

CBA LEGAL FUTURES INITIATIVE

**ACCESSIBILITY, QUALITY, AND PROFITABILITY FOR PERSONAL PLIGHT LAW FIRMS:
HITTING THE SWEET SPOT**

By Noel Semple

Prepared for the Canadian Bar
Association Futures Initiative



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

**ACCESSIBILITY, QUALITY, AND PROFITABILITY FOR PERSONAL FLIGHT
LAW FIRMS: HITTING THE SWEET SPOT**

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By Noel Semple¹

Prepared for the Canadian Bar Association Futures Initiative.

ABSTRACT

Personal plight legal practice includes all legal work for individual clients whose needs arise from disputes. This is the site of our worst access to justice problems. The goal of this project is to identify sustainable innovations that can make the services of personal plight law firms more accessible to all Canadians.

Accessibility is vitally important, but it is not the only thing that matters in personal plight legal practice. Thus, this book seeks out innovations that not only improve accessibility, but also preserve or enhance service quality as well as law firms' profitability. These "sweet spot" opportunities emerged from interviews with 32 personal plight legal practitioners across the country, and from an extensive review of the literature.

The first chapter of this book describes personal plight legal needs, clients, and law firms, and introduces the "sweet spot" frame of reference. The next chapters focus on practical opportunities for personal plight legal practice related to Price Certainty (Chapter 2); Deferred Payment (Chapter 3); Diversifying Services (Chapter 4); Vertical Division of Labour (Chapter 5); and Horizontal Division of Labour (Chapters 6 and 7). The concluding chapter (Chapter 8) compares the prospects for large personal plight law firms, and small ones, to pursue these innovations. Throughout, the book offers practical recommendations for personal plight law firms, and also for regulators and professional groups interested in helping those firms create sustainable access to justice. These recommendations are collected in the Appendix.

TABLE OF CONTENTS

- ABSTRACT 1**
- EXECUTIVE SUMMARY..... 13**

- CHAPTER 1**
- INTRODUCTION 19**
- 1.1. Personal Plight Legal Needs and the Inaccessibility of Justice 20**
- 1.2. Actual and Would-Be Personal Plight Clients..... 22**
 - 1.2.1. Legally Inexperienced Clientele..... 23**
 - 1.2.2. One-Shotter Clientele 24**
 - 1.2.3. Emotive and Non-Legal Dimensions of Personal Plight Legal Needs 24**
- 1.3. Personal Plight Law Firms..... 26**
 - 1.3.1. Innovation in Personal Plight Legal Services 26**
 - 1.3.2. Three Aspirations for Personal Plight Law Firms 27**
 - 1.3.3. Two out of Three: Not Good Enough..... 28**
- 1.4. The Sweet Spot..... 31**



CHAPTER 2

- PRICE CERTAINTY..... 33**
- 2.1. Price Certainty and Labour Requirement Risk 34
- 2.2. Labour Requirement Risk..... 34
- 2.3. The Feasibility of Price Certainty..... 36
- 2.4. Advantages of Price Certainty for Firms and Clients..... 37
 - 2.4.1. Price Certainty Improves Profitability..... 37
 - 2.4.2. Price Certainty Improves Quality 39
- 2.5. Price Certain Retainer Options..... 40
 - 2.5.1. Discretionary “Services Rendered” Billing 41
 - 2.5.2. Uncapped Time-Based Billing 41
 - 2.5.3. Flat and Capped Billing..... 42
 - 2.5.4. Advertised vs. Quoted Flat Fees 44
 - 2.5.5. Escape Hatch Rider 46
 - 2.5.6. Recovery-Proportionate Contingency Fee 46
 - 2.5.7. No-Win-No-Fee Rider 47
 - 2.5.8. Legal Expense Insurance..... 48
- 2.6. Addressing Labour Requirement Risk..... 49
 - 2.6.1. Legislative Reform to Reduce Labour Requirement Risk..... 49

2.6.2. Externalize the Risk : Legal Expense Insurance and Third Party Litigation Funding.....	50
2.6.3. Absorb More Risk at the Firm Level.....	50
2.7. Conclusion: Price Certainty	52

CHAPTER 3

DEFERRED PAYMENT.....	53
3.1. Access to Justice and Payment Scheduling	53
3.2. Non-Payment Risk.....	54
3.3. Payment Scheduling Spectrum	55
3.3.1. Pre-Payment & Large Retainer Deposits	55
3.3.2. Smaller Retainer Deposits; Periodic or Delayed Payment.....	56
3.3.3. Payment on Recovery.....	56
3.3.4. Payment after Recovery	57
3.3.5. Reverse Payment: Sale of Claim to Firm.....	57
3.4. Managing Non-Payment Risk to Facilitate Deferred Payment	59
3.4.1. Give Firms More Security over their Work Product.....	60
3.4.2. Reduce Unpredictable Regulation of Fees.....	61
3.4.3. Allow Billed-Basis Accounting for Taxation Purposes	62
3.4.4. Contingency Billing as Sweet Spot Price Structure.....	63
3.5. Conclusion: Deferred Payment	65



CHAPTER 4

DIVERSIFYING SERVICES	67
4.1. Introduction.....	67
4.2. Price-Quality Tiers.....	68
4.2.1. Traditional Law Firm Price/Quality Tiers	68
4.2.2. One-to-Many Legal Services.....	69
4.2.3. Unbundled Legal Services.....	70
4.3. Unbundling in Three Dimensions.....	71
4.3.1. Bringing Unbundled Services To Market.....	72
4.4. Unbundled Services in the Sweet Spot?.....	73
4.4.1. Unbundling and Accessibility.....	74
4.4.2. Unbundling and Profitability	76
4.4.3. Unbundling and Legal Professionalism	78
4.5. Conclusion: Price/Quality Tiers and Unbundling.....	84

CHAPTER 5

VERTICAL DIVISION OF LABOUR	85
5.1. Delegation to Junior Lawyers.....	86
5.2. Delegation to Non-Lawyer Staff.....	86
5.3. Delegation to Clients.....	88
5.4. Delegation to Systems.....	88
5.4.1. Systematization of Personal Plight Legal Services.....	89
5.4.2. Packaging of Personal Plight Legal Services	90
5.4.3. Commoditization of Personal Plight Legal Services.....	91
5.5. The Comparative Advantages of the Delegators.....	91
5.6. Impediments to Vertical Division of Labour in Personal Plight	92
5.6.1. Over-Delegation and Mis-Delegation	92
5.6.2. The Challenges of Vertical Division of Labour in Personal Plight	94
5.7. Encouraging Vertical Division of Labour	95
5.7.1. Client Communication Problems and Vertical Division of Labour Solutions.....	97
5.8. Vertical Division of Labour as Investment	99
5.9. Conclusion: Vertical Division of Labour.....	100



CHAPTER 6

HORIZONTAL DIVISION OF LABOUR AMONG LEGAL PROFESSIONALS	101
6.1. Specialists and Generalists	102
6.1.1. The Advantages of Specialization.....	102
6.1.2. Connecting Personal Plight Clients to Specialists.....	105
6.1.3. Diagnosis and Referral Generalism.....	106
6.1.4. Generalism in Isolated Communities.....	106
6.2. Legal Skill Specialization.....	108
6.3. Referral fees: Getting Each Case to the Right Professional	109

CHAPTER 7

HORIZONTAL DIVISION OF LABOUR: NON-LEGAL PROFESSIONALS.....	111
7.1. Helping Professionals	112
7.2. Managers	112
7.3. Research and Development.....	113
7.4. Legal Process Analysis	114
7.5. Capital Sources	115
7.6. Innovators and Entrepreneurs.....	116
7.7. Reconciling Autonomy, Collaboration, and Innovation.....	117
7.8. Conclusion: Horizontal Division of Labour with Non-Legal Professionals.....	119

CHAPTER 8

- FIRM SCALE: IS BIGGER BETTER, OR IS SMALL SUPERIOR?..... 121**
- 8.1. Does Bigger mean Better for Personal Plight?..... 122**
- 8.1.1. Big Firms and Price Certain Retainers (Chapter 2)..... 122**
- 8.1.2. Big Firms and Deferred Payment (Chapter 3)..... 122**
- 8.1.3. Big Firms and Diversification of Services (Chapter 4)..... 123**
- 8.1.4. Big Firms and Vertical Division of Labour (Chapter 5)..... 123**
- 8.1.5. Big Firms and Horizontal Division of Labour among Legal Professionals (Chapter 6 and Chapter 7)..... 123**
- 8.2. The Superiority of Small Firms?..... 124**
- 8.2.1. Modest Economies of Scale in Personal Plight..... 124**
- 8.2.2. Smalls and Solos: Routes into the Sweet Spot..... 125**
- 8.3. Room for Both Big and Small..... 126**
- APPENDIX 1: Summary of Recommendations..... 127**
- APPENDIX 2: Research Methodology..... 133**
- ENDNOTES..... 135**



EXECUTIVE SUMMARY

○ INTRODUCTION (CHAPTER 1)

Personal plight legal needs arise when individuals encounter disputes with legal dimensions. Personal plight legal practice includes all legal services that respond to such needs. Civil litigation niches such as family law, personal injury law, and estate litigation are all personal plight. State action also creates personal plight legal needs for individuals, including niches such as criminal defence, child protection, and tax law. Personal plight clients are more likely than other clients to be legally inexperienced, and to have needs with emotive and non-legal aspects.

The personal plight quadrant of the legal practice map is the site of our worst access to justice problems. Along with the public justice system, Canada's law firms are deeply implicated in the struggle for access to justice, and they are the focus of this book. What sort of innovation should we be looking for within personal plight firms? While accessibility is essential and sorely lacking, it should not be our only aspiration for the future of personal plight legal practice. Quality is obviously also important. High quality legal services are effective, convenient, and responsive to each client's specific needs. They support the rule of law by reconciling the client's goals with the rule of law and other legitimate interests. *Profitability* is also desirable -- not only because practitioners have "bills to pay," but also because there is no reasonable prospect that legal aid and pro bono volunteerism will be sufficient to meet the enormous unmet need for personal plight legal services. Innovative practice models that can be funded by clients themselves, and that respond to firms' desire to increase income and reduce risk, can make especially powerful, sustainable contributions to access to justice.

There is no reasonable prospect that legal aid and pro bono volunteerism will be sufficient to meet the enormous unmet need for personal plight legal services.

Accessibility, quality, and profitability are all important, but much personal plight legal practice in North America today has only two of these three characteristics. "Sweet spot" innovations have all three of these characteristics. Building on the work of the CBA's [Legal Futures Initiative](#) and [Access to Justice Committee](#), this book seeks to identify, analyze, and publicize instances of sweet spot innovation in personal plight legal services, and to show how regulators and professional groups can encourage further progress in this direction.



○ PRICE CERTAINTY (CHAPTER 2)

Offering clients and would-be clients more price certainty is a useful path into the sweet spot. However, non-tort personal plight firms value uncapped time-based billing because of the unpredictability of the labour requirements to resolve a case. Labour requirement risk is a function of unpredictable legal complexity, unpredictable adversary behaviour, and unpredictable client behaviour.

While labour requirement risk is endemic in personal plight matters, it is equally clear that increasing price certainty is possible for these firms. In addition to accessibility, price certainty can also enhance the profitability and quality of personal plight legal services. Section 3.5 analyzes alternatives such as flat fees, contingent fees, and legal expense insurance in terms of their ability to offer clients price certainty without imposing unacceptable labour requirement risk on personal plight firms. If this risk can be reduced, externalized, or absorbed by firms, then the path will be cleared for them to improve access to justice by offering more price-certain retainer terms to their clients.

○ DEFERRED PAYMENT (CHAPTER 3)

Accessibility improves when personal plight firms allow their clients to pay gradually over time, or to pay the fee from the proceeds of the case. Because personal plight clients may be willing and able to pay larger fees if the payment is deferred, deferred payment is a sweet spot model that also supports the profitability of law firms. However, the risk that clients will not voluntarily pay the amount owed (non-payment risk) drives firms to require upfront cash retainers and prepayments. This Chapter analyzes options for deferring payment, including periodic payment, payment on recovery, and sale of claim to law firms. Legislators and regulators can encourage firms to offer deferred payment by reducing the non-payment risk that confronts them. This might mean giving firms more security over their work product, or reducing the risk of discretionary, retrospective fee “haircuts” imposed by courts and regulators. Billed-basis tax accounting acknowledges the economic reality of deferred billing, and avoids discouraging it. The Chapter concludes by arguing that contingency fees, if appropriately regulated, fit well within the sweet spot, and that legislatures should encourage their use in more different types of legal practice.

○ DIVERSIFYING SERVICES (CHAPTER 4)

As the Futures Report stated, there are enormous opportunities for “lawyers who demonstrate... distinct value by offering *choice* to their clients in how they receive legal services.” Diversifying services – especially among different price/quality tiers – is the third route into the sweet spot for personal plight law firms. After reviewing traditional law firm approaches to price/quality tiers and one-to-many legal services, this Chapter focuses on unbundled legal services. It concludes that unbundling offers valuable opportunities: especially in matters not involving the state, and especially if retainers are drafted carefully and cases are selected carefully. Unbundling can succeed to the extent that lawyer and client think of their retainer in terms of “assistance”, as opposed to “salvation”.

Appropriate delegation to junior lawyers, to non-lawyer staff and even back to clients themselves lets firms reduce costs and increase efficiency.

○ VERTICAL DIVISION OF LABOUR (CHAPTER 5)

Better division of labour within firms can lead to more accessible, higher quality, and more profitable personal plight legal services. *Vertical* division of labour can be defined as the efficient delegation of tasks to relatively low-cost workers and systems. Appropriate delegation to junior lawyers, to non-lawyer staff, and even back to clients themselves lets firms reduce costs and increase efficiency. Vertical division of labour also involves increasingly intelligent systems, which generate new opportunities to systematize, package, and commoditize services to the mutual benefit of clients and firms. Intelligent vertical division of labour, among other advantages, allows higher-cost senior legal professionals to focus on the tasks for which they are especially well-suited, such as advocacy and clinical legal judgment. It is true that delegation can backfire, and personal plight files are arguably less amenable to complex vertical division of labour than corporate-client and uncontested matters are. Still, vertical division of labour is a significant sweet spot opportunity -- not only to reduce costs but also to improve service quality with regard to matters such as client communication. Personal plight firms should be encouraged to invest in vertical division of labour.

○ HORIZONTAL DIVISION OF LABOUR: AMONG LEGAL PROFESSIONALS (CHAPTER 6)

Horizontal division of labour means searching “laterally” for human professionals with distinct skill-sets useful to personal plight legal practice. Horizontal division of labour is essentially an effort to improve quality, not an effort to reduce costs. Professional practitioners may be *specialists* in certain niches or *generalists* working in multiple niches, and appropriate division of labour between these two groups is an important way to divide labour horizontally. Specialization leads to higher-quality services, as well as professional advantages for practitioners. However generalist professionalism has key access to justice benefits, such as connecting inexperienced clients to appropriate specialists, and diagnosing their often multifaceted legal needs. Generalist legal professionals are especially valuable in geographically or linguistically isolated communities. Referral fees have a legitimate role to play in promoting efficient horizontal division of labour between generalists, legal niche specialists, and legal skill specialists.

○ HORIZONTAL DIVISION OF LABOUR: WITH NON-LEGAL PROFESSIONALS (CHAPTER 7)

Horizontal division of labour in personal plight firms should reach beyond legally trained workers, and encompass non-legal professionals such as social workers, managers, entrepreneurs, and venture capitalists. Members of the “helping professions” can play a valuable role in meeting the non-legal needs that those with personal plight legal needs often experience at the same time. For tasks related to management, research & development, and legal process analysis, non-legal professionals could both free legal practitioners to focus on practicing law, and ensure that innovative sweet spot opportunities are not missed by firms. More ambitiously, non-lawyers can provide capital to facilitate firms’ investments in contingency-billed cases and their growth to scale. They can also provide entrepreneurship to build new sweet spot personal plight firms from scratch. Reconciling professional autonomy, innovation, and inter-professional collaboration is a challenge for the bar, but rolling back “insulating” rules that keep non-lawyers at arms’ length from firms is a necessary step.

There is room for both big and small firms in the personal plight sector.

○ FIRM SCALE (CHAPTER 8)

North American personal plight law firms tend to be small, both compared to corporate law firms and compared to alternative business structure personal plight firms in places like the UK and Australia. Is small firm size an impediment to sweet spot innovation? Larger firms enjoy economies of scale and are generally more able than small ones to absorb risks and make investments. These factors make it easier for them to adopt sweet spot innovations such as price certainty, deferred payment, diversified services, and vertical and horizontal division of labour. Indeed, large personal plight firms outside of North America have already done so.

On the other hand, economies of scale are relatively modest in the personal plight sector, and lawyers interviewed for this research did not generally perceive many opportunities to improve quality, accessibility, or profitability by growing their firms. Smalls and solos have their own routes into the sweet spot, some of which are relatively traditional and some of which are enabled by new technology and new ways of working. Ultimately, there is room for both big and small firms in the personal plight sector.

○ CONCLUSION

Innovation for accessibility is urgently needed in personal plight legal practice. The most durable and transformative innovation will foster service quality and profitability while it enhances accessibility. The key innovations pertain to price structure, to service variety, and to division of labour. Enormous opportunity exists for firms, and for the profession collectively, to move personal plight legal practice into the sweet spot.

A summary of the recommendations made by this book can be found in Appendix 1.

The research methodology is explained in Appendix 2.



CHAPTER 1

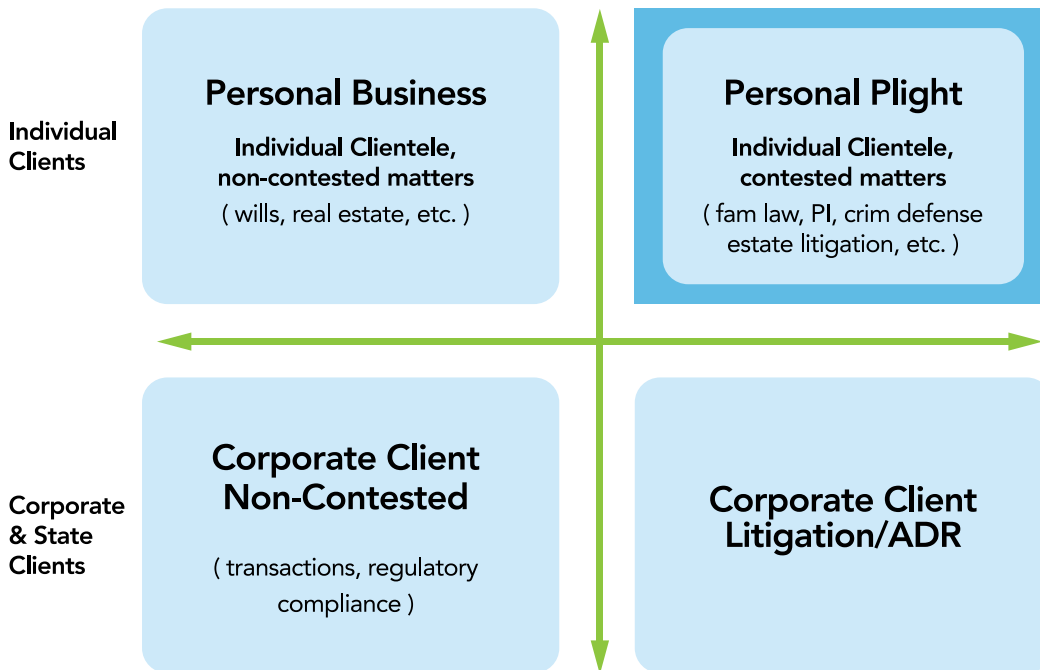
○ INTRODUCTION

Personal plight legal practice includes all legal work performed for individual clients whose legal needs arise from disputes. It is profoundly important in modern societies. Personal plight legal practice upholds fundamental human rights, it guides people through the legal crises of life, and it advances social justice. This book identifies practical strategies to help law firms make high quality, economically sustainable personal plight legal services accessible to the many people in our society who urgently need them.

The phrase “personal plight” was coined in 1977 by John Heinz and Edward Laumann, as part of their typology of law practice based on client type and client need.² After a detailed study of Chicago lawyers, Heinz and Laumann empirically identified a personal client “hemisphere” of law practice, whose practitioners had very little to do with the “corporate client hemisphere.”³ They then subdivided the personal client hemisphere into two practice groups, based on whether or not the client needs arose from disputes. Thus, legal practice can be visualized as follows:⁴



Figure 1 Four Quadrants of Legal Practice



ADAPTED FROM HEINZ & LAUMANN, CHICAGO LAWYERS (1982)

This Introductory Chapter begins by identifying the distinguishing characteristics of personal plight needs, clients, and law firms. It then proposes three aspirations for personal plight legal practice: accessibility, service quality, and profitability. The “Sweet Spot” is the happy situation where personal plight law firms combine all three of these attributes. The CBA Futures Report emphasized “opportunity for lawyers... to provide valuable new services to an expanding client base,” and to create access to justice in so doing.⁵ Opportunities of this nature for personal plight law firms are the focus of this book. It offers a series of strategies for moving firms into the “sweet spot,” which this Introduction will summarize. This research was informed by key informant interviews with 32 lawyers, whose insights are cited extensively throughout the book.⁶

1.1. PERSONAL PLIGHT LEGAL NEEDS AND THE INACCESSIBILITY OF JUSTICE

A personal plight legal need arises when an individual⁷ becomes involved in a dispute for which the law could, in principle, offer assistance.⁸ The dispute might involve another individual, such as an ex-spouse or a neighbour. The dispute might be with a corporation: for example an insurer, employer, or a vendor. The dispute might also be with a state entity, such as a criminal justice authority, social benefits administrator, or immigration agency. An “everyday legal problem” arising out of normal activities might create a personal plight legal need.⁹ However a once-in-a lifetime scenario, like being a refugee, can also create such a need.

Personal plight legal needs are diverse. Some involve the pursuit of social justice and/or collective mobilization, for example a class action alleging police brutality.¹⁰ Other personal plight needs are purely individual assertions of financial rights, for example a dispute between shareholders. Some personal plight legal needs are dire (e.g., a homicide charge), others are much less so (e.g., a backyard property boundary dispute). Some people in personal plight confront a state body or a corporation with vastly greater resources and experience. In other cases the other side is a neighbour, a sibling, or an ex-spouse with modest resources and experience.

Personal plight needs cut across income levels. Eviction creates a personal plight legal need for a low-income tenant; divorce creates a personal plight legal need for a billionaire. Middle income people experience distinct and pressing personal plight access to justice problems, as illustrated by the 2012 Middle Income Access to Justice Symposium.¹¹ In Canada such individuals typically make too much to qualify for state-funded legal aid, but lack the funds to pay market prices for these services.¹²

Personal plight legal needs are at the epicentre of Canada's access to justice predicament.¹³ Formal legal rights and obligations have proliferated in spheres of life that lacked them in previous eras, such as family relationships and interactions with the police. However, these new rights and obligations are complex, and the legal fora in which they are asserted and resisted are not typically user-friendly.¹⁴

For these reasons, attempting to resolve personal plight legal needs without assistance is often very challenging if not impossible. People need expert help, but the help is often very difficult to find and/or pay for. The willingness of the state to create new legal rights (a process which is generally cheap and easy for the state) has dramatically outstripped its willingness to fund the expensive systems and professionals that can meaningfully help people assert those rights. Meanwhile, the common law's tendency to ramify into ever more-complex labyrinths of doctrinal distinctions steadily increases the demands on everyone involved.¹⁵

The resulting access to justice predicament shows itself in many ways. On the civil side,¹⁶ the Everyday Legal Problems Survey shows that almost one in every two Canadians experiences personal plight problems in any three-year period.¹⁷ At the time of this survey, the majority of these problems experienced by respondents in the previous three years had either not yet been resolved, or had been resolved in a manner that the respondent found to be unfair.¹⁸ Fewer than 20% of respondents with legal problems had the benefit of any professional legal advice in dealing with them.¹⁹



Contingency billing involves its own access to justice problems, including lack of representation for clients with high-risk and/or claims of low monetary value.

For people experiencing civil personal plight, the cost of seeking justice is high in terms of money, in terms of time, and in terms of aggravation and stress.²⁰ Many people therefore “lump it” -- abandon their own claims of rights or accede to defensible civil claims against them.²¹ Others persevere but at a cost that may in fact exceed the benefit of the justice obtained.²² These “pyrrhic victories” are common in civil litigation, especially when all of the financial and non-financial costs involved in seeking justice are considered. In personal injury and class actions, contingency billing makes fees more immediately affordable,²³ leading some to deny that there is any access to justice problem in these fields.²⁴ However contingency billing involves its own access to justice problems, including lack of representation for clients with high-risk and/or claims of low monetary value,²⁵ and large fees which significantly cut into the amounts recovered by claimants in some cases.²⁶

The state funds representation for indigent people facing incarceration or other threats to their rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.²⁷ However, those facing lesser criminal charges and middle income people (who exceed the very modest legal aid cut-offs) confronting state action often face a choice between devastating legal fees, abandonment of rights, or the severe challenge of self-representation. Racialized, aboriginal, and homeless Canadians face disproportionate police attention and incarceration among other access to justice problems;²⁸ the inaccessibility of high-quality legal services to them may be part of the reason.²⁹

The struggle for personal plight access to justice includes the legal *system*: courts and other public sector bodies with justice-related mandates.³⁰ Making the justice system more accessible has been the primary goal of much recent research.³¹ However, Canadian legal professionals and law firms are also deeply implicated in this access to justice struggle.³² Enhancing accessibility of personal plight legal *practice* is the focus of this book.

○ 1.2. ACTUAL AND WOULD-BE PERSONAL PLIGHT CLIENTS

Not everyone who experiences a personal plight legal needs or wants professional help to resolve it, especially if the problem is minor. However, most people who have significant dispute-related legal needs do want professional help,³³ and for good reason. In many such disputes, a party represented by a legal professional can expect to get better a better outcome than a self-represented party can.³⁴ Having legal help also substantially reduces the time costs and psychological costs involved in asserting one’s legal rights, compared self-representation.³⁵ *Would-be* personal plight clients are as important as actual ones in this discussion. These are people experiencing personal plight who would retain professional legal help if it were more affordable or otherwise accessible to them than it actually is.³⁶

Like other consumers, personal plight clients are generally interested in the price and quality attributes of the available options, and they want to exercise choice among options with different

attributes.³⁷ As the Futures Report found, they increasingly expect “legal services to be delivered like all other services... in ways that are familiar to them, user-friendly, and quick.”³⁸ Individuals’ needs vary, of course.³⁹ However three key attributes distinguish actual and potential clients of personal plight law firms from other consumers legal services. These are (i) legal inexperience, (ii) “one-shotter” status, and (iii) the emotive and non-legal dimensions of the needs.

○ 1.2.1. LEGALLY INEXPERIENCED CLIENTELE

First, personal plight clients are usually legally inexperienced.⁴⁰ Legal consciousness is patchy – people often fail to recognize the legal dimensions of their life problems or the assistance that law firms might provide.⁴¹ Unlike mid-sized or large corporate clients, they purchase legal services infrequently, if at all, and generally know little about the options available.⁴² Many actual and would-be personal plight clients have never previously worked with a law firm,⁴³ at least not in a similar area of law.⁴⁴ *Information asymmetry* therefore characterizes the process of shopping for personal plight legal services.⁴⁵ Most personal plight clients know significantly less than the law firms do about the quality and price characteristics of the different options available. They have difficulty evaluating the options in order to make a decision.⁴⁶

It is difficult for clients to evaluate the quality of the service both while it is being delivered and after the retainer ends.

The ramifications of legal inexperience for personal plight clients do not end once the retainer begins. Personal plight legal services have “credence” characteristics, meaning that it is difficult for clients to evaluate the quality of the service both while it is being delivered and after the retainer ends.⁴⁷ The outcome of the case is not a reliable basis for client inferences about the quality of the legal service.⁴⁸

A corporate client is likely to have some idea of its legal rights before it retains a firm to advance them, and some sense of how aggressively it wishes to pursue those rights.⁴⁹ Personal plight clients are much more likely to have no impression, or a mistaken impression, of their legal rights.⁵⁰ Some clients must be talked down from unreasonable positions, while other clients must have their resolve strengthened.⁵¹ Speaking of the latter type of client, personal injury lawyer SS said:

my clients will come in and say ‘we need to get this behind us’. And I’ll say ‘your trial’s a year away. I can settle your case for 50% of what it’s worth now, or you can get 100% of what it is now on the eve of trial, because the offers always go up as we get close to trial.’ Sometimes you start the case, you go a couple of days of trial, then you get the right offer. ... So I’m asking you to stick with me on this. Let’s beg, borrow or steal, but you need to stick this out because it’s going to mean a huge difference in your quality of life going forward.⁵²

The legal inexperience of most personal plight clients also means that their firms must *translate* between the language of the law and the client's own language.⁵³ Translation is important, among other reasons, because personal plight clients are likely to be confronted with important strategic decisions, for example regarding settlement. It is the legal professional's duty to ensure that these decisions are informed by an understanding of the costs, risks, and benefits of the various options.⁵⁴ This often requires longer conversations and a higher level of interpersonal skills than is the case with an experienced corporate client.⁵⁵

○ 1.2.2. ONE-SHOTTER CLIENTELE

In addition to being legally inexperienced, personal plight clients are also usually "one-shotters" who are not likely to need the firm's legal services again after the matter is resolved.⁵⁶ No matter how wonderful one's family law firm may be, one does not want to have a long-term relationship with that firm. In light of increasing specialization, one's family law firm is increasingly unlikely to also be one's real estate law firm and/or employment law firm.⁵⁷

Therefore, personal plight client relationships tend to be "one-off," and this is a challenge for legal professionalism in these fields. Compare them to typical relationships in the corporate client non-contested quadrant.⁵⁸ These relationships tend to be long-term and valuable to both client and firm. The desire to preserve the relationship encourages the firm to provide good value-for-money. According to "Johnson," an Ontario lawyer cited in Jack Batten's book *Lawyers*:

In the big firms the lawyers have an incentive to do a bang-up job because they know their clientele is going to be around with more work tomorrow and next month and a year later. They maintain a continuing relationship with their clients. But the guy in the shopping plaza handles one-shot stuff -- a house purchase, a divorce, a motor-vehicle accident -- for a client who comes into his life for a couple of weeks and then vanishes.⁵⁹

The value of the long-term relationship also encourages the corporate client to provide good money-for-value to its firm. Fee negotiations are not necessarily zero-sum games.

In the personal plight quadrant, the low likelihood of future dealings creates an incentive for opportunistic behaviour on the part of both the firm, such as underserving or overcharging, and the client (e.g. making meritless complaints in order to obtain discounts on the bill). The firm does have an interest in its reputation and in client referrals, but this is a relatively weak discipline on opportunism. The client faces no such discipline whatsoever.

○ 1.2.3. EMOTIVE AND NON-LEGAL DIMENSIONS OF PERSONAL PLIGHT LEGAL NEEDS

The third distinctive characteristic of personal plight clients is the emotive and non-legal dimensions that their legal needs often involve.⁶⁰ The word "plight" is apposite. The needs that bring an individual into a family law, personal injury, or criminal defence law office arise from personal life crises, which would be stressful even if they were unaccompanied by legal needs.⁶¹

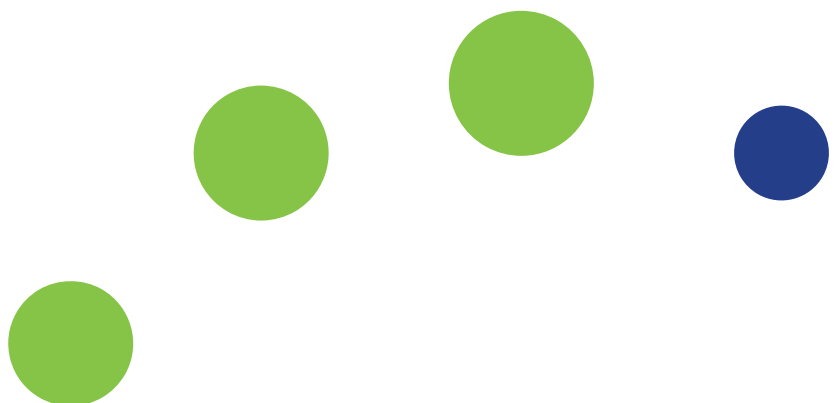
In some (although certainly not all) cases, the emotive and non-legal dimensions of the needs push the practitioner toward the role of ally,⁶² or even saviour for the client.⁶³ Personal plight legal professionals must recognize and respond appropriately to the non-legal needs and emotive dimensions of their clients' situations.⁶⁴ This is not simply a matter of firms offering informal therapy as a side-dish to their legal services. Emotional intelligence and interpersonal skills are often essential to providing the core services for which the firm has been retained.⁶⁵ For example, a firm which fails to perceive a client's nonmonetary goals in a dispute (i.e. obtaining an apology from the other side) is unlikely to fully satisfy that client.⁶⁶

A firm which fails to perceive a client's non-monetary goals in a dispute ... is unlikely to fully satisfy that client.

