professions, is on order of 4% to 35%. As alluded to above, over the years, a number of lay public adjusters have sprung up to represent clients in third-party injury disputes, even though such representation is widely held to violate unauthorized practice provisions. Consistent with the existence of a licensure premium, limited anecdotal evidence suggests that these adjusters sometimes charge contingency fees substantially below the standard 33%. *See, e.g.*, Dauphin Cnty. Bar Ass'n v. Mazzacaro, 351 A.2d 229, 230 (Pa. 1976) (describing a public adjuster who would settle uncontested third-party injury claims for a 10% to 20% contingency fee); La. Claims Adjustment Bureau, Inc. v. State Farm Ins. Co., 877 So. 2d 294, 296 (La. Ct. App. 2004) (describing firm that settled auto accident claims for a 25% contingency fee); James Podgers, *Crumbling Fortress*, 79 A.B.A. J. 50, 55 (1993) (suggesting that select public adjusters in Phoenix would handle personal injury claims for fees “as low as” 18%).

¹⁸³ Telephone Interview with D.W. (May 8, 2008).

¹⁸⁴ *Sperry v. Florida*, 373 U.S. 379, 402 (1963).

¹⁸⁵ *See, e.g.*, Donald J. Quigg, *Nonlawyer Practice Before the Patent and Trademark Office*, 37 ADMIN. L. REV. 409, 409–10 (1985) (broadly describing regulation of patent attorneys and agents at the PTO).

¹⁸⁶ KRITZER, *supra* note 170, at 116.

¹⁸⁷ *See* 20 C.F.R. §§ 404.1740, 416.1540 (2010) (establishing rules of conduct); 20 C.F.R. §§ 404.1705(b), 416.1505(b) (providing qualifications for representatives).

In short, the lawyer requirement may be overkill; skilled, independent, licensed paraprofessionals may be able to settle individuals' routine injury claims just as effectively as attorney personnel. But the murky status quo, in which the formal prohibition leads settlement mills to engage in an under-the-table delegation, gives clients the worst of both worlds.

3. *The Matter of Fees*

A third problem, alluded to above, concerns the issue of fees. Settlement mills, that is, appear to charge standard legal fees (or slightly more) for less than standard legal services, again suggesting that mills may be exploiting client ignorance concerning the particular service provided.

Studies suggest that most personal injury contingency fees hover around 33% of a client's recovery. Studies also suggest that fees *exceeding* one-third are relatively rare. In Herbert Kritzer's study of Wisconsin contingency fee practitioners, for example, he found that, of lawyers who charged a fixed (i.e., non-tiered) contingency fee, a full 93% charged a fee of one-third, whereas only 1% charged more than that amount.¹⁸⁸ Data from Alaska similarly show that, during a roughly three-year period, 71% of cases involved fees of one-third; only 12% were higher.¹⁸⁹ So, too, a 1988–1989 RAND study found that, of practitioners charging a fixed contingency fee, only 10% charged a fee greater than one-third.¹⁹⁰ Of course, not all personal injury lawyers use fixed contingency fees. Some employ tiered fees, which escalate at predetermined intervals. Returning to the Wisconsin study, Kritzer found that only a minority of lawyers (31%) used tiered fees, but of those who did, the “most common pattern” was to charge 25% of the gross recovery “if the case did not involve substantial trial preparation (or, in some cases, did not get to trial), and one-third if it got beyond this point, perhaps rising to 40 percent or more if the case resulted in an appeal.”¹⁹¹

¹⁸⁸ KRITZER, *supra* note 19, at 39.

¹⁸⁹ *Id.* at 42–43.

¹⁹⁰ *Id.* at 43 (citing DEBORAH R. HENSLER ET AL., RAND, SURVEY OF COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES, 1988–1989 [Computer File and Documentation] 230 (2001)); *accord* INS. RESEARCH COUNCIL, AUTO INJURIES, *supra* note 115, at 75 tbl.A-21 (reporting that, of surveyed auto accident claimants, only 9% in 1998 and 12% in 2002 recalled paying contingency fees exceeding 34%).

¹⁹¹ KRITZER, *supra* note 19, at 39–40; *see also* Stephen K. Dietz et al., *The Medical Malpractice Legal System*, in APPENDIX: THE REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 114–15 & tbls.III-43, III-44 (1973) (reporting that, in medical malpractice cases, the contingency fee is typically around 33%, rising to 40% in the event of trial).

In comparison, every one of the twelve settlement mills I have so far studied charges a tiered contingency fee. And among those firms, as compared to Kritzer's data, most start with a *higher* percentage (at least 33%—and perhaps as high as 40%—compared to Kritzer's 25%) and also trigger the escalator *sooner* in the litigation process.¹⁹² While Kritzer found that firms generally triggered the escalator only after “substantial trial preparation,” all settlement mills in my (admittedly very small and unscientifically drawn) sample trigger the escalator when suit is merely filed.¹⁹³

To be sure, to the extent that settlement mills do charge higher contingency fees, there is one ready and reasonable explanation: Because most settlement mill claims are small, they arguably justify a larger percentage.¹⁹⁴ A \$5000 case and a \$50,000 case, in other words,

¹⁹² One important detail is that both Kritzer's data and my data come from retainer agreements. KRITZER, *supra* note 19, at 39. Reliance on retainer agreements runs the risk of overstating the fee actually charged, given that some lawyers will reduce their fee in order to induce settlement. *Id.* at 41 (“It is not at all uncommon for lawyers to collect fees that are less than what the retainer agreement entitles them to.”). It is plausible (although speculative) that settlement mill lawyers, intent on forging settlements, reduce fees at uncommonly high rates, which would account for some of the apparent discrepancy. *See* Telephone Interview with A.M. (May 14, 2008) (stating that, at the Weiss firm, “Even though [the fee] was 40%, you'd see an average of 20-25-30% in fees. That was not uncommon.”).

¹⁹³ At Weiss, for example, though there was some disagreement as to the actual percentage utilized, the majority of sources recalled that the contingency fee was 40% if the case could be resolved prior to the initiation of litigation and 45% if litigation commenced. Telephone Interview with A.M. (May 14, 2008); Telephone Interview with F.M. (Apr. 29, 2008); Telephone Interview with E.C. (Apr. 22, 2008). *But see* Telephone Interview with K.R. (May 1, 2008) (recalling fee of one-third); Transcript of Deposition of Joe W. Weiss at 53, *Comm. for Lawyer Discipline v. Weiss*, No. 94-CI-18282 (Tex. Dist. Ct. Sept. 5, 1995) (stating that a particular client was charged fee of 35%). Rogers, meanwhile, typically charged a tiered contingency fee: 33% in the absence of suit and 40% if a lawsuit was initiated. *See* *Wilson v. Law Offices of James M. Rogers*, No. 823761-7 at 7 (Cal. Super. Ct. July 17, 2002), *withdrawn*, (Oct. 15, 2002); Telephone Interview with J.R. (July 28, 2008). Other firms display similar patterns. The Sledge firm of Louisiana, for example, charged a fee of 33% in the absence of suit, 40% if a suit was filed, and 50% in the event of an appeal. Sledge Submission, *supra* note 181, at LDS-0152 (firm's contract for legal services). At the Dupayne firm of Georgia, clients were charged 33% in the absence of suit and 40% if suit was initiated. Telephone Interview with J.G. (Aug. 27, 2007); Telephone Interview with A.E. (Aug. 16, 2007). At the Guirard firm of Louisiana, clients were charged 36% in the absence of suit and 40% if suit was filed. Guirard Disciplinary Transcript, *supra* note 139, at Ex. ODC 3 (firm's contract for legal services). At the Azar firm of Colorado, clients were charged 35% and up to 40% “if it [became] necessary to file suit or demand arbitration.” Plaintiff's Motion for Partial Summary Judgment as to Liability for Breach of Fiduciary Duty at Ex. A, *Pappas v. Frank Azar & Assocs.*, No. 06-cv-01024-MSK-BNB (D. Colo. Mar. 30, 2007) (firm's fee agreement). At the Spital firm of California, the “normal” agreement was one-third, rising to 40% if the case went into litigation. Spital Transcript, *supra* note 151, at 4746 (testimony of Samuel E. Spital).

¹⁹⁴ On the other hand, just how much smaller is debatable. In 1979–1980, the Civil Litigation Research Project concluded that the median case in state court involved roughly

might require a comparable amount of effort while offering to the contingency fee practitioner radically different rewards. If the contingency fee practitioner thus chooses to raise his fee when damages are low, so be it. Bolstering this argument, if the very small cases that settlement mills accept have traditionally been rejected by conventional counsel (a question considered above), they presumably have been turned down because they are not profitable.¹⁹⁵ If high fees (and economies of scale) are necessary to make small claims profitable, that would militate in settlement mills' favor.

Other factors, though, militate in favor of a lower percentage. As compared to conventional counsel, settlement mills do not wrestle with particularly novel or difficult issues, devote extraordinary time or attention to their cases, display extraordinary skill or expertise, or shoulder significant risk.¹⁹⁶ As for novelty and difficulty, Jim Rogers acknowledged that his firm specialized in "basic," "very straightforward" cases with "no argument about liability."¹⁹⁷ Another settlement mill partner, likewise, described many of his firm's claims as "so very cut and dry."¹⁹⁸

Not surprisingly, in view of their simplicity, settlement mills appear to expend little time and effort on the cases they resolve. While Kritzer's research reveals that even the highest-volume contingency fee lawyers average twenty-five hours per case,¹⁹⁹ many settlement mill claims are reportedly settled in a fraction of that

\$4500. HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 14, 20 (1991). In inflation-adjusted dollars, that equals roughly \$13,000, which is not dramatically more than settlement mills' typical recovery. Inflation was calculated pursuant to CPI INFLATION CALCULATOR, *supra* note 90.

¹⁹⁵ See *supra* Part II.A.5 (discussing accident victims' access to redress).

¹⁹⁶ Model Rule 1.5(a) lists eight factors to be considered in determining the reasonableness of a fee. These include, inter alia, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2007). The rule does not discuss risk, but the factors are "not exclusive," *id.* at cmt. 1, and others have identified risk as an important factor bearing on the appropriateness of a given contingency fee, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994) (stating that, when deciding whether contingency fees are appropriate, "likelihood of success" is among the factors that "should be considered").

¹⁹⁷ Telephone Interview with J.R. (July 28, 2008).

¹⁹⁸ Sledge Disciplinary Transcript, *supra* note 12, at 427 (testimony of Lawrence David Sledge).

¹⁹⁹ Herbert M. Kritzer, *Investing in Cases: Can You Profit from Contingency Fee Work?*, 70 WIS. LAWYER 10, 44 (1997); accord KRITZER, *supra* note 194, at 31 (reporting that the median case in the Civil Litigation Research Project sample, resolved for about \$13,000 in today's dollars, consumed 30.4 hours of attorney time); ROBERT J. MACCOUN ET AL., RAND, *ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM* 41 tbl.3.8 (1988) (providing estimate of twenty "billable" attorney hours and ten non-attorney staff hours per automobile case).

time.²⁰⁰ One Louisiana firm, for example, distributed an office policy manual which advised that “most [automobile] cases should take no more than 4–6 hours of staff work to turn over.”²⁰¹ A few sources from a Florida firm indicated that typical cases required less than a day of work.²⁰² And various sources, from firms in Texas and California, likewise recalled that the typical case could be wrapped up in less than six hours.²⁰³

Nor do settlement mill practitioners display extraordinary talent. As we have seen, it is not unusual for settlement mills to delegate much of their work to non-attorney personnel, and the lawyers at such firms often downplay the legal skill required, describing their work as follows:

“I might as well have been working on an assembly line.”²⁰⁴

“[T]he whole system is set up to do as little work as possible.”²⁰⁵

“I felt like a claims adjuster with a law license.”²⁰⁶

“It’s barely the practice of law. . . . You are a glorified adjuster until you file suit, and when you file suit, minimal work gets done.”²⁰⁷

“Lawyers over there on the pre-litigation side are just brokers, that’s all you are. A good monkey could do the work.”²⁰⁸

Finally, settlement mill lawyers face remarkably little risk. Contingency fee lawyers typically face numerous unknowns when they agree to represent a client: Will the case result in a favorable settlement or judgment? Even if it does, will that settlement or judgment be collectible? How much will it cost in both effort and expense to obtain that recovery? How much time will pass before the recovery is

²⁰⁰ To be sure, some settlement mill lawyers report substantially higher inputs. *See, e.g.*, Telephone Interview with A.M. (May 14, 2008) (“[On] [t]he average file, I would spend anywhere between ten hours to fifty hours, even without litigation.”).

²⁰¹ Sledge Submission, *supra* note 181, at LDS-0042 (staff memo).

²⁰² Telephone Interview with R.J. (Apr. 8, 2008) (stating that he spent “a couple, few hours” per settlement); Telephone Interview with K.E. (Apr. 3, 2008) (stating that an usual case required “[n]ot more than eight hours”); Telephone Interview with D.R. (Mar. 4, 2008) (recalling that he spent two to three hours, from time of demand to time of release); *cf.* Telephone Interview with H.L. (Apr. 7, 2008) (estimating ten to twenty hours for typical soft-tissue case); Telephone Interview with C.R. (Apr. 1, 2008) (recalling that he spent eight to ten hours on typical soft-tissue case).

²⁰³ *See* Telephone Interview with C.P. (May 20, 2008) (noting that, at his Texas firm, “two hours would cover everything”); Telephone Interview with J.K. (May 15, 2008) (“I’d probably say per case maybe four hours, max.”). For relevant information about the Rogers firm, see *supra* note 77 and accompanying text, which provides estimates of four to five hours.

²⁰⁴ Telephone Interview with R.J. (Apr. 8, 2008).

²⁰⁵ Telephone Interview with C.P. (May 20, 2008).