To guide an individual client to an appropriate and satisfactory settlement, a personal plight practitioner must often take into account the shifting anger, guilt, and vindictiveness that shapes the client's attitude and the attitude of the other side. For example, family lawyer FF said:

a lot of what I do on a file is basically acting sort of as a filter for my clients, or I sometimes even joke that they're outsourcing their higher brain functions, the ones that are responsible for emotional regulation and things like that, because they come to me and they sort of explode and what's coming out of them is their fight or flight mechanism, and they landed on my lap to be the one who picks through that, and says which issues are the ones we need to address, and... guiding them towards understanding what to deal with and what to live with.⁶⁷

Thus, along with their tendencies to legal inexperience and one-shotter status, emotional content is a distinctive attribute of personal plight clientele that must be taken into account in identifying practical innovations for the firms that serve them.



○ 1.3. PERSONAL PLIGHT LAW FIRMS

Personal plight law firms are the focus of this research.⁶⁸ Sole practitioner lawyers and boutique firms specializing in family law, criminal defence, plaintiff-side personal injury law, personal employment disputes,⁶⁹ and estate litigation are all examples of personal plight law firms.⁷⁰ Some generalists combine personal plight work with other legal work.⁷¹ Finally, independent paralegals doing tribunal or minor criminal defence work for individual clients are also in this category.

Personal plight law firms are ambulances at the bottom of life's cliffs. As Richard Susskind and others have argued, it would be better in principle to have preventative services -- "fences" at the top of these cliffs, to obviate the need for ambulances.⁷² In some cases, legal work in a different quadrant may work as a cliff-top fence. For example, a well-drafted will and estate administration plan is preferable to even the best estate litigation work. Technology might create other cliff-top fences, such as the super-safe driverless cars that could eventually render much personal injury law practice unnecessary. However, the tectonic forces of social change and social progress tend to thrust up new "cliffs" just as quickly, which create need for new legal ambulances. Cyberbullying and condo-dweller disputes are examples of new forms of personal plight creating new work for personal plight law firms.⁷³

Personal plight law firms in Canada today tend to be small. Over the course of the 20th century, Canada's largest law firms mostly abandoned the personal client hemisphere. New mid-size firms such as Axess Law and Anderson Sinclair LLP are emerging in the personal business quadrant but have yet to take on personal plight matters in a major way.⁷⁴ While personal plight legal services were historically the province of general practitioners,⁷⁵ practitioners and even law firms are increasingly specialized in a single personal plight niche.⁷⁶ Ronit Dinovitzer's 2014 survey of new Canadian lawyers found that, just two years after being called to the bar, 65.2% of these new lawyers already spend more than half of their time working in a single area of law.⁷⁷

○ 1.3.1. INNOVATION IN PERSONAL PLIGHT LEGAL SERVICES

In North America, innovation in the other three practice quadrants is more conspicuous than it is in personal plight. Corporate hemisphere clients and their law firms are pursuing labour savings through offshoring, outsourcing, and artificial intelligence.⁷⁸ For uncontested personal business matters, automated forms from the likes of RocketLawyer and LegalZoom have made significant inroads.⁷⁹ At first blush, "NewLaw," in North America, seems to have skipped personal plight where its access-enhancing benefits are needed the most.⁸⁰ Very few personal plight firms rank among the trailblazers identified in the CBA Futures' innovation case studies.⁸¹ With a small number of interesting exceptions, innovative personal plight firms also seem to be missing from the work of incubators such as Ryerson's Legal Innovation Zone, the MaRS LegalX Cluster, or Fleet Street Law.⁸²

Nevertheless, the interviews and other research undertaken for this project suggest that there is in fact substantial innovation within the personal plight quadrant. This innovation is in many cases unheralded and inconspicuous. Typically, it occurs within the small firms and solo practices that continue to predominate in the quadrant, and it works to the benefit of the clients of those firms. One goal of this book is to identify, analyze, and celebrate instances of innovation in personal plight legal services. A second goal is to show how regulators and professional groups can encourage sweet spot innovation in personal plight firms.

○ 1.3.2. THREE ASPIRATIONS FOR PERSONAL PLIGHT LAW FIRMS

○ 1.3.2.1. ACCESSIBILITY

The dire access to justice problems in the personal plight legal services quadrant have been described.⁸³ However, accessibility is not the *only* thing that matters, and it should not be our only aspiration for the future of personal plight legal practice. *Quality* and *profitability* are also important.

Innovation ... is in many cases unheralded and inconspicuous. Typically it occurs within the small firms and solo practices that continue to predominate in the quadrant.

○ 1.3.2.2. QUALITY AND PROFESSIONALISM

High quality, professional legal services apply “relevant knowledge, skills and attributes in a manner appropriate to each matter.”⁸⁴ They reflect the “5 C” duties of legal professionals to their clients: competence, confidentiality, conflict of interest-avoidance, candid communication, and commitment to the client’s cause.⁸⁵ They are efficacious in improving the client’s legal outcome, but they are also convenient, prompt, and supportive for the client.⁸⁶ High quality legal services, unlike static legal information, are responsive to the individual client’s specific needs. In personal plight matters, these may include advice, negotiation, and advocacy among other things.

High quality legal work has positive externalities – it does good for people other than the client.⁸⁷ It supports the rule of law by helping to reconcile the client’s goals with the legitimate interests of the other side, the justice system, and the public.⁸⁸ As the Futures Report put the point, legal professionalism means that lawyers must “be zealous representatives of their clients” while also “protect[ing] the rule of law and the administration of the legal system.”⁸⁹ In most types of personal plight work, strong lawyer-client relationships are an essential condition of high quality legal services.

○ 1.3.2.3. PROFITABILITY

Profitable personal plight legal practice does not rely on state-funded legal aid or *pro bono* volunteerism on the part of practitioners. It is funded by the resources that the clients bring to the table. Economically self-sustaining innovations and practices create livelihoods for new practitioners, and they increase profits in existing personal plight firms.

Profitable innovations are desirable not only because practitioners have “bills to pay,”⁹⁰ (including student debt repayments).⁹¹ Profitability is also desirable because there is no reasonable prospect that state funding and volunteered labour will be sufficient to meet the enormous unmet need for personal plight legal services.⁹² Practice models that are economically self-sustaining, but also accessible, will attract talented professionals to serve these clients.⁹³

The long-run profitability of a law firm is affected by the risks that it confronts. Being sued by clients, being subjected to regulatory investigation, and being “stuffed” on bills are all risks that personal plight firms naturally seek to minimize. Risks confronting personal plight law firms, and opportunities to reduce them, are major themes in this book.

Malcolm Mercer aptly observes that, while unmet legal needs are ubiquitous, there are also many unemployed and under-employed legal professionals.⁹⁴ Why can’t the supply meet the demand? This book suggests that developing new practice models, and eliminating regulatory impediments to them, will create the conditions in which the supply of legal talent can meet the unmet demand in personal plight.

○ 1.3.3. TWO OUT OF THREE: NOT GOOD ENOUGH

Accessibility, quality, and profitability are key aspirations for personal plight legal practice. It is not always realistic or necessary for all three to be realized in a law firm. Legal information and simple tools for people experiencing personal plight need not involve high quality professionalism as that phrase was defined above. Some personal plight legal practice never will be, and never should be, profitable. This includes much personal plight work for low income clients. The state and the profession must fund this work through donations of money and time.⁹⁵

However, it is problematic that most personal plight legal practice in Canada today has only two of these three characteristics. Figure 2 illustrates this point. Most sources of legal help for people experiencing personal plight would be found in one of the three areas on Figure 2 in which only two circles overlap.

Figure 2 Personal Plight Legal Practice Today



1.3.3.1. STATE-FUNDED AND PRO BONO PERSONAL PLIGHT: HIGH QUALITY AND ACCESSIBLE, BUT NOT PROFITABLE

Accessibility and quality coexist, but economic self-sustainability is lacking in other practice contexts. State-funded legal aid supports most criminal defence, child protection, and refugee law cases. Pro bono volunteerism also meets some personal plight legal needs.⁹⁶ A variant on pro bono is *low bono*, in which a law firm discounts fees for clients of modest means.⁹⁷ (In light of the low rates of compensation paid by state-funded legal aid schemes, many consider these files to be a form of low bono.⁹⁸)

Especially in time-billed personal plight niches, firms often do “unintentional” *pro bono* and *low bono* work, after a client runs out of money and the firm waives or discounts its fee to allow the retainer to continue. Other altruistic practice models include *cross-subsidization*, in which a law firm uses profits from some files to support free or discounted work for those who cannot pay the market price,⁹⁹ and “hybrid” or “social enterprise” firms which are legally required to pursue goals other than the maximization of profit.¹⁰⁰

Clients with legally-aided and *pro bono* files pay little or nothing and accessibility is realized. Nor is there any evidence that quality and professionalism suffer when the fee is waived by the firm or covered by legal aid. However, the lack of profitability means that the work is dependent on the willingness of governments to fund it, or the willingness of legal professionals to sacrifice income to perform it.

Legal aid will always be a central pillar of personal plight work in which individuals confront the state, and indeed it is constitutionally guaranteed in many such matters.¹⁰¹ However, legal aid doesn't come close to meeting unmet demand, especially in civil personal plight niches such as family law. Voters are generally unenthusiastic about plans to expand legal aid.¹⁰² This may be because, unlike healthcare or education, the average middle-income voter does not perceive much prospect of ever needing to use it.¹⁰³ The recent dramatic defunding of legal aid in the UK, and lack of negative consequences for the government that did so, illustrates its political vulnerability. It would not be prudent to count on major state infusions of legal aid funding in the foreseeable future sufficient to resolve access to justice deficits in Canada.¹⁰⁴

Likewise, *pro bono* personal plight work will continue to make a commendable but small-scale contribution to meeting the pervasive unmet needs. As Michael Trebilcock puts the point, it is probably "unrealistic to expect lawyers in private practice... to devote substantial proportions of their time to *pro bono* services or to dramatically reduce fees."¹⁰⁵ In short, neither taxpayers nor *pro bono* volunteerism can be realistically expected to fund the personal plight work that needs to be done, which is not currently being done.

○ 1.3.3.2. INTERACTIVE FORMS, WEBSITES AND ARTIFICIAL INTELLIGENCE: ACCESSIBLE AND PROFITABLE, BUT NOT PROFESSIONAL

The second overlap area on [Figure 2](#) contains computer-based solutions such as interactive forms, websites and artificial intelligence. This includes online generalized legal *information*, as distinguished from legal *advice* tailored to the client's specific needs. A host of online options and apps exist for those with small claims court,¹⁰⁶ family law,¹⁰⁷ and some other personal plight needs.¹⁰⁸ People increasingly turn to these resources, and for some matters they may be perfectly adequate.¹⁰⁹ Well-known brands such as LegalZoom and RocketLawyer now offer a few basic automated personal plight services in addition to their many forms for uncontested matters.¹¹⁰ DoNotPay, "the world's first robot lawyer," provides some basic personal plight legal services.¹¹¹

Artificial intelligence may one day provide customized, responsive legal services to people experiencing personal plight, but that day is not yet imminent.

These resources are, generally, highly accessible. They are available to anyone with access to a computer or a library. They are either free to the user or charge low fixed fees. They also have significant potential for profitability, or so venture capitalists seem to assume.¹¹² However, they lack quality and professionalism as those terms were defined above.¹¹³ Artificial intelligence may one day provide customized, responsive legal services to people experiencing personal plight,¹¹⁴ but that day is not yet imminent.¹¹⁵ As noted above, personal plight clients are typically legally inexperienced, and often experiencing a life crisis which gave rise to but extends beyond the legal need.¹¹⁶ They need and want professional, expert human allies to meet their legal needs.¹¹⁷

While the internet is rapidly increasing access to legal information, it is not yet replicating the other elements of legal professionalism that personal plight clients need and want.¹¹⁸

1.3.3.3. PRIVATE SECTOR PERSONAL PLIGHT WORK: PROFESSIONAL AND PROFITABLE, BUT NOT ACCESSIBLE

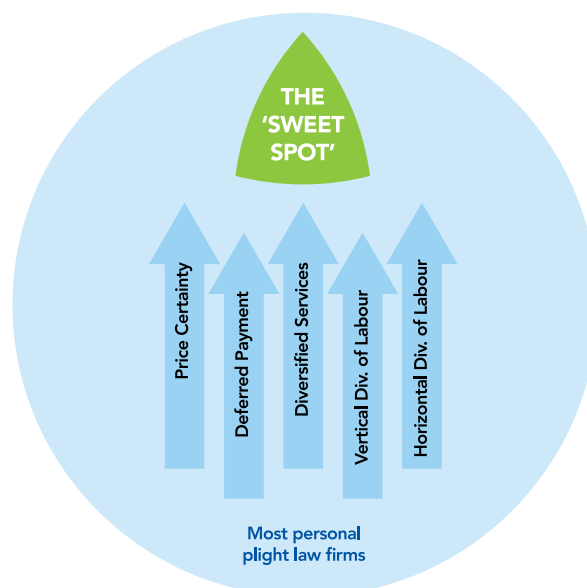
Finally, traditional law firms doing civil personal plight work are found in the lower overlap area on Figure 2. They typically have strong legal professionalism and are economically self-sustaining. There is no evidence of a work quality or professionalism crisis in these firms: client satisfaction with the work itself seems to be relatively high.¹¹⁹ According to 2014 National Legal Problems Survey, 81% of Canadians who consulted lawyers regarding an everyday legal need found the advice they received to be helpful.¹²⁰ The proportion of these lawyers who are subject to meritorious complaints or negligence actions, or to any type of professional discipline, is very small.¹²¹

Civil personal plight practice is also generally economically self-sustaining in Canada.¹²² It can be quite profitable for firms, although results naturally vary across niches and practice environments. Accessibility for clients and potential clients is what is missing. Steep financial and non-financial barriers stand between individuals experiencing civil personal plight matters and the private sector law firms which do this work, especially in time-billed practices.¹²³

1.4. THE SWEET SPOT

At the centre of Figure 2 is the “sweet spot” of personal plight legal practice, in which services are accessible, as well as high quality, and profitable for the firms that offer them. The argument of this book is *not* that all personal plight services should crowd into this area.¹²⁴ The argument is that moving more private sector personal plight law practice into the sweet spot would be a major leap forward. Thus, the goal of this book is to identify the innovations that can bring personal plight law firm into this sweet spot.

Figure 3 Five Paths into the Sweet Spot



This book proposes five paths into the sweet spot. Chapter 2 considers the opportunities and challenges involved in offering *price certainty* to clients, through flat, capped and contingent fees. *Deferred payment* (Chapter 3) is another fee structure option that can promote firm accessibility and profitability if the attendant risks can be managed. Chapter 4 explores *diversification of services* by personal plight firms, with a special focus on price-quality tiers and unbundling. *Vertical* division of labour, analyzed in Chapter 5, means intelligently delegating the work involved in personal plight legal practice to humans and machines in order to preserve quality while cutting costs. Chapters 6 and 7 focus on *horizontal* division of labour. The means reaching out “laterally” to legal and non-legal human professionals with skill sets that foster high quality, accessible, and profitable personal plight legal practice. Finally, Chapter 8 considers the potential of first large personal plight firms, and then small ones, to adopt the innovations described in this book.

To follow these paths into the sweet spot, personal plight law firms must understand and manage risk, make appropriate investments, and remain cognitively open to non-traditional sources of innovation. Regulators and professional groups have a key role in helping them to do so. Specific recommendations to firms and to regulators are identified in **boldface**, and collected in the [Appendix](#) of this book.

CHAPTER 2

○ PRICE CERTAINTY

The unaffordability of legal fees is the best known barrier to the accessibility of personal plight legal services.¹²⁵ High-quality and professional legal services may never be cheap, so long as law and procedure remain as complex they presently are. However, their unaffordability cannot be entirely attributed to high average fees per case. Nor can the unaffordability problem be entirely attributed to the scarcity of licensed practitioners inflating lawyer fees and incomes.¹²⁶ In fact, many personal plight lawyers will ruefully acknowledge that if they needed their own firms' services, they would be hard-pressed to afford them.¹²⁷ Personal plight practitioners are not simply prospering at the expense of their clients.

Pricing *structures* -- as opposed to the absolute amounts being charged per file-- are contributing in a major way to the affordability problem in personal plight legal services. Uncapped time-based billing and large up-front cash retainer requirements undermine the affordability of personal plight law firms. These pricing structures also undermine sectoral profitability by driving potential clients away from personal plight law firms, and into self-representation, or the abandonment of their legal rights.¹²⁸ Conversely, **innovative approaches to pricing can create significant economic opportunities for these firms by giving them access to the untapped markets of unrepresented people experiencing personal plight.**¹²⁹

Chapter 2 argues that offering clients *price certainty* is a way to move personal plight practice into the sweet spot where accessibility, quality, and profitability coexist. Flat fees, recovery-proportionate contingency fees, and legal expense insurance are among the price structures that offer this benefit to various degrees. *Labour requirement risk* -- the unpredictability of the labour necessary to resolve a personal plight case -- discourages firms from offering price certainty and payment scheduling. Nevertheless, section 2.6 will show that labour requirement risk can be eliminated, externalized and/or absorbed, making price-certain fees economical for firms.

○ 2.1. PRICE CERTAINTY AND LABOUR REQUIREMENT RISK

“This guy said ‘...lawyers, it’s like getting in a cab and saying to the driver ‘put the meter on and just drive.’ ... It was a very simple way of putting a very fundamental problem. It’s not about the sticker price, it’s about the lack of certainty. And so when you drill down and get underneath that, the thing that really adds value for clients is price certainty.”¹³⁰

To a person with a personal plight legal need, a blank cheque often seems to be the price of entry to a law firm that can help.¹³¹ In non-tort personal plight matters, uncapped time-based billing remains pervasive in North America.¹³² Often, time-billing firms are unable or unwilling to predict at the outset of a retainer the total amount that will be charged once all the hours are tallied.¹³³ The firm might provide a “ballpark” estimate of the final bill at the outset of the retainer.¹³⁴ However, the “ballpark” range may be too wide to provide much comfort to the client. For example, \$13,638 is the average Canadian firm’s cumulative fee for a contested divorce.¹³⁵ However, in the first meeting the client might well be told that the final price could be as little as \$500 (if a single letter to the other side leads to a mutually acceptable settlement) or as much as \$25,000 (if a trial proves necessary).¹³⁶ As estate litigator HH put the point, “if you went to your plumber and ask how much is this going to cost and they say between 5 dollars and 5 thousand dollars, would you be satisfied with that? Probably not.”¹³⁷

The price uncertainty of time-based billing is a source of significant dissatisfaction for personal plight clients.¹³⁸ There are few if any other major expenditures in the average person’s life that require acceptance of so much risk. Although undesirable for all law firm clients (and all consumers generally),¹³⁹ price uncertainty is generally even *more* problematic for personal plight clients than it is in the other three practice quadrants.¹⁴⁰ In uncontested matters, both corporate and individual clients are more likely to find firms offering price certainty, e.g. through flat fees or predictable annual budgets.¹⁴¹ Meanwhile in the corporate litigation practice quadrant, the unpredictability of legal cost for an individual litigation file may not present problems, if the client has many such files each year.¹⁴²

○ 2.2. LABOUR REQUIREMENT RISK

Law firms are not dogmatically committed to uncapped time-based billing.¹⁴³ They are likely to offer flat fees when they encounter uncontested matters. For example, many family lawyers offer flat fees for drafting premarital agreements on consent, or divorces in which the parties are in agreement on all terms and require only the court’s formal granting of divorce.¹⁴⁴

However, in contested non-tort personal plight cases, firms value uncapped time-based billing because of the unpredictability of the labour requirements to resolve a case.¹⁴⁵ Today’s personal plight firms are essentially in the business of selling their expert labour.¹⁴⁶ Labour requirement risk simply means that the quantity of labour required to resolve any given personal plight case is hard

to predict at the outset. A ‘runaway engagement’ consuming seemingly endless hours is possible.¹⁴⁷ Even among garden variety files, there can be significant variation in the labour required.¹⁴⁸

Labour requirement risk is a function of three factors: (i) unpredictable legal complexity, (ii) unpredictable adversary behaviour, and (iii) unpredictable client behaviour. First, the legal/procedural complexity of the matter may be unpredictable at the outset.¹⁴⁹ Judges’ decisions are hard to anticipate, as is the complexity of the facts and law that the firm will have to master. Second, the behaviour of the other side is hard to predict. They may or may not “dig in their heels” and refuse to settle; they may or may not launch numerous procedural motions. According to some lawyers, if the adversary is self-represented this form of unpredictability is compounded.¹⁵⁰

The client’s own behaviour is the third unpredictable factor that affects the firm’s labour input requirements.¹⁵¹ Communicating with clients is a core ethical duty of lawyers,¹⁵² as well as a practical imperative in a service business such as law. Thus, if a firm quoted a flat fee of \$15,000 on the assumption that 50 hours of work would suffice, but the client’s unusual demands (perhaps combined with the adversary’s unusual intransigence and unexpected factual wrinkles) drive that labour requirement up to 80 hours, then the firm may end up working for an hourly rate which does not even cover its overhead.¹⁵³

Family lawyer “TT” noted that time-based billing encourages the client to moderate his or her demands on the firm. From TT’s point of view, the problem with flat fees is that:

*if I say to someone I’m going to do a case conference brief for you and I’m going to bill you \$2000, my experience will be, they would want a 50-page case conference brief now, and 30 revisions to it. If they’re paying for that, they would never pay for that.*¹⁵⁴

Unpredictable legal complexity, unpredictable adversary behaviour, and unpredictable client behaviour can dramatically affect the time which the firm will have to spend on the file.¹⁵⁵ Whether the matter will settle, and when it will settle, are key variables in this regard. One family lawyer reported that although she “tr[ies] as much as possible to create efficiencies... invariably every file will always have something that makes it unique and makes it not fit into ... the standards and routines that you’ve tried to establish and put into place.”¹⁵⁶ This makes it more difficult to “price” a case at the outset.

Labour requirement risk varies among personal plight practice niches.¹⁵⁷ It is high in family law, according to Ontario practitioners, because of “wildcard” factors such as the unpredictable number and complexity of motions.¹⁵⁸ Lawyer QQ, who will quote flat rates for Small Claims Court matters, will not do so for Superior Court of Justice matters. This is because, in the latter forum, there is much greater potential for unexpected motions and procedural wrinkles which would inflate the time requirements.¹⁵⁹



At the initial consultation, the client's apparent personality may affect the lawyer's willingness to offer price certainty.

Within a practice area, other variables affect a firm's perceived risk and therefore its willingness to offer price certainty. Lawyer NN is open to flat fees in family law cases, but not if the other side is unrepresented because without a lawyer's advice she perceives a greater risk that her adversary will be intransigent.¹⁶⁰ At the initial consultation, the client's apparent personality may affect the lawyer's willingness to offer price certainty, insofar as some clients seem more likely to demand large quantities of the lawyer's time.¹⁶¹ Some personal plight lawyers feel safe offering price certainty at a certain stage in a case (e.g. pleadings) but not others (e.g. a motion).¹⁶² Criminal lawyer C2, who generally does work on a flat fee basis, tries to "avoid criminal harassment charges and fraud. Criminal harassment because they start harassing you. Generally speaking we will be harassed by them now. They call, fax you, email you; it never stops."¹⁶³ The common theme is that the firm's perception of labour uncertainty risk determines whether or not the client can be offered a price-certain arrangement such as a flat or contingency fee.

○ 2.3. THE FEASIBILITY OF PRICE CERTAINTY

While labour requirement risk is endemic in personal plight matters, it is equally clear that increasing price certainty is possible for these firms. Some respondents suggested that labour requirement risk is overblown by their more conservative colleagues, or that the risk can be avoided or managed. Alberta family law practitioner E2 stated that while "lawyers will say 'I can't quote a price because it's just too uncertain,' I don't think it's uncertain having done this for just about 30 years... more things are same than they are different."¹⁶⁴ Another, who had worked in several different niches, said that he does not

see any reason why a lawyer cannot pretty much closely estimate what legal fees would be for a particular step in litigation. Any type of litigation... I think the problem with litigation the way I see it being practiced is that if you don't determine what the end result should be for your client - an appropriate result - you lose sight of that and get into these letter exchanges.¹⁶⁵

F2 is the co-founder of a consumer law firm offering fixed fees. He argued that when lawyers complain about the unpredictability of litigation, all they

are saying when they say that is there is variation in the process. But in the statistical model there is variation in every process. There is variation in the insurance market but it doesn't mean that you can't figure out a premium based on an aggregate sample which has basic

statistical models that say we should be charging this. You lose some on some. You gain some on the others. You present a premium and you move... Aggregation of varying risk is insurance and that lawyers suck at it is not an excuse not to try it.¹⁶⁶

Some personal plight law firms have already moved past uncapped time-based billing. Plaintiff-side personal injury lawyers typically offer a “no-win, no-fee” commitment, with fees guaranteed to be proportionate to the amount recovered.¹⁶⁷ FlatLaw, “Canada’s Flat Rate Legal Marketplace,” has a page of offers to the public from Canadian lawyers to provide various litigation-related services for flat prices which are listed on the site.¹⁶⁸ Client-paid (as opposed to legally aided) criminal defence practice in Ontario is typically billed on a “flat rate per stage” basis, with a certain amount being charged to take a case to a certain milestone.¹⁶⁹ It is also common for Small Claims Court and administrative tribunal matters to be billed on a flat rate basis.¹⁷⁰ Below, retainer models will be analyzed in terms of price certainty and labour requirement risk,¹⁷¹ and practical mechanisms will be proposed to handle the risk.¹⁷²

○ 2.4. ADVANTAGES OF PRICE CERTAINTY FOR FIRMS AND CLIENTS

However, it is worthwhile to first elaborate on the claim that price certainty can bring personal plight firms into the “sweet spot.” In addition to accessibility, price certainty can also enhance the profitability, quality, and professionalism of personal plight legal services.

○ 2.4.1. PRICE CERTAINTY IMPROVES PROFITABILITY

Adopting price-certain fees might augment a personal plight firm’s profitability both in the short run and in the long run. In the short run, it offers clients a valued benefit, for which they are probably willing to pay. Calgary family lawyer Lonny Balbi (a proponent of flat fees) reports that, in many cases, clients are willing to “pay a premium” to shift this risk to the firm.¹⁷³ If so, a firm switching from time-based to flat fees could set those fees at levels that would produce higher revenues per file than the uncapped time-based fees did. Clients might still prefer this firm to its time-billing competitors, because this firm is offering price certainty, and assuming risk that the firm is better positioned to accept than the client is. As noted above, lawyers report that personal plight clients consistently prefer options that eliminate or reduce price uncertainty.¹⁷⁴

A firm switching from time-based to flat fees could set those fees at levels that would produce higher revenues per file than the uncapped time-based fees did.

In the long run, more price-certain models such as flat and recovery-proportionate contingency fees can incentivize personal plight firms to make investments that increase their long run profitability.¹⁷⁵ First, unlike time-based billing,¹⁷⁶ they incentivize investments in efficiency: reducing the input of time required to produce results for clients.¹⁷⁷ While it is true that a firm's labour requirement to resolve a personal plight case depends on the behaviour of the court, adversary, and client,¹⁷⁸ it also depends greatly on the firm's own work practices. More price-certain billing gives the firm a bonus for making these practices more efficient.¹⁷⁹ A family lawyer described the helpful incentives of flat fee billing:

If you can deliver that product in less time, now it becomes a return on your quote.... there's a disincentive to screw around and over-research... [and write] letters back and forth. There's waste. I think if you flat-fee something and you have a good idea that it's a reasonable number, I think it has real potential. Because then... the incentive is to actually deliver quicker, not longer. It takes away 'might as well do 20 hours or research' whether it's going to help my client or not... over the long run you end up making more money. Because what you do is become more efficient.¹⁸⁰

For example, consider a family law firm that bills by the hour and charges an average of \$20,000 per divorce file. This firm switches to price-certain billing (some combination of flat, capped, and contingency). Now incentivized to find faster ways to get results and to economize on labour inputs, the firm becomes more efficient. The average fee remains \$20,000 per file, but the firm's lawyers and other staff earn that sum with fewer hours of work. They can now spend more time at the cottage or take on *pro bono* files while maintaining partner draws, or else take on more paying cases for more revenue.

Providing a flat-fee service satisfactorily often leads to other opportunities from the same client. F2, whose firm offers will-drafting for fixed fees, explains that

we're very well aware that 99 dollars means 99 dollars times two because you are bringing in your wife, plus powers of attorney for 79 dollars each, plus your will storage of 29 dollars, so that's now coming up to 520 dollars in an hour. Plus they are also giving us probate when they die which is an extra 1200 bucks all for an hour of service... at the end of the day it doesn't mean we have to go hungry.¹⁸¹

A similar "door-crasher" benefit might favour personal plight firms that offer at least some flat fee legal services.

○ 2.4.2. PRICE CERTAINTY IMPROVES QUALITY

Quality and professionalism are among the necessary characteristics of “sweet spot” personal plight legal services.¹⁸² Uncapped time-based billing poses threats to lawyer-client relationships and therefore to these virtues.¹⁸³ Several lawyers reported that unpleasantly surprising time-based bills are a major source of collections problems and client complaints to regulators.¹⁸⁴ According to employment lawyer YY, the

*tension that is created between lawyers and clients about legal fees [is] counterproductive to a good work relationship. ... it's palpable. Either they're not contacting you because they don't want to be in contact and they're afraid you'll ask about legal fees or you as a lawyer feel resentment because you are working on something on terms you didn't agree to initially.*¹⁸⁵

Respondent B2 retained a lawyer for civil litigation while she was herself in law school. B2 subsequently became a self-represented litigant in her case, and was later called to the bar. As a client, B2 said, she “really hated the whole ticking-clock thing.”¹⁸⁶ Because of time-based billing, B2 found that in meetings with her lawyer she would “get very nervous and really try to focus on only the emergency issues,” leaving her “ignorant” of the larger overarching issues in the case such as the possibility of cost awards and settlement strategy.¹⁸⁷

Open-ended time-based billing creates incentives which undermine legal professionalism. This pricing model gives unethical firms a reason to submit false dockets,¹⁸⁸ or intentionally “rag the puck” – spending and billing time which does not improve the client’s outcome.¹⁸⁹ Even completely ethical firms are nudged by time-based billing to “over-serve” -- to spend client-paid time improving their work product to an excessively high quality.¹⁹⁰ Sean Robichaud aptly describes the result of combining uncapped time-based billing with lawyers’ personal tendencies:

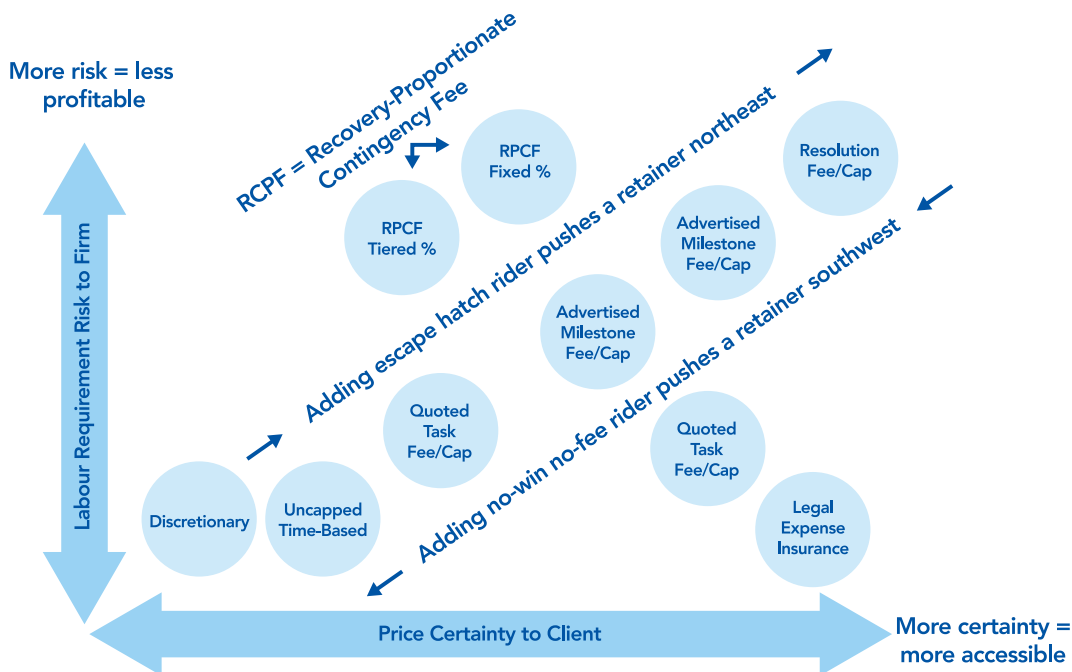
*We as lawyers are usually idealistically driven by the same thing the client is: we want to win – whatever “win” means in the circumstances. Because of that, lawyers will work very long hours and tirelessly to “win” or obtain a favourable result for our clients. This work ethic works well for the client insofar as end-game results, but translates poorly when they obtain the bill. Combining an objective to win, a strong work ethic, and an hourly rate will always result in shock and disappointment to the client, no matter how favourable the result.*¹⁹¹

Of course, flat and contingent fees pose their own threats to professionalism and lawyer-client relationships: under-service in the former case and, arguably, premature settlement in the latter.¹⁹² However, these fee systems base the client's bill on something the client values: a settlement or award, or at least a work product such as a factum. Time-based billing is based on something the client is unlikely to value: how much time was spent by the firm.¹⁹³ Thus, it is plausible that **a move to price certainty can improve client satisfaction, lawyer-client relationships and professionalism, as well as affordability and profitability in personal plight law practice.**

○ 2.5. PRICE CERTAIN RETAINER OPTIONS

Price certainty is a promising path into the sweet spot because it can improve the accessibility, profitability, and professionalism of personal plight services. How can more personal plight firms offer more clients more price certainty in more cases, despite labour requirement risk? The first step is to conceptualize price certainty as a spectrum along which legal service billing models can be placed. Those that offer the client more certainty generally (although not invariably) require the firm to assume more labour requirement risk and thereby affect firm profitability at least in the short term. Figure 4 plots these retainer options graphically. A personal plight firm which moves its pricing rightwards and downwards on the price certainty/labour requirement risk spectrum will move towards the sweet spot.¹⁹⁴

Figure 4 Labour Requirement Risk/Price Certainty Spectrum



○ 2.5.1. DISCRETIONARY “SERVICES RENDERED” BILLING

In terms of price certainty, uncapped time-based billing was actually an improvement on the model that it supplanted. With the “discretionary billing” approach that was common before the mid-20th century, a law firm would choose a price after the work was completed, describing the work in a general way or simply as “services rendered.”¹⁹⁵ An element of discretion in billing has advantages: the bill might thereby better reflect legitimate factors such as the value obtained by the client or the urgency demanded by the client.¹⁹⁶ Litigator B2 argued that discretion *should* be applied, for example, to waive fees for hours spent to correct the firm’s own mistake.¹⁹⁷ However, discretionary billing clearly belongs at the left-most extremity of the price certainty chart. Under purely discretionary billing, the client lacks even the certainty that the bill will be proportionate to the firm’s labour on the file.¹⁹⁸

○ 2.5.2. UNCAPPED TIME-BASED BILLING

In major personal plight practice areas such as family law, estate litigation, and general civil litigation, fees in Canada and the United States are usually calculated on the basis of time billed by one or more individuals within the firm.¹⁹⁹ Although time may be charged on a daily (*per diem*),²⁰⁰ or even monthly basis,²⁰¹ six-minute increments are standard. Six-minute increment time-based billing completely protects the firm from labour requirement risk: no matter how long it takes, the retainer entitles the firm to payment for every six minutes billed.²⁰² However, it exposes personal plight clients to profound price uncertainty. YY, a plaintiff-side employment lawyer, who abandoned this approach, said that he now

*[doesn’t] bill anything on an hourly basis. [Clients] have expressed a lot of concern about lawyers and hourly rates because they have no control about the amount of hours that a lawyer will spend. So whether he is doing \$50 or \$300 an hour it can still end up being a lot of money and it is not predictable.*²⁰³

With remarkable consistency, personal plight lawyers who have offered clients a choice between an uncapped time-based fee and an alternative with greater price certainty told the author that almost all clients choose the latter option.²⁰⁴ One firm (outside of Canada) offers all family law clients a choice between a flat price and an hourly rate, and “90% of them will choose the flat price.”²⁰⁵ A personal injury lawyer who gives a choice between hourly and contingency fees said that 90% of his clients also choose contingency.²⁰⁶ This is evidence of the importance of price certainty to accessibility, and of the powerful opportunity open to firms that can find ways to offer it.

○ 2.5.3. FLAT AND CAPPED BILLING

Flat and capped fees are located to the right of time-based billing on the Labour Requirement Risk/Price Certainty Spectrum in Figure 4. Flat fees (also known as block fees) are the simplest way to offer price certainty to personal plight clients. The fee is a predetermined amount that will not vary with the time spent by the firm, or the outcome of the case. “The best thing about a [flat rate],” Windsor lawyer QQ said, “is that the client, whether they like the number or not, they know what it is.”²⁰⁷ Flat fees in personal plight matters typically create labour requirement risk for the firm, for the reasons explained above,²⁰⁸ but section 2.6 will argue that these risks can be addressed.

Under a *capped* fee system, time is docketed and billed but the bill is guaranteed not to exceed a predetermined amount.²⁰⁹ A cap, of course, would need to be lower than the largest amount that could realistically be billed in order to offer any real price certainty to the client. Structurally, flat and capped fees offer equal degrees of price certainty to the client. The difference is that the latter offers the client the upside possibility of a lower fee if labour requirements prove to be relatively moderate. Conversely, it also deprives the firm of the upside possibility of high per-hour revenue in the event of modest labour requirements.

Sam Glover argues that flat fees should be used instead of capped fees in most cases. The upside opportunity to earn a high rate per hour, Glover suggests, is reasonable compensation for the firm’s acceptance of labour requirement risk.²¹⁰ An interesting variant is the “soft cap” offered by Toronto lawyer BB. His retainer promises to bill hours above a certain number at a greatly discounted rate of \$50 per hour.²¹¹

○ 2.5.3.1. TASK FEE/CAP BILLING

Under the rubric of flat and capped fees, there are several models with different price certainty and risk allocation characteristics. Usually least risky to the firm is the Task Fee/Cap charged for a specified task to be completed by the firm. In this model, a flat fee is quoted to, for example, draft and file a statement of claim or defence.²¹² Toronto litigator Mick Hassell’s “litigation garage,” for example, offers to “review materials for a Court appearance and give advice on how to present your case” for \$750.²¹³

Under this model the client continues to bear the risk of the matter settling later rather than sooner, as well as the risk of new issues being added to the litigation. However, Alberta family lawyer E2 suggests that these risks are, at least psychologically, easier for clients to bear than the total uncertainty of open-ended time-based billing:

Usually clients will understand: ‘you want me to deal with an interim support matter’ or ‘you want me to deal with child support variation’. And then halfway through the husband files application to vary custody. It’s easy to say this project is based on these parameters, now within those parameters if it takes me more time then it’s my problem, but if there’s an additional parameter we didn’t agree, then

there's a project change. It's like an add-on to a homebuilder. If you tell me you want a pool after we've started construction, no one's going to think you're unreasonable when you say OK we have to give you a new quote.²¹⁴

○ 2.5.3.2. MILESTONE FEE/CAP BILLING

The Milestone Fee/Cap is charged in exchange for getting the case to a certain stage.²¹⁵ For example, Sarnia lawyer KK offers to represent a client in a Small Claims Court matter up to trial, with further payment being required if a trial is necessary.²¹⁶ Criminal lawyer C2 told me that he might require \$7,500 to represent an individual charged with domestic assault up to the judicial pretrial, and \$3,000 for each day in court after that.²¹⁷ However, the fee for the trial phase would be capped at the rate applicable for two days, even if the trial were actually to require three or four days.²¹⁸

'Milestone' flat fees seem, in many personal plight practice contexts, to reflect an appropriate allocation of risk between client and firm.

The Milestone Fee/Cap is located northeast of the Task Fee/Cap on [Figure 4](#), because it typically gives the client somewhat more price certainty and requires the firm to accept somewhat more risk. This is because the number of discrete tasks required to get to resolution is typically less predictable than the number of milestones. Most personal plight cases might settle early or settle late, or fail to settle at all, thus requiring labour-intensive motion and/or trial advocacy. The client with a milestone fee/cap retainer obtains price certainty for the period leading up to the milestone, but bears the risk that the matter will settle late or not settle at all, thereby necessitating further litigation stages and further fees. The firm still bears the risk that, within a particular stage, the behaviour of the court, adversary, or client will necessitate a greater-than-expected resource expenditure. However, the firm will be paid again, or freed from further commitment, if the matter continues beyond the milestone. The firm also retains the flexibility to adjust quotes of subsequent milestone fees in order to encourage the client to settle or continue litigating, based on the firm's perception of the client's best interest.²¹⁹ **"Milestone" flat fees seem, in many personal plight practice contexts, to reflect an appropriate allocation of risk between client and firm.** Criminal lawyer C2, for example, says:

people look at that and say that's worth it to me. If I get my charges withdrawn for \$7500 that's a number I can live with. Sometimes it works well because it is not much work at all. Other times we should have charged \$30,000. It's enough where we can safely work in those parameters.²²⁰

○ 2.5.3.3. RESOLUTION FEE/CAP BILLING

Very high price certainty is offered by the Resolution Fee/Cap, which is at the upper-right hand corner of Figure 4. Here, the firm commits to meet the client's entire legal need in exchange for a single pre-determined amount or maximum. The client is guaranteed at the outset that the case will be resolved through adjudication or acceptable settlement in exchange for \$15,000. She knows that she has \$15,000 in a savings account, or she knows where she can borrow it. The fee may be a substantial burden, but she need not worry about the risk that it will actually cost \$25,000 or \$40,000 to resolve her case.

While common for non-contested personal business needs, such as will-drafting or representation in a residential real estate transaction,²²¹ this model is less common for personal plight matters due to the high labour requirement uncertainty risk which it imposes on the firm.²²² Some criminal defence lawyers do bill clients on this basis,²²³ and at least one large American "franchise" firm offered family law services on this basis in the 1990s.²²⁴ The Resolution Fee/Cap may also be feasible if the personal plight legal need is fairly discrete. For example, one former family lawyer offered what was effectively a flat or soft-capped fee to obtain an increase in child support for a client. She absorbed the risk of increased labour demands arising from the other side's conduct:

*Clients come in and say what would it cost me for a variation, his income went up... I would say that should be about \$2000-\$2500. If it went along the way of just being paperwork and drafting the papers that's what the time would be. Some people it wasn't that easy but why should they have to pay a lot more. I'm not saying I wouldn't bill an extra \$250 but I didn't bill double it because the client on the other side was making it longer.*²²⁵

○ 2.5.4. ADVERTISED VS. QUOTED FLAT FEES

Flat fees for personal plight legal services are sometimes advertised to the world at large. Flatlaw and the Family Law Self-Rep Providers' Directory advertise prices for various service packages from participating firms.²²⁶ Toronto firm Olanyi Parsons offers on Flatlaw to draft and file any application to the Ontario Human Rights Tribunal for \$2500.²²⁷ Under rules in most Canadian provinces, firms may advertise prices so long as the advertising is not misleading.²²⁸ Advertising specific flat fees offers strong price certainty: the client knows what the flat fee will be before he or she even visits the firm.²²⁹ Advertised milestone fees are therefore close to the upper right-hand corner of the Labour Requirement Risk/Price Certainty Spectrum (Figure 4).

C2 says he can predict 'from the get-go typically when people are going to be problematic clients,' and he might adjust his quote accordingly.

However, much greater security for the firm can be obtained, with only modestly reduced price certainty to the client, if the flat fee is quoted after the initial client consultation. After meeting the client and learning about his or her needs, the firm can appreciate many of the legal issues and client behaviour issues (and perhaps some of the adversary behaviour issues) that will drive the labour requirement, and can quote accordingly.²³⁰ For example, criminal defender C2 quotes a block fee on most domestic assault cases, but the quote will increase, based on the initial consultation, if unusual complexity seems likely.²³¹ C2 also says that he can predict “from the get go typically when people are going to be problematic clients,” and he might adjust his quote accordingly.²³²

There is a large incorporated law firm (not currently operating in North America) that recently introduced flat fees for all contested family law matters. “DD,” the firm’s CEO, told the author that before doing so the firm identified “40 or 50 scopes of work” in family law and assigned a flat price to each.²³³ The firm then developed “a way of triaging cases to assess very early which particular scope of work is best suited to that client’s needs.”²³⁴ Thus, by contrast to the Flatlaw offers, “it doesn’t mean that every family law client who contacts us the price is \$4,000, but every family law client that contacts is going to be offered a flat price.”²³⁵ An Ontario firm which does some low-conflict family law work (e.g. negotiating separation agreements) on a flat fee basis described a similar process.²³⁶

Other personal plight practitioners use a more informal process to quote flat fees after consultations. For example, a Toronto civil litigator told me that he quotes capped litigation fees as follows:

in the intake retainer process, we establish what the client wants, and what I can do, and I propose a budget. So if, for example, someone wanted me to review a defence that they drafted, and say they found me through JusticeNet, as an example, I might propose a four hour... maybe a six hour budget. So I’ll say let’s spend one hour meeting, I will spend three or four hours reviewing your document and doing some research if necessary, and we’ll spend another hour where I meet up with you, report to you. So that’s six hours, and put that in the retainer so spend approximately one hour doing this, three or four doing that, another one doing this. So they know exactly where the time is going., and I tell them I’m going to bill you hourly and if there’s anything left over in the retainer I return it to you.²³⁷

○ 2.5.5. ESCAPE HATCH RIDER

Escape hatch riders in flat/capped retainers provide that if labour demands exceed a certain threshold (or if certain events occur that can be expected to substantially increase labour requirements), then the retainer will end unless a further fee is paid. They reduce the firm's risk at the expense of the client's price certainty. Thus, adding such a rider to any of the retainers in [Figure 4](#) moves it rightwards and upwards.

Hamilton criminal defender A2 said that this is a common retainer term in his practice area, applicable to "clients who didn't really tell you the whole story and then you find out later the situation is a lot more complicated than they led it on to be."²³⁸ Sociologist Jerry Van Hoy observed the negotiation of a family law retainer at a large American "franchise" law firm in the 1990s, in which the flat fee was conditional on no more than two court appearances being required.²³⁹

Windsor lawyer NN reports that in her family law cases, "we typically try to start with flat rate for instance for a separation agreement [but] if it goes in excess of this many hours and a lot of bantering back and forth then we will have to talk about an hourly rate."²⁴⁰ This escape hatch is unlocked in roughly half of NN's cases.²⁴¹ If it is unlocked, then the client is given the choice between ending the retainer and paying NN's firm an additional fee.²⁴²

As noted above, one major source of labour requirement risk is the unpredictability of the client's own communication demands on the firm.²⁴³ Unlike legal/procedural complexity and unpredictable adversary behaviour, the client herself largely controls this element. The client decides, for example how many times to email or phone the firm per week. **Firms concerned about the labour requirement risk involved in fixed fees should consider using "escape hatch" riders allowing the firm to apply a time-billed surcharge for time responding to client communications after a specified number of hours per month.**

○ 2.5.6. RECOVERY-PROPORTIONATE CONTINGENCY FEE

The North American-style contingency retainer also offers clients a degree of price certainty. Here the client is assured that, if money is recovered through settlement or adjudication, the price of the legal service will be a predetermined percentage of the amount recovered.²⁴⁴ The absolute dollar amount of the fee lacks the certainty offered by flat/capped fees. However, the fee's proportionality to the amount recovered is guaranteed. Thus, on [Figure 4](#) the Recovery-Proportionate Contingency Fee is located midway along the "price certainty to client" axis. Recovery-proportionate contingency fees pose significant labour requirement risk to the firm, as well as "litigation risk" (the risk of recovering nothing or less than expected).²⁴⁵ For this reason, these retainers are located at the top end of [Figure 4](#). Still, the arguments presented in section 3.4.4 support the view that appropriately regulated and competitive contingency fees are a great example of a "sweet spot" approach to personal plight legal practice because they offer clients both price certainty and deferred payment.

The contingency arrangement deters premature settlement at a stage when clients might be tempted by a lowball offer from the other side.

Recovery-proportionate contingency fees can be deployed in creative hybrid approaches to pricing.²⁴⁶ Two personal plight lawyers told the author that they would charge a flat fee for the early stages of a case, followed by (if necessary) a contingency arrangement for later stages and trial.²⁴⁷ One of these two suggested that the contingency arrangement deters premature settlement at a stage when clients might be tempted by a lowball offer from the other side.²⁴⁸

The contingency arrangement may be fixed, for example 20% of the amount recovered. It may also be “tiered,” for example 15% of a pre-trial settlement or 25% of a trial award.²⁴⁹ The latter arrangement is slightly southwest of the former on the price certainty spectrum.²⁵⁰ The “lodestar” contingency fee (in which the fee is calculated on the basis of time billed multiplied by a factor to reward the firm’s success) does not offer this form of price certainty, although it does offer the “no-win-no-fee rider,” which is explained in the next section.

○ 2.5.7. NO-WIN-NO-FEE RIDER

The no-win-no-fee rider is another powerful price certainty mechanism for personal plight cases. This rider states that, in the event that nothing is recovered for the client through adjudication or settlement, no fee will be charged. The rider may or may not also provide that the firm will absorb the cost of disbursements.²⁵¹ Thus, although the client may not have any certainty about what the fee will be if there is some success (depending on the pricing arrangement), she has certainty that there will be no fee if there is no success. The firm, correspondingly, absorbs the risk of putting hours into a case which will produce no revenue if it fails completely.

The no-win-no-fee rider is routine in personal injury practice, and not uncommon in other spheres such as employee-side employment law. It is best known as a corollary of contingency billing, in both its recovery-proportionate and lodestar variants. In the lodestar variant, the client typically “pays for” the no-win-no-fee rider by agreeing to an arrangement which produces more than the prevailing hourly rate if the firm succeeds.²⁵²

Although contingency fees typically come with no-win-no-fee riders, it is worth noting that a retainer could include one but not the other of these features. For example, a firm could charge an upfront or monthly flat fee to work on a case, along with a recovery-proportionate contingency bonus.²⁵³ A no-win-no-fee guarantee could be added to non-contingency billing arrangements as well, so long as there is an unequivocal indication of whether there was a “win” or not. For example, time-billing lawyers seeking monetary remedies for their clients sometimes take cases “on spec,” meaning that the client will not be expected to pay unless money is recovered for the client.²⁵⁴ The “on spec” model is sometimes used in family law (a niche in which contingency billing is rare and is forbidden in Ontario), and is also used in estate litigation.²⁵⁵ It was also common for personal injury matters in the United Kingdom and in Ontario prior to the legalization of formal contingency arrangements for these matters.²⁵⁶

The no-win-no-fee rider could also be appended to a flat fee retainer. For example, a flat milestone fee to represent a client through mediation could be payable if and only if a mutually acceptable settlement is reached in that mediation. A client might accept a significantly

higher flat rate in exchange for the price certainty offered by this rider. Nor is there any reason in principle why a no-win-no-fee guarantee could not be offered if the remedy being sought is non-monetary, e.g. in a contested immigration file. There are various creative opportunities available to allocate different types of risk between firm and client, in order to produce sweet spot retainers.

○ 2.5.8. LEGAL EXPENSE INSURANCE

Moving southeast on [Figure 4](#) generally means moving toward the sweet spot. Special attention should therefore be paid to the retainer model located in the “southeastern” corner of the figure. Legal expense insurance (LEI) – if it will actually cover a policyholder’s entire time-billed fee for personal plight legal services – offers the ultimate in price certainty without imposing *any* labour requirement risk whatsoever on the firm.²⁵⁷

Under LEI, the policyholder pays a set monthly premium before the legal need arises, and the LEI-provider pays the personal plight firm’s fee.²⁵⁸ The client need pay nothing further (or only a fixed deductible) when the legal service is provided. This price certainty makes the service quite accessible.²⁵⁹ In some European countries, up to 75% of the population is covered by LEI.²⁶⁰ Some LEI plans, especially those purchased by employers or unions to cover large numbers of employees, offer significant benefits for personal plight legal needs.²⁶¹ For example, the plan for members of Canada’s Unifor union will pay up to \$3,300 to fund a lawyer for common personal plight needs, including family law and criminal defence.²⁶²

At least in North America, most LEI plans exclude many of the most needed and least accessible personal plight legal services, such as contested family law matters.

However, at least in North America, most LEI plans exclude many of the most needed and least accessible personal plight legal services (such as contested family law matters),²⁶³ or offer only limited help for these needs (e.g. through telephone advice lines).²⁶⁴ The labour requirement uncertainty risk which afflicts these practice areas is no more attractive to insurers than it is to firms or clients. Plans, such as LegalShield, that are available for individual purchase (as opposed to collective purchase for a group of employees) provide especially meagre coverage for personal plight legal needs. This may reflect the fact that when individuals themselves decide whether to purchase the plans, adverse selection -- the fact that those more likely to make claims are more likely to purchase the policies -- can worsen the risk profile.²⁶⁵

Price uncertainty is a major barrier to the accessibility of personal plight legal services. As indicated by the Labour Requirement Risk/Price Certainty Spectrum ([Figure 4](#)), there are many options for firms to offer their clients price certainty and thereby improve accessibility. Most of these options do, however, involve more labour requirement risk than uncapped time-based billing does. This makes them potential threats to firms’ long-run profitability, and pushes them away from the sweet

spot. The next section considers ways to address labour requirement risk and thereby clear a path toward price-certain billing.

○ 2.6. ADDRESSING LABOUR REQUIREMENT RISK

Practitioners know that their clients want price certainty. They know that their firms could attract more clients, and more revenue, if they could find workable ways to offer it. This section considers various opportunities to address the labour requirement risk that stands in the way of price-certain retainers.

○ 2.6.1. LEGISLATIVE REFORM TO REDUCE LABOUR REQUIREMENT RISK

Legislative reform could reduce the unpredictability of litigation procedure, and therefore labour requirement risk for law firms. As noted above, personal plight firms in this study's sample are more willing to offer flat/capped fees for small claims court and administrative matters than they are for family court and general civil litigation matters.²⁶⁶ This divergence seems to reflect, at least in part, the fact that the number of motions and the labour requirements for discovery are much easier to predict in the former category of cases.

It follows that **reforming family court procedure and general civil procedure to bring it closer to small claims court and administrative tribunal procedure would reduce labour uncertainty risk and enable the firms to offer more price certainty on these matters.**²⁶⁷ Further **expanding the jurisdiction of Small Claims Court to cover higher-value disputes could have a similar effect.**²⁶⁸

While procedural simplicity is a virtue in of itself for a code of civil procedure, it would also have the desired effect of reducing labour requirement risk for personal plight firms and thereby making it more feasible to offer price certainty to their clients through flat/capped and contingent fees. Procedural simplicity also, of course, lowers the average price per case by reducing the average number of hours required to represent a client.²⁶⁹

Of course, there are reasons why this has not yet been done. Procedural simplification may come at the expense of other important goals such as due process and adjudicative accuracy. Those who draft and reform civil procedure rules must make difficult trade-offs. Family lawyer Rob Harvie suggests, however, that the status quo balance is questionable given the deplorable state of access to civil justice in Canada:

*In creating "perfect" justice, the law has become more complex, and that complexity adds further to the cost. Does society benefit when you have better justice for 10% of the population but 90% of the population can't afford to implement the directives of our highest court? Perhaps the time has come to accept less "perfect" justice, delivered quicker and cheaper.*²⁷⁰

○ 2.6.2. EXTERNALIZE THE RISK : LEGAL EXPENSE INSURANCE AND THIRD PARTY LITIGATION FUNDING

Legal expense insurance (Section 2.5.8, above) is the only model on the Labour Requirement Risk/Price Certainty Spectrum that offers the personal plight client high price certainty without imposing much labour requirement risk on the firm. This is because the risk is accepted by a third party: the insurer. It is thus a promising opportunity for sweet spot personal plight legal services, albeit probably not one which law firms or regulators can pursue on their own. Choudhry, Trebilcock and Wilson show that **there is a persuasive case for a publicly administered, but not necessarily publicly funded – legal expense insurance regime** that would pool risk and cover personal plight legal needs at a reasonable premium cost.²⁷¹

Third-party litigation funding is ... a loan to the client and does not affect the client's obligation to the firm.

Another way to externalize the risk is third party litigation funding (TPLF). TPLF is not technically a fee structure, insofar as it is a loan to the client and does not affect the client's obligation to the firm.²⁷² However, TPLF loans are often brokered by the law firms and the funds are often used exclusively to pay the client's legal fees. Like legal expense insurance, TPLF allows personal plight firms to externalize some of the labour requirement risk inherent in a file. If the lender agrees to pay the firm on an hourly basis while accepting repayment from the borrower as a proportion of the recovered amount, then the labour requirement risk has been externalized. **In regulating third party litigation funding, policy-makers and judges should consider its capacity to reduce the risk confronting firms and thereby facilitate price certainty.**

One intriguing proposal is that **the government could offer interest-free litigation loans to personal plight clients.**²⁷³ Repayment would be income-contingent, as is the case with student loans in some jurisdictions. As with Choudhry et al.'s state-administered legal expense insurance proposal described above,²⁷⁴ this scheme would be operated on a break-even basis.²⁷⁵

○ 2.6.3. ABSORB MORE RISK AT THE FIRM LEVEL

In the absence of regulatory reform to reduce personal plight labour requirement risk, and in the absence of third parties willing to accept it, firms might still be able to *absorb* more of the risk and thereby adopt more sweet spot pricing. In the practice of law, as in life, risk is inevitable. Lawyers may tend to be risk-averse,²⁷⁶ but tort lawyers' embrace of contingency billing shows that many are willing to accept litigation risk if the incentives are appealing.²⁷⁷ Likewise, there is a financial incentive, as well as an access to justice benefit, for firms to absorb more labour requirement risk. As argued above, personal plight clients will likely be willing to pay somewhat higher fees if the structure of those fees offers price certainty.²⁷⁸

A firm that understands and even quantifies the labour requirement risk posed by its cases is in a good position to profitably absorb more of that risk by offering price certainty. This firm can also price the risk appropriately, for example by offering its clients alternative price structures with and without price certainty. Simple trial and error with flat fee retainers can generate this understanding. For example, a flat fee 'learning curve' was described by four personal plight lawyers interviewed for this study.²⁷⁹ Windsor lawyer QQ, who was licensed just one year before the interview, described his experience with offering flat fees:

I am getting better at it because experience is telling me it takes me this long to do this or that and then the more I do it, the more efficient I am getting. It is just working itself out that way. It was a challenge at first because I didn't know how much it's going to cost me, so I was writing off a ton of time on some files... I am getting better at managing that. A lot of what I am doing is inefficient because I am starting off. Even though I am spending more hours than the retainer, that's just the natural growing pains of the first year lawyer. I truly believe in the block fees... the more experience I am getting, the more I am able to mitigate against this unpredictability.

280

Family lawyer JJ said that milestone fee billing (section 2.5.3.2, above) would be "certainly doable" if she were to analyze her past cases and determine appropriate prices. She acknowledged that this model "makes sense" but said she is "just too lazy," and busy enough with a successful time-billed practice, to do so.²⁸¹ **Time-billing personal plight practitioners may overestimate the labour requirement variability in their cases, and therefore overestimate the difficulty of setting economically sustainable flat fees.** A certain bravery is required, as JJ went on to say:

*Part of it is just having courage, right. Sometimes you just have to decide okay, I might be exposed a little bit, but this is good. And yeah I might get bitten every now and again, well what do you do. If you play everything 100% safe you don't accomplish a whole lot.*²⁸²

Identifying appropriate flat or capped fees for different types of matters does not, of course, eliminate labour requirement risk. The firm must accept that revenue per hour of labour input will vary between cases. Toronto employment lawyer II, asked if he ever loses money on a flat fee file, said "it does happen occasionally." However, he focuses on the "overall health of the business. At the end of the year what is the scorecard? If it balances out or goes up then that is the business risk I have taken in the process."²⁸³

While sole practitioners can develop flat/capped price schedules through trial and error, larger firms can invest more systematically in research and development to quantify and price labour requirement variability. DD, the leader of a large alternative business structure personal plight firm (not currently practicing in North America), suggested that labour requirement variability in family law cases is often overestimated. “Family law,” he said, “is a process. And what people are actually fighting over is something that travels within a very limited band.”²⁸⁴ His firm has been:

*investing in things like trying to develop fixed [flat] fee services in family law. You know there’s a three/four year project where we were just pouring money in to develop processes, systems, new ways of doing it. Making mistakes around pricing in a way that was acceptable to clients but was a way of us making ends meet and developing a profitable business... we analyzed the whole market and said, well, fixed pricing can work in a category of cases. What’s within the category of cases? So there are something like 40 or 50 scopes of work. And so basically over time what we’ve developed is a way of triaging cases to assess very early which particular scope of work is best suited to that client’s needs.*²⁸⁵

Such investments in research and development are very helpful in moving personal plight firms into the sweet spot where accessibility, professionalism, and profitability coexist. They are, however, difficult investments to make for the solo and small firm practitioners who dominate the personal plight legal services market in North America today. Large firms would also seem to have an advantage in absorbing labour requirement risk in that they can spread it over more files each year.²⁸⁶ Chapter 8 will consider the potential for small, and large, personal plight firms to absorb the various types of risks involved in move into the sweet spot.

○ 2.7. CONCLUSION: PRICE CERTAINTY

Chapter 2 has suggested that adopting price-certain fee structures can make personal plight law firms more accessible and improve lawyer-client relationships, without undermining firm profitability. Flat fees, capped fees, recovery-proportionate contingency fees, and legal expense insurance are all specific models that offer price certainty. Labour requirement risk is the other side of the coin: inherent in each of these models is potentially expensive uncertainty about the number of hours it will take to meet the client’s need. However, as shown, there are various options to reduce, externalize, or absorb labour requirement risk and thus clear the path to fee certainty.

CHAPTER 3

DEFERRED PAYMENT

Deferred payment is another opportunity to push personal plight legal services toward the sweet spot. This Chapter focuses on the question of *when* personal plight clients are required to pay for the legal services that they receive. It identifies the accessibility advantages of deferred payment, and then the non-payment risk that it poses to firms. [Figure 5](#) plots payment scheduling alternatives along a spectrum, and section 3.3 explains the options along this spectrum. The Chapter concludes by identifying opportunities to manage non-payment risk and thereby encourage deferred payment retainers.

3.1. ACCESS TO JUSTICE AND PAYMENT SCHEDULING

Accessibility suffers if a firm requires a large cash retainer deposit, or the entire flat fee, before providing legal services to the client. Conversely, allowing clients to pay gradually over time increases accessibility. In matters in which the client can be expected to eventually receive a lump sum or a stream of money from the other side, allowing the legal fee to be deducted from that amount is another form of accessible payment scheduling. Because personal plight clients may be willing and able to pay larger fees if the payment is deferred, payment scheduling can also support the profitability of law firms.