²⁰⁶ Telephone Interview with K.R. (May 1, 2008).

²⁰⁷ Telephone Interview with K.N. (Nov. 8, 2007).

²⁰⁸ Telephone Interview with D.W. (May 8, 2008).

obtained?²⁰⁹ These are precisely the uncertainties that are said, quite reasonably, to justify an elevated fee when a recovery is attained.²¹⁰ Yet, at settlement mills, as we have seen, such risks are much reduced or altogether absent.²¹¹

Judging the reasonableness of contingency fees is admittedly fraught, particularly since high fees can sometimes reduce principal-agent conflicts and, paradoxically, work to clients' advantage.²¹² But the possibility of rent-seeking is real when the anomalies described above are coupled with the following three considerations: First, some public adjusters, who forthrightly provide a streamlined service, charge substantially lower contingency fees for seemingly similar work;²¹³ second, well-documented information asymmetries plague the contingency fee marketplace;²¹⁴ and, third, data reveal that plaintiffs' lawyers in auto cases earn *higher* average effective hourly rates than do other contingency fee practitioners, even though auto cases tend to require less expertise and entail reduced risk.²¹⁵

III

THE NEED FOR REFORM

Part III considers the need for reform. Subpart A briefly reviews settlement mills' myriad advantages and disadvantages, particularly in

²⁰⁹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994) (reciting various risks). These risks are not just theoretical; research suggests that plaintiffs' lawyers receive no payment for a non-trivial percentage of contingency fee cases. See KRITZER, *supra* note 173, at 138 (reporting that 19% of contingency fee lawyers studied by Civil Litigation Research Project received no payment).

²¹⁰ Kritzer, *supra* note 170, at 748–49.

²¹¹ See *supra* note 107 (discussing rarity of no-offer cases).

²¹² See generally Michael McKee et al., *Contingent Fees, Moral Hazard, and Attorney Rents: A Laboratory Experiment*, 36 J. LEGAL STUD. 253 (2007) (showing in laboratory setting that lawyer effort increases as contingent fees rise).

²¹³ See Deidra M. Lemons, *Free-Lance Adjusters' Fees Muddy Water*, HOUSTON CHRON., July 5, 2001, at 5C (reporting that public adjusters charge fees of 7% to 10%); see also *supra* note 182 (regarding fees charged by a smattering of third-party public adjusters).

²¹⁴ See, e.g., Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 93–97 (2003) (outlining various information asymmetries in contingency fee tort litigation). As we will see *infra* at Part III.C, facts about attorney quality are particularly elusive.

²¹⁵ Kritzer, *supra* note 170, at 788 tbl.9b (showing that auto practitioners in Wisconsin earned a mean effective hourly rate of \$417, while “[o]ther personal injury” practitioners earned \$281); *id.* at 791 tbl.10a (displaying survey data collected by RAND showing that, in a sample of federal proceedings terminated in 1991, auto practitioners earned a mean effective hourly rate of \$1031, while “[o]ther tort” practitioners earned \$484); *id.* at 793 tbl.10b (displaying survey data collected by RAND showing that, in a sample of federal proceedings filed in 1992–1993, auto practitioners earned a mean effective hourly rate of \$288, while “[o]ther tort” practitioners earned \$230).

light of the distinct demographics of the clientele served. Subpart B then analyzes the existing lawyer regulatory architecture and considers why settlement mills are destined to fall through certain persistent gaps. Subpart C then shows that, given these gaps, the task of ensuring adequate attorney quality is largely relegated to the individual client—a fact that has profound implications for the Bar’s duty to make objective information about lawyer quality more readily available.

A. *Disparate Justice, Déjà vu*

As we have seen, settlement mills have many advantages. They may well expand the availability of basic legal services and they spare their clients from litigation’s expense, uncertainty, time, and trouble. On the other hand, though, some clients with fabricated or exaggerated claims are over-compensated, perhaps significantly. And our notion of individualized justice is compromised. Settlement mills do not typically engage in a fine-grained assessment of fault; they invest little in each case’s factual and legal development; and they sometimes delegate “legal work” to non-lawyer personnel. There is, of course, a strong argument that these shortcuts do not matter, or do not matter much, for small claims. Indeed, lots of lawyers cut corners, and it is arguably precisely such routinization that permits the representation of those with only modest injuries.²¹⁶ But some clients with serious injuries are almost certainly ill-served, and there is an undeniable problem when clients are not informed (or worse, misinformed) of the peculiar nature of the service provided.

The problems plaguing settlement mills are particularly stark when we recognize that, in the United States, we have grown accustomed to two tiers of justice. The “haves” benefit, and have long benefited, from personalized legal services provided by highly educated, meticulously trained, and lavishly compensated practitioners intent on discovering and exploiting every tactical advantage.²¹⁷ The “have-nots,” meanwhile, when represented at all, are, and have long been, represented by under-paid and over-worked practitioners whose adversary impulses are muted by some mix of high caseloads, insufficient support, and inadequate training.²¹⁸ Thus, the work of the law

²¹⁶ See *supra* note 29 (noting that traditional tort’s formal commitment to individualized justice tends to yield in various contexts).

²¹⁷ See generally ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964) (providing a sociological account of Wall Street law firms of the 1960s).

²¹⁸ Approximately 80% of low-income residents’ legal needs are wholly unmet. LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA A-1* (2009), available at

firm lawyer for the affluent is, as Eve Spangler reported, “the work of a fine custom tailor: highly individualized and with exquisite fit.”²¹⁹ Meanwhile, the work of a lawyer for the poor is, as Jerome Carlin found, frequently “mass process[ed],” “routinized,” and all too often ill-fitting.²²⁰

The one area where this class-based justice is thought *not* to obtain is the particular world of personal injury. Tort law entitles one to relief from injury irrespective of one’s wealth or status.²²¹ And contingency fee financing, overwhelmingly the choice of personal injury litigants, should make that relief practically available.²²² Armed with the contingent fee, the rich and poor alike should be able to retain counsel with equal talent and time, making the phrase “equal justice under law” eminently attainable, rather than merely aspirational, at least in this narrow corner of practice.²²³

Yet, settlement mills overwhelmingly represent individuals who are poor, uneducated, and/or who belong to historically disadvantaged

http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. The services provided to the remaining 20% can be less than adequate. *See generally* MARJORIE GIRTH, POOR PEOPLE’S LAWYERS (1976) (analyzing legal assistance programs in New Jersey that provide the poor with sub-standard legal services resulting from chronic underfunding). For specific descriptions of the quality of services provided, see *id.* at 76–77. *See also* Jerome E. Carlin et al., *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC’Y REV. 9, 55–59 (1966) (characterizing legal services for low-income people as “of a quite limited character”).

²¹⁹ EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 50 (1986) (characterizing views of senior partners).

²²⁰ Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 385 (1965) (describing services as “mass process[ed]”); Carlin et al., *supra* note 218, at 57 (describing Legal Aid services as “routinized”).

²²¹ Of course, since lost wages are compensable, the rich plaintiff is usually entitled to *more* relief in absolute terms. *Cf.* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 158–70 (2010) (observing that plaintiffs’ gender and race might also impact economic recovery).

²²² Approximately 96% of individual personal injury plaintiffs pay their lawyers on a contingency fee basis. Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15–16 (1996).

²²³ *See* BELL & O’CONNELL, *supra* note 123, at 123 (“[P]laintiffs’ lawyers . . . function in the tort system to provide injured persons with something that aggrieved citizens dealing with other areas of law often lack: access to the courts and *equality of representation*.” (emphasis added)); ROSS, *supra* note 29, at 75 (“[T]he contingent fee . . . makes the little man’s claim as interesting to the lawyer as the big man’s claim.”); James W. Bollinger, *Contingent Fees—The New Suggestion of Judicial Supervision*, 69 CENT. L.J. 355, 356 (1909) (“The contingent fee actually makes the courthouse the one temple of justice for all, equally accessible to both the rich and the poor.”); Lee S. Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served?*, 14 FORUM 406, 406 (1979) (“The contingent fee makes it possible for anyone in our society to get the best lawyer.”); *see also infra* notes 228–29 and accompanying text (referring to the contingency fee as “a great leveler” and “equalize[r]”).

ethnic and racial minority groups.²²⁴ Given persistent social hierarchies, these clients are also personally acquainted with few lawyers and know little about the civil justice system generally. “[T]here are no lawyers in [my clients’] personal social circles,”²²⁵ one settlement mill lawyer explained, while another recalled, “People didn’t know what a real law firm was.”²²⁶ A third responded, when asked to describe his typical client, “Working class. . . . People who don’t have any particular understanding of the legal system, except what they’ve heard from television.”²²⁷

If the contingency fee is “a great leveler”²²⁸ famously able to “equalize[] otherwise unequal litigants,”²²⁹ what explains this? Part of the answer might be that *when* low-income individuals pursue tort claims, they are, some studies suggest, *more* likely to seek the assistance of counsel, presumably because of a sense, perhaps well-founded, that they lack the literacy, sophistication, or savvy to handle the problem effectively without legal assistance.²³⁰ If the poor disproportionately want lawyers even for very small claims, and if settlement mills occupy the market niche willing to accept those very small claims, that will predictably affect settlement mills’ clientele. Part of the answer might also stem from the fact that settlement mills settle—and settle quickly—and the poor, who are less likely to have sturdy

²²⁴ See, e.g., Telephone Interview with J.J. (Apr. 24, 2008) (stating that, at the Rogers firm, a typical client was “[g]enerally a person of color” and “either lower income or lower-middle class”); see also Engstrom, *supra* note 3, at 1524 (describing typical settlement mill clients).

²²⁵ Mark Ballard, *The Ad-Made Man and the Old-Line Firm: Changes in Law Practice Are Played Out in Baton Rouge*, NAT’L L.J., Sept. 30, 2002, at A1, A12 (quoting E. Eric Guirard).

²²⁶ Telephone Interview with S.S. (May 30, 2007).

²²⁷ Telephone Interview with T.T. (Aug. 14, 2008).

²²⁸ Samuel R. Gross, *We Could Pass a Law . . . What Might Happen If Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 341 (1998) (“Whatever else might be said about the contingent fee, it is a great leveler.”).

²²⁹ Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, 2 LITIG. 27, 34 (1976).

²³⁰ See HUNTING & NEUWIRTH, *supra* note 120, at 99 (“Of those who decide to take action, persons with the lowest SES are most likely to employ a lawyer”); BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 152, 156–57 (1977) (“Problem-havers who consulted lawyers on tort matters had substantially *lower* mean income (\$8,000) than those who did not (\$11,000).”). *But cf.* 1 U.S. DEPT OF TRANSP., *supra* note 120, at tbl.46S (comparing attorney retention rates by highest grade completed and reporting that seriously injured auto accident claimants with college and graduate degrees were far more likely to retain counsel, as compared to claimants with less formal education); Bruce Campbell & Susette M. Talarico, *Access to Legal Services: Examining Common Assumptions*, 66 JUDICATURE 313 (1983) (reporting on a Georgia survey which found that low-SES individuals were substantially less likely to hire lawyers or identify problems as requiring legal assistance).

safety nets, may disproportionately prefer payments certain and without delay.²³¹

But part of the answer, too, and perhaps a larger part, stems from the fact that the poor are far more likely than their wealthier counterparts to choose a lawyer on the basis of attorney advertising.²³² And why is that? Three explanations seem likely. First, as compared to wealthier individuals, the poor are less likely to have social and familial ties with lawyers and are less likely to have used legal services in the past, meaning they are less likely to know more personal ways to find lawyers and also less likely to know the reputations of various practitioners.²³³ Next, some advertisers affirmatively craft their ads to appeal to low-income or historically disadvantaged groups.²³⁴ Jim Rogers, for example, explicitly geared his commercials “to appeal to folks who may not be upward-income individuals.”²³⁵ Finally, there might be a simple misconception at work. One 1992 New Mexico survey (specifically focused on direct mail advertisers) found that, as compared to their wealthier and more highly educated counterparts, the poor and least educated were far more likely to think that attorney advertisers are *superior* to non-advertisers, believing advertisers to be comparatively more skillful, of better quality, and inclined to give a better deal.²³⁶

²³¹ Carlin et al., *supra* note 218, at 77 (“Lawyers who deal with poor persons in . . . personal injury cases . . . tell us that poor clients often exert strong pressure to ‘settle out’ so that they can pay their bills and have ‘something extra’ to live on.”); *accord* Telephone Interview with J.J. (Apr. 24, 2008) (“A number of our clients were uninsured.”). Returning to the notion that settlement mills maintain particularly close relationships with doctors and chiropractors, settlement mills might also be attractive to uninsured accident victims because they can offer medical care on credit. *See supra* note 136 (discussing Rogers ad, which promised medical as well as legal services).

²³² ABA COMM’N ON ADVERTISING, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 97 & tbl.XII (1995) [hereinafter LAWYER ADVERTISING] (showing that lower-income households are substantially more likely to choose lawyers on basis of advertising, as compared to moderate-income households); Scott Sandlin, *Poster Boy or Scapegoat?*, ALBUQUERQUE J., Oct. 12, 1997, at A1 (reporting statements by Will Hornsby of the ABA’s Commission on Advertising: “‘If you look at who responds to advertising, they are people who don’t otherwise know how to find a lawyer,’ . . . and generally are ‘newly-relocated,’ low-income, undereducated, and minorities.”).

²³³ *See* Lawyer Advertising, *supra* note 232, at 97 (observing that low-income individuals “are the least likely to know of other resources for finding a lawyer”).

²³⁴ *Id.* (“Those who advertise personal legal services, especially personal injury or other contingency-fee services, target low and moderate-income populations.”).

²³⁵ Rogers Deposition, *supra* note 69, at 18–19.

²³⁶ *See* Petition for Writ of Certiorari at apps. 51, 52, *Revo v. Disciplinary Bd. of the Sup. Ct. for the State of N.M.*, 521 U.S. 1121 (1997) (No. 96-1780) (appending a December 1992 survey of Albuquerque adults’ responses to direct mail advertisement). The least educated were also, crucially, twice as likely as their most educated counterparts (77% versus

Whatever the explanation, though, settlement mill clients are overwhelmingly persons of limited means. And this fact has normative bite. True, settlement mills have much to recommend them, and, as previously discussed, might be improving the lot of certain individuals who, in settlement mills' absence, might have trouble securing any type of legal representation or even shy away from claiming altogether. But, at the same time, these client characteristics suggest a discouraging *déjà vu*: a replication of the all-too-familiar justice gap where high-income personal injury claimants are more apt to retain "conventional counsel" of exquisite fit, while low-income claimants are more apt to retain firms where legal services are mechanized and mass produced. Unlike the traditional justice gap where counsel quality hinges on a client's unequal ability to pay, however, this justice gap—especially as it exists for the small proportion of settlement mill clients with large claims—is less explicable and consequently more invidious since it rests merely on one's ability to *choose*. As one former settlement mill lawyer from Texas bluntly explained:

Anyone with a law degree in this town or familiarity with how the courts work would say, "You can't go there." But it's the people sitting at home watching Jerry Springer who see his ads that are on five times a day between the hours of one and four in the afternoon . . . who go to him. And get trapped in the snare.²³⁷

B. *The Trouble with the Current Regulatory Architecture*

The status quo is, I suggest, quite flawed. But as explained below, the current regulatory architecture—consisting of disciplinary, liability, institutional, and informal controls—is unlikely to curb settlement mills' worst abuses, suggesting that a new, tailored mechanism is needed to achieve meaningful reform.²³⁸

1. *Disciplinary Controls*

Disciplinary controls, typically in the form of bar disciplinary proceedings, are the first and most well-known lawyer regulatory tool. For a host of reasons, however, these proceedings are ill-suited to address the settlement mill shortcomings previously identified as most

38%) to believe that advertising lawyers are legally required to be "experienced in the trial" of cases in the substantive area in which they advertise. *Id.* at app. 52.

²³⁷ Telephone Interview with C.P. (May 20, 2008).

²³⁸ The description of the current regulatory architecture is drawn from the classic work, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

problematic.²³⁹ The first reason for this is the simplest: Settlement mills do not *necessarily* run afoul of clear rules of professional responsibility. No rule requires attorneys to file lawsuits and try cases. Nor must attorneys inform clients about their propensity to do so. Likewise, under the rules, it is arguably fine to incentivize negotiators with quotas and contests, mechanize case processing, and, given proper training and supervision, delegate important tasks, such as client screening, to non-attorney personnel. Furthermore, though I suggest above that settlement mill fees might be outsized in relation to the effort exerted, and one could certainly advance a global critique that settlement mill representation falls below a minimal threshold of competence, rules governing both fees and competence are vague enough that disciplinary counsel would have great difficulty proving outright violations. And, not surprisingly, commentators indicate that disciplinary actions for excessive fees and incompetent representation are exceptional.²⁴⁰

Furthermore, even when settlement mill conduct *does* violate a clear rule of professional ethics, existing disciplinary mechanisms are unlikely to either detect or punish the transgression. As for detection, disciplinary bodies are reactive; they rely on grievances filed typically by fellow attorneys, judges, and (most often) former clients—three constituencies that, for a host of reasons, are poorly positioned to detect or blow the whistle on settlement mill abuse.²⁴¹ For starters, since settlement mills rarely file lawsuits, they do not typically interact with defense counsel or with judges. They interact, instead, with insurance claims adjusters, who, unlike lawyers and judges, are not subject

²³⁹ This is not to suggest, of course, that settlement mill lawyers are never disciplined. A number of the firms discussed in this research were. Indeed, I have located a number of settlement mills by reviewing public disciplinary records.

²⁴⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007) (regarding fees); *id.* R. 1.1 (regarding competence); see also ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY 11 (1992) ("The disciplinary system was not designed to address complaints about the quality of lawyers' services or fee disputes."). Indeed, disciplinary action for excessive fees and incompetent performance is unusual. RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 211 (2008) ("Disciplinary committees rarely punish lawyers for excessive fees."); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 850 (4th ed. 2005) (observing that courts and ethics opinions "often state that it is inappropriate to impose discipline for conduct that amounts 'only' to negligent malpractice"); Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1345 (1996) (noting that contingency fee lawyers are "virtually never disciplined for charging unreasonable fees").

²⁴¹ Most grievances are filed by clients, rather than by judges or fellow practitioners. See ABEL, *supra* note 240, at 502–03; see also *id.* at 499 (pointing out that lawyer disciplinary systems are "almost entirely reactive").

to rules of professional responsibility and are therefore not duty-bound to report perceived unethical conduct.²⁴² Settlement mill clients, meanwhile, because of their particular unsophistication, are unlikely to identify even egregious ethical lapses when they occur and, even if they do identify misconduct, are relatively unlikely to know how to lodge a formal complaint.²⁴³ More, even if a client can identify wrongdoing *and* knows to whom to direct her grievance, doing so takes resolve, as disciplinary proceedings can trigger retaliatory action, drag on for years, and seldom benefit the complaining client.²⁴⁴ Finally, in the unlikely event that a complaint *is* filed, statistics are not on the client's side. Few grievances result in formal charges.²⁴⁵ And, in the unlikely event that formal charges culminate in a formal finding of wrongdoing, serious penalties are exceptional.²⁴⁶

2. *Liability Controls*

Liability controls, typically in the form of malpractice actions, impose a second formal constraint on attorney misfeasance. But they, too, are unlikely to curb settlement mill abuse. Most obviously, this is because clients, and particularly settlement mill clients, have trouble identifying even egregious attorney misbehavior. Then, in the unlikely event that a client *does* detect wrongdoing, daunting obstacles stand between an aggrieved client and a recovery significant enough to prompt a law firm to change its ways.²⁴⁷

²⁴² See, e.g., Telephone Interview with S.S. (May 30, 2007) (explaining that all of her negotiations were with adjusters). Model Rule 8.3(a) imposes an obligation to alert authorities when a lawyer knows that another lawyer has committed a rule violation “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness” MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2007). To be fair, though, compliance with Rule 8.3 is spotty; few lawyers tattle on fellow lawyers, even when misconduct is observed. See RICHARD L. ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 466–68 (2011) (discussing lawyers’ and judges’ reluctance to report lawyer misconduct).

²⁴³ For a discussion of the difficulty clients have identifying lawyer misbehavior, see ABEL, *supra* note 180, at 144. According to one (admittedly dated) study, only a minority of clients even know of the existence of professional disciplinary procedures. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 962–63.

²⁴⁴ DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 158–62 (2000).

²⁴⁵ ABA CENTER FOR PROF’L RESPONSIBILITY, 2008 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart I (2008) (showing that out of 120,406 complaints received by disciplinary agencies nationally, only 5048 lawyers—a meager 4.2%—were formally charged).

²⁴⁶ In 1983, for example, Abel reports that the Association of the Bar of the City of New York received 8766 complaints, prosecuted 491 attorneys (5.6%), suspended 86 (1%), and disbarred 65 (0.7%). ABEL, *supra* note 240, at 503.

²⁴⁷ Notwithstanding these obstacles, some malpractice actions are nevertheless filed. For example, in a 2000 deposition, Jim Rogers noted that, over the years, he had been sued for malpractice “probably five to ten times.” Rogers Deposition, *supra* note 69, at 47.

The first obstacles are practical. Most notably, in order to make the malpractice action worthwhile, the underlying action must involve damages significant enough to make the lawsuit profitable for a malpractice lawyer who, like the lawyer whose conduct is at issue, will likely be paid via contingency fee. This means that clients are only apt to file malpractice actions when a lawyer's misconduct results in large, provable, and collectible damages.²⁴⁸ If the underlying case is small—as most settlement mill claims are—it will not be worth a malpractice lawyer's time. Similarly, a lack of malpractice insurance will often defeat damage collection and, in turn, deter case initiation. Only Oregon requires its attorneys to carry malpractice insurance; in other states, some 25% to 80% of lawyers are uninsured.²⁴⁹

Legal hurdles are no less daunting. To prevail on a malpractice action, plaintiffs must show breach, causation, and damages.²⁵⁰ As for breach, malpractice plaintiffs must show that the original attorney's performance fell below the prevailing practice in the community—which can be difficult to prove if reliable information regarding the practices of other relevant lawyers is not available.²⁵¹ Next, plaintiffs must link their attorney's negligence to the diminished value of their particular claim, which can be tricky, and must also link the damages sustained to the attorney's breach. Together, this means that plaintiffs must prove a case within a case, showing that the underlying claim had legal merit which the attorney's error erased or diminished. These various legal hurdles mean that, even when claims are initiated, they very rarely succeed. According to one recent study, 78% of opened legal malpractice claims resulted in no payment.²⁵²

²⁴⁸ DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 1011–12 (5th ed. 2009); Geoffrey C. Hazard, *Ethics*, NAT'L L.J., July 6, 1992, at 15 (“The [legal] malpractice remedy . . . has practical utility only if the claim is open-and-shut or involves a large sum of money (upwards of \$250,000 in many localities).”); see also Wilkins, *supra* note 238, at 831 (“[C]lients with small or difficult to prove claims are unlikely to gain access to the malpractice system.”).

²⁴⁹ ABEL, *supra* note 242, at 468 (“A 1988 survey of more than 12,000 California lawyers suggested that only 17 percent were insured.”); Thomas G. Bousquet, *It's Time for Mandatory Malpractice Insurance*, TEX. LAW., Dec. 6, 1993, at 17 (“Approximately 60 percent of the attorneys in private practice in the state have no professional liability insurance.”); Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 258 n.96 (2010) (“Oregon is the only state that currently requires malpractice insurance coverage . . .”).

²⁵⁰ See RESTATEMENT (THIRD) GOVERNING LAWYERS § 48, cmt. c (2000).

²⁵¹ See RHODE, *supra* note 244, at 165 (“[N]o reliable evidence is available on how lawyers generally handle many legal tasks.”).

²⁵² Kara MacKillop & Neil Vidmar, *Legal Malpractice: A Preliminary Inquiry* 14 (Oct. 25, 2006) (unpublished manuscript) (on file with the New York University Law Review) (presented at the First Annual Conference on Empirical Legal Studies).

3. *Institutional Controls*

Institutional controls—control by judges and regulators—are the third mechanism commonly thought to restrain attorney conduct.²⁵³ But settlement mills are, once again, unusually impervious to these mechanisms. Most obviously, because settlement mills only rarely initiate lawsuits, they seldom practice before judges or administrators who mete out institutional sanctions. Then, even when troubling conduct is identified, institutional controls that exist point in the wrong direction. Predominant institutional controls include judges' ability to hold lawyers in contempt, impose sanctions pursuant to Federal Rule of Civil Procedure 11 and state court counterparts, penalize discovery abuse, and publicly admonish obstreperous conduct. Yet, these controls were erected to curb *overly zealous* lawyering, punishing, for instance, the bombastic argument, the withholding of documents, or the filing of frivolous motions or claims. Few, if any, institutional constraints exist to curb *overly passive* lawyering when one fails to vigorously represent one's client vigorously.

4. *Informal Controls: The Reputational Imperative*

Finally, peer disapproval is also unlikely to temper settlement mill abuse. For most lawyers, informal controls are influential.²⁵⁴ Peer disapproval—or conversely, the “reputational imperative”—is typically so potent because most lawyers' financial survival depends on signing new clients; to sign new clients, most lawyers rely heavily on referrals from fellow practitioners; and a good reputation is usually a precondition to referral receipt.²⁵⁵ The reputational imperative, when it works, thus reduces self-dealing in individual cases and also (via referral networks) channels work to competent providers. But mass advertising diminishes the reputational imperative. When firms get their clients primarily from paid advertising (as settlement mills do),

²⁵³ For a discussion of various institutional controls, see RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 66–68 (1999), ABEL, *supra* note 180, at 152–54, and Wilkins, *supra* note 238, at 835–38.

²⁵⁴ Charles Wolfram, for example, has written that “informal sanctions” are “[t]he most widely effective form of regulation of lawyers.” CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 22 (1986).

²⁵⁵ The “reputational imperative” refers to the need to maintain a good reputation among past clients and fellow practitioners in order to obtain referrals and thus generate future business. For more on the reputational imperative and the importance of referral networks, see *supra* notes 18–19 and accompanying text.

they can choose to bypass reputation-based business—stripping informal controls of much of their power.²⁵⁶

*C. The “Pin-the-Tail-on-the-Donkey”²⁵⁷ Problem
of Attorney Choice*

If the legal profession set and consistently maintained high standards such that all lawyers could be counted on to be both expert and ethical, prospective clients would not need to be particularly concerned with problems of attorney choice. Virtually any lawyer in good standing could be relied upon to provide competent—and comparable—counsel.²⁵⁸ Yet most lawyers would (and, when surveyed, do) agree that this utopian vision does not reflect the status quo.²⁵⁹ As settlement mills help to illustrate, there are real differences in attorney quality, and the choice a client makes has broad repercussions for the type of representation she will receive and even, studies suggest, the size of the recovery she will ultimately obtain.²⁶⁰

Choosing a lawyer wisely is thus extremely important. It is also—especially for clients without lawyers in their social and familial net-

²⁵⁶ For information on settlement mills’ distinctive reliance on advertising, see Engstrom, *supra* note 3, at 1492–93.

²⁵⁷ BELL & O’CONNELL, *supra* note 123, at 7 (describing picking a personal injury lawyer as a “pin-the-tail-on-the-donkey process”).

²⁵⁸ ROSENTHAL, *supra* note 76, at 117.