Like price uncertainty, upfront payment requirements weigh more heavily on personal plight clients than they do on corporate clients or individuals with uncontested personal business legal needs. Many personal plight legal needs arise unexpectedly and the legal services must be accessed quickly.²⁸⁷ Contesting threatened eviction from an apartment or deportation from the country are examples, as are some family law needs. This urgency distinguishes them from personal business legal needs (e.g. drafting a will or incorporating a small business), where the expense can be anticipated well in advance and planned for. In some niches the underlying crisis giving rise to the personal plight legal need – such as incarceration or termination from employment – creates a cash flow problem that makes the legal fee especially difficult to pay upfront.

○ 3.2. NON-PAYMENT RISK

Why, then, do some personal plight law firms require pre-payment of legal fees? Of course, every business would prefer revenue now instead of revenue later. However, other companies selling large-ticket goods and services to individual consumers – car dealerships, household appliance vendors, homebuilders -- typically find that offering delayed payment is more profitable on balance, because it allows so many more people to afford what is being sold.

In personal plight legal services, the relatively high risk that the client will not voluntarily pay the amount owed explains the importance of upfront payment requirements.²⁸⁸ *Non-payment risk* materializes when the fee goes partially or completely unpaid, when it is paid late, or when the firm must spend its own time or money on collection efforts. As Windsor litigator QQ said about his flat fee arrangements: "I'm not saying 'sure I'll do it and I'll bill you for it.' There is risk on my end to eventually collect. I'd rather get the retainer upfront."²⁸⁹

Compared to corporate clients, personal clients generally pose greater non-payment risks.²⁹⁰ Among the Maine and New Hampshire family lawyers interviewed by Mather et al. in the late 1990s, a remarkable 43% said that fee payment was a problem in at least *half* of their cases.²⁹¹ Family lawyer Lonny Balbi partially attributes non-payment risk to the way clients perceive value in legal services:

*A service that is needed is worth more than a service that has been delivered... the more that a client needs the service you are willing to provide, the more it is worth prior to the delivery of the service. It is once the service has been delivered that problems in collection and complaints arise.*²⁹²

Upfront payment demands also screen out those who are unlikely to ever pay in full. One criminal lawyer likes prepaid block fees because the client's willingness to pay indicates "right upfront whether they are serious or not. If I say it's going to cost \$5000 and they think it is too much I'd rather them go out my door that day than complain a year later."²⁹³ Likewise, according to an estate litigator:

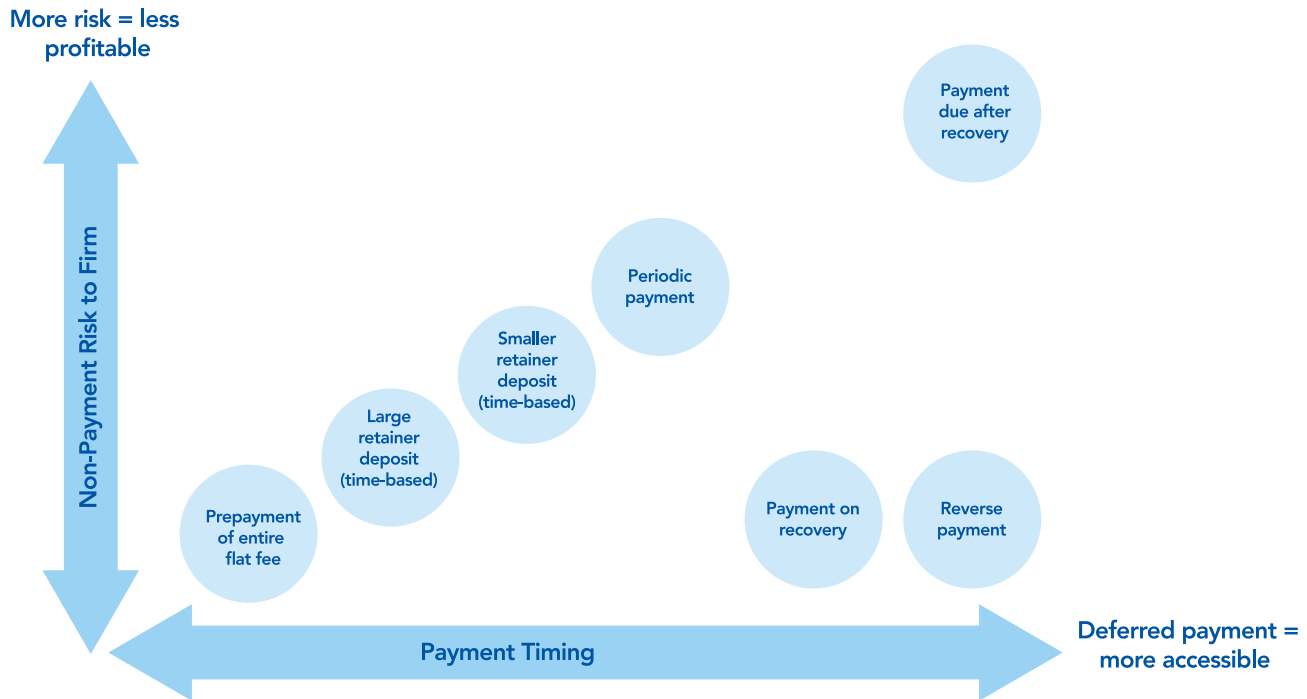
*if you're chasing the initial \$5,000 retainer and in front of you is complicated litigation, you've got court dates around the corner, this isn't going to be a walk in the park type file...if the client isn't able to come up with an initial \$5,000 retainer, you're going to have other problems.*²⁹⁴

Full upfront payment of a flat fee, or deposit of a cash retainer sufficient to cover any eventuality, offer strong payment security for the firm.²⁹⁵ Thus, non-payment risk frustrates accessible payment scheduling in personal plight matters, just as labour requirement uncertainty frustrates price-certain retainers.

3.3. PAYMENT SCHEDULING SPECTRUM

Like price certainty, payment scheduling terms can be plotted on a spectrum (Figure 5). Deferring payment increases accessibility. However, it often (but not invariably) does so at the expense of economic self-sustainability, insofar as it increases non-payment risk.

Figure 5 Non-Payment Risk/ Payment Timing Spectrum



The options plotted on Figure 5 are explained below. **A personal plight firm that moves its retainers rightward on the Non-Payment Risk/Payment Timing Spectrum, while minimizing upward movement, will bring its services closer to the sweet spot.** The Non-Payment Risk/ Payment Timing Spectrum shows that moving east generally, although not invariably, requires moving north, increasing risk and reducing long-run profit. However, Section 3.4 will suggest options for legislative and regulatory reform to help firms manage this risk.

3.3.1. PRE-PAYMENT & LARGE RETAINER DEPOSITS

For time-billed matters, a four- or five-digit cash retainer deposit may be required before a personal plight law firm will do any substantial work.²⁹⁶ One set of 48 reports from Canadian self-represented litigants about the cash retainers that lawyers had requested from them showed a median of \$4375.²⁹⁷ The money is placed in a trust account and withdrawn to cover the fees as they become due.²⁹⁸ If the amount is insufficient to cover the time billed, the firm will require the client to replenish the retainer deposit. Firms may also require flat fees to be prepaid.

Personal plight clients often find it quite difficult to produce these sums up front, even if they would be able to afford them if scheduled over time.²⁹⁹ According to time-billing personal plight lawyers HH and KK, at the initial consultation clients are often more focused on the cash retainer deposit requirement than they are on the hourly rate, even though in principle only the latter will affect the final price of the service.³⁰⁰ As noted above, the average legal fee for a contested divorce in Canada is \$13,638, and many other personal plight legal services have similar four- or five-digit price tags.³⁰¹ All other common major purchases, e.g. of a car or a home, offer financing and payment scheduling opportunities allowing the amount to be paid over time.

Although many personal plight lawyers offer free initial consultations,³⁰² others attach a price tag to the first meeting with the client even if no further legal services will be provided. According to a Toronto employment lawyer, “one of the things I hear is that someone will go in and see a lawyer and they’ll say ‘you have no case’ after 15 minutes, and ‘pay me \$350.’”³⁰³

○ 3.3.2. SMALLER RETAINER DEPOSITS; PERIODIC OR DELAYED PAYMENT

Accepting a smaller retainer deposit and/or accepting scheduled payments over time increases accessibility.³⁰⁴ Many time-billing personal plight firms will do so when the client is not willing or able to come up with the upfront payment requirement.³⁰⁵ Such concessions, of course, increase the firm’s non-payment risk and therefore moves the retainer northeast on [Figure 5](#).

Payment can also be scheduled creatively to balance the client interest in deferred payment with the firm’s interest in minimizing non-payment risk.³⁰⁶ Criminal defence lawyer A2 does not require full payment of his flat fee before the work begins, but he does require it one month before the scheduled guilty plea or trial. This leaves him sufficient time to bring a motion to get off the record in the event that the money is not paid.³⁰⁷

YY, who leads an employment and human rights boutique law firm, has a creative pricing model that combines price certainty with accessible payment scheduling. At the outset of a case, YY estimates what his legal fee would be if the matter were to proceed to adjudication. This is based on the projected labour requirement. YY then estimates how many months it would take for the case to get to adjudication. He then divides the fee by the estimated duration of the case. The result is the amount that the client will be required to pay each month for as long as the litigation continues. If the matter settles before the hearing, then the client pays nothing further. No cash retainer deposit is required.³⁰⁸ Whether or not this approach could work in personal plight niches said to have greater labour requirement risk than employment law (e.g. family law) is unclear.³⁰⁹

○ 3.3.3. PAYMENT ON RECOVERY

Some personal plight clients are seeking money from an adversary who is likely to pay something at the conclusion of the matter, whether it is settled or adjudicated.³¹⁰ Common examples include the seriously injured personal injury plaintiff, the divorcing homemaker spouse, and the dependant who claims support from an estate. In such cases, legal services become much more affordable if the firm agrees to postpone payment until money is recovered for the client.³¹¹ A document recently

prepared by Canadian Bar Association includes numerous examples of payment-on-recovery practices being used to create access to justice.³¹²

“We have more access to justice here than in other areas ... because we work on a contingency fee so we don’t get paid until they get paid.”

At the moment of recovery, the client is in a relatively good position to pay the firm. As one personal injury lawyer put it, “we have more access to justice here than in other areas ...because we work on a contingency fee so we don’t get paid until they get paid.”³¹³ Payment-on-recovery is a standard feature of contingency fee arrangements, as well as the “on spec” arrangements found in some employment law, family law and estate litigation retainers.³¹⁴

On the Non-Payment Risk/ Payment Timing Spectrum (Figure 5), payment-on-recovery is located near the desirable southeast corner. It is a “sweet spot” model because it provides accessible payment scheduling without requiring the firm to take on non-payment risk. The firm will typically receive the settlement funds or court-ordered payment from the other side in trust, and deduct its fee pursuant to the retainer contract before providing the balance to the client.³¹⁵

○ 3.3.4. PAYMENT AFTER RECOVERY

Having the option to pay *after* the services are provided, perhaps in instalments, would make the services even more affordable. However, this model involves very high non-payment risk for the firm, and is usually only accepted as a compromise by the firm if the client professes inability to pay in any other way after the bill is rendered.³¹⁶ Unlike large-ticket durable goods (real estate, automobiles, household appliances), legal services themselves cannot be repossessed in the event of non-payment. That being said, **offering clients the benefit of payment after recovery might become feasible if third parties absorb the risk or if personal plight firms are given more options to secure their accounts receivable.** These options will be considered below in Section 3.4.

○ 3.3.5. REVERSE PAYMENT: SALE OF CLAIM TO FIRM

The only option more accessible than paying for legal services gradually over time would be never having to pay for them at all. Obviously *pro-bono* and state-funded legal services are of this nature, but there may also be an opportunity here for profit-seeking personal plight practices. Sale of claim, also known as total claim alienation,³¹⁷ is the mechanism by which a law firm can economically provide a remedy to a personal plight claimant without ever requiring the claimant to pay for legal

services. The firm purchases the claim from the claimant for a sum agreed at the outset, pursues the claim, and then retains whatever it collects through settlement or adjudication.³¹⁸ No lawyer-client relationship exists between the vendor and the buyer of the claim. Although the literature has focused on the potential for claim sale in personal injury matters, the model could also conceivably be applied to class action, wrongful dismissal, and purely financial family law cases.

Dr. Vicki Wayne's monograph on the topic argues that prohibiting sale of claims is contrary to claimants' interests.³¹⁹ Over 95% of all claims are settled. Settling a personal plight claim effectively means "selling" it to the adversary (or the adversary's insurer). Allowing *only* the claimants' adversaries to "buy" the claims, Wayne argues, creates a monopsony, favouring claimants' adversaries by excluding competition for the claims and suppressing their "prices."³²⁰ Conversely, permitting sale of claim to other parties, such as personal plight law firms, would expand the pool of buyers and thereby increase the value of the claims.

Sale of personal plight claims would also allow litigation risk to be transferred to well-funded and experienced parties better able to bear it than the claimants themselves.³²¹ Premature settlement is a significant problem for shallow-pocketed personal plight claimants confronting better-resourced adversaries.³²² If a claimant urgently needs money, they are likely to settle before the point at which the claim's value is maximized.³²³ This is not only because settlement produces an immediate payment, but also because holding out for a better offer and/or trial is risky. Doing so might yield less than the offer on the table, and it might yield nothing. Early in a case, a well-capitalized and experienced personal plight firm might offer the claimant a much higher price than the adversary's settlement offer, because the personal plight firm has a greater appetite for the litigation risk involved in maximizing the claim's value.

Sale of claims is said to encourage unmeritorious nuisance claims. However, time-based and contingency billing create the same incentives for firms.

Nevertheless, selling personal plight legal claims is currently illegal in all of major common law countries.³²⁴ There appear to be two sets of arguments against the practice. First, it is said that, in light of the information asymmetry characteristic of personal plight lawyer-client relationships,³²⁵ sale of personal plight claims would lead to exploitative transactions.³²⁶ In an unregulated and uncompetitive market, it is probably true that many claimants would sell their claims for unreasonably low prices.³²⁷ However the same problem arguably exists in today's market for personal plight legal services (especially contingency-billed services).³²⁸ Regulatory reforms already necessary to create a price-competitive market for personal plight legal services could also address the risks of exploitation involved in sale of claims.

Sale of claims is also resisted on the basis of broader concerns. It is said to encourage unmeritorious “nuisance” claims. However, time-based and contingency billing create the same incentives for firms, and judicial mechanisms such as adverse costs awards seem to be an effective way to address this problem without forbidding potentially access-enhancing arrangements.³²⁹

On a legal-philosophical level, sale of claims is said to involve unacceptable “commodification,” undermining the corrective justice goals of tort law. However, it is hard to see how it is substantively worse in this regard than settlement, which is effectively the sale of one’s claim to one’s adversary. Other existing practices, such as the offloading of defendants’ responsibility onto insurers, also seem to commodify tort claims.³³⁰ Anti-sale arguments based on upholding the rule of law or ensuring public denunciation of wrongdoing, again, seem to be equally applicable to any settlement of a claim.³³¹

Permitting sale of claims would require a major change to the civil justice system and it would not solve all of our access to justice problems. Like the Recovery-Proportionate Contingency Fee, it could only work where the redress sought is exclusively monetary or readily saleable property. Any contract to sell a claim would have to ensure the vendor’s cooperation with the purchaser in maximizing the claim’s value, i.e. by providing evidence. Nevertheless, sale of claim represents a potential “sweet spot” solution -- a “cheap, low-risk means of obtaining redress” for personal plight claimants.³³² **Law societies and legislators should consider whether legalizing and regulating the sale of personal plight claims to law firms would be favourable to the interests of personal plight claimants.**

○ 3.4. MANAGING NON-PAYMENT RISK TO FACILITATE DEFERRED PAYMENT

Non-payment risk drives personal plight firms toward upfront payment demands, which in turn make their services less accessible.³³³ However, as with labour requirement risk, there are other ways to mitigate this risk. Credit checks allow assessment of the non-payment risk posed by any given personal plight client; it is not clear whether their use is common among law firms. As with labour requirement risk, larger firms would seem to have an advantage over smaller ones in absorbing non-payment risk. A single large and uncollectable bill would be a serious blow to a solo practitioner, but not to a large personal plight firm like the UK’s Co-Operative Legal Services.³³⁴ Thus, the latter firm should be more likely to absorb non-payment risk and offer accessible payment scheduling, at a price which is mutually advantageous to firm and client.

Legal expense insurance (LEI) and third party litigation funding (TPLF) were identified above as ways to offer clients strong fee certainty without imposing labour requirement risk on firms.³³⁵ These options also externalize non-payment risk. The firm need not worry about the client’s willingness and ability to pay if payment is due from a reliable insurer or TPLF funder. The Law Society of Manitoba’s Family Law Access Centre accepts non-payment risk on behalf of firms, collecting fees from modest-income clients and guaranteeing payment to firms that have agreed to serve those clients at reduced hourly rates.³³⁶

Legislative and regulatory choices affect the ability of personal plight firms to offer deferred payment. This section considers four relevant policies. Increasing firms' security over their work product (3.4.1) and reducing unpredictable fee regulation (3.4.2) reduce non-payment risk. Billed-basis tax accounting (3.4.3) encourages deferred payment arrangements. Finally, reforming regulation of contingency fees (3.4.4) can make this important sweet-spot billing model work more effectively for more clients.

○ 3.4.1. GIVE FIRMS MORE SECURITY OVER THEIR WORK PRODUCT

If legislators reduce personal plight firms' non-payment risk, then in principle the firms should be able to offer their clients more accessible payment scheduling. Law firms with unpaid legal fees are in some cases entitled to enforce the debts against client property that was protected, created, or secured by the firm's work. These legal mechanisms are known as liens or charging orders.³³⁷

If legislators reduce personal plight firms' non-payment risk, then in principle the firms should be able to offer their clients more accessible payment scheduling.

However, there are many cases in which law firms have no such security. For example, family lawyers often have little or no recourse against support payments or matrimonial home equity obtained as a result of their efforts. As a respondent in an earlier study put it, "I can't go 'repo' their divorce."³³⁸ This increases non-payment risk and increases firms' need to demand large up-front cash retainers instead of more accessible payment scheduling. Family lawyer TT told this anecdote:

We used to take cases where we would say: 'OK, pay us at the end when you get the house'. And then I had some clients who would fire you just before the end of the file, and transfer the home. And then you have to go sue the client, and you have to try and set aside the transaction. It's a lot of work to get paid ... I got burned for some significant money a couple of times and then I stopped doing it. And I'd like to be able to do it because it really was a good access to justice way of helping people. But I can't do it anymore.³³⁹

Increasing personal plight firms' security in their work product, for example by offering lien-type rights over matrimonial homes and spousal support income streams, would reduce non-payment risk and increase the potential for offering more accessible payment scheduling to clients.

○ 3.4.2. REDUCE UNPREDICTABLE REGULATION OF FEES

Non-payment risk is increased by the unpredictable and retrospective fee “haircuts” sometimes administered by regulators and judges. In many jurisdictions, clients are given the right to seek reductions in lawyers’ bills after the services are provided.³⁴⁰ In Ontario, quasi-judicial assessment officers may reduce any lawyer’s bill. Judges have even broader powers to reduce contingency fees in cases where the client is a minor or is a class. In contingency-billed cases, the firm accepts the risk of a low effective hourly rate if the case goes poorly (i.e. produces an unexpectedly low recovery or requires an unexpectedly high labour or disbursement investment by the firm.)³⁴¹ However, if the case goes well, the regulator may administer a haircut on the basis that the effective hourly rate turned out to be high, or on the basis of hindsight criticism of the firm’s approach to the case.³⁴²

Fee haircuts can be administered in the absence of any wrongdoing by the firm, on the basis that the fee did not turn out to be “fair and reasonable” in light of the outcome.³⁴³ In many jurisdictions there is no set of billing practices that offers firms “safe harbour” from this form of non-payment risk. Even if the firm’s bill survives a challenge intact, legal professionals will often have been required to spend significant amounts of time defending the bill.

The risk of unpredictable fee haircuts in time-billed matters encourages firms to demand upfront payment. Pre-payment reduces this risk because a client is much more likely to complain about a fee not yet paid than a fee that was paid at the outset of the case. Fee haircuts also probably increase the absolute price of personal plight services by increasing the cost of doing business. Finally, if there is no safe harbour approach to billing which guarantees immunity from fee haircuts, then it becomes rational for firms to charge high “rack rates” to all clients, and then discount bills to avoid the regulatory process only for those clients who threaten to complain.³⁴⁴

Personal plight legal fees must be regulated, because the nature of legal services leaves inexperienced individual consumers unable to adequately protect their own interests in an unregulated market.³⁴⁵ However, regulating fees with *ex ante* guidelines, which do not increase non-payment risk for compliant firms, would reduce non-payment risk and thereby lead to more accessible payment scheduling and lower fees overall. Delineating “safe harbour” billing practices which protect clients while eliminating fee haircut risk for firms would be helpful. For example, firms could be allowed to submit contingency agreements for court approval at the outset, in exchange for immunity from discretionary reduction after the case is complete.

As with labour requirement risk, reforms that reduce non-payment risk can have an adverse impact on other desirable justice system goals. In a case like *Batalla v. St. Michael’s Hospital*, where the agreed-upon contingency fee would have paid the firm \$4000 for each hour of work, and the client was a critically injured child, the argument for a fee haircut will appear compelling.³⁴⁶ However, **in weighing relevant considerations to create and administer legal fee regulation, the effect on nonpayment risk – and therefore on accessible service prices – should be among the factors on the scale.**

3.4.3. ALLOW BILLED-BASIS ACCOUNTING FOR TAXATION PURPOSES

Taxation policy should avoid penalizing personal plight law firms that use deferred billing. Most taxpayers are required to include the value of unbilled work-in-progress in income for the year in which the work is performed. However, Canadian law firms have been permitted to use “billed-basis accounting,” which means declaring income from each client only in the year in which the client is billed.³⁴⁷

Billed-basis accounting recognizes personal plight law firms’ economic reality and promotes deferred billing in two ways. First, if the fee will be contingent in some way upon the outcome, billed-basis accounting acknowledges that the actual value of the work may not be ascertainable until the outcome is known.³⁴⁸ Second, if the billing will be deferred, billed-basis accounting avoids imposing tax liability with regard to income that a firm cannot possibly realize until a future year.³⁴⁹

The Government of Canada’s March 2017 budget proposed to eliminate the option for lawyers to use billed-basis accounting.³⁵⁰ A Canada Revenue Agency Guidance document issued in April 2017 clarified that work-in-progress would not be taxed if the taxpayer’s fees “only become known and billable” after the taxation year, and there is not yet any liability on the client’s part to pay the fee.³⁵¹ This Guidance restores billed-basis accounting for contingency and other retainers with no-win no-fee guarantees.

However deferred billing is also used in personal plight cases without an explicit no-win-no-fee guarantee.³⁵² In such cases, the fee may be “known,” but not “billable,” at the end of the taxation year. Under *de facto* or informal contingency retainers, the retainer may make the client liable to pay regardless of the outcome, but the firm will partially or completely waive the fee if there is little or no success.³⁵³ The April 2017 Guidance document left it unclear whether the value of work-in-progress would be taxable in such cases. If so, the reform would constitute a major disincentive to deferred billing outside of formal contingency retainers. As the CBA Submission points out, deferred billing arrangements are commonly used for disadvantaged and equity-seeking clients, including divorcing homemaker spouses, wrongfully dismissed employees, and First Nations rights claimants.³⁵⁴

The following account from a personal plight lawyer, cited in the Canadian Bar Association’s submission on billed basis accounting, illustrates both the access to justice benefits of deferred billing in non-contingency cases, and the severe and unfair hardship that work-in-progress accounting would impose:

My client was a young woman who had been sexually harassed by her supervisor, and when she complained, she was fired. I investigated and confirmed the story through a credible independent witness. I decided to take on the case and deferred payment until a settlement or a court decision was reached. I accumulated a lot of work in progress.

The young woman started receiving intimidating anonymous emails that couldn't be traced. Then the independent witness moved to China and couldn't be located. The client decided to settle her claim for less than it was likely worth, because she couldn't handle the stress. My eventual income was drastically different than the actual work in progress.³⁵⁵

Tax law should permit billed-basis accounting for all deferred-payment accounts in law firms, in order to treat these arrangements fairly and avoid disincentivizing this access-enhancing practice.

○ 3.4.4. CONTINGENCY BILLING AS SWEET SPOT PRICE STRUCTURE

Legislators and regulators interested in making personal plight legal services more accessible should look closely at their approach to contingency fees. In Canada and the United States, recovery-proportionate contingency fees are widely used for personal injury, class action, and a few other personal plight matters.³⁵⁶ Legal fees calculated on this basis can be large, mounting to six digits in some personal injury actions and seven or eight digits in class actions.³⁵⁷ Moreover, large outputs of firm labour are not invariably necessary to generate these returns. In fact, contingency-billed work can be among the most lucrative of all legal work. The most successful personal injury and class action lawyers are said to out-earn any of their Wall Street and Bay Street colleagues in the corporate client hemisphere.³⁵⁸

It is therefore intriguing that complaints about the unaffordability of legal fees almost never focus on contingency-billed matters. Even when recovery-proportionate contingency fees are very high, it seems that clients find them relatively affordable.³⁵⁹ This seems to be because the contingency model combines the two attributes of sweet spot price structure identified already: fee certainty and deferred payment. The client enjoys a no-win-no-fee guarantee, certainty that the fee will be proportionate to the recovery,³⁶⁰ and the right to postpone payment of the fee until the moment of recovery.

The most successful personal injury and class-action lawyers are said to out-earn any of their Wall Street and Bay Street colleagues in the corporate hemisphere.

Contingency fees also fulfill the remaining sweet spot criteria relatively well. They are profitable for firms, in part because of the lack of non-payment risk.³⁶¹ In terms of service quality and professionalism, the contingency model has been praised for aligning the firm's interest with the client's interest more effectively than either time-based or flat billing does.³⁶² Contingency offers

incentive to maximize monetary recovery, but also incentive to consider the likely marginal effect of each additional hour worked on the outcome (unlike time-based billing).³⁶³

Some criticize contingency fees for incentivizing overzealous or unethical behaviour by lawyers who must win in order to get paid.³⁶⁴ However, excessive adversarialism can be policed by the adversary, the court and the regulator,³⁶⁵ unlike the behind-scenes docket inflation that time-based billing incentivizes and the shirking that flat-fee billing incentivizes.³⁶⁶ Each billing model creates temptations to unethical conduct for unscrupulous practitioners, but the temptations created by contingency billing are easier to apprehend than are those created by other models.

There is definitely room for improvement in contingency billing and its regulation, from a consumer welfare and access to justice point of view.³⁶⁷ At least in Ontario, there are serious problems related to the treatment of costs awards in contingency calculations and to the calculation of fees after a client fires a firm among other things.³⁶⁸ Regulatory action is also necessary, in the author's view, to foster price and quality competition among contingency-billing personal plight firms, and to address the serious risk that premature settlement of tort cases poses to clients.³⁶⁹

Nevertheless, the author's view is that appropriately regulated and competitive contingency fees have powerful benefits for access to justice. **Regulators should consider removing impediments to the use of contingency fees in all personal plight cases where the client seeks purely monetary redress, including family law cases.**³⁷⁰ Ontario and some other provinces completely forbid contingency billing in family law matters.³⁷¹ Family lawyer Stephen Durbin argues that contingency billing could level the playing field for homemaker spouses in contested divorces. Time-based billing, according to this argument, confers an advantage on the breadwinner spouse who typically has more income and assets and can "hold out" longer for a favourable settlement.³⁷² Some resist this argument on the basis that the fees would be excessive, and family law remedies such as child support should not be reduced to compensate lawyers.³⁷³ On the other hand, time-based fees already cut deep into family finances and do so in a manner which is arguably less affordable for clients.³⁷⁴

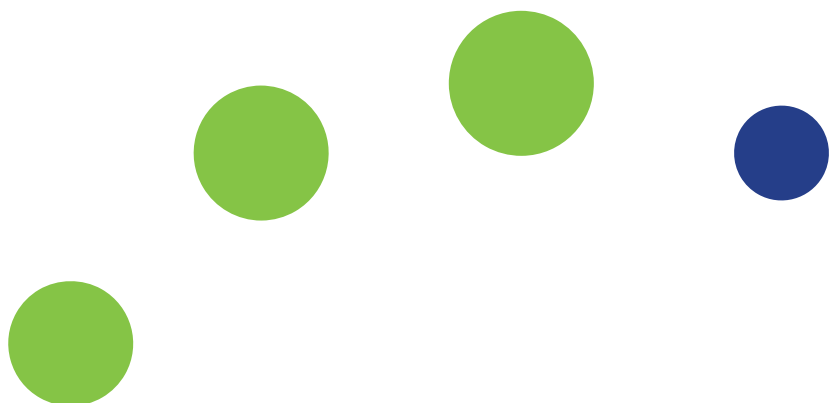
Some jurisdictions also cap permissible contingency fees. British Columbia caps contingency fees at 33% of the recovered amount in motor vehicle cases, absent prior court approval,³⁷⁵ and Ontario caps contingency fees at 50%.³⁷⁶ New Brunswick has the lowest contingency fee cap in the country, at 25%.³⁷⁷ However, contingency fee caps may deny access to legal services for claimants with low-value and/or high-risk claims.³⁷⁸ Personal plight firms are of course free to deny representation to such claimants. They might take on more of them if the permissible contingency percentage were greater.³⁷⁹

Capping contingency rates is a simplistic response ... which may have unintended consequences.

It bears repeating that, due to information asymmetry between personal plight client and firm,³⁸⁰ **there is a very real risk that some clients will pay far too much in contingency fees and regulators need to respond to this risk. However, capping contingency rates is a simplistic response to the problem which may have unintended consequences.**³⁸¹ Ontario's cap does nothing for claimants who pay the maximum permissible percentage for representation in cases that involve minimal risk and labour, when other firms would have been willing to do the work for much lower percentage fees. As Michael Trebilcock argues, a reasonable fee in a given contingency matter must reflect the risk assumed by the firm.³⁸² The difficulty of comparison-shopping and lack of price competition are the root sources of this problem. Fostering price competition, reforming legal fee regulation, are more effective ways to ensure that personal plight clients get good value-for-money from their law firms.³⁸³

○ 3.5. CONCLUSION: DEFERRED PAYMENT

Chapter 3 has considered deferred payment. Like price certainty, this is a way of structuring personal plight legal fees to make them more affordable for clients, without necessarily making them any less profitable for law firms. Also like price certainty, deferred payment retainer options can be plotted on a continuum. As the payment schedule becomes easier for the client, it unfortunately generally also increases the non-payment risk to which the firm is exposed. Therefore, section 3.4 considered options to address this risk, both at the firm level and through legislative and regulatory reform.



CHAPTER 4

○ DIVERSIFYING SERVICES

“Opportunities lie ahead for lawyers who demonstrate that distinct value by offering choice to their clients in how they receive legal services.”³⁸⁴

“I’m quite happy with my Chevrolet, provided it gets me from A to B effectively. But don’t tell me I can’t have a Chevrolet because I can’t afford a Rolls Royce.”³⁸⁵

○ 4.1. INTRODUCTION

Diversifying services – especially among different price/quality tiers – is the third route into the sweet spot for personal plight law firms. Clients are, among other things, consumers.³⁸⁶ Like other consumers, they generally want to have options and choices available. For example, offering personal plight legal services in multiple languages, in multiple locations,³⁸⁷ through house- and hospital-calls, after business hours,³⁸⁸ over the phone and online³⁸⁹ increases the number of people who can be profitably helped.³⁹⁰ Prospective clients also appreciate having a choice between time-based, flat, and contingency billing in appropriate cases.³⁹¹

This chapter focuses on service diversity in the form of *price/quality tiers*. After reviewing traditional law firm approaches to price/quality tiers (section 4.2.1) and one-to-many legal services (section 4.2.2), the remainder of this Chapter will focus on unbundled legal services. The Chapter will scrutinize unbundling against the three aspirations for personal plight legal practice identified in the Introduction: accessibility, quality, and profitability. It concludes that, although far from a panacea, unbundling offers valuable opportunities to personal plight firms in certain contexts. This is especially true if lawyer and client subscribe to the “assistance” model of personal plight legal services, as opposed to the “salvation” model.³⁹²

○ 4.2. PRICE-QUALITY TIERS

Consumers generally value having options at different price points.³⁹³ This is true so long as the more expensive options are superior in some way to the cheaper ones, and so long as all of the options provide good value for money.³⁹⁴ Price/quality tiers are obvious in many markets for consumer goods and services. General Motors' distinction between Chevrolets, Buicks, and Cadillacs is a well-known example. General Motors earns more money selling Chevrolets than it does selling Cadillacs, despite higher profit margins on the Cadillacs. Likewise, price/quality tiers can boost firm profitability as well as access to justice and, in the right circumstances, legal professionalism.