²⁵⁹ In a mail survey of 500 Sacramento lawyers, 97% of respondents agreed or strongly agreed that there was great variability among legal service providers. Howard G. Schutz et al., *Lawyers’ Perceptions of Consumers’ Attitudes: Satisfaction, Quality, and Selection Criteria*, 12 J. LEGAL PROF. 87, 95 (1987); see also ROSENTHAL, *supra* note 76, at 60–61 (concluding, based on a study of fifty-nine personal injury victims, that “ineffective professional service” is “quite common”).

²⁶⁰ See, e.g., FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 201, 216 (1993) (finding that medical malpractice specialists negotiated settlements that were nearly twice as large as the sums obtained by non-specialists in similar cases); JAMES S. KAKALIK ET AL., *RAND, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES* xi (1984) (finding that a lawyer’s asbestos-related experience helped determine whether or not his clients would recover); ROSS, *supra* note 29, at 167, 193 tbl.5.4 (comparing recoveries obtained by solo practitioners and specialists and finding substantial disparities, although no attempt is made to control for claim size or quality); DANIELS ET AL., *supra* note 119, at 19–21, 27–38 (showing that certain Wisconsin medical malpractice practitioners obtained payments more often and in far higher amount as compared to others, even roughly accounting for injury severity); CATHERINE T. HARRIS ET AL., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs’ Attorneys*, 58 SMU L. REV. 225, 248 (2005) (analyzing North Carolina medical malpractice data and concluding that “[a]ttorney attributes are at least as important as case attributes”); accord DAVID S. ABRAMS & ALBERT H. YOON, *The Luck of the Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1149–50, 1166–72 (2007) (reviewing data from the Clark County Office of the Public Defender in Nevada and finding that, even when cases and lawyers were randomly assigned, certain public defenders consistently obtained better results, and observing that “the attorney to whom a defendant is randomly assigned has a substantial impact on the likelihood and duration of his sentence”).

works—extremely difficult. 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.

1. *Market Forces: Existing Insufficiencies and Inefficiencies*

Credible information about lawyer performance is difficult (more often, impossible) to find, no matter one’s resources or resolve.²⁶¹ There is nowhere to look, for instance, to determine the extent to which a given lawyer usually litigates or settles, or, if he settles, whether he tends to resolve cases quickly or slowly or whether he obtains unusually generous or stingy sums. There is no centralized databank recording attorney malpractice complaints, judgments, and settlements.²⁶² And even matters of discipline tend to be shrouded in secrecy. Most states do not publicize attorney grievances in the absence of a finding of probable cause; not all states publish information about who has been sanctioned; and even formerly disbarred lawyers (practicing after readmission or in a new state) are typically under no obligation to reveal the blot on their record when wooing new clients.²⁶³ Information deficits are then 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, and often shortly after an accident when wounds are still raw.²⁶⁴

²⁶¹ The lack of credible information available about lawyer performance and the concomitant difficulty individual clients have intelligently selecting counsel is widely recognized and well documented. *See, e.g.*, DEREK BOK, *THE COST OF TALENT* 140 (1993) (“Most potential clients know very few lawyers and have no way of judging their abilities.”); ROSENTHAL, *supra* note 76, at 132 (“Client use of legal services is less a matter of informed choice than of taking the first lawyer who comes along.”); WITT, *supra* note 29, at 283 (“There is virtually no way for a potential claimant to choose sensibly among lawyers competing for a claim.”); *see also supra* note 27 and accompanying text (highlighting the paucity of data).

²⁶² RHODE, *supra* note 244, at 161.

²⁶³ If a lawyer is admitted in multiple jurisdictions, a disbarment in one does not necessarily affect his practice in another. Even within the same jurisdiction, disbarred lawyers can often apply for reinstatement within a few years; a significant proportion (perhaps half) of those do win readmission; and, of lawyers who win readmission, “[f]ew . . . tell their clients they were disbarred, because usually the law doesn’t require it.” Ann Davis, *Bar Readmissions Cloaked in Secrecy*, *NAT’L L.J.*, Aug. 12, 1996, at A1; *see also* ABEL, *supra* note 180, at 148, 291 & tbl.33 (analyzing data for state disciplinary sanctions from 1974–1986); RHODE, *supra* note 244, at 161.

²⁶⁴ The average American uses a lawyer only twice and most accident victims who retain counsel do so promptly. CURRAN, *supra* note 230, at 190 (finding that an average American uses a lawyer only twice in her lifetime); DEBORAH R. HENSLER ET AL., *RAND, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES*, 112, 131, 133 tbl.5.8 (1991) (noting that most clients who contacted lawyers “did so promptly”); *see* INS.

This is not to suggest that no resources are available to guide clients in their selection but rather that current resources are lacking. Existing lawyer ranking and rating systems, for example, are better than nothing—but not by much. One problem is that traditional regimes, such as Martindale-Hubbell, Best Lawyers in America, and Super Lawyers, are often geared toward corporate clients, which is precisely the segment of the market where information deficits are smallest.²⁶⁵ Other relatively recent web-based entrants, such as Avvo.com and LawyerRatingz.com, cast the net more broadly with an eye to helping all sorts of individuals find qualified counsel.²⁶⁶ Still, these websites tend to rely heavily on voluntarily submitted client reviews, and clients often lack the capacity to judge the quality of legal services received, dramatically reducing reliability.²⁶⁷ Worse, the reviews might not even come from actual clients. As LawyerRatingz candidly disclaims, “[I]t is not possible for us to verify which raters have knowledge of which lawyers, so always take the ratings with a grain of salt. Remember, we have no way of knowing who is doing the rating—customers, people in the lawyer industry, regular people, dogs, cats, etc.”²⁶⁸

Traditional not-for-profit referral services (often sponsored by bar associations) are no better. These services typically field calls from individuals with legal problems and advise individuals as to whether

RESEARCH COUNCIL, AUTO INJURIES, *supra* note 115, at 37 (reporting that 52% of auto accident claimants who retained counsel did so within one week of their accident).

²⁶⁵ For a discussion of why information deficits are smaller for corporate clients, see *infra* note 348 and accompanying text. For information on these resources, see Jennifer M. Young, *Simply the “Best?” A Comparison of Lawyer Rating Systems*, HAW. B.J., June 2008, at 6. See also Adam Liptak, *On Second Thought, Let’s Just Rate All the Lawyers*, N.Y. TIMES, July 2, 2007, at A9 (“Legal publications these days are full of lists of supposedly stellar lawyers, which are a nice way to generate advertising and good feelings but perform no particular service.”).

²⁶⁶ For more information on Avvo.com, see *About Us*, AVVO, http://www.avvo.com/about_avvo/overview (last visited Aug. 11, 2011) and Liptak, *supra* note 265. For more information on LawyerRatingz, see LAWYERRATINGZ, <http://www.lawyerratingz.com/> (last visited Aug. 11, 2011). For a discussion of these and other relatively new web-based resources, see Stephanie Francis Ward, *Grade Anxiety: Firms Fret About Clients Rating Their Work*, A.B.A. J., Feb. 2010, at 49–53.

²⁶⁷ 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*, 1 LAW & HUM. BEHAV. 373, 378 (1977) (“[C]lients frequently praise services that are shoddy by most other measures”); accord ABEL, *supra* note 240, at 526 (observing that websites that merely aggregate client reactions “risk[] letting superficial judgments of style eclipse substantive measures of lawyer performance”).

²⁶⁸ *Help/Frequently Asked Questions*, LAWYERRATINGZ, <http://www.lawyerratingz.com/faq.jsp> (last visited Aug. 11, 2011).

or not their problem requires legal assistance. If legal assistance is needed, the service will match the caller to an attorney with appropriate subject-matter expertise. The matching, however, is very coarse. At the time of the prospective client's call, the service will typically match the caller's request for, say, a divorce lawyer to the next divorce lawyer in the rotation, without regard to the lawyer's competence, the caller's preferences, or the characteristics or complexity of the particular case. Nor do referral services offer much in the way of quality assurance. Though a few referral networks require the lawyer-applicant to demonstrate some subject matter expertise, screening is more often perfunctory. So long as a lawyer pays an annual fee and meets very minimal requirements, he will be added to the queue.²⁶⁹

2. *Practitioner Referral Networks: An Illustration of a Broken Market*

The existence and prevalence of personal injury *practitioner* referral networks (not to be confused with referral services, discussed above), vividly illustrate the toll information deficits take. Practitioner referrals describe the system by which certain cases (often those that are particularly large or complex) are transferred from lower-echelon practitioners to higher-echelon practitioners in return for a portion of the ultimate fee (typically around 30% to 50%).²⁷⁰ Via referral networks, according to one influential scholar, "potential plaintiffs minimize search costs."²⁷¹ Clients, it is said, know next to nothing about attorney quality, but fellow practitioners, peering over one another's shoulders, may know a great deal.²⁷² Rather than attempting to assess attorney quality themselves, then, clients can hire a lawyer more-or-

²⁶⁹ For information on traditional referral services, see generally ABEL, *supra* note 180, at 135, Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 *FORDHAM L. REV.* 645, 654–55 (2001), and Laura Mansnerus, *Bar Groups Are Happy To Find You a Lawyer*, *N.Y. TIMES*, Feb. 27, 1993, at A34. Some for-profit online referral services, which facilitate more sophisticated sorting, are also cropping up. For information on this new generation of referral services, see Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet*, 20 *GEO. J. LEGAL ETHICS* 769, 774–75 (2007).

²⁷⁰ Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 *DEPAUL L. REV.* 635, 639 n.22 (2005) (showing a mean referral fee of 29.9% in Texas); Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 *LAW & SOC. INQUIRY* 87, 101 & tbl.4 (1988) (showing that a 50% fee to a referring lawyer is the most common arrangement in New York).

²⁷¹ Charles Silver, *Does Civil Justice Cost Too Much?*, 80 *TEX. L. REV.* 2073, 2088 (2002); see also Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 *LAW & SOC. INQUIRY* 269, 281 (2005) ("The referral system ensures that the higher-value cases will, as a general rule, work their way up through the hierarchy of the plaintiffs' bar . . .").

²⁷² Parikh, *supra* note 18, at 252.

less at random and then let the referral market “do their shopping for them.”²⁷³

But anecdotal evidence from settlement mill practitioners, as well as others, casts doubt on just how reliably these networks operate.²⁷⁴ Although some settlement mill practitioners do report referring the biggest and most complicated claims to outside trial counsel (and particularly when those claims involve the high risk, highly specialized areas of medical malpractice or product liability),²⁷⁵ others appear reluctant to forego any portion of a sizable fee. At the Rogers firm, for example, despite the high case volume and an evident reluctance to try cases in-house, by most accounts, referrals were exceptional. One former attorney recalled, “Not one single time that I was there did he refer a single case out to anybody for trial,”²⁷⁶ while another concurred, “Danger is, he didn’t farm out the cases that [did] need to go to trial.”²⁷⁷ At a Florida firm, the story was similar. There, when asked how often cases were referred, a lawyer replied, “I would say rarely if ever. That’s an opportunity for a fee to go out the door. You’re trying to get fees to come in, not to go out.”²⁷⁸ Another agreed, attributing his firm’s reluctance to refer big claims to outside trial counsel to the fact that “it would be giving at least 25% of the fee, if not half.”²⁷⁹ The following colloquy from a sworn statement of a

²⁷³ Silver, *supra* note 271, at 2088.

²⁷⁴ See Daniels & Martin, *supra* note 18, at 395–96 (noting that, in response to the changing legal market in Texas, “[s]ome local lawyers have begun keeping their substantial cases, rather than referring them, in the hope of hitting it big”); accord PHILIP J. HERMANN, BETTER SETTLEMENTS: THROUGH LEVERAGE 100–01 (1965) (observing that “some general practitioners” will not routinely “refer a case to a specialist until they have personally exhausted all settlement possibilities”).

²⁷⁵ See, e.g., Telephone Interview with K.R. (May 1, 2008) (“If it was a case that he thought had a high value, he would send it out.”).

²⁷⁶ Telephone Interview with S.R. (Mar. 27, 2008).

²⁷⁷ Telephone Interview with L.J. (Apr. 17, 2008); see Harper, *supra* note 69 (“[W]hat distinguishes the Law Offices of James M. Rogers is that it almost never goes to trial—or even refers out big cases to firms that have trial experience.”); Rogers Deposition, *supra* note 69, at 87 (testifying that he recalled cases “where we had discussed matters with outside counsel” but would “need to think” to remember whether the firm had “actually retain[ed]” outside counsel); cf. Telephone Interview with J.R. (July 28, 2008) (Q: “How often were cases referred to other [law] firms?” A: “It would happen sometimes. It wouldn’t happen a lot. I can’t give you an exact number. It certainly was not uncommon, but it happened occasionally. It wasn’t a huge number. . . . A lot of the cases that were referred out got referred out at the earlier stages before they ever got to people.”); Telephone Interview with N.M. (June 3, 2008) (stating that, in rare instances, the firm would refer cases to “probably a litigator”).

²⁷⁸ Telephone Interview with R.J. (Apr. 8, 2008).

²⁷⁹ Telephone Interview with G.V. (Apr. 7, 2008).

lawyer who worked at a Georgia settlement mill is also instructive:

Q: But I take it that, as to the split, the big money cases, he shuttles off to other lawyers on a referral basis. True? He refers those cases out?

A: Actually, he kept the big money cases as long as he could settle them

Q: Did he say anything to you that suggested that he'd rather settle the cases so he can take a hundred percent of the fee as opposed to having to split it with another lawyer?

A: Of course.

Q: Did he say that to you?

A: Yes. Many times.

Q: Tell me what he said.

A: He would say "Well, now, if we settle these cases, we get the money, but we're going to have to split it with somebody else if we take it to suit."²⁸⁰

Next, even if a referral would be profitable from the firm's perspective, *and* the settlement mill's managing partner actually *recognizes* that his firm's settlement will be so compromised that he is better off relinquishing high-value claims,²⁸¹ settlement quotas or financial incentives can still spark an intra-firm principal-agent problem, motivating line-level negotiators to keep files in-house. Such incentives, according to one former lawyer, led some negotiators at his Florida firm to "settle a case for less than the value or be inclined to rather than refer it somewhere else."²⁸² The Weiss firm presents a case in point: There, attorneys were not paid traditional salaries; compensation was instead wholly dependent on the fees that lawyers personally generated.²⁸³ Referring a case outside the firm thus entailed

²⁸⁰ Sworn Statement of S.S. 29–31 (Aug. 19, 1998). In that proceeding, S.S. did confirm that cases, regardless of their size, would be referred out if a settlement agreement could not be reached. *Id.* at 29. In a subsequent interview, S.S. estimated that such referrals would happen approximately 1% of the time. Telephone Interview with S.S. (May 30, 2007). (This sworn statement was executed by S.S., on advice of counsel, while employed by a Georgia settlement mill. S.S. has consented to the statement's use and quotation herein. Telephone Interview with S.S. (July 16, 2007).)

²⁸¹ Given the existence and pervasiveness of self-serving biases, such recognition might be rarer than one might suppose. See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 31–33 (2008) (discussing pervasive overconfidence or "unrealistic optimism" while making managerial decisions); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110–11, 121 (1997) (noting people's tendency to rate themselves as above average when it comes to wide a variety of skills and attributes, including driving, ethics, managerial prowess, productivity, and health—and highlighting that professionals are not "immune to the self-serving bias").

²⁸² Telephone Interview with D.D. (May 20, 2008).

²⁸³ Telephone Interview with F.M. (Apr. 29, 2008); *cf.* Telephone Interview with A.M. (May 14, 2008) (stating that the fact that he forewent a fee when cases were referred out

sacrificing one's fee. Further encouraging settlements, one Weiss attorney recalled "pressure" to generate \$100,000 in fees per month.²⁸⁴ Any case relinquished did not count.

Even if the above is anomalous and the big, complex cases *are* routinely and reliably referred up the chain to the most able practitioners, that solution is certainly second best. As noted, referring practitioners are paid 30% to 50% of the eventual fee for often nothing more than a phone call.²⁸⁵ If clients could effectively identify the best practitioners right off the bat, high-echelon attorneys would not have to split fees with referring practitioners. The savings would be enormous, and it is at least plausible that some of it would be passed on to clients.²⁸⁶

IV

A PROPOSAL FOR REFORM

Part IV considers how to supplement the existing regulatory architecture to mitigate many of the problems so far identified, with respect to both settlement mills and personal injury legal services more generally.²⁸⁷

did not affect his behavior because "there was always a new case that just walked through the door"). *But see* Telephone Interview with K.R. (May 1, 2008) (failing to recall fee-based compensation regime).

²⁸⁴ Telephone Interview with F.M. (Apr. 29, 2008) ("We were each to produce at least \$100,000 a month in attorneys' fees. . . . It was made very clear to you by the other attorneys who worked there, and you better darn well make it. You certainly felt the pressure."); *cf.* Telephone Interview with A.M. (May 14, 2008) (stating that Weiss would say that negotiators "'ought to be able to settle out \$100,000 a month, in total money brought in,' but people were above and below that constantly").

²⁸⁵ Parikh, *supra* note 18, at 253 (quoting an elite Chicago lawyer as stating, "It just strikes me that there is something inherently wacky in the marketplace that folks will receive, in this day and age, what will amount to a lot of money for doing nothing.").

²⁸⁶ On the other hand, currently, when a client finds a high-echelon lawyer without an intermediary, it does not appear that the high-echelon lawyer reduces his fee to reflect the saved commission. *See* Brickman, *supra* note 214, at 74 (contending that lawyers, when hired by clients directly, "refuse to share . . . saved commission costs").

²⁸⁷ This reform proposal is certainly not the first to address some of the problems identified herein. *See, e.g.,* Kritzer, *supra* note 170, at 778–79 (calling for elimination of the ban on lay settlement of claims); Erichson, *supra* note 29, at 562–63 (proposing that lawyers offering certain non-traditional legal services be obliged to inform clients of the services' pros and cons); Witt, *supra* note 29, at 289 (calling for the elimination of the ban on for-profit broker intermediaries so lay brokers could help prospective clients find suitable counsel). In adding this proposal to the literature, I do not rule out other alternatives, although an analysis of past proposals' advantages and disadvantages is outside of this Article's scope. Nor is this the first transparency reform regime proposed. Lester Brickman, for instance, has suggested that a closing statement be filed at each case's conclusion and that the closing statement include the hours worked, recovery attained, expenses incurred, and attorney fee charged. In his conception, these forms should be available to the public but not necessarily searchable. Lester Brickman, *Contingent Fees*

Since January 1, 1957, a rule of the New York State Supreme Court's Appellate Division, First Department, has required lawyers retained on a contingent fee basis to pursue claims involving personal injury or wrongful death to file confidential "closing statements" with the New York Office of Court Administration at each claim's conclusion.²⁸⁸ In its current incarnation, each closing statement shows, among other things, whether the case was closed with or without suit; whether the case was settled, abandoned, or resolved by court judgment; the gross amount 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.²⁸⁹

A. *Mandatory, Public Closing Statements*

Building on the above model, I propose a transparency reform measure with four components. First, lawyers paid via contingent fees to represent clients asserting personal injury or wrongful death claims should be required to file a closing statement with the state bar or other competent authority at the conclusion of each representation

Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. REV. 29, 113–25 (1989). Others have advocated somewhat similar proposals, although usually in passing. See, e.g., ABEL, *supra* note 242, at 472–75 (suggesting that better information be given to clients "before they retain lawyers"); RICHARD MOORHEAD & PETER HURST, CIVIL JUSTICE COUNCIL, CONTINGENCY FEES: A STUDY OF THEIR OPERATION IN THE UNITED STATES OF AMERICA 19–20 (Robert Musgrove ed., 2008) (stating that, if contingency fees were to be adopted in England and Wales, "consideration might be given to strengthening the need to protect reputation by, for example, requiring claimant lawyers to publish success rates and levels of average damages for different types of case"); David Barnhizer, *Profession Deleted: Using Market and Liability Forces To Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 213 (2004) (calling for lawyers to disclose their "track record[s]"); H. Brian Holland, Book Review, 78 HARV. L. REV. 1299, 1303 (1965) (reviewing F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES (1964)) (stating, in passing, that "[m]ore widespread adoption of rules such as those in effect in New York, requiring the filing of detailed closing statements by counsel, would make valuable research material available to the student of legal fees").

²⁸⁸ The requirement additionally applies in "connection with any claim in condemnation or change of grade proceedings." N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(a)–(b) (2010). Closing statements came into being alongside a rule presumptively capping contingency fees. Their "primary purpose," as originally conceived, was "protection of the public through monitoring of the fees charged by practitioners at the Bar." Rabinowitz v. Cousins, 219 A.D.2d 487, 488 (N.Y. App. Div. 1994). New York's Second Department has followed suit by also requiring closing statements. N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20(b) (2010). A somewhat similar requirement is also in force in Alaska. See ALASKA STAT. § 09.68.130 (2010).

²⁸⁹ N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(b) (2010).

(except where a class action is certified).²⁹⁰ These closing statements should, at least initially, specify:

- (1) The name and address of the client;
- (2) The name and address of plaintiff's counsel and employing law firm(s);
- (3) The name and address of defendant(s) and defense counsel;
- (4) The name and address of the insurance carrier, person, or entity paying the judgment or claim;
- (5) Whether the claim involves (a) an automobile accident, (b) a product liability claim, (c) medical malpractice, or (d) other;
- (6) Whether suit was initiated;
- (7) If suit was initiated, whether the suit was terminated by voluntary dismissal or abandonment, involuntary dismissal, pretrial judgment, settlement, or judgment;
- (8) The time elapsed between the accident and the final judgment or settlement;
- (9) The amount of plaintiff's claimed economic loss (calculated by adding together medical bills, lost wages, and other past and estimated future pecuniary expenditures);
- (10) Gross recovery attained (even if zero);
- (11) Whether the recovery included a non-monetary term, and, if so, a brief description of that term; and
- (12) Amount paid to the client and to the client's attorney (and if more than one attorney, the amount paid to each).²⁹¹

Second, reporting should be mandatory. Lawyers who fail to supply accurate information should be disciplined and subject to stiff penalties.²⁹² In order to promote accuracy, clients, defendants, and (if applicable) defense counsel and insurers should also be sent a copy of the closing statement for review, and all recipients should be obligated

²⁹⁰ The proposal exempts class counsel because assembling the material for all class members would likely prove difficult, and sections (e) and (g) of Federal Rule of Civil Procedure 23 already provide some analogous protections. FED. R. CIV. P. 23(e) (establishing procedures to be followed upon the settlement, voluntary dismissal, or compromise of class actions); FED. R. CIV. P. 23(g) (establishing procedures for appointing class counsel). Thought may also be given to exempting counsel engaged in multi-district litigation, which is conducted pursuant to 28 U.S.C. § 1407 (2006).

²⁹¹ As in New York's First Department, a joint closing statement should be filed if multiple attorneys are retained. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(b)(3) (2010).

²⁹² Lawyers in New York's First Department who fail to submit closing statements are subject to discipline. *See, e.g., In re Garcia*, 874 N.Y.S.2d 513, 516–17 (N.Y. App. Div. 2009) (suspending respondent from practice of law for, inter alia, failing to file closing statements). It is unclear, however, how consistently the requirement is enforced. *See ROSENTHAL, supra* note 76, at 187 (raising questions concerning attorney compliance with closing statement requirements).

to bring any material errors or omissions to the attention of relevant authorities. Defense lawyers and insurers should be sanctioned for any willful failure to comply with this requirement.²⁹³

Third, statistics derived from closing statements should be compiled and published on the Internet. Certain steps should be taken, however, to preserve the confidentiality of potentially sensitive material. These steps should 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 option. In addition, while closing statements should be filed within a short time (perhaps thirty days) of the claim's conclusion, data drawn from the statements should only be "published" on a semi-annual basis in order to make it more difficult 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.

Fourth and finally, the data should be searchable based on category (e.g., "gross recovery," "time elapsed," etc.), lawyer, or law firm. In other words, a prospective client searching by category should be able to identify the top ten personal injury law firms in her state, as judged by the ratio of "economic loss" to "gross recovery." Alternatively, a prospective client who has narrowed down her search and is interested in retaining a particular law firm to represent her in, for example, an auto accident claim should be able to see a detailed firm profile, including the percentage of the firm's caseload that involves auto accidents, how often the firm succeeds in obtaining some recovery for its auto accident clients, and the average gross and net recoveries obtained. The prospective client, additionally and importantly, should also be able to see how the above measurements compare to other providers. Ideally, in order to round out the above portrait, lawyer and firm profiles should also include information concerning lawyers' malpractice and disciplinary histories, although including such material is controversial, and the database would also function in its absence.²⁹⁴

B. Facilitating Client Use

An initial question, as we ponder the resource's ramifications, is whether personal injury clients would actually consult it. Provided the

²⁹³ Civil liability for defendants and clients might also be considered.

²⁹⁴ See generally DeGraw & Burton, *supra* note 24, at 362 (calling for such disclosures and recognizing that such disclosures are controversial).

information is presented simply enough, there is reason to believe that many would.²⁹⁵ Clients currently spend a non-trivial amount of time researching lawyers prior to retention, and the website would conceivably reduce search costs, permitting clients to engage in one-stop shopping, rather than casting about for information from a variety of different sources.²⁹⁶ Indeed, lawyer information clearinghouse Avvo.com reports an impressive two million website visits per month, indicating a demand, or even hunger, for information of this type.²⁹⁷ Another encouraging sign is that some patients have embraced loosely analogous medical practitioner profiles.²⁹⁸ After the first three years of the Massachusetts medical practitioner program, for example, its online profile system “operate[d] at over 3,000,000 hits per year.”²⁹⁹

An further question, of course, is not just whether quality data would be consulted; it is whether quality data would influence consumer choice. And here, too, though the evidence is concededly mixed, there are some encouraging signs.³⁰⁰ A recent study of fertility clinics found that after provider report cards were made mandatory, more patients preferred fertility clinics with higher birth rates.³⁰¹

²⁹⁵ In the healthcare field, data show that some patients currently rely on physician and hospital report cards. Madison, *supra* note 25, at 222–23 (“Patients are using report cards to make health care decisions, but in limited numbers.”). Lawyers, intent on maximizing referral fees, would also presumably consult the profiles prior to referring cases to fellow practitioners.

²⁹⁶ According to one survey, clients of all types spend an average of nineteen hours researching lawyers prior to retention, although whether this accurately reflects the time personal injury clients spend is unknown. YANKELOVICH, *LAWYERS IN AMERICA: HOW WE CHOOSE THEM, USE THEM, AND SOMETIMES LOSE THEM* 6 (2000).

²⁹⁷ *Avvo Advertising*, AVVO, http://media.avvo.com/avvo/cms/avvo_advertising_info_sheet.pdf (last visited Aug. 11, 2011).

²⁹⁸ For general information on Massachusetts’s physician profiles, for instance, see *On-Line Physician Profile Site*, MASS. BD. OF REGISTRATION IN MED., <http://profiles.massmedboard.org/MA-Physician-Profile-FAQ.asp> (last visited Aug. 11, 2011).

²⁹⁹ *What Consumers Should Know About Their Doctors: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 106th Cong. 46 Attachment 1 (2000) (statement of Nancy Achin Sullivan, Exec. Dir., Mass. Bd. of Registration in Med.).