Currently, personal plight law firms often seem to clients and would-be clients to offer “only the Cadillac:” the traditional full-scope retainer delivered by a lawyer or team chosen by the firm. The quality may be very high, but the price is out of reach. For example, the \$26,591 average Canadian legal fee for traditional full-scope representation in a contested divorce culminating in a five-day trial is simply not affordable for most people,³⁹⁵ even if the fee arrangement includes price certainty and ample time to pay.

Even for those who can afford them, “Cadillac” legal services are disproportionate to the significance of some legal needs. It is difficult, for example, to imagine any traffic ticket dispute that would justify a \$400/hour lawyer, given the small amount at stake and the straightforward nature of such cases. Disputes with airlines about lost baggage and delayed flights are another example. Thus, price-quality tiers can unlock not only the market of middle-income people with serious personal plight needs, but also the market of affluent people with minor personal plight needs for which Cadillac services are disproportionate.

○ 4.2.1. TRADITIONAL LAW FIRM PRICE/QUALITY TIERS

Offering price/quality tiers is common sense and by no means unknown even to relatively traditional personal plight firms. For example, if there are lawyers on staff with different hourly rates available, clients may be given a choice as to whether and to what extent the “junior(s)” will work on the file. These juniors might lack some of the insight or advocacy skill which the more expensive senior practitioners would provide, but they bill at lower rates. Several interviewees reported offering this as an option to their clients.³⁹⁶ Non-legal staff can also be deployed in this way. For example, Alberta family lawyer E2 (whose personal rate is \$500/hour) assigns some work to his clerk whose work is billed to the client at \$125 per hour. However, E2 gives clients the option of having lawyers do all of the work.³⁹⁷ This is a straightforward example of diversifying services into price/quality tiers. “Vertical” division of labour (delegation) within personal plight law firms is explored at length in Chapter 5.

There are other ways to create price/quality tiers. A conscientious time-billing personal plight lawyer who is cognizant of limited client means might offer to spend fewer hours, e.g. drafting litigation documents that are shorter or less polished than they might otherwise be. Making concessions to the adversary in pursuit of earlier settlement might also be considered a “Chevrolet” approach.³⁹⁸

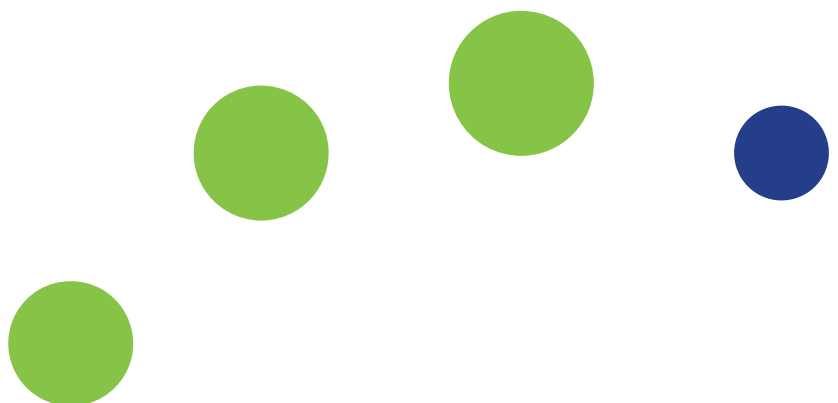
These service models all fall within the ambit of the “traditional full-scope retainer,” where the lawyer assumes complete or almost complete responsibility for solving the client’s legal problem.³⁹⁹ **Firms should offer price/quality tiers to clients whenever they can,⁴⁰⁰ and legal services regulation should encourage them to do so.**

Firms should offer price/quality tiers to clients whenever they can, and legal services regulation should encourage them to do so.

A class action can also be understood as an affordable “Chevrolet” personal plight legal service. Relative to an individual plaintiff, a class member loses many of the benefits of traditional legal services – she cannot even instruct the firm that is helping her, let alone obtain personalized advice and guidance from that firm. However she does receive a legal service, and a share of a financial remedy, in exchange for a legal fee which is generally very affordable because it is shared among hundreds or thousands of class members (and because it is a recovery-proportionate contingency fee). **Class actions** present numerous interesting policy issues that are beyond the scope of this paper, but they **have powerful access to justice benefits and should be encouraged by regulators and legislators for appropriate matters.**

○ 4.2.2. ONE-TO-MANY LEGAL SERVICES

“One-to-many” legal services potentially offer an even more affordable price/quality tier. In this model, a single law firm simultaneously provides services to multiple clients. Of course personal plight lawyers can write books or record videos sharing their substantive expertise with the world.⁴⁰¹ However, people with personal plight want personalized *advice*, as opposed to just *information* about law and procedure.⁴⁰²



There are ways for firms to provide real, personalized advice to multiple clients simultaneously.

The client workshop led by a lawyer is one model. Here, participants have the opportunity to discuss their cases with each other, as well as receive advice from the lawyer. Simply telling one's story to sympathetic listeners with similar problems can be a helpful way to gain perspective. Self-represented litigants might provide this service for each other in a program organized by a firm but with minimal involvement by actual lawyers.

Toronto lawyer Heather Hui-Litwin has offered a "Classroom for Self-Reps" for 5-10 people. Topics include "ABC's of Legalese" (\$50/person for a two-hour session) and "Preparing for Court Hearings" (\$200.00 for two 2-hour sessions.)⁴⁰³ Employment lawyer YY describes the model as follows:

*Perhaps you should come to our course on -- we call it "Human Rights 101" for example. We provide a course and maybe it's \$25, maybe it's \$50. The way we make it work for the firm in terms of financial viability is if we can get 100 people in the course it makes it worthwhile financially for us, but we are also providing a broader range of people with good information that they can use.*⁴⁰⁴

Although his own effort in this area "hasn't got a lot of traction," YY still believes it has potential as a way to reach people "outside of the traditional consultation process which is prohibitive for a lot of people" by the price of a lawyer's time.⁴⁰⁵

○ 4.2.3. UNBUNDLED LEGAL SERVICES

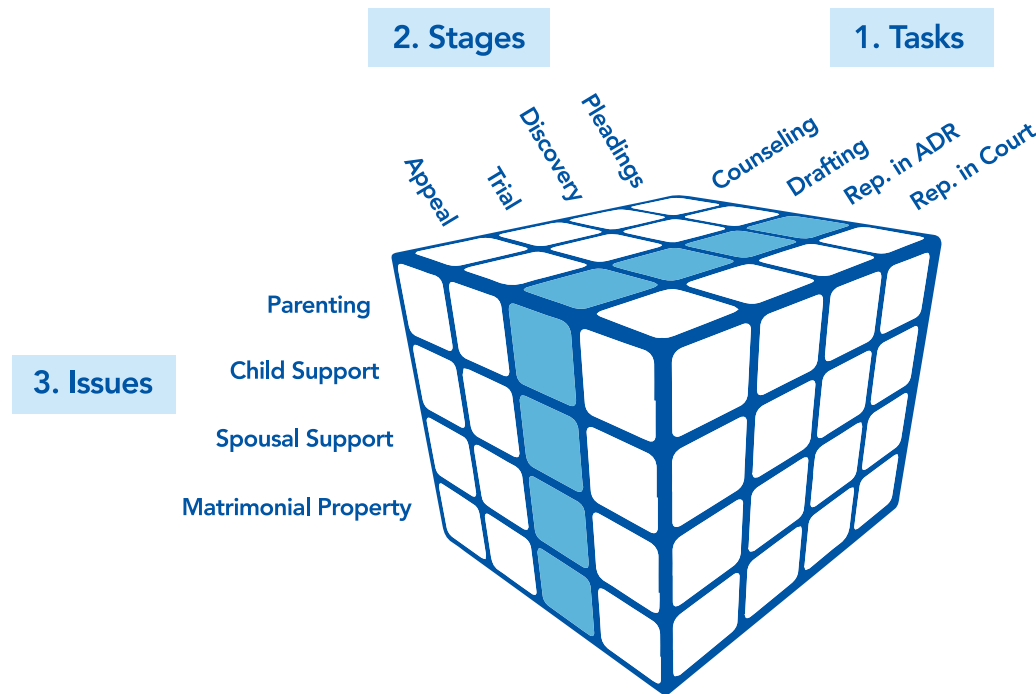
Unbundled (aka "limited scope") services are a form of price/quality tiering that constitutes a more radical departure from business as usual in personal plight legal services.⁴⁰⁶ Here, the firm takes on part but not all of the legal work required to meet the client's need. This section begins by defining unbundling options using a "three-dimensional" model of a personal plight case and identifying informal and formal ways to bring unbundled services to market. It then analyzes unbundling in terms of the three sweet spot criteria: accessibility, law firm economic sustainability, and legal professionalism.

The section concludes that certain forms of unbundling have strong potential for certain clients with particular types of civil personal plight needs. Unbundling is more problematic for criminal defence matters. According to the interviewees, choosing appropriate cases and establishing clear expectations are essential for the success of unbundled retainers. The legal inexperience of the typical personal plight client, and the difficulty she encounters in understanding and unbundling her own legal needs, are among the challenges inherent unbundled service models. Unfortunately, those who have the least ability to afford "Cadillac" full-scope representation may be the same people who are least likely to benefit from the "Chevrolet" alternative of unbundling.

4.3. UNBUNDLING IN THREE DIMENSIONS

The literature has distinguished “vertical unbundling” from “horizontal unbundling.”⁴⁰⁷ However, a three-dimensional model is arguably more accurate. In a complex personal plight case, *multiple issues* are pursued across *multiple stages*, and handling each issue requires *multiple tasks* at each stage. Thus, the case can be conceptualized as a cube:

Figure 6: Three Dimensions of Unbundling



Under the traditional full-scope retainer, the firm takes responsibility for the entire cube: *all* necessary legal services to reach final resolution of *all* of the legal issues arising from the client’s personal plight need. Under an unbundled retainer, the firm handles only some of the blocks that make up the cube. This restricts the firm’s labour input requirement, and therefore reduces the price at which the service can be profitably provided.

Typically, an unbundled service will consist of one or more *slices* of the cube. Under *issues-based unbundling*, a client might retain a firm to handle complex legal issues (e.g. matrimonial property division in a family law case) while handling more legally straightforward issues (e.g. negotiating a child custody and access arrangement) him- or herself. *Stages-based unbundling* is also possible. Toronto litigator Mick Hassell, for example, offers representation limited to the trial of a matter, on the assumption that the client has self-represented or retained another firm to handle previous stages.⁴⁰⁸ Other firms will agree to appear for a motion or a mediation only.

Task-based unbundling is the third way to slice the cube, and apparently the most common approach in Canada. The firm performs some but not all of the legal tasks required by the client, without limiting the service based on issues or litigation stages. Counselling or “coaching” self-represented litigants is an example of task-based unbundling.⁴⁰⁹ Under this model, the client receives only “behind-the-scenes” advice, and is not represented by the firm in negotiations or litigation.⁴¹⁰ Sarnia family lawyer JJ describes it as follows:

A lot of times it was in the sense of giving advice, giving an explanation, sometimes doing some coaching in the background. People come in and maybe they are going off to a mediation session or maybe they are having some discussions with their spouse directly. At least educating them on the law and their options - what they can and can't do before they enter into some of those discussions. Trying to do what you can.⁴¹¹

According to Nikki Gershbain’s foundational work on this model, a legal coach should ideally help the client with both substantive and procedural advice, and the retainer should extend from the beginning of the case to the end.⁴¹² The Family Law Help Centre, operated by Feldstein Family Law Group, offers five categories of task-based unbundling: Legal Opinions; Legal Research; Drafting Services; Coaching Services, and Representation.⁴¹³

Even one full slice of the cube might be too much for some personal plight clients. If so, one or two of the constituent service “blocks” could be provided. For example, ghostwriting (drafting a demand letter, pleading, or factum for a self-represented litigant) is a single task provided for a single litigation stage,⁴¹⁴ which might cover only one issue. Family lawyer Joel Miller’s “Family Law Coach” service includes several “single use support” services.⁴¹⁵ For \$85 plus tax, Miller’s “Quick Communication Coach” service offers “an email response to a single question.”⁴¹⁶

○ 4.3.1. BRINGING UNBUNDLED SERVICES TO MARKET

Unbundled service retainers are often negotiated informally between client and firm. In many cases the relationship will begin as a traditional full-scope retainer, but the client eventually loses the ability or willingness to pay for the Cadillac.⁴¹⁷ Unbundled services then become “Plan B.” Many interviewees followed this informal path into unbundled services.

“I’m forthright with them from the beginning because it’s so much worse if it takes them by surprise.”

However some personal plight law firms openly discuss these options at the outset. The approach taken by Toronto family lawyer FF has much to recommend it:

I sit down with them right at the beginning and say 'here are what your options are. You're probably not going to qualify for legal aid. My hourly rate is \$275 per hour. You know, you might be able to afford me up until the first motion, and I will do the best work I can for you, but realistically if it doesn't settle before then this is not going to be a long-term solution for you. If you only want me up until the first motion, and then you want to ... do like a self-represented thing or you wanted to find another counsel you can do that, but then you also need to think about ... what's going to be involved in transferring the file from me to another lawyer and then getting them up to speed on it, so you might want to think about someone else.' I'm forthright with that from the beginning because it's so much worse if it takes them by surprise.⁴¹⁸

Others go further, and advertise unbundled services. British Columbia's Waymark Law,⁴¹⁹ the Family Law Coach, and the Litigation Garage in Toronto are Canadian examples.⁴²⁰ Australian firm Affording Justice groups its services into three models: Legal Advice, Legal Task Help, and Legal Representation.⁴²¹ The Legal Advice tier is divided into sub-tiers based on the complexity of the issue and the projected time requirement. Discounts are offered for clients willing to describe their needs using a web intake form, as opposed to phoning the office.⁴²²

○ 4.4. UNBUNDLED SERVICES IN THE SWEET SPOT?

Demand for unbundled personal plight services seems to be strong. Julie Macfarlane, after interviewing hundreds of self-represented litigants, found that many

respondents described a fruitless search for a lawyer who would "just" help them with a part of their case – for example, reviewing their documents, checking their forms or coming with them to a hearing or court appearance. ... Respondents described seeking assistance with completing forms; reviewing completed forms and other documents; writing a letter to the other side; answering questions of law; preparing for a hearing; and representation in court for one hearing only.⁴²³

Nevertheless, the opportunities and challenges involved in unbundling require careful analysis. "Sweet spot" personal plight legal service models offer accessibility to clients, profitability to firms, and high-quality legal professionalism for the benefit of the justice system and all its participants.⁴²⁴ To what extent does unbundling fit this bill?

○ 4.4.1. UNBUNDLING AND ACCESSIBILITY

○ 4.4.1.1. ADVANTAGES FOR ACCESSIBILITY

Accessibility is the most important advantage of unbundled legal services. For many clients, unbundled legal services are like the relatively affordable, accessible Chevrolet.⁴²⁵ They would prefer Cadillac full-scope representation,⁴²⁶ but this affordable alternative is much better than receiving no help at all, which would force an unappetizing choice between unassisted self-representation and abandoning one's legal rights.⁴²⁷ Even if the firm handles most of the case but unbundles a few blocks for the client to do alone, the cost savings may be very welcome.⁴²⁸

If billed through a traditional uncapped time-based retainer, unbundled services are still likely to be more affordable than full-scope representation because fewer hours will be required.⁴²⁹ However, **unbundling lends itself well to flat or otherwise price-certain billing**, which augments accessibility further.⁴³⁰ This is because unbundling (especially task-based unbundling) makes the firm's labour requirement easier to predict. For example, the time required to draft a pleading will not hinge on the unpredictable behaviour of the client, the adversary, and the court.⁴³¹

Unbundling is cost-effective if and when the firm and the client can identify the constituent "blocks" of the case cube for which the firm's services are most needed.⁴³² This analysis might be performed at the outset. Alternatively, the client may be able to take a "first crack" at certain tasks and fall back on the firm's assistance when it proves necessary. Richmond Hill family lawyer TT described a successful unbundled retainer:

He hired me to draft his motion materials. We did, we gave him a little bit of coaching...then he hired me when he got into serious negotiations for settlement, and I settled the case for him. He didn't have to deal with any of the scheduling the case conference dates... and a bunch of correspondence, it went back and forth. He picked his spots. He probably spent about 10 grand and he got great value for his dollar because he helped get his support reduced, and we helped him settle his case.⁴³³

○ 4.4.1.2. RISKS FOR ACCESSIBILITY

However, "picking one's spots" is not always so easy. Sarnia litigator KK said that, while she is open to unbundling, it also "worries me a bit because if I have control of the file I can make sure that everything is done that needs to be done, but if they ask me to do one specific thing, they might not know that there is something else they need to be doing."⁴³⁴ Once the "bundle" is untied, it is important to ensure that all of the "sticks" are grasped by either the client or the firm, instead of being forgotten on the ground en route to a bad outcome.⁴³⁵

B2, who is a proponent of unbundled services, nevertheless acknowledged the risks. She told the author about a lawyer friend who provided unbundled services that ended up being more expensive than a traditional full-scope retainer fee to handle the entire case would have been.⁴³⁶ This is entirely possible if the client's personal efforts do not advance the cause, or if the client's misguided efforts must be remediated by the firm.

"If they ask me to do one specific thing, they might not know that there is something else they need to be doing."

Self-represented litigants who get close to a substantive court appearance often feel an increased need for representation, which creates demand for stage-based unbundling.⁴³⁷ On one level, it is logical for a firm to get involved at later stages when the stakes are higher and more oral advocacy is required. However, "hopping in and out" of the file can be problematic. The litigant may have taken a position or made statements during the self-represented stage which is difficult to reconcile with the firm's approach.⁴³⁸ Toronto lawyer YY paraphrased his advice to clients at the initial consultation who want to make a first effort themselves:

If you come back to me 5 months from now it may be very difficult for me to do as an effective job as I think I could do, because you've already put yourself in a certain position by arguing things a certain way. That's not to say it's wrong because you have your own sense of agency. You're articulating the facts, but there's often a lot more than the facts, right? [Such as] all of the procedural stuff and employers' things that employees might not recognize right away.⁴³⁹

Similarly, Toronto litigator BB expressed concern about not having sufficient information to meet the client's expectations:

If I just said that I'm a coach in the background for the entire case, then I worry that if I'm not present for some sort of settlement discussion, or I haven't reviewed a piece of evidence, or there's something that they didn't know to tell me, that there could be an area of law for example that I don't coach them on, and later they say 'why didn't you coach me on that?' And I'll say 'Well, you never told me, I never knew.'⁴⁴⁰

For a firm to do any competent work on a personal plight file requires a more-or-less fixed investment of time to get “up to speed” – to learn the facts, understand the parties’ positions, and perhaps learn some necessary law.⁴⁴¹ The client will presumably have to pay for this time regardless of how much work the firm does. If only one or two service “blocks” are provided by the firm, the “getting up to speed” cost can be high relative to the value of the services received.⁴⁴²

Some clients are better positioned than others to “pick their spots.” B2 suggested that the clients best able to benefit from unbundling are those with education and self-confidence. Insofar as such people are more likely to have money, B2 observed the irony that unbundling provides the greatest assistance for those who already reasonably affluent and who may therefore be best able to afford traditional full-scope representation.⁴⁴³

○ 4.4.2. UNBUNBLING AND PROFITABILITY

○ 4.4.2.1. ADVANTAGES FOR PROFITABILITY

Profitability for firms is the second attribute of sweet spot personal plight services. Unbundling seems to make good business sense. The labour requirements of each file are smaller and more certain than they are with traditional full-scope retainer files. Thus many more paying clients can be served, even if each client produces less revenue.⁴⁴⁴

Unbundling offers a plausible opportunity to serve a large and potentially lucrative untapped market. There are hundreds of thousands of middle-income Canadians experiencing personal plight, whose legal needs go unmet.⁴⁴⁵ These people cannot afford four- or five-digit retainers and the open-ended fee obligations involved in the traditional, time-billed, full-scope retainer. They can, however, afford to pay *something* for legal services that help them meet their needs. Over the 20th century General Motors enjoyed tremendous success because it developed profitable, affordable versions of products that had formerly been accessible only to the wealthy. Canada’s personal plight bar has the opportunity to do likewise, as legal entrepreneur F2 told me:⁴⁴⁶

Even when what they are asking for may not be the absolute gold star service, it is the service they are asking for. And provided that you ultimately stipulate that as the service you are providing you are doing more for them than anyone else who... ultimately doesn’t end up servicing them at all as a result.⁴⁴⁷

Unbundling personal plight services can mitigate the threats to firm economics posed by traditional full-scope retainers. Non-payment risk can be eliminated if unbundling allows a switch to pre-paid flat fees.⁴⁴⁸ Even with time-based fees, clients may be more likely to pay because the bills are smaller and more affordable than those generated by traditional full-scope retainers. If a client does refuse to pay an unbundled bill promptly and in full, the financial hit to the firm is smaller than it would be if the outstanding amount were larger.⁴⁴⁹

Unbundled retainer clients may have more realistic expectations of the firm than do full-scope retainer clients do. If the outcome is disappointing despite the firm's best efforts, unbundled clients may be less likely to blame the firm, and therefore less likely to challenge the bill and/or complain to the regulator. Richmond Hill family lawyer TT said:

I've always been of the viewpoint if I had 20 clients that paid me \$5,000, I would take that any day of the week over one client that's \$100,000. Because odds are, of those 20 clients, I probably have 18 or 19 happy people because they didn't have a war. And the person who pays me \$100,000, has had a war. They're probably not going to be a happy person. I may have gotten them a fabulous result, or not. But they've gone through a world of [pain]. The other people came in, they had their deal, they got their agreements done, they got to move on with their life. So they're the lucky ones, they're the winners.⁴⁵⁰

Windsor litigator NN said that unbundled coaching has become a successful part of her practice, and one that generally leaves clients "certainly happy."⁴⁵¹

○ 4.4.2.2. RISKS TO PROFITABILITY

Nevertheless, unbundling poses its own distinct risks to firm economics. Habits of prudent lawyers, such as "wanting to look at everything and looking at it from all angles," seem difficult to reconcile with unbundled service provision.⁴⁵² Survey data collected by the National Self-Represented Litigants Project suggests a widespread perception that unbundled legal services are more likely to generate regulatory complaints and lawsuits from clients, although there is no statistical evidence that this actually the case.⁴⁵³ "Scope creep" risk was described by B2, who was herself a personal plight client before she became a lawyer.⁴⁵⁴ Unless the retainer is "really clear on what the scope is," clients will pressure the firm to "squeeze more value, more time, more advice, out of it."⁴⁵⁵ In Nikki Gersh bain's survey lawyers offering coaching services to self-represented litigants, scope creep was the practice management challenge most frequently identified by the respondents.⁴⁵⁶ Without any nefarious intent, clients may misunderstand their entitlements under a limited-scope retainer contract.⁴⁵⁷

Thus, **lawyers with experience in this area emphasize the importance of careful retainer drafting for unbundled retainers.** The contract must be very clear about exactly which blocks in the cube are and are not the firm's responsibility.⁴⁵⁸ Explaining the risks of unbundled services, including the risk that something excluded from the service package would have made an important difference to the client's case, is also important.⁴⁵⁹

One set of unbundling risks that cannot be eliminated through retainer-drafting are those arising from the court. Being "trapped on the record" is a concern for some: the judge may refuse to allow the lawyer to withdraw after the agreed-upon service has been provided. In the

words of employment lawyer II, “judges are quick to find you as [the client’s] lawyer even though you are not their lawyer” any more, after the agreed-upon services have been rendered.⁴⁶⁰

Another interviewee who provides unbundled services said that if “it’s a settlement conference and the case may be going to trial, I’m going to be reluctant to go to the settlement conference unless I know who the judge is, because I’m concerned that that judge may try to rope me into the trial.”⁴⁶¹ Unbundled work should not be punished or disincentivized, and **legislation should make it clear that judges must not compel lawyers who are in compliance with unbundled retainer obligations to do any further work.**

It remains incumbent on unbundled service-providers to identify appropriate and inappropriate cases for unbundling. FF’s family law firm will not take on any unbundled work, due to a disastrous episode in which the firm narrowly avoided being required to pay costs personally. This firm acted for a client early in a divorce case before the client terminated the retainer. Six months later, two days before a judicial settlement conference, the client retained the firm again. There was insufficient time to prepare the documents completely, and the slapdash documents infuriated the judge who ordered that either the client or the firm would have to pay the other side’s costs.⁴⁶² Fortunately the client agreed to pay the costs, but this anecdote was related by FF as an example of the risks involved in unbundled services.

To identify these risks to firms involved in unbundled practice is not to assert that they exceed the risks involved in traditional full-scope retainer practice.⁴⁶³ Lawyers, who arguably tend to be risk-averse, may overestimate the risk of approaches with which they are not personally familiar.⁴⁶⁴ JJ, who provides unbundled as well as full-scope family law services, said that among lawyers:

there’s always the concern there is going to be some kind of liability come back, some kind of complaint that I haven’t done a good job on what I’ve done or a part job... that’s always been the fear. I have to say that has not been my experience to this point.⁴⁶⁵

○ 4.4.3. UNBUNDLING AND LEGAL PROFESSIONALISM

In addition to being accessible and profitable, sweet spot personal plight services must also support service quality and professionalism. Personal plight legal services are the site of market imperfections arising from information asymmetry and externalities.⁴⁶⁶ Therefore, even if clients want to buy these services and firms can profitably sell them, we must also ask how well they actually work. They must uphold the rule of law by reconciling the client’s objectives with the administration of justice and the legitimate interests of the court and the other party or parties. They must also add real value for clients: offer the responsive, client-customized services that websites and artificial intelligence cannot (yet).

How compatible is unbundling with quality and professionalism? From the court’s point of view, the services can be very welcome indeed. Given that the alternative to unbundled legal services is

often completely unassisted self-representation, the model can bring legal professionalism to cases that would otherwise lack it and thereby make a significant positive impact on the administration of justice. However, the efficacy of unbundled services in improving client results does seem to depend on context.⁴⁶⁷ In one Los Angeles landlord-tenant court studied by Jessica Steinberg, clients with limited-scope legal assistance did *not* get better outcomes on average compared to those who were entirely self-represented, although they did get better procedural justice.⁴⁶⁸

PP is a former family lawyer who had become a judge by the time she was interviewed for this research. She said that unbundled legal services are “absolutely” helpful in family court. She referred in particular to affidavits prepared on an unbundled basis:

The biggest problem for judges is usually lack of evidence. If you have somebody who prepares affidavit documents, a judge has a way to -- even if the [litigant] doesn't talk about any of that -- the judge can look at it and say the evidence supports this at paragraph x, y and z.⁴⁶⁹

Regarding the risk of unbundled service providers being “trapped on the record,” PP made it clear that she personally would “never put somebody who is doing unbundled services on the record,” because she is “aware of what an invaluable service that really is.”⁴⁷⁰ Likewise, Superior Court Justice Alison Harvison-Young, speaking at a panel event, described herself as a “beneficiary” of unbundled legal services, which are “enormously helpful” in family cases.⁴⁷¹

Offering high-quality services intelligently tailored to the individual client’s needs depends on strong lawyer-client relationships. On this criterion, the analysis of unbundling is somewhat more complex. Whether it is compatible with legal professionalism seems to depend on the model of legal professionalism that underlies the lawyer-client relationship. In short, to the extent that lawyer and client expect the firm to deliver *salvation* for the client, unbundling will be problematic. However, to the extent that the *assistance* model characterizes the role expectation, unbundling will be viable.

○ 4.4.3.1. INCOMPATIBILITY OF UNBUNDLING WITH THE SALVATION MODEL OF PERSONAL PLIGHT PRACTICE

Salvation is what some people in personal plight want from a law firm, and what some legal professionals want to provide.⁴⁷² Some clients want the firm to “take over completely,” and “trus[t] the lawyer to take care of everything.”⁴⁷³ In Kritzer’s survey of American lawyers serving individual clients in the 1980s, 28% reported a mutual understanding with the client that “the client would pretty much turn the case over” to the lawyer, and an additional 30% reported an expectation that “the lawyer would make most of the decisions.”⁴⁷⁴

The salvation model includes not only client deference to the lawyer’s expertise,⁴⁷⁵ but also a type of emotional reliance. Daphne Dumont, a Prince Edward Island lawyer with many personal plight cases, writes compellingly about the:



*special moment which is key to the relationship of lawyers to their clients... just after the problem is explained, after the client's fears are expressed, and after the details of the legal problem are thoroughly talked over, when the lawyer, confident in her knowledge of procedure and her estimate of the justice of the client's claim, begins to take up the strain of solving the client's problem. The lawyer accepts the responsibility, and the process of seeking justice gets underway.*⁴⁷⁶

In a similar vein, American lawyer and author Sam Glover writes:

*After a client signs a retainer with me, I look them in the eye and tell them "Okay, you don't have to worry about this any more. Your problems are now my problems." It is just a thing I say, but it is a true thing I say. My clients go home and sleep soundly for the first time in weeks or months. I go home and think about the legal issues all evening. At night I dream about my client's case.*⁴⁷⁷

Responsibility and power tend to go hand in hand. The saviour-lawyer has both the responsibility for and power over the client.⁴⁷⁸ While the client may retain the right to make major decisions such as whether to accept a settlement offer, he or she is not expected to lightly refuse or second-guess the professional advice of the saviour-lawyer.⁴⁷⁹ Instead, the operating assumption is that "both parties are best served by the professional assuming broad control over solutions to the problems brought by the client."⁴⁸⁰ Toronto employment lawyer Il was remarkably explicit on this point:

*I don't like my clients having any autonomy. I am very hard on them. Probably because I think that I am adding so much value and I know what it is in their best interests as counsel and if they don't see it then it is not a good relationship.*⁴⁸¹

That the client *trusts* the lawyer's judgment, and trusts the lawyer's alignment with the client's interests, is essential to this type of relationship.⁴⁸² "You need people to trust you," said criminal defender C2, "and essentially hand over their decision-making process to say 'yeah whatever you think is best.'⁴⁸³

The saviour lawyer has both responsibility for and power over the client.

This salvation model of personal plight client relationships may be old-fashioned, and it has been subjected to withering critique.⁴⁸⁴ However, it is not entirely obsolete. It is a more natural fit for personal plight than it is for any of the other three quadrants of legal practice. Personal plight clients are typically inexperienced one-shotters, and often undergoing personal crises.⁴⁸⁵ Therefore, compared to corporate clients and personal clients with uncontested needs, they are more likely to seek a saviour who will “take up the strain” and “accept the responsibility” for the process and outcome.⁴⁸⁶ Severe personal plight – such as a critical personal injury, a deportation, or an incarceration – can incapacitate the client on some level, enhancing the need for salvation and diminishing the client’s capacity to take an active personal role in responding to the situation.

Unbundling is very difficult to reconcile with the salvation model of personal plight practice. For a firm to take on only a slice or a single block of the “cube” that is the client’s plight, and to carefully delimit its obligation in the retainer, is incompatible with both sides’ expectations under this model. “Picking one’s spots” for unbundled service and self-representation requires a level of expertise that is not consistent with the wish to surrender control to the firm and pray (and *pay*) for salvation.