³⁰⁰ See generally Madison, *supra* note 25, at 223–25 (analyzing a number of studies, some of which suggest that health quality data have no effect on patient choice and others of which indicate some effect); Constance H. Fung et al., *Systematic Review: The Evidence That Publishing Patient Care Performance Data Improves Quality of Care*, 148 *ANNALS INTERNAL MED.* 111 (2008) (same). Though these studies are somewhat discouraging, one might speculate that prospective clients would be *more* swayed by quality data than prospective patients because, when picking lawyers, prospective clients are less likely to face constraints imposed by insurers, less likely to face geographic restrictions (since face-to-face meetings are less critical), less likely to have ongoing provider relationships (as patients have with primary care physicians, for example), less likely to act on the basis of provider recommendations or referrals, and less likely to require immediate assistance.

³⁰¹ M. Kate Bundorf et al., *Do Markets Respond to Quality Information? The Case of Fertility Clinics*, 28 *J. HEALTH ECON.* 718, 723–26 (2009); accord Michael Sauder & Ryan

Another study from the early 1990s found that hospitals and physicians that performed better on the New York cardiac surgery report card gained market share.³⁰² And finally, a 2007 study of school choice in North Carolina found, quite strikingly, that even impecunious parents responded to simple and concise information on school test scores, coupled with students' odds of admission, "by choosing schools with significantly higher test scores than their current guaranteed option."³⁰³ One may conclude, then, that if presented simply enough, quality information would influence consumer choice.

An important difference, though, is that, in the North Carolina school study, the information was specifically compiled for and presented to parents.³⁰⁴ Here, at least initially, information would be passively provided online, and some citizens—and particularly low-income citizens—would lack either access to the Internet or the technological savvy needed to conduct searches.³⁰⁵ State Bars would thus need to facilitate the website's utilization. Most obviously, Bars could publicize the website's existence, either with their own media blitz or by requiring attorneys to add a sentence about the website to their advertisements.³⁰⁶ State Bars could also employ administrators to staff

Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 *LAW & SOC'Y REV.* 105, 122–24, 127–32 (2006) (examining graduate school rankings from 1993 to 2003 and concluding that rankings affected both number and quality of applications received).

³⁰² Dana B. Mukamel & Alvin I. Mushlin, *Quality of Care Information Makes a Difference: An Analysis of Market Share and Price Changes After Publication of the New York State Cardiac Surgery Mortality Reports*, 36 *MED. CARE* 945, 949–50 (1998).

³⁰³ Justine S. Hastings et al., *Preferences, Information, and Parental Choice Behavior in Public School Choice* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 12,995, 2007). Interestingly, low-income families were *particularly* affected: Receiving concise statistics had "the same impact on revealed preference for test scores that a \$64,700 increase in household income would have." *Id.* at 22–23. The study's authors speculated that the information had such an impact on low-income families because, prior to its transmittal, "low-income parents could have less information from peer groups on which schools are good schools." *Id.* at 19–20.

³⁰⁴ *See id.* at 12–13.

³⁰⁵ To be sure, the majority of American households (over 70%) have computers with Internet access. *Home Internet Access: Continuing To Grow, But Big Differences Among Demographics*, NIELSEN WIRE (Mar. 6, 2009), http://blog.nielsen.com/nielsenwire/online_mobile/home-internet-access-continuing-to-grow-but-big-differences-among-demographics/.

³⁰⁶ States could require, for example, that all billboard, TV, and radio advertisements for personal injury or wrongful death attorneys include the following: "For more information about [law firm] and how it compares to other law firms, see [website address] or call [phone number]." While not uncontroversial, this disclosure should pass constitutional muster. *See Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (emphasizing that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech").

a toll-free telephone line to assist personal injury victims in their searches.

Critically, however, Bars would likely not be alone in their dissemination efforts. Just as in the medical context, non-profit and for-profit intermediaries would likely help to publicize the resource and, more importantly, compile and translate the data for easy consumer comprehension.³⁰⁷ It is fair to assume, for instance, that new or existing lawyer rating websites (such as Avvo.com) would readily incorporate closing statement information (such as gross recoveries, net recoveries, and loss-to-recovery ratios) into lawyer profiles. The popular press would almost certainly draw upon this information to develop their own rankings and ratings regimes.³⁰⁸ Non-profits devoted to access to justice might supply streamlined and personalized information to low-income claimants. And, finally, lawyers themselves would likely seize the opportunity to make truthful, readily verifiable comparisons with other lawyers or law firms in their advertisements.³⁰⁹

C. Predictable Effects

Requiring that closing statements be filed, and filed publicly, would have a number of salutary effects. For starters, the public filing of closing statements would, for the first time, give clients access to information about past performance that would allow them to predict, with some basis, the quality and type of service that a particular lawyer or law firm is likely to provide. And when it comes to past performance, clients would be able to *sort* attorneys along a number of different dimensions. A client desperate for a quick cash payout, even if that payout comes at a discount, would be able to search for lawyers who quickly and reliably resolve claims. A client seeking a hardened litigator would be able to find a lawyer with a record of going to, and prevailing in, court. And a reform-minded client who

³⁰⁷ See *Frequently Asked Questions*, HEALTHGRADES, <http://www.healthgrades.com/business/information/faqs.aspx> (last visited Aug. 11, 2011) (“We compile outcomes data from dozens of independent public and private sources and translate it into easily understandable, objective report card ratings on providers.”); *About Us*, HEALTHGRADES, <http://www.healthgrades.com/business/information/> (last visited Aug. 11, 2011) (touting “more than eight million unique visitors . . . each month”).

³⁰⁸ Magazines already publish such lists, albeit without the benefit of objective, verifiable information. See, e.g., Kim Eisler, *30 of Washington DC's Best Lawyers*, WASHINGTONIAN (Nov. 1, 2003), <http://www.washingtonian.com/articles/lawlobbying/2364.html>.

³⁰⁹ Law-abiding lawyers cannot currently make such comparisons because it is impossible to substantiate them, and unsubstantiated comparative claims are apt to be misleading. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2007).

primarily wants a defendant to change its ways, lest the same misfortune befall another, would be able to find a lawyer that frequently includes in her settlements substantial non-monetary terms.

This reform, meanwhile, is prone to increase client satisfaction, both because client aims are more likely to align with lawyer competencies and also because some research suggests that consumers who take a more active role selecting professional service providers experience a higher degree of satisfaction with the services received.³¹⁰ Moreover, a 1989 RAND study found that litigants who view their attorneys favorably are somewhat more likely to view both civil justice procedures and outcomes favorably, which means that helping forge better lawyer-client relationships could have rippling effects.³¹¹

Closing statements would be a boon for researchers and policy makers as well. Although most cases are settled, startlingly little is known about settlements, particularly (as is often the case) when no lawsuit is ever filed.³¹² So, too, though we benefit from a significant and sophisticated theoretical literature exploring contingency fee financing, our grasp of basic empirical questions remains rudimentary: We still know almost nothing, for example, about the relationship between the percentage charged and outcome achieved.³¹³ Similarly, though the occasional sensational judgment captures headlines—and, often, the public's wrath—too rarely do we have the data to support or refute assertions that the judgment *de jure* is representative or anomalous or, for that matter, ever collected in whole or in part.³¹⁴ The website, then, would offer an unprecedented glimpse into the near-secret world of civil settlement, while also providing new and

³¹⁰ See HOWARD G. SCHUTZ & DEBRA S. JUDGE, AM. ASS'N FOR ADVANCES IN HEALTH CARE RES., CONSUMER SATISFACTION WITH PHYSICIANS 49–51 (1986).

³¹¹ E. ALLAN LIND ET AL., RAND, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 61–62 (1989).

³¹² See Saks, *supra* note 101, at 1288 (“[O]ur society has been unable to produce research that is even minimally adequate to answer our most basic questions about the behavior of the civil justice system.”); see generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 645 (1981) (observing that the vast majority of cases are settled).

³¹³ Hadfield, *supra* note 99, at 129 (“[H]ard numbers on what legal services cost and what fraction of that cost is for real value are few and far between.”). Notably, this ignorance has not stopped over a dozen legislatures (and the federal government) from capping contingency fees in certain cases, a policy which may or may not make sense. See Charles Silver & David A. Hyman, *Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims*, 37 FORDHAM URB. L.J. 357, 358 (2010) (discussing various legislative efforts to cap contingency fees).

³¹⁴ See Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 317 (1999) (bemoaning the lack of reliable data about tort verdicts).

comprehensive data about cases resolved within the court system, both of which might then provide a template for the development and evaluation of more thoughtful policy reforms.

Next, the publication of closing statement data would deter lawyers from engaging in misleading and deceptive advertising. Deceptive advertising is, of course, forbidden.³¹⁵ Yet, *determining* whether an ad is or is not deceptive is difficult since an ad's veracity often hinges on hard-to-discover information, and even disciplinary counsel often "lacks the necessary information and resources" to sort fact from fabrication.³¹⁶ In one recent study, for instance, the New York State Bar Association found that, though "a very small minority of advertisements could be categorized as false or deceptive on their face," upon further investigation, almost a third of the ads reviewed (34 of 119) contained inaccuracies.³¹⁷ By publicizing information about how firms actually operate, disciplinary counsel (and the public) would be better equipped to identify false statements and ultimately ensure that law firm ads more often and more closely reflect the service provided.³¹⁸

In addition, administrative costs, for both plaintiffs' firms and the administering body, would be quite modest. As for plaintiffs' firms, compliance would be straightforward, especially since Model Rule 1.5(c) already requires counsel to prepare a written statement for clients "[u]pon conclusion of a contingent fee matter" containing some of the information required.³¹⁹ At the state level, meanwhile, a relatively sophisticated website with search features would need to be developed; some administrative personnel would need to be employed; and, ideally, a committee should be appointed to periodically assess and adjust disclosure requirements. But all of these costs should be manageable.³²⁰

³¹⁵ See MODEL RULES OF PROF'L CONDUCT R. 7.1 (2007) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); see, e.g., *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006) (en banc) (holding that attorneys who advertise falsely may be held liable for violations of the Colorado Consumer Protection Act).

³¹⁶ N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS OF TASK FORCE ON LAWYER ADVERTISING 47 (2005) (finding that disciplinary counsel often "lacks the necessary information and resources to identify misleading advertising").

³¹⁷ *Id.*; see generally Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002) (discussing significant under-enforcement of advertising regulations).

³¹⁸ For example, the Weiss ad described *infra* at Part IV.C.2 would be less likely to air or air for long, if a quick glance at closing statement data contradicted the firm's claims.

³¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2007).

³²⁰ *Cf. Patient Protection Act of 2000: Hearing on H.R. 5122 Before the H. Comm. on Commerce*, 106th Cong. 87–88 (2000) (statement of Nancy Achin Sullivan, Exec. Dir., Mass. Bd. of Registration in Med.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106h>

Finally, in a world with public, searchable closing statements, lawyers and law firms can be expected to adjust their conduct to improve how they measure up against their peers, creating what is sometimes called the “sunshine effect.”³²¹ Most changes in behavior, although admittedly not all, would be positive. I consider five of the predictable changes below.

1. *How Would Lawyers and Law Firms Change Their Conduct?*

Since outputs are influenced by inputs, implementation of the closing statement proposal would logically impact case screening, with consequences for both the strength and size of claims lawyers would accept. First, by mandating the disclosure of abandoned claims, paltry settlements, dismissals, and outright losses, closing statements are likely to discourage firms from accepting as clients those with doubtful or unmeritorious claims.³²² Notably, the screening practices of high-echelon personal injury firms would be relatively unaffected, as those firms already invest heavily in pre-retention review and “cherry pick” cases with the highest likelihood of success.³²³ Lower-echelon firms that do not currently invest much in screening would, however, have a new and powerful reason to give dubious or long-shot claims a harder look. And that is likely to be generally beneficial. Mandatory case screening (at least prior to filing) has long been embraced by the

hrg67118/pdf/CHRG-106hhrg67118.pdf (reporting that the Massachusetts physician profile system was implemented in only eight months, by a small staff, and at a cost of only \$300,000).

³²¹ See Ha T. Tu & Johanna R. Lauer, Center for Studying Health System Change, *Designing Effective Health Care Quality Transparency Initiatives*, ISSUE BRIEF, July 2009, at 5; see also *Hearing on Making Health Care Work for American Families: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) [hereinafter Ginsburg Statement], available at <http://www.hschange.org/CONTENT/1051/1051.pdf> (statement of Paul B. Ginsburg, President, Center for Studying Health System Change) (“Experience with publication of provider quality data [shows] that providers are very responsive in the sense that they take steps to improve whatever dimensions of quality they are being measured on.”); Fung et al., *supra* note 300, at 118–20 (conducting a broad literature review and concluding that publicly releasing performance data stimulates hospitals to improve quality).

³²² Doubtful and unmeritorious claims are most apt to be lost at trial or pretrial or, even if settled, are apt to be settled for substantially reduced sums. See Ross, *supra* note 29, at 183–84 (showing, in auto cases, that coders’ conclusion of “apparent liability” was strongly related to “payment outcome”); Peters, *supra* note 101, at 1813–20 (concluding that dubious medical malpractice claims were more likely to be denied and, if paid at all, were likely to be discounted).