People accused of crimes or otherwise confronting a more powerful and experienced adversary are perhaps most likely to seek salvation from a law firm. This helps explain why interviewees expressed skepticism about criminal defence as a suitable site for unbundled legal services. GG, who has experience in criminal defence, is a strong proponent of the “coaching” model of unbundled services, but she acknowledged that it is “most useful in family law, civil litigation” as opposed to criminal work.⁴⁸⁷ Criminal lawyer C2 argued that unbundling is completely inappropriate in his field. This is partially because of the necessary level of expertise:

You can’t do this stuff on your own... this is part of the problem I have with unbundled services. It’s like opening a hospital and go nuts... go to that room down there and there’s some scalpels. Yeah, you got all the tools, but you are going to kill yourself... You can provide people general information like this is what a judicial pretrial is about or these are sorts of things that are going to happen, but when it comes time to decide you really need to know the whole case.⁴⁸⁸

C2’s resistance to unbundled criminal defence work is also based on his conception of the lawyer’s role. This conception clearly resonates with the “salvation” model:

I think a good lawyer is either all in or they’re not. They wouldn’t let their client ... go into trial and say ‘well I taught you everything I could let’s see if you can fly.’ Especially if you are watching them fail and know quickly how to fix it, you would probably unbundle my unbundling and do it for free because you are messing this up and making me look worse.⁴⁸⁹

To the extent that lawyer and client adopt the salvation model of their relationship, unbundling will be problematic if not impossible. In a world where all personal plight lawyers had to be their clients' saviours, there would be little place for unbundling. However, this is no longer the world we live in, if it ever was.

○ 4.4.3.2. COMPATIBILITY OF UNBUNDLING WITH THE ASSISTANCE MODEL OF PERSONAL PLIGHT PRACTICE

The *assistance model* positions the personal plight firm as the client's *helper* rather than the client's saviour.⁴⁹⁰ In this model, the client remains the protagonist in his or her effort to deal with personal plight, and the firm takes a more flexible supporting role.⁴⁹¹ It is more likely to be operative in cases where the client has more relevant personal experience and more capacity. The assistance model is also more viable where the dispute is a civil one involving parties of relatively equal bargaining power. Many (although certainly not all) family law cases are of this nature.

Due to its more modest and more flexible role expectations between lawyer and client, the assistance model allows much more scope for unbundling.⁴⁹² The assistance model, it has been argued, is increasingly a better fit with what personal plight clients are actually looking for from law (and other professional) firms.⁴⁹³ A "decline of deference" toward lawyers and other professionals has been observed,⁴⁹⁴ and an increasing client interest in having more control over decisions.⁴⁹⁵ Jordan Furlong has described the rise of the "self-navigator" client who, "rather than turning over her entire matter to a lawyer and following his lead... maintains command and direction of her legal situation, assigning specific tasks or roles to various tools or resources along the way, and often carrying out some herself."⁴⁹⁶ As the CBA Equal Justice report noted, "people want more active involvement in the management, strategy and decision making about their legal matters."⁴⁹⁷ Estate litigator HH agreed that "there's way more push back with clients, and I think I've seen that more recently, in terms of strategy being pursued, asking questions. Which I think is a good thing."⁴⁹⁸

In every retainer, as a matter of legal ethics, it is the client's role to give instructions and the practitioner's role to take them.⁴⁹⁹ However, in practice client disempowerment tends to accompany the salvation model of practice. Like a person being carried out of a burning building over a firefighter's shoulder, a client who seeks salvation from a law firm tends to surrender authority to the firm in so doing. By contrast, *assistance* (whether bundled or unbundled) does not come at that price. Ottawa lawyer D2 said her firm "treated clients as partners rather than like the subjects of our work." Concretely, this meant reporting to clients in an especially thorough and frequent way, and encouraging clients to make as many of their own decisions as possible about the conduct of the case.⁵⁰⁰ Unbundled retainer clients in England & Wales, in interviews, said they valued the way the model left them with "control" and "responsibility" for their own cases.⁵⁰¹

Because unbundled services encourage clients to take more responsibility, and to think of the law firm's work in terms of assistance rather than salvation, they are said to promote client empowerment.⁵⁰² In the words of Toronto family lawyer FF, "it's pretty straightforward that a person should be able to manage their own experience, and buy the experience when they need the experience, and the expertise."⁵⁰³ GG, in British Columbia, sees her coaching work empowering clients in part by building their confidence:

I sit down with them and I encourage them, sometimes I feel like a cheerleader, because part of the problem is people just don't think they can do it. ... A lot of what I have to do is convince people that they can do this and tell them about my clients who have done it. And who have succeeded doing it. I really get tired, Noel, of the 'woe is me stuff' because I've seen people, I've seen what they can do, even though the system, it's true, is not set up for [self-represented litigants]. It's much more accessible than it's given credit for with strategic professional intervention. So that's where I'm coming from.⁵⁰⁴

"I feel so empowered with what you're giving me" is how Ottawa lawyer D2 characterizes her clients' attitude toward her unbundled legal services.⁵⁰⁵ As noted above, for clients for whom empowerment is important, unbundling may leave them happier, more likely to pay their bills, and less likely to sue or complain about the firm.⁵⁰⁶

Conversely, D2 described some lawyers' refusal to work on an unbundled basis as "presumptive" and "an exertion of power" over clients.⁵⁰⁷ It is true that some personal plight clients are looking for salvation. However it is equally true that some personal plight lawyers are personally attached to the saviour role and do not wish to help clients on any other basis. In the view of Alberta family lawyer Rob Harvie,

we lawyers have been encouraged by our law schools, our regulators, and perhaps even the public to take an overly paternalistic approach towards our clients. We take control of our clients' issues and in so doing, adopt many of their problems as our own. This does a disservice to our clients – who need us as objective sources of guidance, not as surrogate parents.⁵⁰⁸

Among the interviewees, D2 and GG agreed that lawyer resistance to unbundling reflects, in part, a reluctance to give up control over the lawyer-client relationship.⁵⁰⁹



○ 4.5. CONCLUSION: PRICE/QUALITY TIERS AND UNBUNDLING

Price/quality tiers, including affordable-but-helpful Chevrolet alternatives, constitute an important route into the sweet spot. Traditional “Chevrolet” options for clients -- requesting juniors on the file, economizing on time, or settling early -- should be encouraged. Unbundling, whereby the firm takes on some but not all of the blocks in the case “cube,” is a more significant break with traditional approaches to personal plight legal practice. The cube can be sliced by task, stage, or issue, and individual blocks or irregular shapes can be broken out to meet the diverse needs and budgets of personal plight clients.

Unbundling ... is a more significant break with traditional approaches to personal plight legal practice.

Unbundling can't work in every personal plight case.⁵¹⁰ Contra-indications, according to the interviewees, include high levels of conflict, high levels of complexity, and high-needs clients.⁵¹¹ Inefficiencies and practical problems seem to be greatest in “stage-based” unbundling, especially if the file is passed back and forth multiple times before being resolved. To the extent that the client or the firm see their relationship in terms of salvation, unbundling has little scope. Criminal charges and significant power imbalance between the parties are also problematic in this regard.

However in appropriate cases unbundling has great potential as a route into the sweet spot. Accessibility is improved, mostly because the price can be dramatically lower than that of the full-scope retainer. Unbundling seems to be a promising business opportunity for personal plight firms. Although it carries its own risks, it also eliminates risks involved in full-scope retainers. Those who actually provide unbundled services are generally much less worried about the risks than are those who do not do so, suggesting that the fear may be overblown. Careful retainer drafting and expectation-setting with clients seems likely to mitigate the risks involved.

In terms of legal professionalism, unbundling is a clear win for the justice system because it is a viable alternative for the many people who would otherwise be completely unrepresented. It is also harmonious with the “assistance” model of legal professionalism which, in addition to being more affordable, is more empowering for clients than the “salvation” model. **Personal plight firms should look for appropriate opportunities to offer more unbundled services.**

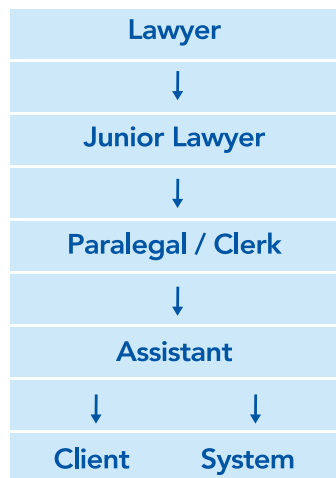
CHAPTER 5

VERTICAL DIVISION OF LABOUR

“Successful law firms of the 21st Century will be those who re-jig their staffing models to ensure that work is done by the lowest cost, yet appropriately skilled, provider – or the work is done by technology.”⁵¹²

Mitch Kowalski

Figure 7 Vertical Division of Labour in a Personal Plight Law Firm



Better allocating and coordinating efforts within firms can lead to more accessible, higher quality, and more profitable personal plight legal services. This Chapter develops the idea of *vertical* division of labour, defined as the efficient delegation of tasks to lower-cost workers and to systems. Whenever a task previously performed by a higher-paid worker is delegated to a lower-cost worker or system, vertical division of labour has occurred. (Chapters 6 and 7 will consider *horizontal* division of labour – pushing law firm tasks “laterally” to other legal and non-legal professionals.)

Vertical division of labour is a conceptually straightforward strategy in any business. However, there is evidence that many personal plight law firms are not yet taking sufficient advantage of it. This Chapter will first outline the benefits of delegation for personal plight law firms, moving downwards on Figure 7 (sections 5.1, 5.2, and 5.3). Section 5.4 considers opportunities for personal plight firms at the various stages of Richard Susskind's model of legal services evolution, and 5.5 identifies the comparative advantages of senior professionals in law firms. The risks of over-delegation and mis-delegation are identified in section 5.6. Section 5.7 looks for regulatory opportunities to encourage efficient division of labour. Section 5.8 argues that, for personal plight law firms, moving toward efficient vertical division of labour is helpfully understood as an *investment* involving risks and rewards.

○ 5.1. DELEGATION TO JUNIOR LAWYERS

The accessibility benefits of delegating work down the pay scale are obvious in law firms that bill by the hour. If a senior lawyer (hourly rate \$400/hr) delegates a task to a junior lawyer (\$200/hr) who can perform it almost as quickly and just as well as the senior lawyer would, the client benefits from the same quality work and pays less for it.⁵¹³ In some cases, vertical division of labour is the *only* way to deliver high-quality and profitable legal services. If a certain client's budget is especially tight, only someone with a relatively low hourly rate will be able to put in the necessary hours to meet the need properly.⁵¹⁴ **Profitability in a time-billing firm generally also increases when work is delegated appropriately**, so long as the senior lawyer has other billable work to keep him or her busy. This is because the firm collects the margin between (i) the junior's billing rate and (ii) the junior's salary and overhead.

In flat and contingency-billed practices, the profit motive to delegate is even stronger. In the absence of time-based billing, no revenue is lost from the delegation even if the senior does *not* have any other paying work to keep them busy. Conversely, the affordability benefit for clients is attenuated because they are not paying by the hour for different employees' time. However, appropriate delegation makes a flat- or contingency-billing firm more efficient, and lets it offer profitable services at lower prices.

○ 5.2. DELEGATION TO NON-LAWYER STAFF

The same logic applies to non-lawyer staff such as paralegals, clerks, and assistants, whose labour costs are typically lower even than those of entry-level lawyers.⁵¹⁵ Most lawyers in personal plight as in other fields already delegate simple administrative tasks.⁵¹⁶ However lawyers interviewed for this project also reported delegation of relatively advanced work to non-lawyers, including document review,⁵¹⁷ screening potential clients,⁵¹⁸ gathering evidence,⁵¹⁹ collecting unpaid accounts,⁵²⁰ and preparing initial drafts of some documents.⁵²¹

Delegation may send tasks outside of the firm or even outside of the country, through processes such as offshoring and nearshoring. “Offshoring,” as defined by Richard and Daniel Susskind, occurs when tasks are delegated to workers in a lower-cost jurisdiction, who may still be employees of the firm that delegated the work.⁵²² The Susskinds distinguish offshoring from “outsourcing,” wherein the lower-cost workers are not members of the same firm.⁵²³ “Nearshoring” means that the workers are located in a relatively low-cost area (usually within the same nation),⁵²⁴ where costs remain low but coordination and quality control are relatively easy.⁵²⁵ For reasons considered below, these processes are much less common in personal plight as opposed to corporate firms. However interviewees did describe a smaller scale application of the “nearshoring” concept – delegation of clerical, bookkeeping and financial tasks to independent contractors often working from home or from relatively low-cost space.

Personal injury firms seem to have gone furthest toward reserving lawyer labour for the tasks that need it most, among personal plight firms.⁵²⁶ This is unsurprising, given the strong incentive to delegation created by the contingency billing model that predominates in this niche. One interviewee reported a 1:4 ratio at his personal injury firm: 14 lawyers and about 60 non-lawyer staff.⁵²⁷ DD, the leader of an overseas firm with a large PI practice, said:

*We have fewer lawyers per head of population than a traditional law firm. But those lawyers that are there spend as far as possible their time doing clinical legal judgment. So they're spending their time interviewing the client, collecting and assessing evidence, formulating the legal and factual matrix for their client, and then standing away from all the process and letting all the machinery, including trained paralegals and trained legal assistants, legal secretaries, and you know in our whole practice in Australia there are three word processing operators, which gives you an idea of the level of automation and the level of case management systems. So it's very little that's left to individual lawyers to influence, sort of the way the case progresses -- except the most important bit which is 'what sort of case is this, what sort of result is appropriate for this particular client, in their particular circumstances'. But all the collation of material, that's all automated.*⁵²⁸

Client screening and intake is a time-consuming, and often unbillable process that some interviewees in other practice areas wished they could somehow outsource.⁵²⁹ Plaintiff-side tort firms seem to have gone the furthest in delegating these tasks to non-lawyer staff.⁵³⁰ However, extensive delegation to staff is certainly possible in other personal plight niches.⁵³¹ DD's firm, in Australia, has extended its staff-heavy model into family law and other areas.

Sociologist Jerry van Hoy studied the large American "franchise" law firms of the 1990s, which at the time provided contested family and estate law services as well as personal injury. Van Hoy identified only a very short list of tasks that would *never* be assigned to secretaries in these firms – court appearances, substantive legal advice to a client, and direct "selling" of legal services to a client.⁵³² "We just make circles in crayon" on forms preprinted with possible legal categories and analyses, according to one of Van Hoy's lawyer interviewees. Secretaries would then do the necessary writing to create the necessary documents.⁵³³ Van Hoy's own assessment of lawyers' role in these law firms was scarcely any more glorious: "the main role of lawyers is to sell clients one of the services that the firm offers."⁵³⁴ However, this study did not clearly distinguish between the uncontested and contested work done by franchise law firms. The preponderance of evidence, considered below, suggests that lawyers have a more durable and prominent role in contested personal plight matters than they do in meeting legal needs that do not arise from disputes.⁵³⁵

○ 5.3. DELEGATION TO CLIENTS

Chapter 4 considered unbundled legal service retainers, wherein the client does some of the work that the lawyer would do under a traditional "full-scope" retainer. It is worth noting here that **unbundling can be considered a form of vertical division of labour**. Beginning with the "full-scope" retainer where the firm does everything, every "delegation" of a task (such as affidavit-drafting) back to the client has the potential to make the legal service more accessible.⁵³⁶ **Costs are saved if the client's own opportunity cost to perform certain necessary tasks is less than what it would cost for the firm do it.** As Toronto lawyer B2 put the point from the client's point of view, "if you can do something yourself, you would... each hour you save is \$300 or \$400 ... that's a lot of money... no matter how wealthy you are."⁵³⁷

○ 5.4. DELEGATION TO SYSTEMS

Vertical division of labour means delegating work down the pay scale in order to save costs without sacrificing quality. However, this process can extend below the bottom of the human pay scale. **The labour involved in personal plight legal practice can and should also be intelligently and selectively delegated to systems** -- "collection(s) of artificial objects organized for a particular purpose."⁵³⁸

As technology improves, delegation to systems can make personal plight legal services more accessible, higher-quality, and more profitable.

This, again, is a common sense idea that most personal plight firms already utilize to some extent. A bank of precedents – model documents which can be quickly adapted to suit new files – is perhaps the most basic system to which labour is delegated in personal plight law firms.⁵³⁹ Intake forms are another well-established system used in many personal plight practices. Much work once done by staff or lawyers has already been delegated to word processing and other basic technological systems in most law firms.

As technology improves, delegation to systems can make personal plight legal services more accessible, higher-quality, and more profitable.⁵⁴⁰ The Susskinds suggest that paraprofessional and assistant work will increasingly be subsumed by technology, in order to produce even greater cost savings.⁵⁴¹ Some lawyers' work can also be delegated to systems. For instance, quantitative legal prediction (QLP) evaluates the prospects of success in a case by drawing on a large database of past decisions.⁵⁴² This can help contingency-billing firms make better intake decisions, as well as informing settlement negotiations.⁵⁴³ QLP is an example of a system already used in the corporate-client hemisphere which may soon create benefits for personal plight clients as well.⁵⁴⁴

In his book *Tomorrow's Lawyers*, Richard Susskind suggests that legal services will evolve through five stages:⁵⁴⁵

Figure 8 Richard Susskind's Stages of Evolution



Susskind argues that, even today, little legal work is actually purely *bespoke* – created “from scratch” to respond to a client’s completely unique and unprecedented situation. Any personal plight firm which uses precedents or intake forms has already moved from Susskind’s first stage (*bespoke* legal services) to his second stage (*standardized* legal services).⁵⁴⁶

○ 5.4.1. SYSTEMATIZATION OF PERSONAL PLIGHT LEGAL SERVICES

Susskind’s third stage of evolution is *systematized* legal services, which includes automated workflow and document assembly systems. Systematization offers opportunities for firms to improve quality, reduce cost and increase profit. A personal plight firm that has taken the lead in systematization is Slater & Gordon, which is active in Australia and the UK. Slater & Gordon executive Dina Tutungi, speaking to Laura Snyder, said the firm has created a “flow” for each of the different types of personal injury matters that the firm handles. The associated software “anticipates different combinations and permutations for how that matter can progress,” and uses “prompts and checklists” to ensure that everything necessary is done regardless of the direction the case takes.⁵⁴⁷ According to Tutungi, delegating file management to this system helps “make sure that the case is compliant with court orders... that the customer service is exceptional, that clients are updated and that the case is moving on schedule.”⁵⁴⁸



Interestingly, Tutungi's comments suggest that systematization also facilitates vertical division of labour among *human* workers within Slater & Gordon. It makes it "easier for certain tasks to be done by experienced legal support staff who are supervised by lawyers." This, in turn, "free[s] our lawyers up to focus on good case management — those high-end analytical and forensic tasks."⁵⁴⁹

Among the Canadian lawyers interviewed for this project, F2 offered the most advanced examples of delegating tasks to systems. F2 leads an innovative Canadian firm that operates in multiple retail locations and uses advanced computer systems and division of labour in order to deliver fixed fee services to individual clients. F2's firm currently concentrates on uncontested personal business services (such as will-drafting and real estate), but the firm is looking for opportunities to apply this approach to personal plight matters.

F2 described various systems that help his firm deliver high-quality, accessible services to individual clients. For workflow and client-relationship purposes, the firm uses Salesforce, the world's largest cloud-based customer relationship management platform. This is an interesting indicator that the systems to which law firms delegate tasks need not necessarily be purpose-built or law-specific software. F2 described most precedent documents as "workflow badly constructed," insofar as they require the user to "go through line by line" in order to customize it, "as opposed to filling in the form blanks."⁵⁵⁰ Automated interactive forms, used by F2's firm, could offer superior vertical division of labour compared to precedents, if they reduce the number of minutes required per use and/or reduce the pay grade of the employee capable of doing the work without affecting quality.⁵⁵¹

○ 5.4.2. PACKAGING OF PERSONAL PLIGHT LEGAL SERVICES

One step beyond systematization in Susskind's model (Figure 8, above) are *packaged* legal services.⁵⁵² Here, "lawyers pre-package and make their experience available to clients on an online basis."⁵⁵³ Susskind argues that packaging lowers price dramatically but can also be profitable, in that it lets practitioners "make money while they sleep."⁵⁵⁴

Slater & Gordon's "Online Unfair Dismissal Lawyer" sits somewhere between systematization and packaging on Susskind's model. For a flat fee of AUS\$300 (roughly C\$300), this website first takes users through a series of questions in order to categorize the user's matter. The user is then prompted to type in their story and upload relevant documents. A lawyer from the firm will then review the documents and phone the user for a 30-minute consultation. Finally, the claim will be emailed to the user, who can file it with the Australian tribunal that handles these matters. The Online Unfair Dismissal Lawyer is an example of an accessible process that delegates extensively to a technological system, while reserving a precisely defined role for lawyers.⁵⁵⁵

Entrepreneurial lawyers see commoditization not as a way to put themselves out of business, but as a way to approach the sweet spot of accessibility, quality and profitability.

○ 5.4.3. COMMODITIZATION OF PERSONAL PLIGHT LEGAL SERVICES

Depending on the definition one chooses, “commoditization” could be an existential threat or an opportunity for legal professionals. Richard Susskind defines commoditized legal services, the fifth and final stage on his model, as those that are “readily available at low or no cost on the internet.”⁵⁵⁶ By this definition, commoditization is *not* a sweet spot opportunity for personal plight law firms to profitably create access to justice. However others use the verb “commoditize” to refer more generally to delegation, especially to systems, moving rightward along Susskind’s model.⁵⁵⁷ “If you want to increase access to justice,” F2 said, “commoditize, commoditize, commoditize.”⁵⁵⁸ These entrepreneurial lawyers see commoditization not as a way to put themselves out of business, but rather as a way to approach the “sweet spot” where accessibility, quality, and profitability meet. Vertical division of labour, especially involving intelligent systems, is key to this process.

It will be suggested below that personal plight legal practice, compared to other practice areas, involves some distinct impediments to vertical division of labour generally, and commoditization in particular.⁵⁵⁹ F2 acknowledged this. His firm is interested in any individual-client work that can be commoditized, but thus far this has meant almost entirely uncontested work. Nevertheless, F2 identified several examples of contested personal plight niches that could be commoditized, because each case involves very similar facts and law. These included (i) real estate litigation in which a buyer wishes to back out of a transaction with the deposit returned, (ii) enforcement proceedings for child and spousal support, and (iii) some landlord-tenant disputes.⁵⁶⁰

○ 5.5. THE COMPARATIVE ADVANTAGES OF THE DELEGATORS

Among other advantages, **vertical division of labour creates time for lawyers and higher paid staff to use their skills to their best advantage.** Jordan Furlong suggests that lawyers

*have been punching below our weight for some time now, devoting our immense talents to tasks that are essentially clerical, transactional or procedural in nature. Others will take that work from us — and in the long run, we’ll thank them, because we will be freed to apply our highest and deepest skills to more important and valuable needs and opportunities.*⁵⁶¹

Family lawyer E2 identified “going to court” as the “prime capacity” of litigation lawyers.⁵⁶² Richard Susskind has also identified oral advocacy as a core lawyer skill relatively insulated from delegation and competition.⁵⁶³ The advocate’s level of experience can be the difference between winning and losing a personal plight case. For example, in applications to Canada’s Immigration and Review Board, Sean Rehaag found a “strong positive relation between grant rates and lawyers’ experience.”⁵⁶⁴

DD sees “clinical legal judgment” as the essential function of lawyers, and he sees enormous unmet demand for clinical legal judgment. To DD, “the difficulty is that at the moment the way the legal profession is structured, most of the revenue lawyers earn is doing

everything *but* the clinical legal judgment."⁵⁶⁵ His firm seeks to profitably expand the number of people who can benefit from that judgment, by allocating as much as possible of the other work to non-lawyers.⁵⁶⁶

Mentorship was mentioned by interviewees as an important factor in professionalism,⁵⁶⁷ and a role for which experienced lawyers are uniquely qualified.⁵⁶⁸ B2 suggested that unbundled legal services, and in particular behind-the-scenes "coaching" of self-represented litigants, are also most appropriate for senior lawyers.⁵⁶⁹ B2 experimented with the coaching model shortly after being called to the bar with mixed success. She concluded that

Limited-scope coaching... should be left to experienced lawyers. Somebody who actually has litigated, traditionally, regularly, for say 5-7 years... there's so much to learn... as I began to take on more clients and they were asking me questions that I didn't know myself, I thought 'this is bad.' ... I just didn't have the experience..⁵⁷⁰

B2 practiced as a sole practitioner. She emphasized the many "little bits of knowledge that you need that are not found in any textbooks or guides, that [are] only passed on by word of mouth, from lawyer to lawyer, or by experience." B2's conclusion was that "you need mentoring," and because she lacked it, she was "at a significant disadvantage." She eventually ceased working in this area, in part because she "didn't really want to 'practice' on the clients."⁵⁷¹ Unbundled retainers might be one of the tasks for which senior counsel have a distinct comparative advantage within a personal plight law firm. Intelligent delegation of routine tasks within full-scope retainers can save more of their time to do this work.

○ 5.6. IMPEDIMENTS TO VERTICAL DIVISION OF LABOUR IN PERSONAL PLIGHT

○ 5.6.1. OVER-DELEGATION AND MIS-DELEGATION

As with all good things, it is certainly possible to have too much delegation within a personal plight law firm. There are certainly tasks for which lawyers are uniquely qualified, and with which most non-lawyers or technological systems would struggle. Delegation to insufficiently trained, insufficiently competent, or insufficiently competent juniors, staff, or systems can obviously undermine service quality.⁵⁷²

DD is the leader of a personal plight firm that uses very advanced vertical division of labour and, and he has "a very deep belief that all legal services are commoditizable to some degree."⁵⁷³

Over-delegation and mis-delegation can increase price and/or decrease profitability. However he acknowledged there are "lots of good questions about how you can do that safely to protect the client's interest, to ensure the right levels of supervision of the work."⁵⁷⁴ It is the lawyer's responsibility to ensure that new technological systems, especially client-facing ones, are tested sufficiently before being deployed and monitored on an ongoing basis to ensure that clients' interests are protected.

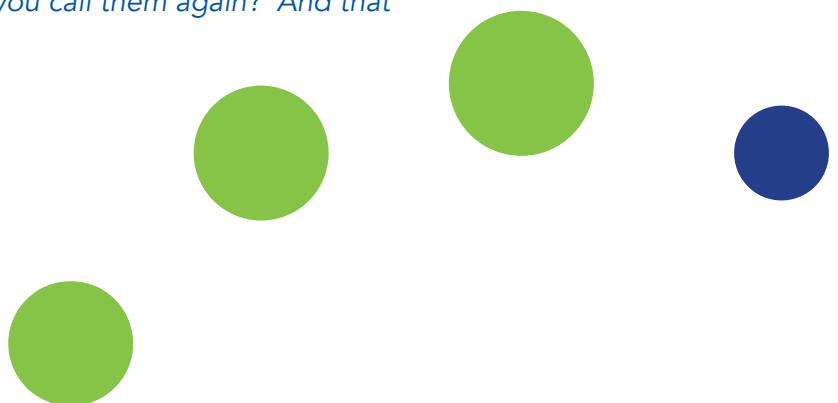
The labour cost of completing a task depends not only on the hourly rate of the person working on it, but also on the amount of time it will take that person to complete it. Experience usually cuts down on the time required: Chatham litigator RR said that, over 30 years of practice, he has become “way more efficient,” and “can do something in 10 minutes that used to take me an hour.”⁵⁷⁵ If a \$400/hr lawyer who could complete a task in 5 minutes delegates it to a \$200/hr lawyer who will require an hour, the client does not come out ahead.⁵⁷⁶ RR also described a 5-day small claims trial which, in his view, would have required only a single day, had his client’s adversary been represented by an experienced lawyer rather than an inexperienced paralegal.⁵⁷⁷

Family lawyer JJ has found that over-delegation of financial disclosure documents to staff not able to handle them leads to “a lot of time correcting the information or chasing the correct information... I’d sooner do it right the first time.”⁵⁷⁸ JJ added that sometimes, even when a lower-cost staff person is entirely able to perform a task, delegating it ultimately requires the lawyer to spend more time later learning the file in order to perform her work in mediation or court advocacy.⁵⁷⁹ In many circumstances, this time spent “getting up to speed” must be deducted from the time savings offered by delegation.

Supervision of delegated work by the delegator is often necessary. In the case of work delegated to non-lawyers, supervision is a regulatory obligation, as well as a prudent given that law firms are legally liable for any errors made by their staff.⁵⁸⁰ However, supervision reduces the cost savings of delegation relative to having the delegator do the work personally. Supervised delegation can also mean costly duplication of efforts. Clients suffer when they are billed by expensive senior lawyers who review and fine-tune already-billed juniors’ work, without adding proportionate value.⁵⁸¹

For civil litigator BB, it is important that he personally “sit down with every [client], and they know I’m their lawyer, and I’m doing the work, and it’s not being passed off to staff or junior lawyers or anybody else.”⁵⁸² He sees this as advantageous to his clients, most of whom are individuals with low-value tort matters:

I think there is some advantage to my clients in that I’m the one who ... say... calls the court to make sure something is properly done, or scheduled. Sure I could have my assistant do it, that would save me 5 minutes, but then they’d have to relay the message to me, and what if I say ‘Did you ask them A, B, C,’ and she says ‘Oh no, I didn’t know I was supposed to ask that,’ ‘Can you call them again?’ And that doesn’t help.⁵⁸³



Delegation, in BB's view, is sometimes

a problem, because you'll look at some files and you'll see all sorts of memos and not necessarily action, you'll see research but if a lawyer is handling a case that they don't know how to handle, they're probably just going to write a memo and let someone else deal with it, and wait for instructions. ... Assistants, and clerks, and junior lawyers, they do help on the balance, but I think it adds layers... I'm not sure they help my clients.⁵⁸⁴

○ 5.6.2. THE CHALLENGES OF VERTICAL DIVISION OF LABOUR IN PERSONAL PLIGHT

Compared to uncontested work and corporate-client work, personal plight legal practice is characterized by (i) small average file size, and (ii) inexperienced (and often traumatized) clientele.⁵⁸⁵ Both of these factors complicate vertical division of labour for personal plight law firms. The relatively small average size of personal plight files is an impediment to offshoring and outsourcing.⁵⁸⁶ Delegating tasks to contractors or employees outside of the firm requires time to “disaggregate” a file into multiple tasks and allocate them appropriately.⁵⁸⁷ For small divorce or criminal defence files, the savings from delegation might not justify this time expenditure. Thus it is unsurprising that large legal process outsourcing firms focus on corporate clients.⁵⁸⁸

Clients may not like it if their hands are being held by different people all the time.

Moreover, some personal plight clients resist delegation of their tasks, regardless of price and service quality considerations. As one interviewee said regarding delegation to staff, “at the end of the day they can do some things but perhaps your client is not going to want them to do other things just because of the nature of the work.”⁵⁸⁹ Personal plight legal needs are often accompanied by significant affective or even traumatic aspects, which emotionally charge lawyer-client relationships and complicate delegation.⁵⁹⁰ A corporation defending a tort suit, or an individual purchasing a home, may not care how the law firm makes the legal service “sausage” so long as the price is right and the quality is good. A person who has lost his marriage or inheritance is perhaps less likely to take this attitude. Family lawyer PP said that the “emotional needs” of clients in that niche necessitate face-to-face meetings with the lawyer in charge.⁵⁹¹ In a similar vein, TT (also a family law practitioner) suggested that clients may not like it “if their hands are being held by different people all the time.”⁵⁹²

C2 argued that, for criminal defence matters, clients

*very much look to the individual. They say I want this person as my lawyer. It is almost like a music artist... If you want Adele to perform, then that's who you want. You don't want Adele Inc. and they send someone who sounds like Adele to come and sing for you. It is not the same thing. Clients are very demanding that way. With something as specific as law you want that one relationship, that comes back to trust... Only so much can be delegated before the client says no I am not letting your associate do the trial.*⁵⁹³

The behaviour of the other side and the behaviour of the client are more difficult for the firm to predict in litigation than they are in simple transactions. The unpredictable behaviour of the court is an additional source of uncertainty. Chapter 2 explained how these factors make it more difficult to offer price-certain fees.⁵⁹⁴ They also, arguably, make it harder to delegate tasks down the pay scale, to systematize them, and to commoditize them.

Two enthusiastic commoditizers of uncontested personal business legal services, interviewed for this research, acknowledged that contentious litigation matters are much more difficult to reduce to workflows.⁵⁹⁵ Some firms that draft simple wills and transfer residential real estate have embraced vertical division of labour to the extent that only a tiny proportion of the tasks require a lawyer's expensive attention. Whether this is possible for any but the simplest personal plight files remains unclear.