³²³ Witt, *supra* note 29, at 280 (discussing facts and implications of high-echelon lawyers’ selectivity); see ROSENTHAL, *supra* note 76, at 99 (“Lawyers at the top of their profession . . . can afford to turn down all cases in which the liability is not near-perfect and in which the anticipated recovery at trial is less than five figures.”); Daniels & Martin, *supra* note 35, at 1789 tbl.4 (reporting that high-echelon lawyers sign a median of 10% of callers to contract).

judiciary through the adoption of Federal Rule of Civil Procedure 11 and state court counterparts, and plaintiffs' lawyers' initial screening or "gatekeeping" role has been dubbed "the first line of defense against frivolous litigation."³²⁴ Buttressing that line of defense would logically lead to fewer non-meritorious claims and nuisance-value settlements, generating some societal savings.³²⁵

Second, the proposal would influence claim size (although it is unclear in which direction). As it stands, the contingency fee provides a powerful incentive to attract and accept large claims, and studies confirm that high-echelon counsel typically reject clients whose injuries are insubstantial.³²⁶ It is possible, given transparency, that some firms would redouble these efforts, since big claims would boost a firm's "gross recovery" score. But also possible, and perhaps more likely, is the opposite: For two reasons, more firms might be more willing to accept the claims of those with less-than-crushing injuries, mitigating the legal need problem Steven Croley and others have identified.³²⁷ First, it is well established that small claims are consistently and significantly overpaid, while big claims are consistently and significantly underpaid vis-à-vis economic loss.³²⁸ As a consequence, small claims tend to have high loss-to-recovery ratios. Second, as also noted in Part II, small claims are generally resolved relatively quickly and would thus reflect well on the "time elapsed" metric.³²⁹ Firms

³²⁴ Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 889 (1992). Granted, enhanced screening could also have unintended consequences, such as deterring long-shot but socially valuable litigation. Nevertheless, the fact that screening has a salutary purpose distinguishes the personal injury context from other arenas where screening is far more problematic (for example, when employed by doctors to weed out the sickest patients). See, e.g., David Dranove et al., *Is More Information Better? The Effects of "Report Cards" on Health Care Providers*, 111 J. POL. ECON. 555, 567–68 (2003) (finding that, in New York and Pennsylvania, cardiac surgery report cards led providers to strategically select patients, which had negative consequences); Rachel M. Werner & David A. Asch, *The Unintended Consequences of Publicly Reporting Quality Information*, 293 JAMA 1239, 1241 (2005) (noting that, despite offering certain benefits, quality reporting has caused "physicians to select patients based on risk profile"); see also *infra* note 350 and accompanying text (discussing the problem of employing closing statements in the criminal context, since such an application would eventually lead to screening of criminal defendants for innocence).

³²⁵ See *supra* notes 134, 140 (highlighting high cost of non-meritorious claims).

³²⁶ See, e.g., Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1064–65 (2006) (reporting that, among interviewed medical malpractice specialists, "few are willing to take anything much below \$100,000, and some will take nothing below \$1 million").

³²⁷ See *supra* note 123 (discussing the fact that some moderately hurt accident victims have difficulty securing counsel).

³²⁸ See *supra* note 153 (discussing the relative overpayment of small claims).

³²⁹ See *supra* note 94 and accompanying text (noting that small claims tend to be resolved relatively quickly).

concerned about faring well on these criteria, then, might start lowering the financial bar on acceptance.

Third, in addition to accepting smaller claims, the reporting of ratios and net recoveries might also spur firms to reduce contingency fees and minimize clients' claimed economic loss (thus deterring medical buildup). Such incentives would work in two ways. First, net recoveries can be calculated by subtracting an attorney's fee and a client's claimed economic loss from a client's gross recovery.³³⁰ 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 and medical bills are inflated. Publicizing net recoveries, then, could exert a powerful positive influence. The reporting of ratios would have a similar effect. Namely, assuming (1) that insurance companies can identify at least *some* medical buildup when it occurs (as it appears they can) and (2) if, when insurers *do* suspect medical buildup, they discount general damages (as it appears they do), then firms with high buildup would have low loss-to-recovery ratios.³³¹ No doubt, some lawyers would still charge too much, and some clients would continue to build claims.³³² But especially to the extent that intermediaries (such as Avvo.com, the popular press, or nonprofit groups) draw attention away from gross recoveries and to net recoveries and ratios, closing statements could inject price competition into the contingency fee marketplace while also curbing firms' inflationary impulses.

Fourth, the proposed website explicitly recognizes (and thus gives "credit" for) non-monetary forms of relief, such as an agreement to remove a dangerous product from the market in a products liability case or, in a dog bite case, an agreement to relocate the animal to a rural locale.

³³⁰ This, of course, is a rough and imperfect calculation because clients will actually net more if (1) some of the claimed economic loss is covered by a claimant's sick leave or first-party health or disability insurer (and there is no subrogation) and/or (2) the claimant's medical bills are reduced after the insurer's reimbursement. See Engstrom, *supra* note 3, at 1541–42 (discussing these possibilities).

³³¹ An Insurance Research Council study suggests there is, and has long been, rampant medical buildup, and even fraud, in New York City. Not surprisingly, then, injured third-party claimants in New York City recover lower ratios than claimants in other parts of the state. In 2002, for example, New York City metro area claimants' economic loss-to-recovery ratio was 1:32, while upstate claimants' ratio was significantly higher at 2:33. INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN NEW YORK AUTO INJURY INSURANCE CLAIMS 37–38, 55–62 (2006); see also Ross, *supra* note 29, at 109 (quoting an insurance adjuster who suggested that he is less likely to settle for "three times the specials" if there has been medical buildup).

³³² Built claims will, after all, still generate higher fees and, often, higher client recoveries.

Currently, the contingency fee lawyer, with an eye on fee maximization, has only a very weak incentive to press for such non-monetary objectives. And, not surprisingly, evidence suggests that non-monetary settlement terms in personal injury cases are rare³³³—and probably too rare, from a social perspective. Unlike pure financial recoveries, non-monetary settlement terms are frequently public-regarding—the removal of a dangerous product might well avoid the next calamity—and sometimes it is precisely such institutional, public-spirited change that the plaintiff most wanted *ex ante* and would find most satisfying *ex post*.³³⁴ Further, because parties may place different values on non-monetary terms, their inclusion can helpfully “expand the pie,” shifting the negotiation from a zero-sum to a positive-sum framework.³³⁵ Drawing attention to such terms, then, is apt to lead to their more frequent consideration and inclusion. And this, in turn, might facilitate both the forging of settlements and clients’ satisfaction with the bargain struck.³³⁶

Fifth and finally, the closing statement regime, which would impose a new burden on lawyers only when they charge contingency fees, would probably cause some practitioners to shy away from this form of financing. This too might be beneficial. The contingent fee is a dynamic and powerful device, vital to the vindication of certain important individual rights. It is, however, not for everyone. Some personal injury clients (namely, those who are particularly well-heeled and risk-preferring), would often be better off eschewing contingency fees in favor of out-of-pocket payment. Yet despite repeated ethical exhortations directing lawyers to discuss alternative billing arrangements with

³³³ See KRITZER, *supra* note 194, at 23, 30, 45–47, 101–02.

³³⁴ See, e.g., Tamara Relis, “*It’s Not About the Money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701, 731 (2007) (presenting results from a survey of accident victims which found that “the vast majority of plaintiffs wanted . . . more than simply financial compensation[] for their harm”); *id.* at 720–21 (noting that the formal justice system’s failure to address litigants’ non-monetary objectives “has been found to be a major reason for litigants’ dissatisfaction”); *id.* at 724 (reporting on studies in the United States and abroad which found that, in filing claims, litigants were at least partly influenced by non-monetary objectives); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 61 (1995) (noting, anecdotally, that in the Agent Orange and Long Island Lighting Company cases, some plaintiffs placed great importance on non-monetary objectives). *But see* KRITZER, *supra* note 194, at 23 (“My data provide no indication that a large fraction of the cases that compose ordinary civil litigation involve goals other than money.”).

³³⁵ See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 829–33 (1984) (highlighting that consideration of non-monetary objectives can convert the legal process “into more than a zero-sum game”).

³³⁶ See Ginsburg Statement, *supra* note 321 (observing that, in his experience, providers “take steps to improve whatever dimensions of quality they are being measured on”).

clients,³³⁷ commentators report that few contingency fee clients are given alternative payment options, and “lawyers will not normally take a personal injury case on *other* than a contingency fee no matter how wealthy the client.”³³⁸ By subjecting practitioners to an additional reporting requirement when contingency fees are charged, the website may recalibrate the fee calculus and stimulate a candid conversation about the advantages and disadvantages of various fee arrangements, again, to generally positive effect.³³⁹

2. *How Would Settlement Mills Fare?*

In a world of increased transparency, settlement mills would have two choices: They could either fundamentally alter their practice or they could retain their unique attributes and compete on speed, ease, predictability, and price. As to the former, closing statements would highlight how often particular firms initiate lawsuits and try cases. As a consequence, some settlement mills would likely take steps to do those things more often, thus blurring the boundary with conventional counsel. Additionally, since firms would be judged not merely on whether they initiate suit or try cases, but instead on whether they prevail in those pursuits, *real* trial practices would have to be built. Clients would be more carefully screened; volumes would be reduced; research tools would be acquired; and talented lawyers would be

³³⁷ See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1521 (1986) (“A lawyer normally has an obligation to offer a prospective client an alternative fee arrangement before accepting a matter on a contingent fee basis.”); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994) (“It is ethical to charge contingent fees as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements.”); MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 3 (2001) (“When there is doubt whether a contingent fee is consistent with the client’s best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.”). This comment to Rule 1.5 was deleted in 2002. ABA CENTER FOR PROF'L RESPONSIBILITY, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 16 (5th ed. 2003).

³³⁸ O'CONNELL, *supra* note 173, at 48. Regarding the infrequency of communication, see HAZARD, JR. ET AL., *supra* note 240, at 788 and RHODE & LUBAN, *supra* note 248, at 839. *But cf.* Kritzer, *supra* note 170, at 760 (noting, from interviews, that some lawyers offer clients a choice between an hourly fee and a contingency fee and are willing to negotiate fee arrangements). Regarding lawyers' reluctance to offer alternative fee arrangements, see BOK, *supra* note 261, at 139–40 and O'CONNELL, *supra* note 173, at 48–49.

³³⁹ This is not to suggest that all—or even most—risk-preferring, wealthy clients would prefer flat or hourly fees. Many presumably would not. See generally Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245 (2010) (suggesting that loss aversion plays a major role in clients' preference for contingency fee arrangements). Nor is it to suggest that the shift to alternative fee arrangements, to the extent it occurs, would be universally positive; lower-income clients, for example, might have a harder time securing representation. See HELLAND & TABARROK, *supra* note 104, at 105–06 (highlighting various problems with a shift to alternative fee arrangements).

recruited and retained. This can be seen as a positive—it does, for example, move mills closer to the traditional tort approach. On the other hand, though, these changes would erode some of the many benefits that settlement mills confer; we might start to see, for example, greater court congestion, longer delay, more unpredictability in outcome, and increased systemic costs.

Other settlement mills, meanwhile, would likely take the opposite tack.³⁴⁰ Rather than attempting to blur the boundary with conventional counsel, they would presumably embrace the *different* service they provide, trumpeting the relative speed and ease with which they settle claims while (at least hopefully) lowering their fees so as to position themselves as the clear bargain alternative.³⁴¹

What probably would not happen is a perpetuation of the status quo where there is, all too often, a glaring gap between services promised and provided.³⁴² One example helps to illustrate the point. As noted previously, there is strong reason to suspect that, at the Weiss firm of Texas, those with “very, very serious injuries” were not well served partly because “[e]verybody knew [Weiss] was more interested in settling than really getting the full value of the case.”³⁴³ At the same time, though, another former Weiss attorney described the firm’s advertising accordingly:

His ad, the one that was so effective, was “these are stacks of money.” And there would be a little stack with ten or twenty dollar bills. And it would say, “If you go to any law firm, this is what you can get for your case.” And then it would show a gigantic stack of

³⁴⁰ This will be possible as long as insurance companies’ willingness to settle claims does not hinge on settlement mills’ willingness to cheaply settle the claims of seriously injured claimants. To the extent it does, the entire settlement mill system might collapse as the closing statement regime channels high-value claims to high-echelon counsel. *See generally* Engstrom, *supra* note 3, at 1542–45 (speculating that insurance companies may be willing to negotiate with settlement mills, even though mills do not hold the “proverbial stick” of trial, because, *inter alia*, settlement mills offer deep discounts on claims of grievously injured accident victims).

³⁴¹ Others have also noted that increased transparency might lead to a reduction in contingency fees. *See, e.g.*, Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 308 (1998) (“[S]imply making consumers aware that there are alternatives in pricing will put some market pressures on the providers of the service.”). Recall that public adjusters appear to charge substantially less than settlement mills. *See supra* note 182 and note 213 and accompanying text. On the other hand, providers may resist. *See* Silver, *supra* note 271, at 2091–92 (suggesting that providers might be unwilling to offer lower contingency fees, fearing that clients will not hire such attorneys given the perception that lower fees signal lower quality).

³⁴² *See supra* note 151 and accompanying text (highlighting this gap).

³⁴³ Telephone Interview with K.R. (May 1, 2008).

bills and say, “This is what you get if you go to Joe Weiss’s firm.” It would light up the phone lines like crazy.³⁴⁴

This disconnect is at the heart of the settlement mill dilemma. And it is a problem that closing statement data—by empowering clients to make more educated attorney selections, emboldening lawyer-competitors to make comparative, substantiated claims about their *own* services, and arming bar counsel with data to identify and deter false and misleading advertising—would most reliably address.

D. *Some Pitfalls*

Despite my enthusiasm for closing statements, I acknowledge that there are a number of potential pitfalls. Below, I consider three: the arguably unfair singling out of personal injury practitioners; the fact that the proposal would, at least sometimes, erode the confidentiality of otherwise secret settlements; and the reality that some potential clients might focus myopically on gross recovery attained, to the exclusion of other, potentially more helpful, indicators. Other problems and complications would surely emerge upon implementation.³⁴⁵ Implementers therefore should periodically review and tweak the regime to improve its efficacy.