○ 5.7. ENCOURAGING VERTICAL DIVISION OF LABOUR

Over-delegation and mis-delegation are real risks, and advanced vertical division of labour is impeded by unique challenges in personal plight matters. Nevertheless, **on balance a greater degree of delegation to humans and systems would be advantageous for many personal plight law firms and their clients.** It would allow them to provide high quality legal services at lower price points and with more profit.

Some resistance to delegation may be essentially irrational. As HH put the point, "there's a tendency of lawyers generally to think 'no one else can do this work, only I can do this work'... I think that's often wrong."⁵⁹⁶ A senior lawyer who embraces vertical division of labour must be prepared to give up some control; Doug Jasinski has colourfully suggested that lawyers tend to have their "operational settings pre-programmed to 'control freak.'"⁵⁹⁷ The ethos of professionalism – the good lawyer's sense that she must take personal responsibility for helping (if not "saving") the client – is salutary in moderation. However it may also give rise to an excessive resistance to delegation, that doesn't exist in a factory or a restaurant.

Inefficient division of labour among pay grades can hurt the bottom line in addition to inflating clients' bills and making legal services less accessible.

The Susskinds argue that “frequently senior professionals are involved in activities for which they are alarmingly overqualified.”⁵⁹⁸ Other authors have directed this criticism at law firms specifically.⁵⁹⁹ Several lawyers interviewed for this research suggested that personal plight law firms generally make insufficient use of lower-priced labour.⁶⁰⁰ Estate litigator HH, for example, said that she finds herself spending much of her time doing tasks for which she feels overqualified. Communicating with other lawyers in order to schedule motions and mediations was the example HH gave of something which “could very well easily be pushed over to the assistants.”⁶⁰¹ Because HH feels overqualified for these tasks, she is reluctant to bill the many hours spent on them to clients at her normal hourly rate of \$325/hr. This shows how inefficient division of labour among pay grades can hurt the bottom line in addition to inflating clients’ bills and making legal services less accessible.

Pushing tasks down the pay scale is in many cases a “sweet spot” strategy that supports the firm’s bottom line as well as the clients’ interests. However, some time-billing firms will need a regulatory nudge in this direction, given that reserving work for the highest-rate billers can in some cases be more profitable than delegating.⁶⁰² **Regulators’ codes of conduct could require time-billing firms to allocate tasks among available workers within the firm with exclusive reference to the best interest of the client, defined to include the client’s interest in price as well as quality.**⁶⁰³

Such a rule would require that the lower-billing of two equally available and equally competent professionals be used to perform a given task. There are very good reasons why some tasks should be given to more experienced or highly trained hands, but profit motive is not among them.

Billing practices can encourage, or discourage, efficient vertical division of labour. **Under time-based billing, offering a blended rate (in which all hours worked at the firm are charged at the same rate regardless of who works them) could incentivize rational delegation within a firm.**⁶⁰⁴ Blended rates also reduce one form of price uncertainty for the client: uncertainty about the proportion of the hours that will be billed at the different possible rates.

Some time-billing personal plight lawyers bill non-lawyer labour to the client as they would lawyer labour.⁶⁰⁵ Others consider non-lawyer labour a form of overhead, like rent and utilities, for which clients should not be specifically billed. The problem with the latter approach is that it disincentivizes efficient allocation of tasks down the pay scale.⁶⁰⁶ Also, folding non-lawyer labour costs into higher hourly rates for the lawyers is arguably unfair to those clients whose cases happen to require a high proportion of lawyer labour, relative to clients who benefit from a large quantity of unbilled non-lawyer labour. For these reasons, **time-billing firms should consider billing non-lawyer labour to their clients, especially if they make commensurate reductions in their lawyers’ billing rates.**

○ 5.7.1. CLIENT COMMUNICATION PROBLEMS AND VERTICAL DIVISION OF LABOUR SOLUTIONS

Client communication is an aspect of personal plight law practice for which vertical division of labour has significant potential. Communicating with clients is a core aspect of legal professionalism, but is also known to be problematic for many firms. Communication breakdown is the leading cause of client lawsuits against lawyers, accounting for more than 30% of all such claims in Ontario.⁶⁰⁷

For personal plight clients, who are typically legally inexperienced and stressed by the underlying problem giving rise to the legal need, understanding and being understood by the law firm is particularly important. In particular, a personal plight client will often perceive, fairly or not, that “nothing is happening” with his or her matter despite the large sums of money paid to the firm.⁶⁰⁸ Drawing on their interviews with American family lawyers, Mather et al. aptly characterize a common state of affairs:

clients understandably see their divorce as of primary importance and may call their lawyers frequently to find out what is happening. In response, attorneys who are faced with the crush of many cases, as well as the unpredictable responses of opposing party and counsel and the slowness of court scheduling, may delay or avoid responding because the answer is ‘nothing.’ The result can be client anger, frustration, and, particularly often in divorce cases, complaints of neglect to the appropriate bar agency.⁶⁰⁹

Those interviewed for this research emphasized the importance of frequent communication, and managing expectations regarding procedure and timeline as well as outcome.⁶¹⁰ This helps a firm keep its existing files and win new ones. Toronto personal injury lawyer SS, for example, said:

we take over files from lawyers all the time and they’ll say ‘I don’t know, I’m fed up, I want to switch, I haven’t heard from my lawyer in a year-and-a-half’... we try to say ‘it’s a communication issue’....so we get the file from them and they’ve been doing everything right, it’s just they haven’t communicated anything. So communication’s key.⁶¹¹

Vertical division of labour can assist personal plight law firms with the challenge of client communication. In short, an appropriate staff person or system can in many cases satisfy clients' demands for communication, without consuming the expensive time of lawyers. Windsor-Essex family lawyer PP relied on her experienced assistant to field many client queries, and respond personally to some of them:

*Clients like that because it was almost instantaneous. She was there and I wasn't. She was very experienced, so sometimes she could even answer the question. Many times they are not legal advice questions. It is 'has Jarrod talked to so and so and did we get a letter?'*⁶¹²

Technological systems supporting efficient client communication include the appropriate use of the "CC" and "BCC" fields to keep clients in the loop on communications sent to the other side.⁶¹³ Large personal plight law firms overseas, such as the UK's Co-Operative Legal Services, have toll-free lines, webforms triggering a phone call from the firm to the client, and online legal enquiry forms to give clients more options for communication. If the client's file is stored securely in the cloud, then an offsite staff person can access it and review details with the client when the lawyer is unavailable.⁶¹⁴

An appropriate staff person or system can in many cases satisfy clients' demands for communication, without consuming the expensive time of lawyers.

Online portals are also useful systems for client communication. The client is given access to a password-protected website dedicated to his or her file. The portal may offer secure communication with the firm, document sharing, and scheduling functions. It can also let a client keep track, in real time, of the firm's dockets and amounts owing.⁶¹⁵ CBA Legal Futures research with clients found that they increasingly want to stay "informed throughout the legal process with regular reports and updates on both the status of the work and the costs-to-date."⁶¹⁶ Portals can let them do so at very minimal cost to the firm. This innovation is an example of how client communication tasks, like other aspects of personal plight legal practice, can be delegated down the pay scale and delegated to technological systems, creating satisfied clients and efficient practices.

○ 5.8. VERTICAL DIVISION OF LABOUR AS INVESTMENT

For a personal plight law firm, efficient vertical division of labour can be understood as an *investment* which involves up-front costs and the assumption of risk, along with the prospect of gain. Consider Susan, a sole practitioner who does all or almost all of the necessary tasks for her personal plight practice by herself. Susan would like to have an associate, articling student, or non-lawyer staff person to whom she can delegate certain tasks. She would also like to use technology to systematize some of her firm's tasks. These steps, she knows, can save her clients money and increase her own income.

However, pursuing vertical division of labour would require an immediate investment on Susan's part. She would have to make time to find a person to hire or software to purchase. She would then have to find time to train and supervise that person,⁶¹⁷ or learn how to use the software. She would have to figure out, probably through trial and error, exactly what should and should not be delegated. Susan would also, of course, have to pay for her new hire or system.

Meanwhile, the prospective payoff from Susan's investment in vertical division of labour is uncertain. The person she hires might turn out to be incompetent, or they might quit soon after being hired. The software or system might not live up to expectations. Thus, the safest course is for Susan to continue doing everything herself. Risk-aversion comes naturally to lawyers, so the benefits of vertical division of labour may easily be disregarded.

Lawyers' resistance to investment in efficient division of labour was aptly described by family lawyer E2:

We make money by running on a hamster wheel. We bill by the hour. And if we're not running on that wheel we're wasting our time, is how we kind of see it. And so if you're spending a lot of time training somebody, it feels like it's cutting into your bottom line ... I've tried saying in my own firm 'we have to make that investment' because over time that turns into passive income. It lets you get off the wheel so you could be on holidays and you actually have people doing some billable work for you. And clients' work is getting done and you're reviewing it from time to time. But it's very difficult to get lawyers to get off the hamster wheel.⁶¹⁸

Delegating to systems also requires investment, with upfront expenditure and uncertain returns. Dina Tutungi, of Slater & Gordon, describes the investment necessary to establish that firm's work flow system.⁶¹⁹

*Getting a work flow system up and running is a long term project requiring significant resource and expenditure. It requires a group of lawyers to sit in a room with a team from IT, and to think through every step that a lawyer can take in the litigation process; everything that they do to prepare a case.*⁶²⁰

Thinking about division of labour as an investment, involving risk as well as potential reward, can help us identify the circumstances in which firms are more or less likely to make the investment and accept the risk. Chapter 8 will consider the prospects for big personal plight firms, as well as small ones, to innovate in this and other areas.

As with the fee-related risks discussed in Chapter 2 and Chapter 3, measures that reduce or externalize the risks involved in the investment are helpful.⁶²¹ Retaining casual or contract labour is less risky than hiring full-time. BB, for example, "would be happy to... pay someone on an hourly basis, but I wouldn't want to put them on a payroll... I just think there's a lot of bureaucracy that comes with that, and I don't want to deal with it."⁶²² Legal recruitment firms already offer to externalize some of the time involved in hiring. **A legal recruitment firm could reduce firms' hiring risk by paying new employees itself for a trial period of employment, and then taking a larger fee from the firm if and only if the employee "works out" and remains employed after a number of months.**

○ 5.9. CONCLUSION: VERTICAL DIVISION OF LABOUR

Vertical division of labour means delegating tasks to people or systems that can perform them more economically, without sacrificing quality (and sometimes improving it). Tasks can be delegated to junior lawyers, to non-lawyer staff, and to the clients themselves. They can also be delegated to systems with varying degrees of technological sophistication and ambition. All forms of vertical division of labour, in addition to reducing costs, carry the potential to save more expert and expensive labour for the numerous tasks that really call for it.

Vertical division of labour can certainly go awry, and personal plight creates special challenges for delegation not associated with other types of legal work. Nevertheless, many personal plight law firms could improve their accessibility and profitability by finding more opportunities to delegate. This Chapter concludes by arguing that vertical division of labour should be understood as an investment for firms, involving up-front costs and uncertain pay-offs. Chapter 8 of this volume will consider opportunities for small personal plight law firms, and big ones, to make this and other investments necessary to move into the "sweet spot" where accessibility, quality, and profitability coincide.

CHAPTER 6

○ HORIZONTAL DIVISION OF LABOUR AMONG LEGAL PROFESSIONALS

Vertical division of labour, the subject of Chapter 5, involves legal professionals delegating tasks, which they could perform themselves, to lower-cost workers and systems, in order to reduce costs while preserving quality. *Horizontal* division of labour, by contrast, means searching “laterally” for human professionals with distinct skill-sets useful to personal plight legal practice. Horizontal division of labour is essentially an effort to improve quality, not an effort to reduce costs.

Figure 9 Horizontal Division of Labour in Personal Plight Legal Practice



Chapter 6 is about horizontal division of labour among legal professionals. Section 6.1 considers horizontal division of labour between legal niche specialists on the one hand and generalists on the other; section 6.2 considers labour division among professionals with different legal skills. The role of referral fees in facilitating efficient horizontal division of labour among legal professionals is the subject of section 6.3. Chapter 7 considers the role that *non-legal* professionals can play in this process.

○ 6.1. SPECIALISTS AND GENERALISTS

Professional practitioners may be (i) *specialists* in certain niches (e.g. family law or personal injury law), or (ii) *generalists* familiar with multiple niches. Legal work done by specialists tends to be of higher quality, and specializing also has significant personal advantages for legal professionals. Generalism, however, has crucial accessibility benefits for personal plight legal practice. This section asks: How can labour be divided so as to simultaneously capture the benefits of specialization and generalism for clients and firms?

It should first be observed that specialization is a matter of degree. Indeed, anyone who practices law full-time might be considered a specialist in law itself.⁶²³ However, a lawyer willing to handle *any* legal need for any client (if such a lawyer still exists) would today be considered the ultimate generalist. Steadily increasing specialization among North American lawyers over the past 100 years has been widely documented,⁶²⁴ and attributed to factors such as the increasing complexity of the law and the increasing concentration of lawyers in urban areas.⁶²⁵ Ronit Dinovitzer found that, just five years into their careers, 65.2% of Canadian lawyers already specialize (defined by Dinovitzer as spending more than half of their time working in one out of 22 legal niches).⁶²⁶ Among those interviewed for this project, several lawyers specialized in a small number of personal plight niches,⁶²⁷ but most specialized in only one.

○ 6.1.1. THE ADVANTAGES OF SPECIALIZATION

Specialization has clear and well-established benefits, both for clients and for legal professionals. DD, leader of a large personal plight firm, was particularly unequivocal on this point:

*I really honestly believe with all of my fabric that specialization is the pathway to true professionalism. Because when you really think fundamentally about what specialization allows, it allows the client to have access to ... the very best knowledge about a particular thing, and also the very best methodology for achieving the outcome.*⁶²⁸

Research tends to support this view. Moorhead, Harding and Sherr were able to gain access to English solicitors' files in order to study the difference in quality between specialists' and non-specialists' work.⁶²⁹ Specialist firms, they found, offered markedly higher-quality services within their specialties. In addition to actually completing a higher proportion of the cases they began,⁶³⁰ specialists also got better results for their clients. In all of the case types considered in this study, the non-specialist firms were less than half as likely as the specialist firms to obtain positive results.⁶³¹ For example, in welfare benefit cases, approximately 29% of specialist firms obtained payments for their clients but only 13% of non-specialist firms did so.⁶³² On the basis of his extensive and systematic observation of oral advocacy by lawyers and non-lawyers, Herbert Kritzer found that specialization in a legal niche is a better predictor of an advocate's efficacy than whether or not the individual had a law degree.⁶³³

There are a number of plausible reasons why specialists would outperform generalists. Superior knowledge of the relevant law and techniques is the most straightforward reason. Toronto personal injury lawyer SS argued that, in his niche, generalists do grave damage to client interests:

The problem is the family lawyer who handled the guy's divorce or his real estate lawyer who handled his home purchase, is still going to say he can handle his personal injury claim if he wants to...there are lawyers out there who do that. They're often the ones that screw them up and they're often the ones who refer them out at a certain point. If they're smart, they'll refer it out at a certain point before they do some damage to the client. ... John Smith who did your real estate deal is still going to try what he thinks is an easy, lucrative personal injury file.⁶³⁴

North American lawyer licensing is currently *universalist* – those licensed to practice law may provide any and all legal services.⁶³⁵ Two interviewees argued that, to protect quality, lawyers' licenses should instead be restricted to niches such as criminal defence or personal injury law. They referred approvingly to doctors, who must obtain specialized training (beyond the baseline M.D. degree) and a niche license in order to practice medicine in many niches.⁶³⁶

Specialization in a legal niche is a better predictor of an advocate's efficacy than whether or not the individual had a law degree.

Specialization may also reduce price and thereby increase accessibility, especially in time-billed practices. Although specialists might have higher hourly rates than generalists do,⁶³⁷ there is reason to believe they also get jobs done more quickly and therefore affordably.⁶³⁸ DD suggested to the author that generalists spend "30-40%" of their time "feeling incompetent" because they lack expertise in the specific legal needs of many of their clients.⁶³⁹ Under time-based billing, the consequence is often that the client is "paying half the fees that they're paying [for the lawyer] to educate themselves."⁶⁴⁰ According to DD, "in the consumer legal services space, small practitioners do that all the time."⁶⁴¹

Interviewees offered personal reasons why they had specialized or wished to do so. These include gaining confidence in their expertise,⁶⁴² and building a reputation that would generate high-quality referrals.⁶⁴³ The law changes constantly, and clients won't or shouldn't always pay for the research necessary for a legal professional to "stay on top" of new developments. Staying on top of fewer niches less mentally taxing and less time consuming.⁶⁴⁴ Three interviewees said that generalism has become less viable in recent decades as the law has become more complex.⁶⁴⁵

Handling similar files many times allows specialist lawyers to develop efficiencies and invest in niche-specific processes and software.⁶⁴⁶ It also supports a positive reputation with opposing counsel and adjudicators that may lead to favourable resolutions more quickly,⁶⁴⁷ in turn producing more income and referrals.⁶⁴⁸ American family lawyer and blogger Lee Rosen has written:

*A narrow focus gives you an opportunity to learn the details. The narrow focus allows you to practice until you become the best. The narrow focus gives you the experience required to be an expert and deliver your offering with exceptional results. A narrow focus gives you the opportunity to turn those results into a powerful message. Your clients tell others. You tell others. Everyone knows you as that lawyer: the lawyer who's amazing at doing that thing and getting the best outcomes.*⁶⁴⁹

Reputational incentives also seem to favour specialization. The more contested cases a firm handles in a specific niche, the more it gains “repeat player” advantages such as familiarity with individuals on the other side, which in turn leads to better outcomes with lower investments of time and money.⁶⁵⁰ Kritzer argued that personal injury specialists are more likely than generalists to “hold out” for the best possible settlement offer from the defendant. This, he explained, is because specialists’ repeated negotiations with the same defendants and defence counsel give them a strong incentive to preserve a reputation for firmness in negotiation.⁶⁵¹

Comments from SS are harmonious with Kritzer’s view. SS described a hypothetical case in which a defendant has offered to settle for \$500,000 but “you know it’s a \$750,000 case, you just got to hold their feet to the fire and get it through discoveries and get a trial date set.”⁶⁵² Two years and hundreds of hours of work might be necessary to obtain the \$750,000 offer, which would increase the firm’s contingency fee by only \$25,000 or \$30,000. In this situation,

*Short term business thinking says yeah, cash in now, don't spend money and time because your marginal rate of return is minimal. But over the long term, that's why we get the work we get, because defence lawyers know they're not going to steal one from us. We're not settling a case for 50 percent, so we can get a quick hit and some bills. We don't need to do that.*⁶⁵³

Variety may be the spice of life, and a career as a generalist lawyer does offer that benefit as well as mitigating the risk that work in a particular niche could dry up.⁶⁵⁴ However, the appeal of specialization appears to outweigh it for most, at least in the long run. Donald Landon observed a pattern of generalism at the outset of lawyers’ careers followed by “pruning” of undesirable practice areas and increasing specialization.⁶⁵⁵ Many lawyers interviewed for this project reported a similar process in their own careers.⁶⁵⁶ The research reviewed above, along with the comments of

the interviewees, suggests strongly that it is more difficult to provide high quality, accessible, and profitable legal services if one is trying to do so in a large number of legal niches simultaneously. **“Jack of all trades” generalism is problematic and most personal plight clients would be better off with a specialist.**

○ 6.1.2. CONNECTING PERSONAL PLIGHT CLIENTS TO SPECIALISTS

Nevertheless, **the rise of specialization has complicated access to justice, even as it has improved service quality.**⁶⁵⁷ The typical individual with a personal plight need is legally inexperienced, and unfamiliar with law firms.⁶⁵⁸ She is fortunate if she even knows that she needs legal services.⁶⁵⁹ Even if she does know this, she might not know what *kind* of legal service she needs. There is a good chance that she does not know of any lawyers, or no more than one or two whom she would trust, and those may well not practice in the applicable legal niche.⁶⁶⁰ As one respondent in a personal injury firm said, “people don’t really know. You’re in a car accident and ... maybe never had a lawyer... these people are in shock and they don’t really know what to do.”⁶⁶¹ The more generalist bar of the mid-20th century offered an important accessibility advantages to actual and would-be personal plight clients: it was more likely that the lawyer a personal already knew of and trusted would actually be able to help her with the legal problem.

The internet is starting to offer some solutions to the challenge of connecting inexperienced clients to a specialized bar. Websites such as the UK’s Law Superstore,⁶⁶² the Law Society of Upper Canada’s Lawyer Referral Service,⁶⁶³ and Avvo⁶⁶⁴ all seek to diagnose problems by having users respond to a series of questions in plain language. They then provide referrals to appropriate legal specialists. “Smart Legal Start” was a concept proposed by students in the Ryerson Law Practice Program Access to Justice Innovation Challenge.⁶⁶⁵ Instead of responding to prompts, a user would narrate his or her own problem in his or her own words, speaking into an app or telephone hotline. Artificial intelligence would transcribe the user’s story into a “Consumer Brief”, and “tag” it with

the legal needs that it reflects. The consumer briefs would then be forwarded to appropriately specialized lawyers, who would contact the users and form retainers with them.

However, the fact that potential personal plight clients are usually legally inexperienced and often distraught is an impediment to technological solutions that may work very well for other types of legal needs. It is not yet clear that high-quality initial client consultations by generalist lawyers can be replaced by technology. Ideally, such interviews are both empathetic and effective in obtaining legally necessary information, and offering clients specialist referrals (and perhaps initial advice).

○ 6.1.3. DIAGNOSIS AND REFERRAL GENERALISM

Thus, **generalism continues to play an important role in an accessible personal plight bar, particularly in diagnoses and referrals.** Firms should be able to identify clients' legal needs outside their own area(s) of specialization, and provide high-quality referrals to assist clients with those needs. Clients often experience clusters of legal and non-legal problems.⁶⁶⁶ A generalist legal professional performs a very valuable service if he or she perceives and briefly explains to the client most or all of the nodes in the client's problem. **The "inability to see problems beyond one's own specialty" – what Richard Moorhead termed "cognitive narrowness"⁶⁶⁷ – is a risk associated with specialization which should be resisted by personal plight practitioners.**

○ 6.1.4. GENERALISM IN ISOLATED COMMUNITIES

In remote and isolated communities, reconciling specialization and accessibility is an especially important access to justice challenge. Specialization in a given legal practice is correlated with population density of practice location.⁶⁶⁸ A mid-sized town offers enough business to support a specialist family lawyer. In a small village this lawyer may have to take on criminal defence and estates matters as well.⁶⁶⁹

Many rural communities report a shortage of legal services. Part of the reason, according to one report, is that "it is becoming less and less feasible for a lawyer to practise as a general practitioner, yet there may be insufficient work in any single practice area to justify specializing."⁶⁷⁰ If generalism is unfeasible and specialization is uneconomical, the path between the rock and the hard place is to close one's rural practice and move to a city, which exacerbates existing access to justice problems in rural areas.⁶⁷¹

Isolation need not be geographic; it can also be linguistic.⁶⁷² A practitioner who speaks a particular language and draws most or all of his or clientele from that linguistic community may have good reasons to be a generalist. Members of the linguistic community may be predisposed to bring any and all legal needs to this practitioner because of the language issue. They may also not know, or be disinclined to trust, legal professionals from outside the group. Lack of cultural competence on the part of specialists may prevent effective retainers in these situations.⁶⁷³

What good is referral to a specialist if that specialist is hundreds of kilometres away?

Thus, the accessibility benefits of diagnosis and referral generalism are especially important in communities that are geographically or linguistically isolated.⁶⁷⁴ Generalism is one of the ways that the personal plight bar can respond to the call in the Futures Report to better respond to the needs of Canada's diverse population.⁶⁷⁵ If there is only one lawyer in an isolated community, it is very valuable for him or her to provide diagnosis and referral for as many of the most common legal needs as possible.

However, diagnosis and referral generalism may be insufficient in these situations. What good is referral to a specialist if that specialist is hundreds of kilometers away? The increasing feasibility of remote legal service provision offers a partial answer.⁶⁷⁶ As video telephony and other internet functionality improves, it is becoming more and more viable to obtain some legal services from a geographically distant firm.⁶⁷⁷ The same developments make it increasingly feasible for a legal professional in a small community to develop niche expertise and deploy it on behalf of clients around the province or even the country, while continuing to offer diagnosis and referral generalism to residents of the community.⁶⁷⁸

Nevertheless, **especially in isolated communities, generalism should arguably go beyond diagnosis and referral, and take the form of "front-line" service provision offered in collaboration with remote specialists.** For example, a generalist within the community might conduct client intake and handle procedural court appearances. If there is a language barrier, he or she would provide translation. However, they would subcontract legal analysis and complex drafting tasks within the file to a specialist firm based in an urban centre, with which he or she would communicate via telephone, email and other means. If an occasional in-person appearance from the urban specialist is necessary, the specialist would fly in. The community-embedded generalist thus preserves his or her relationship with the clients, and delivers a service with the quality benefits of specialization.

Alternatively, the local generalist firm could have a video telephony consultation room and a set of referral relationships with remote specialist firms. Under this model, the local generalist would play a more limited role, e.g. providing the referral, verifying the client's identity, and providing the private room and high-speed internet connection with which the client would communicate with the remote urban specialist firm. These are merely two among many models that could successfully meld the benefits of specialization and generalism, even for geographically or otherwise isolated communities.⁶⁷⁹



○ 6.2. LEGAL SKILL SPECIALIZATION

A second type of horizontal division of labour among legal professionals is also valuable. A legal professional might concentrate professional development in a particular legal *skill*, as opposed to a legal niche. Writing about the Canadian legal profession in 1990, Stager and Arthurs described firms with

division of labour not only according to the field of law but also according to the roles or functions to be performed. The vernacular expression ‘finders, minders, and grinders’ -- describes three basic aspects of client relationships. Prominent, senior lawyers are ‘finders’ of clients, through business and social connections in the community. Clients are then passed on to ‘minders’ who will maintain regular contact with clients, while younger partners and employees are ‘grinders’ who do much of the legal work.⁶⁸⁰

These authors were describing large law firms with long-term corporate clientele. However there are also examples of legal skill specialization in personal plight legal practice. Windsor lawyer QQ, recently called to the bar, spoke of his aspiration to become a specialist in trial advocacy, to whom civil cases in various niches would be referred in order that he conduct the trial.⁶⁸¹ Toronto lawyer Mick Hassell already offers a service of this nature.⁶⁸² Criminal defender C2 told the author that he doesn't do appellate work, and said that, for the most part, either “you are a trial lawyer or appeal lawyer” in criminal defence.⁶⁸³

The lawyer stands between the legal system and the client, translating and mediating between these two worlds.

Effective personal plight practice, in any niche, requires a complex balance of forceful advocacy and creative compromise, in pursuit of an advantageous resolution for one's client at the lowest possible financial, emotional, and temporal costs.⁶⁸⁴ The balance depends on the case and often shifts over the course of each case. The lawyer stands between the legal system and the client, translating and mediating between these two worlds. Some fortunate souls are equally adept at all of these roles, while others excel at one element more than others. Mather et al, reporting on their interviews with family lawyers, wrote that

46% of the lawyers in our sample [were] legal craft oriented, 28 percent as client-adjustment-oriented, and 26 percent as having some elements of each. ... Seeing their primary role as providing legal advice and assistance, [‘legal craft oriented’] attorneys tended

to feel uncomfortable when they faced clients who demanded psychological support, financial counseling, parenting advice, and general guidance about life choices... the lawyers in our sample that we classified as primarily oriented toward client-adjustment were likely to be attracted to divorce cases by precisely those emotional needs and problems of living that distracted or repelled legal-craft-oriented attorneys.⁶⁸⁵

Toronto criminal defender C2 described horizontal division of labour within his own firm:

A lot of what I do is talking to the clients, working relationships, fostering trust within me and our support to ensure we can do the job for them ... there's a lot of things that I am not as good at as [C2's associate]... Not all litigators are good writers. Not all writers are good litigators. There's all sorts of things. As long as the client is happy with the end result...⁶⁸⁶

Allocating each task within a personal plight file to the legal professional best trained and most apt to handle it is a valuable horizontal division of labour. It can improve the quality of the work product, reduce the amount of time it takes to create it, and create more satisfaction among the workers who get to do what they love. Chapter 8 will consider the potential for big and small personal plight law firms to take advantage of the opportunities offered by horizontal division of labour. However, the next section will consider another important way to encourage efficient horizontal division of labour: the referral fee.

○ 6.3. REFERRAL FEES: GETTING EACH CASE TO THE RIGHT PROFESSIONAL

Appropriately regulated referral fees can support efficient horizontal division of labour among legal professionals. A referral fee is a sum paid by a firm retained on a matter to the individual or firm that gave the client the name of the retained firm. In most Canadian provinces, lawyers are permitted to pay referral fees to other lawyers,⁶⁸⁷ although not to non-lawyers.⁶⁸⁸ Referral fees are typically calculated as a percentage of the fee paid by the client to the retained firm. In the personal injury field, many Canadian personal injury firms pay referral fees equal to 15-20% of the fee they collect from the file.⁶⁸⁹ Flat referral fees are also offered by some firms.⁶⁹⁰

Appropriately regulated referral fees increase the likelihood that a personal plight client will ultimately retain the specialist firm that will provide them with the best service and value.⁶⁹¹ In the likely event that the client's first contact is with a different firm, a referral fee incentivizes and compensates that first-point-of-contact firm for the valuable work of identifying a suitable specialist. In contingency fee matters, percentage-based referral fees incentivize the referrer to send the matter to the firm that will obtain the largest recovery for the client, because this will generally produce the largest fee for the referred-to firm and ultimately the largest referral fee for the referring firm.⁶⁹²

As argued above, this diagnosis-and-referral generalism has essential access to justice benefits, given the characteristics of personal plight clients. This is especially true in isolated communities. Referral fees can make an important contribution to the economic viability of generalist firms. They might also form part of the compensation arrangement between a generalist firm providing front-line services and a geographically remote specialist firm providing analysis and drafting on the same files. Because they help reconcile specialization and generalism, **referral fees should continue to be permitted.**⁶⁹³

However referral fees also have drawbacks for clients. They represent a cost of business for service-providing firms which can be expected to increase average fees paid by clients. Excessive referral fees might even reduce the net fee for the service-providing firm to the extent that service quality will be undermined.⁶⁹⁴ If service-providing firms keep more of the fees for themselves (and pay less to the referring firms), then they will in principle be willing to put more time and money into the files, which is to their clients' benefit. Regulators should **cap referral fees at the minimum level sufficient to appropriately compensate and incentivize referrals.**⁶⁹⁵ There is also a convincing argument that referral fees should be disclosed more transparently, and subject to regulation regarding how they are calculated.⁶⁹⁶

CHAPTER 7

○ HORIZONTAL DIVISION OF LABOUR: NON-LEGAL PROFESSIONALS

“You need more than good lawyers to run a successful law firm. If you want to grow and succeed you need the skills of a very wide range of people from a wide range of disciplines — and not all of those people can be found within the confines of the legal profession.”⁶⁹⁷

Andrew Grech

Horizontal division of labour means deploying different skill sets in order to make personal plight legal services higher quality, more accessible, and more profitable. This effort should reach beyond the legally trained workers who were considered in Chapter 6. It should encompass non-legal professionals such as social workers, managers, entrepreneurs, and venture capitalists.⁶⁹⁸ Firms’ use of accountants and bookkeepers is an already-widespread example of horizontal division of labour with non-legal professionals.⁶⁹⁹ There are ample further opportunities along these lines, which this Chapter will consider. It concludes that, to allow firms the full advantage of horizontal division of labour with non-lawyers, regulators must relax their insistence that only lawyers can own and control law firms.