1. *Singling Out Contingency Fee Practitioners*

First, the proposal requires disclosures from only certain contingency fee practitioners even though it is well established that all types of lawyers engage in ethical misconduct and all types of fee arrangements (whether hourly, flat, or contingent) pose problems.³⁴⁶ I do contend, however, echoing a sentiment espoused by Deborah Rhode, Roger Cramton, David Wilkins, and others, that different segments of the Bar face *different* ethical challenges and thus need regulatory

³⁴⁴ Telephone Interview with F.M. (Apr. 29, 2008). I have not been able to view the ad or confirm its contents.

³⁴⁵ Additional concerns include, but are not limited to, the following: the possibility that closing statements will erect a new barrier to entry for new practitioners; the potential for significant annual and semi-annual volatility; the difficulty in deciding how to apportion “credit” in cases involving multiple lawyers, and especially between a referring and recipient practitioner; and the possibility that reporting dropped cases will deter lawyers from dropping cases, even when the discovery process reveals an absence of liability.

³⁴⁶ The hourly fee provides an incentive to “churn” cases, spending more time than necessary. Fixed-fee lawyers have an incentive to under-invest in case development. The contingency fee, similarly, tempts lawyers to secure the maximum fee with the minimum expenditure of time and effort—and thus to expend less effort than may be necessary to achieve the optimal result from the client’s perspective. For further discussion of various conflicts, see RHODE, *supra* note 244, at 168–83 and Engstrom, *supra* note 3, at 1525 & n.256.

mechanisms tailored to the particular challenges they face.³⁴⁷ This mechanism, in other words, is tailored to address significant problems identified in contemporary personal injury contingency fee practice. Whether it could or should be expanded and tailored to other practice areas is a question that merits further study.

Closing statements are apt to work best when (1) the representation has fairly clear aims (thus producing fairly identifiable wins and losses); (2) the principal concern is that lawyers will under-identify (rather than over-identify) with clients, spending too little time on the representation; (3) client information deficits are significant; and (4) additional client screening is apt to be, on balance, socially beneficial. In the personal injury context, all criteria are at least arguably met. In most other contexts, in contrast, at least some of these conditions are notably absent. It seems, for example, that the proposal would be glaringly ill-suited to lawyers in the corporate hemisphere, where information deficits are far smaller (since in-house counsel tend to be extremely sophisticated), and the principal risk is not inadequate identification between lawyer and client but rather *over-identification*—that the lawyer, too financially reliant on a client’s continued business, will too quickly acquiesce to the client’s even unreasonable demands.³⁴⁸ Expansion to areas such as family law or trusts and estates, where what constitutes a win or a loss is eminently debatable, would be messy and likely unsatisfactory.³⁴⁹ Finally, the criminal defense context features wins and losses, frequent under-identification between lawyer and client (especially when volumes are high and

³⁴⁷ See RHODE, *supra* note 244, at 20; see generally Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); Wilkins, *supra* note 238. Targeted rules are nothing new. Model Rule 1.5 already requires that contingency fees be in writing, whereas other fees “shall be communicated to the client, preferably in writing,” and also requires contingency fee practitioners to provide clients with closing statements upon the conclusion of representation. Compare MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (regarding contingency fees), with *id.* R. 1.5(b) (regarding fees generally). Cf. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43–52 (1976) (criticizing the Bar for unjustly singling out contingency fee practitioners).

³⁴⁸ For a discussion of the risks of over-identification between lawyer and corporate client, see RHODE, *supra* note 244, at 9, Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1913 (2008), Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709 (1998), and Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). For a discussion of in-house lawyers’ ability to select and evaluate the performance of outside counsel, see Abel, *supra* note 170, at 355 and Gilson, *supra* note 267, at 902–03.

³⁴⁹ 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”).

lawyers are paid on a flat-rate basis), and the problem of unsophisticated clients. But expansion there might nevertheless be problematic, as revealing conviction and acquittal rates would inexorably lead to the screening of prospective clients for innocence, which—given defendants' involuntary participation in the proceeding and the constitutionally protected right to counsel—seems a far cry from giving personal injury lawyers an added incentive to, in one scholar's words, "hold back the floodtide of unmeritorious cases upon the courts."³⁵⁰

2. *Eroded Confidentiality of Settlements*

Next, publicly filed closing statements would, at least occasionally, expose the financial terms of otherwise secret settlements.³⁵¹ To be sure, the extent of the exposure is limited, as the proposal takes steps to preserve confidentiality where feasible: The identity of the parties, defense counsel, and the insurer would be concealed; closing statements would be publicly loaded only every six months rather than on a rolling basis; and the plaintiff would have the option not to reveal any non-monetary term.³⁵² Still, motivated observers would sometimes be able to match a closing statement with a particular newsworthy claim that, prior to settlement, had been winding its way through the judicial system.

The broad issue of the desirability of secret settlements is sharply contested, partly because the question implicates a debate that is even deeper and more profound: whether the core function of the civil justice system is to resolve discrete disputes or to advance broader, public-regarding aims.³⁵³ Part of the disagreement also stems from the fact that two basic empirical questions at the heart of the debate—(1) whether secrecy, or its abrogation, affects overall litigation or

³⁵⁰ Kritzer, *supra* note 37, at 10; see Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 629–31 (1993) (discussing the problem of screening for client innocence).

³⁵¹ On the plus side, disclosures might helpfully shuffle support for and opposition to the closing statement proposal, since the Plaintiffs' Bar has long worked to curtail secret settlements, and the Defense Bar has long opposed such efforts.

³⁵² States could additionally give judges the ability to exempt specific claims by court order from the disclosure requirement upon a showing of good cause.

³⁵³ Compare Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes."), with Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 470 ("The primary purpose for which courts were created . . . is to decide cases according to the substantive law.").

settlement rates³⁵⁴ and (2) the frequency with which secret settlements serve to conceal public health hazards³⁵⁵—are as yet unanswered.

Fortunately, in light of the limited information revealed by this transparency reform measure, we need not confront the propriety of secret settlements head-on. Closing statements are most likely to reveal the amount paid to resolve certain, big-ticket litigation. If it is known, for example, that a particular plaintiffs' lawyer is litigating an important product liability case against a given manufacturer, then litigation comes to a halt, and, sometime later, a closing statement reveals that the lawyer has settled a product liability claim for a large sum, interested observers would connect the dots. This revelation would lead to a number of likely consequences, including increased litigation against the manufacturer and decreased demand for its product or products. Those on opposite ends of the political spectrum would no doubt disagree about the desirability of these results, but there is, at the least, a strong argument that these effects are wholly consistent with the core goals of the tort system.³⁵⁶ While the revelation might spur litigation, in other words, there is little reason to believe that *unmeritorious* litigation would result.

3. *Undue Reliance on Gross Recoveries*

A third possible critique of my closing statement proposal is that clients would flock to the firms with the highest gross recoveries, even though gross recovery³⁵⁷ attained is a noisy signal. Large recoveries, that is, might be more a consequence of the raw material received (i.e., the greater intrinsic value of the case), as opposed to any actual legal talent displayed.

This argument is right but limited. One empirical study is most revealing. In 1988, Stephen Spurr published a study of lawyer quality using confidential New York closing statement data obtained through a court order.³⁵⁷ In the study, he compared mean recoveries attained

³⁵⁴ See David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1225 (“[T]he argument that the availability of secrecy agreements affects overall litigation or settlement rates or the average time needed to consummate settlements lacks any evidentiary support.”); cf. Diana Digges, *Confidential Settlements Under Fire in 13 States*, LAW. WKLY. U.S.A., Apr. 30, 2001, available at 2 Ann. 2001 ATLA-CLE 2796 (Westlaw) (concluding that per capita litigation rates actually *fell* in Florida following enactment of a state statute restricting secret settlements).

³⁵⁵ Marcus, *supra* note 353, at 464 (discussing paucity of hard data).

³⁵⁶ See Dana & Koniak, *supra* note 354, at 1227 (“To the extent our system of tort and other systems of liability serve socially desirable dual ends of deterrence and corrective justice, anything that impedes potential plaintiffs from learning about and bringing valid claims and receiving full compensation is undesirable.”).

³⁵⁷ Spurr, *supra* note 270, at 90 n.6.

by a “[r]andom sample of lawyers” to the mean recoveries attained by a sample of “[h]igh-quality lawyers and law firms,” identified as such by the *New York Law Journal* based on “information obtained from lawyers and judges.”³⁵⁸ Spurr concluded that high-quality lawyers and law firms had a mean recovery more than four times higher than their “random” counterparts (\$96,979 versus \$20,197).³⁵⁹

Now, there is no doubt that Spurr’s data involved significant noise; the claims of the high-quality and random lawyers were surely not created equal, either as to size or quality. More and worse, medical buildup might have inflated some lawyers’ claims, giving them an illegitimate leg up. But, for our purposes, *none of this matters*. Even if prospective clients myopically focused on gross recovery attained (as opposed to focusing on, say, ratios, which mitigate somewhat the raw material problem), and even if gross recovery is highly imperfect, it would probably be good enough. While more and more recent information is admittedly needed, available data suggest that publicizing information about gross recoveries would prompt even unsophisticated prospective clients to identify the very lawyers that sophisticated legal professionals (fellow lawyers and judges) identified as those of the highest quality—and without any payment of hefty referral fees to get there.

CONCLUSION

Settlement mills came into being in the late 1970s and early 1980s on the heels of the Supreme Court’s *Bates* decision, and shortly after no-fault auto plans were debated, and ultimately rejected, in most states. Born in the policy space left by no-fault’s formal demise, settlement mills have managed, quite improbably, to achieve many of its vaunted benefits. No-fault proponents have traditionally derided the tort system as a slow, expensive, court-clogging lottery, which leaves many needy accident victims uncompensated and delivers to others compensation far in excess of their actual loss. Settlement mills address these criticisms by delivering to an apparently expanded set of claimants fairly standardized, predictable sums, with relatively little delay, at comparatively low systemic cost. And settlement mills’

³⁵⁸ *Id.* at 93 tbl.1 & n.11.

³⁵⁹ *Id.* at 108. This disparity mostly holds when the cases obtained from practitioner referrals are excluded. *Id.* at 93 (calculating \$84,070 versus \$18,210). A study by Stephen Daniels and his co-authors also underscores the fact that success and gross recovery data can be illuminating. Daniels analyzed certain Wisconsin malpractice lawyers’ recoveries over a thirteen-year period and found a sizable and consistent separation between the recoveries attained by the most and least successful practitioners, even when an attempt was made to control for injury severity. Daniels et al., *supra* note 119, at 19–20, 36.

impact appears to be widely felt. In recent decades, as settlement mill representation has become more prevalent, statistics suggest that a wider pool of auto accident victims are seeking compensation for accidental injuries;³⁶⁰ auto accident filings comprise a smaller slice of court dockets;³⁶¹ and the chance that any particular auto claim will produce a lawsuit has decreased dramatically.³⁶² In sum, policy makers failed to address the vexing problem of auto accidents, and settlement mills took shape, however imperfectly, to fill the regulatory void. Much of what is *good* about settlement mills, in fact, can be traced to the fact that they represent a partial substitution for no-fault legislation.

But no-fault's failure is not the firms' only forbearer. Settlement mills can also trace their lineage to policy makers' repeated and spectacular failure to confront the vexing problem of attorney choice. It has long been known that lawyer quality matters and that certain lawyers tend to achieve better results for their clients.³⁶³ It has also long been known that individuals, and particularly those of limited means, have trouble finding quality counsel. Karl Llewellyn drew attention to this problem back in 1938, likening an individual's selection of an attorney to pulling a prize out of a "grab bag."³⁶⁴ In 1969, the Model Code warned, "A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention."³⁶⁵ And the Supreme Court highlighted this problem in its 1977 *Bates* decision.³⁶⁶

Yet, policy makers have never addressed the issue of attorney choice head-on. Policy makers have failed to construct a regulatory architecture that broadly ensures adequate attorney quality. And in the three decades following the *Bates* decision, policy makers have failed to police the accuracy of attorney ads and—despite the Supreme Court's clear admonition to do so—have also failed to arm prospective clients with information which would permit them to

³⁶⁰ See *supra* notes 115–16 and accompanying text.

³⁶¹ HENSLER ET AL., *supra* note 87, at 8 & tbl.2.1, 9 & fig.2.2, 32; NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 26 (Brian J. Ostrom et al. eds., 2002).

³⁶² See Mark J. Browne & Joan T. Schmit, Patterns in Personal Automobile Third-Party Bodily Injury Litigation: 1977–1997, at 16–17 (Sept. 2, 2004) (unpublished manuscript) (on file with the New York University Law Review) (showing "paradoxical evidence" that, between 1977 and 1997, "the likelihood that an insurance claim resulted in a legal claim filing decreased . . . while the likelihood that the claim led to attorney representation increased").

³⁶³ See *supra* note 260 (providing citations).

³⁶⁴ Llewellyn, *supra* note 2, at 116.

³⁶⁵ MODEL CODE OF PROF'L RESPONSIBILITY EC 3-4 (1969).

³⁶⁶ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370 n.23 (1977).

“place advertising in its proper perspective.”³⁶⁷ It is in *this* regulatory void that settlement mills, with their over-the-top ads and under-the-radar practices, have also developed. And policy makers’ malaise in the face of the vexing problem of attorney choice has enabled that which is most *problematic* about settlement mills (e.g., the incompetent representation of the most seriously hurt, the sub rosa delegation to non-attorney personnel, and the curiously high fees) to take root.

In this Article, I have proposed a system to dramatically increase transparency in one segment of the legal services industry. The proposal is far from perfect. Some clients can be counted on to ignore the data, no matter how clearly the information is conveyed; some firms would no doubt discover ways to manipulate their standings; and some of the anticipated benefits I lay out would surely prove elusive. But the mandatory, public filing of closing statements would force settlement mill operations out of the shadows, while, at long last, giving *all* prospective personal injury clients the ability to “place advertising in its proper perspective.” And this, I submit, represents a significant step forward.

³⁶⁷ *Id.* at 375.