○ 7.1. HELPING PROFESSIONALS

Personal plight legal problems often come bundled with non-legal problems. Therefore, non-legal expertise is very often called for in meeting clients' needs.⁷⁰⁰ Members of the “helping professions,” such as social work, psychiatry, and occupational therapy, can play a valuable role. The Canadian Bar Association has called for “comprehensive, cost-efficient services through teams of lawyers... and providers of related services (like social workers).”⁷⁰¹ DD, leader of a large personal plight firm,⁷⁰² gave an example of how his firm does so:

*We have the biggest and best asbestos litigation department in the country... Quite often the family [is] dealing with a loved one who's going to die in a 3-18 month period. So you can imagine that's a very traumatic experience, there's a lot going on in their lives. Lawyers are terribly ill-equipped to deal with that. So the legal problem is just one dimension of what's happening to that group of people. So we'd employ social workers too... so most of the client interface is dealt through the social workers we deployed. So they'd arrange the palliative care, they'll do stuff that lawyers are completely helpless at.... it's all part of the service.*⁷⁰³

Multi-disciplinary partnerships involving lawyers and helping professionals are one way to offer “one-stop shopping” to personal plight clients with legal and non-legal needs.⁷⁰⁴ However, in North America, legal services regulation leaves very little scope for such arrangements, because it insists that lawyers remain in complete control of law firms.⁷⁰⁵

○ 7.2. MANAGERS

Even if the work done by a law firm is “purely” legal, the firm is a business that requires management to make it succeed.⁷⁰⁶ Management work includes dealing with employees (actual and potential), information technology, docketing and financial administration,⁷⁰⁷ marketing,⁷⁰⁸ and regulators.⁷⁰⁹ **Having non-lawyers perform management tasks is one way to divide labour horizontally.**

Management is not generally taught in law school, and very few legal professionals chose their careers due to enthusiasm or aptitude for this work.⁷¹⁰ Interviews conducted for this project suggested that many small firm practitioners would rather spend less time on management, and more time on “real” legal work that helps to move a client file forward and/or generate revenue.⁷¹¹ In the words of Ottawa human rights lawyer D2:

*The work you want to do is the work on your files and you want to move them forward. And you want to take on new files. What you end up doing, on Friday afternoon you're sitting in your office doing all of your paperwork, your management stuff, and we receive no training. You're just guessing at this point.*⁷¹²

In a similar vein, Sarnia family lawyer KK “wish[es she] could just deal with the law part and not worry about the business part of it... juggling with the billing, overhead, and everything else.”⁷¹³ DD, who has met many small firm lawyers in Australia and the UK, said that many “wake up thinking how did it come to pass that I spend 30%-40% of my time administrating, and not being a lawyer, and not serving my clients.”⁷¹⁴

Very few legal professionals chose their careers due to enthusiasm or aptitude for management work.

Some interviewees did report that they find these tasks un-arduous or even enjoyable.⁷¹⁵ However, the opportunity to offload such tasks, which large firms seem to be more likely to offer, is appealing to many. If being a personal plight lawyer *necessarily* also means being an entrepreneur and manager, then some talented new legal professionals who might want to help individuals with personal plight needs, will turn to corporate-clientele practice instead, simply because it allows access to larger firms and therefore careers with fewer non-legal risks and obligations.⁷¹⁶

In addition to professional dissatisfaction, having personal plight lawyers manage their own firms can also create more concrete problems in terms of service quality, accessibility, and profitability. JJ, a family lawyer and former leader of an association of lawyers practicing in rural Ontario, said that she

*see[s] a lot of soles and smalls especially in the counties where you have people who are good lawyers, but lousy businesspeople. They need that kind of backend support and we don't seem to have that kind of a process... Drive through any small town in Southern Ontario and you look at these storefronts. I see some of my colleagues with outdated offices and outdated modes of operating. There's better ways of doing things, but we're all not good businesspeople.*⁷¹⁷

○ 7.3. RESEARCH AND DEVELOPMENT

Certainly, many management tasks currently consuming lawyer time could better be performed by other people. At the same time, research and development work that could move personal plight firms into the sweet spot is simply not being done at all in most firms. Jordan Furlong defines research and development as “activities that a business undertakes in the hope they will lead to the development of new (or the improvement of existing) products, services, and procedures.”⁷¹⁸ Furlong has called for an expansion of legal R&D in four areas: “New Products And Services; New Delivery Mechanisms; New Pricing Systems; New Management Systems.”⁷¹⁹ The predominant billable hour system is a disincentive for lawyers to spend their own time on non-billable efforts to devise and improve service models, despite its potential to make large long-run

contribution.⁷²⁰ **Non-lawyer consultants and executives could play a key role in research and development work within personal plight law firms.**⁷²¹

○ 7.4. LEGAL PROCESS ANALYSIS

Richard Susskind has identified a key role for “legal process analysts” to scrutinize a firm’s stream of cases and identify opportunities to more efficiently divide the necessary labour among legal and non-legal professionals as well as machines and systems.⁷²² The CBA’s *Do Law Differently* report describes the necessary work as “break[ing] down the way in which a given legal service is provided, map[ping] out the route by which a solution is reached, and figur[ing] out a more effective and efficient way to get there.”⁷²³

Legal process analysis facilitates the efficient vertical and horizontal division of labour described in Chapter 5, Chapter 6, and Chapter 7. It could also allow a firm to better predict, at the intake stage for any given case, what inputs will likely be necessary to bring it to a resolution.⁷²⁴ This would in turn **allow the firm to confidently offer price-certainty in fees**, which as Chapter 2 argued, is an important sweet spot strategy.

Legal process analysis requires time and a broad lens which may not come naturally to most practicing legal professionals. An excellent practitioner naturally focuses on the *one* file upon which he or she is working at any given moment in the day. A client paying for that professional’s time legitimately expects nothing less. However, moving a personal plight law firm into the sweet spot calls for its leaders to consider the next *thousand* cases, and devise workflows and divisions of labour to deliver high quality, accessible, and profitable service to each one of those thousand cases. Ottawa lawyer D2 noted that

*your sole or small practitioner... has very little time to think about systems. To think about efficiencies. To unpack law society rules around who you can bring into work with you to do the client intake, to manage client files while you are doing legal work. Being able to step away and look at these practices that often involve clients in a lot of trauma or distress, you don’t have the ability to look at how to make them work best for you from a more holistic perspective.*⁷²⁵

In a similar vein, the *Affordable Justice* report called for lawyers “taking time out from their day to day practice to conduct workflow analysis and establish more affordable, more sustainable, ways of operating.”⁷²⁶ Because “taking time out” for such purposes is so challenging for many personal plight legal professionals, the people in the best position to do this legal process analysis are likely not legal professionals at all. Although familiarity with the legal issues in play would be needed, a legal process analyst would not need to be a licensed legal professional.

○ 7.5. CAPITAL SOURCES

Non-lawyers could also be helpful sources of capital for personal plight law firms, and it is problematic that current “insulating” rules in North American legal services regulation sharply restrict their ability to play this role.⁷²⁷ Capital permits risk-taking, investment, and growth to efficient scale for a law firm. Across the personal plight quadrant, accessing capital can help personal plight law firms move into the sweet spot.⁷²⁸ Allowing firms access to more sources of capital would reduce the cost they pay for that capital, to the mutual benefit of the firms themselves and their clients.⁷²⁹

Access to capital is especially important for firms that offer the deferred-payment retainer models discussed in Chapter 3.⁷³⁰ Deferred payment is best known as a feature of contingency fee arrangements, although it may also be offered to a client (for example in a family law matter) whose final bill will be calculated on an hourly basis.⁷³¹ Deferred payment requires a firm to cover the expenses associated with the file while it is open. This includes the firm’s own labour and other costs for the months or sometimes years that the case remains open.

Firms that defer payment and front disbursements for clients make a crucial contribution to access to justice.

Deferred payment also, often, means that the firm covers disbursements paid to advance the client’s case. In personal plight cases requiring extensive expert evidence and services, disbursements can easily mount to five or six-digit sums.⁷³² These are typically not reimbursed to the firm unless and until the litigation produces a settlement or award sufficient to cover them. In his Chatham office, personal injury lawyer RR said “we work for free for 7 years,” and pointed to a file in the corner of his office that he said had “50 or 60 thousand dollars of [my] tax paid cash money” in it.⁷³³ Toronto personal injury lawyer SS said his firm carries “\$10 million in paid disbursements” at any given point in time, as a result of deferred payment arrangements.⁷³⁴

Firms that defer payment and front disbursements for clients make a crucial contribution to access to justice. Doing so requires a level of capital and risk tolerance that relatively few firms possess. As RR put the point, “there aren’t very many lawyers in the province who have the personal financial ability to even do that... 50 thousand dollars of their own money to inject into one file.”⁷³⁵ If firms had access to more sources of capital— for example through non-lawyer share ownership in firms— then more of them would be able to do this crucial access to justice work.⁷³⁶

Premature settlement risk is another reason why shallow-pocketed contingency-billing firms are hazardous to their clients’ interests.⁷³⁷ Insufficiently capitalized firms are tempted to settle expensive deferred-payment cases too early, in order to access the fee. SS argued that many personal injury firms “simply don’t have the financial ability to finance these cases properly, to get them ready

for trial, and try the case, and [take] the chance you're going to lose, and [have to] write off these disbursements."⁷³⁸ When they take on such cases anyway, they may face irresistible pressure to recommend low-ball settlements to their clients.

Third-party litigation financiers provide capital to "carry" deferred-payment cases.⁷³⁹ **Although not without its own problems, third party litigation finance is an example of horizontal division of labour reaching beyond the legal profession in order to access capital, that may be relatively scarce and expensive within the profession.** While this is already permitted, regulators continue to forbid longer-term "alternative business structure" arrangements by which non-lawyers could provide capital to law firms, for example by taking equity stakes in those firms.⁷⁴⁰ **Regulators should permit alternative business structures, in order to improve personal plight firms' access to non-lawyer sources of capital.**⁷⁴¹

○ 7.6. INNOVATORS AND ENTREPRENEURS

Chapter 7 has identified a range of specific tasks and functions involved in personal plight legal practice that might better be performed by non-legal professionals. However, the contributions of those outside the legal guild need not be limited to narrowly-defined functions; they could play a much more transformative role. **Non-lawyer innovators and entrepreneurs might devise as-yet unimagined ways to deliver high quality, accessible, and profitable personal plight legal services. The legal profession and its regulators should facilitate this possibility.**

An MBA might develop a way to manage the risk involved in flat fee pricing for contested personal plight matters. A website developer might figure out how to provide legal services over the internet that clients in crisis can trust. A family therapist might conceive a package of legal and non-legal services that meets the needs of large numbers of divorcing people. A team with all three of these skillsets might create a revolutionary new way to deliver accessible and high-quality personal plight legal services.

What would happen if innovators and entrepreneurs without law degrees could create, manage, and own personal plight law firms?⁷⁴² They would have to hire, or otherwise collaborate with, licensed legal professionals to perform core legal tasks such as calculating net family property, drafting compelling facta, and counselling confused and distraught clients.⁷⁴³ As the *Futures* report points out, licensed legal professionals are uniquely trusted by society to simultaneously advance their clients' interests while upholding the rule of law,⁷⁴⁴ and the prohibition on unauthorized practice of law reflects this policy. Moreover, in the personal plight practice quadrant, licensed legal professionals in wealthy countries have distinct skills that will not soon be replicated by information technology or offshore competition.⁷⁴⁵

However, one can imagine a law firm in which the lawyer's role is comparable, in Mitch Kowalski's striking simile, to the role of the pilot in an airline.⁷⁴⁶ In other words, lawyers as highly trained specialists might be employed to focus on the tasks for which they are best suited: helping clients with their legal needs. Responsibility for firm leadership and innovation (along with legal process analysis and capital supply) would be left to others. Such a law firm would not only grant the wish

expressed by many lawyers that they be able to focus on clients and their legal issues,⁷⁴⁷ but also allow non-lawyers with great ideas for running sweet spot law firms to put those ideas into effect.

○ 7.7. RECONCILING AUTONOMY, COLLABORATION, AND INNOVATION

Autonomy -- retaining control of one's own law practice -- is very important to many legal practitioners.⁷⁴⁸ Indeed, it is a regulatory requirement in almost all North American jurisdictions that law firms be controlled exclusively by lawyers.⁷⁴⁹ Can the benefits of collaboration with non-lawyers be reconciled with complete lawyer control over law firms?

Clearly, some forms of horizontal division of labour with non-legal professionals do not compromise lawyer control over law firms in any way. As noted above, it is already very common for lawyers to contract out tasks to accountants and bookkeepers, without giving up any autonomy over their practices. Likewise, firms can hire or form contracts with social workers, human resource professionals, and legal process analysts without giving up control.⁷⁵⁰ This works if the law firm identifies the value that horizontal division of labour can offer, and takes the initiative to reach out to secure it.

Audacious innovation does not come naturally to legal professionals.

What about the bolder forms of inter-professional collaboration and innovation that seem to be necessary to push personal plight legal practice into the sweet spot? Can they too be generated within the confines of the legal profession? To a certain extent, the answer is yes. The CBA's *Legal Futures* and *Do Law Differently* reports have highlighted many examples of bold departures from traditional practices initiated by personal plight legal practitioners.⁷⁵¹ This book has sought to do likewise. In recent years, ventures such as the Ryerson Legal Innovation Zone and the Mars LegalX cluster have encouraged innovation.⁷⁵²

More can also be done to promote innovation within the profession. Canadian law schools can try to make new lawyers more entrepreneurial and innovative, as some American ones already have.⁷⁵³ The Legal Futures Report proposed a "legal innovation investment fund," funded by Canadian lawyers, that would take stakes in promising legal ventures and pay dividends.⁷⁵⁴ That lawyers are allergic to innovation is a misleading stereotype that should be abandoned.

Nevertheless, innovation *led* by non-lawyers may be essential if our personal plight law firms are to make the necessary leap in accessibility without sacrificing service quality and economic viability.⁷⁵⁵ Scholars such as Jordan Furlong and Gillian Hadfield have argued persuasively that audacious innovation does not come naturally to legal professionals.⁷⁵⁶ In her book *Rules for a Flat World*, Hadfield suggests that because legal markets are "almost completely populated by lawyers, all trained in the same way, all required to operate in the same small set of business models, all

relying on the same restricted sources of capital," these markets will consistently fail to produce the "transformative innovations" that we need.⁷⁵⁷ Several interviewees agreed that lawyers tend to risk aversion or conservatism regarding practice models.⁷⁵⁸

One impediment to lawyer-led innovation in personal plight legal services is that the lawyers with the strongest *drive* to innovate are not the same people as the lawyers with the best *capacity* to create large-scale and durable innovation. The author's impression is that Canada's law students and newest lawyers are hungry, open-minded, and eager to try new things.⁷⁵⁹ However, rolling out innovative and accessible new approaches to personal plight legal practice, on a large scale, is work that calls for a certain level of experience. More experienced Canadian personal plight lawyers are less likely to be "hungry" and highly motivated to innovate. The reality is that, once he or she has some experience and a reputation, Canadian personal plight practitioners in many niches and geographic areas can make a comfortable living practicing in a very traditional way.⁷⁶⁰ It is a rare legal professional who, after decades of honing his or her craft helping clients with cases, and landing more challenging and lucrative cases, will wish to put those cases aside and focus on tasks such as management, expansion, and legal process analysis, let alone risking everything on an entrepreneurial re-imagining of the firm.

Non-lawyer innovators have a key role to play in filling this "innovation gap." However the role they would be *willing* to play is probably not compatible with the complete lawyer control over law firms upon which North American legal services regulators currently insist.⁷⁶¹ As noted above, it might be non-lawyer entrepreneurs or technology companies that are best able to devise innovative "sweet spot" models for personal plight legal practice.⁷⁶² It might be non-lawyer venture capitalists who are willing and able to capitalize such firms. However, entrepreneurs and investors seek entitlement to profits, not just employment or a consulting contract with a law firm. They are unlikely to accept these subordinate roles, and if legal services regulators permit them no others then they will simply ignore this market. As Toronto lawyer F2 put the point, "those people who are best at workflow process are not permitted to own law firms right now," which suppresses accessible innovation as well as competition.⁷⁶³

Opening the door to greater horizontal division of labour with non-legal professionals is in clients' interests because innovation leads to more accessible and high quality services. It is also in legal professionals' interests because new business models can help lawyers to more effectively meet client needs, increasing demand for their services in the process. It is essential that lawyers retain the autonomy to place their clients' interests ahead of shareholders' interests and all other business interests, but regulatory progress in jurisdictions such as Australia and the United Kingdom suggests that this goal can be readily achieved without blanket exclusions of non-lawyer investment.⁷⁶⁴ For these reasons among others, **regulators should take relax the "insulating" rules requiring law firms to be exclusively owned by lawyers, and permit alternative business structures.**⁷⁶⁵

○ 7.8. CONCLUSION: HORIZONTAL DIVISION OF LABOUR WITH NON-LEGAL PROFESSIONALS

Horizontal division of labour means involving different legal and non-legal skill sets in personal plight law firms, in order to improve quality and accessibility. The diversity of skill sets possessed by legal professionals -- including niche specialists, generalists and those with legal skill specialties -- should be intelligently deployed to efficiently deliver high-quality legal services. However, horizontal division of labour with *non-legal* professionals also offers important opportunities to improve personal plight legal practice. To maximize the potential for such collaborations, the legal profession will need to rethink its insistence on total lawyer control of law firms.



CHAPTER 8

○ FIRM SCALE: IS BIGGER BETTER, OR IS SMALL SUPERIOR?

How can personal plight law firms make their services more accessible to Canadians, without sacrificing quality or profitability? This book has identified a series of paths to this “sweet spot.” Chapters 3 and 4 focused on how fees are structured; Chapter 5 considered diversifying service packages; Chapters 6, 7 and 8 explored the potential of division of labour. This Chapter will consider the question of firm *scale*. How does the size of a law firm affect its ability to profitably deliver accessible and high quality personal plight legal services?

In Canada today, the personal plight sector of the bar is dominated by small firms and solo practitioners.⁷⁶⁶ The author is not aware of any such firms with more than a few dozen legal practitioners, and most firms are much smaller. By contrast, firms such as Co-Operative Legal Services and Slater & Gordon – which employ hundreds if not thousands of legal professionals – have emerged outside of North America.⁷⁶⁷ It is probably no coincidence that this has happened in Australia and the United Kingdom, jurisdictions that have permitted law firms to access external capital.⁷⁶⁸

Growth can offer personal plight firms economies of scale, meaning that the average cost of delivering services will decrease as the quantity served increases. Being bigger also makes it easier for firms to absorb risks and make investments required for sweet spot innovations. However, economies of scale are modest in personal plight legal services by comparison to other sectors of the economy, and technology is improving the ability of small firms to make sweet spot innovations. Ultimately, there is a place for both big firms and small ones in the personal plight legal services marketplace.

○ 8.1. DOES BIGGER MEAN BETTER FOR PERSONAL PLIGHT?

The potential for larger firms to increase access to justice for individual clients has been explained in detail by scholars such as Gillian Hadfield,⁷⁶⁹ Frank Stephen,⁷⁷⁰ and Laura Snyder,⁷⁷¹ as well as in the author's own work.⁷⁷² Here, it will suffice to note some of the reasons why **larger firms might find it easier than smaller ones to carry out the strategies proposed by this book**. Indeed, large consumer personal plight firms abroad have already adopted many of these strategies.⁷⁷³

○ 8.1.1. BIG FIRMS AND PRICE CERTAIN RETAINERS (CHAPTER 2)

Price certain retainers, for example flat or contingent fees, create risk for a firm because the labour required to resolve a personal plight matter (or even a stage thereof) is often difficult to predict.⁷⁷⁴ Larger firms tend to be better equipped to absorb this labour requirement risk by offering price certain retainers. In the United States, the “franchise” law firms of the 1990s (Hyatt Legal Services and Jacoby & Meyers) offered flat fees in contested divorces.⁷⁷⁵ DD, whose large firm currently offers flat fee personal plight services in Australia and the UK, stated frankly that “we couldn't do fixed fees and be a small boutique practice.”⁷⁷⁶

Offering easier payment terms makes a firm's services more accessible and potentially more profitable.

There are two reasons for this. First, larger firms handle more cases of each particular type in a year and can therefore identify predictable patterns in the labour requirements for those cases more quickly.⁷⁷⁷ Second, the variance in labour requirements that remains for a particular case type becomes less problematic with scale.⁷⁷⁸ If a single employment dispute, for which a flat fee has been charged, takes three times as long as predicted, that is a much more serious problem for a sole practitioner than it is for a firm of 100 lawyers.⁷⁷⁹

○ 8.1.2. BIG FIRMS AND DEFERRED PAYMENT (CHAPTER 3)

Offering easier payment terms (as opposed to requiring large upfront cash retainers) makes a firm's services more accessible and potentially more profitable.⁷⁸⁰ Doing so, however, exposes the firm to increased non-payment risk.⁷⁸¹ Again, a larger firm can more easily absorb this risk.

Appropriately regulated contingency fee services are a type of deferred payment retainer with especially powerful advantages for both firms and clients.⁷⁸² Larger firms should be able to safely offer their clients contingency fees on a broader range of cases, because they are better able to bear the multiple risks posed by contingency practice.⁷⁸³ As employment law sole practitioner YY put the point, “everyone wants a case on straight contingency but it is hard with a small practice when you don't have the wiggle room.”⁷⁸⁴

○ 8.1.3. BIG FIRMS AND DIVERSIFICATION OF SERVICES (CHAPTER 4)

Diversification of services, especially among price/quality tiers, is a key route into the sweet spot.⁷⁸⁵ However, creating a viable new model for personal plight legal services – e.g., unbundled, online, or systematized⁷⁸⁶ – requires an investment in research and development.⁷⁸⁷ Any new model must be devised, tested, and refined so as to meet the needs of the firm, its clients, and its regulator. This R&D investment is easier for larger firms to make. The necessary resources can more easily be obtained. Moreover, the investment can be amortized over a larger number of files taking advantage of the innovation, if it succeeds.⁷⁸⁸

Before it expanded into family law services, DD's firm "hired market research companies, and we did focus groups and loads and loads of research" in order to learn about what separating people want from a law firm. This informed the development by the firm of a new model – including fixed fees and sophisticated division of labour -- to meet client needs.⁷⁸⁹ This resource-intensive process is clearly easier for a larger firm.⁷⁹⁰

○ 8.1.4. BIG FIRMS AND VERTICAL DIVISION OF LABOUR (CHAPTER 5)

Scale should offer several advantages in delegating tasks efficiently along a pay scale.⁷⁹¹ First, identifying optimal vertical division of labour within a firm requires an investment of time,⁷⁹² which like other investments becomes easier to make as the firm becomes larger. Second, scale makes it easier for a firm to build a workforce precisely customized to the firm's caseload. In principle, this increases the likelihood that skill sets within the workforce will be applied to files that make optimal use of them. It should also reduce the chance that there will be labour shortage or surplus within the firm at any given point in time.⁷⁹³ Third, scale might also facilitate mentorship,⁷⁹⁴ to the extent that a larger firm provides opportunities for experienced professionals to pass on valuable knowledge and skills to less-experienced colleagues.

○ 8.1.5. BIG FIRMS AND HORIZONTAL DIVISION OF LABOUR AMONG LEGAL PROFESSIONALS (CHAPTER 6 AND CHAPTER 7)

Horizontal division of labour means involving a greater variety of legal and non-legal skill sets in personal plight legal practice.⁷⁹⁵ Here, again, larger firms should have some advantages. Optimal horizontal division of labour includes capturing simultaneously the benefits of legal niche specialization and generalism,⁷⁹⁶ and a large firm can simultaneously offer the benefits of specialization and generalism to its clients. It is more likely than a small firm to employ specialist professionals in *all* of the niches touched on by the client's problem. It is also more likely to have intake processes, and collaboration networks among its legal niche specialists, to ensure that all aspects of the client's situation are identified and dealt with appropriately. Scale also increases the capacity of a personal plight firm to deploy legal *skill* specialists (e.g. such as intake counsel or trial counsel⁷⁹⁷) and non-legal specialists to clients' benefit. **Rolling back insulating regulation and welcoming alternative business structures would allow personal plight firms to access capital and scale up, and thereby favour the emergence of "sweet spot" practice models.**⁷⁹⁸

○ 8.2. THE SUPERIORITY OF SMALL FIRMS?

Still, **it would be a mistake to write off small firms and solo practitioners in the personal plight sector.** If the economic advantages of scale are as large as the arguments above suggest, why haven't Canadian personal plight firms already scaled up in order to capture them? Insulating regulation restricting access capital is not a complete answer. Corporate-client law firms, in the same regulatory environment, have become very large using capital contributed by their own lawyer partners. Moreover, large firms providing a wide range of personal plight services did exist in the United States in the 1980s and 1990s, despite the same prohibition of alternative business structures.⁷⁹⁹ These firms (such as Jaccoby & Meyers and Hyatt Legal Services) exited the personal plight market or focused exclusively on personal injury, leaving other personal plight work to smalls and solos. This history suggests that insulating regulation does not make growth to large scale impossible, even if it does make it more difficult.

Economies of scale in personal plight legal practice will remain relatively modest.

○ 8.2.1. MODEST ECONOMIES OF SCALE IN PERSONAL PLIGHT

In any regulatory environment, **economies of scale in personal plight legal practice will remain relatively modest** compared to those found in other industries and other legal sectors. Auto manufacturers, for example, experience strong incentives to become large, because the fixed costs involved in designing, manufacturing, and marketing vehicles are so much more easily recouped by a firm that can sell tens of thousands of units. This is not true of law firms serving individual clients with personal plight needs.

By contrast to the needs of large corporate clients, the needs of personal plight clients can much more readily be met by solo lawyers or small firms. Unlike a major corporate lawsuit or transaction, it is unlikely that any single personal plight file will require more work, or more expertise in different legal specialty niches, than a single lawyer can provide. Corporate law firms have been required to grow along with their clients over the past century in order to meet the evolving needs of these clients; the same is not true for personal client law firms.

The personal plight lawyers interviewed for this research did not generally perceive many opportunities to improve quality, accessibility, or profitability by growing their firms.⁸⁰⁰ Two sole practitioners suggested that large firms actually have higher overhead costs and lower efficiency.⁸⁰¹ The law and economics literature suggests certain efficiency advantages for sole proprietorships.⁸⁰² Finally, it is worth noting that Australia has eliminated almost all of its insulating regulation, but in that jurisdiction 50% of all solicitors still work in firms with 4 or fewer partners.⁸⁰³ This again suggests that the economic viability of small firms is not merely an artefact of insulating regulation.

○ 8.2.2. SMALLS AND SOLOS: ROUTES INTO THE SWEET SPOT

Section 8.1 suggested some of the ways that scale might help a law firm handle the demands and opportunities of personal plight legal practice, given the increased capacity of large firms to absorb risk and make investments. However **small firm and solo professionals have their own distinctive and effective approaches to mentorship, to smoothing the peaks and valleys of client demands over time, and to capturing the benefits of division of labour.** Some of these approaches are long-established. Mentorship opportunities need not arise within a firm, they can emerge through informal social contacts, the Canadian Bar Association, and smaller ad-hoc groups.⁸⁰⁴ While a large firm can divide work so that no one has too much or too little to do at any point in time, smalls and solos can use referrals to accomplish the same goal. Referrals allow an overloaded practitioner pass new prospective clients to a colleague in another firm, and likely benefit from reciprocation at a later point in time.

It is becoming easier for small and solo firms to enjoy vertical and horizontal division of labour without the diversified pools of full-time employees found in large firms. Technological systems can make it easier to get by with less human clerical assistance. Employment lawyer II had worked in a large firm before starting his own practice with one other partner. Regarding the alleged division of labour advantages of large firms, II's view was that "I don't know what service they provide that I couldn't get on a cheaper scale myself." He argued that "because of the technology it is so easy to start and maintain a very high level practice with very few costs."⁸⁰⁵ Family lawyer Joel Miller also sees a bright future for "small law:"

*Small Law doesn't need fancy offices with high rent and support staff. We'll have virtual offices and virtual assistants. We'll operate from unconventional locations: Tim Horton's, the library, or from home, and use email, phones and video conferencing to offer our services to the consumer, rather than requiring her to come to us. Face to face meetings will be reduced. Home offices will increase.... Small Law will make effective use of the Internet and technological advances to be more effective and keep costs down.*⁸⁰⁶

Human skills sets (legal and non-legal) are still essential for optimal vertical and horizontal division of labour in personal plight law firms. However, technology is making it easier for a small firm to access these skill sets without the expense and risk of hiring full-time employees.⁸⁰⁷ Internet-enabled contracting provides ready access to help on a part-time or even piece-work basis.⁸⁰⁸ As video telephony and cloud-based applications improve, it will be increasingly viable for small firm and solo legal professionals to form productive and reliable – but casual – working relationships with physically remote collaborators of all kinds.⁸⁰⁹ It might even soon be possible for lawyers to form small partnerships or other collaborative work relationships with lawyers in geographically distant places, in order to share risks, pool investments, and efficiently manage caseload. Although

the emerging casual “gig economy” can certainly be criticized on other grounds,⁸¹⁰ it arguably helps even the playing field between large and small firms in terms of efficient division of labour.⁸¹¹

○ 8.3. ROOM FOR BOTH BIG AND SMALL

Consider the restaurants in any city. You will find large corporate chains, small owner-operated ventures, and franchises (which are simultaneously small in some ways and big in others). Food service regulators guarantee output quality; they do not restrict access to capital. Nor do they forbid non-chefs from owning restaurants on the grounds that only chefs can possibly care enough about the quality of the food. The resulting diversity of business models is advantageous to hungry people, but also to those who work in the sector, who have many options for employment and entrepreneurship. The urban restaurant industry has succeeded in several important ways that the personal plight legal sector has not. Its offerings are highly diversified and broadly affordable.

Without denying obvious differences between food and law, lessons can be drawn from the restaurant industry for the personal plight legal services sector. First, **there is room for both large and small firms.** The scale of unmet demand is such that, with the right innovations, a well-functioning market would support both models. Second, **firms of different sizes are ideal for different clients and different professionals in different contexts.** Regulators should eliminate unnecessary insulating regulation in order to allow this diversity to flourish.

Third, **franchising has significant potential to combine the benefits of big and small.**⁸¹² In this model, the franchisee firm itself remains small, owned and controlled by practicing lawyers who are embedded in the community and dedicated to focusing on their clients “one at a time.”⁸¹³ The franchisor, meanwhile, offers brand, back-office support, technological support, research, and many of the other advantages of a large firm.⁸¹⁴ Ottawa lawyer D2 said she would welcome the chance to outsource “all” of her office management tasks and back-end to a franchisor, provided that the arrangement “doesn’t compromise the solo or small’s ability to be themselves in the community.”⁸¹⁵ One interviewee mentioned early-stage plans to offer “standard operating processes” and work templates to family lawyers across the country, along with marketing and logistics support.⁸¹⁶

○ APPENDIX 1: SUMMARY OF RECOMMENDATIONS

Personal plight practice – the essential work that legal professionals do for individuals involved in disputes – can and must become more accessible. There is enormous economic opportunity for law firms to meet this challenge, without sacrificing service quality, legal professionalism, or profitability. Informed by interviews with practitioners and a review of all relevant literature, this book proposed a series of innovations to help practitioners to meet these objectives, and to take advantage of this opportunity. What follows is a list of all of the specific recommendations made in this book, with links to the sections of the book in which the arguments are developed.

○ RECOMMENDATIONS FROM CHAPTER 2: PRICE CERTAINTY

- Innovative approaches to pricing can create significant economic opportunities for personal plight firms by giving them access to the untapped markets of unrepresented people experiencing personal plight. ([Chapter 2](#))
- Providing a flat-fee service satisfactorily often leads to other opportunities from the same client. (Section 2.4.1)
- A move toward price certainty can improve client satisfaction, lawyer-client relationships and professionalism, as well as affordability and profitability in personal plight law practice. (Section 2.4.2)
- “Milestone” flat fees seem, in many personal plight practice contexts, to reflect an appropriate allocation of risk between client and firm. (Section 2.5.3.2)
- Firms concerned about the labour requirement risk involved in fixed fees should consider using “escape hatch” riders allowing the firm to apply a time-billed surcharge for time responding to client communications after a specified number of hours per month. (Section 2.5.5)
- Reforming family court procedure and general civil procedure to bring it closer to small claims court and administrative tribunal procedure would reduce labour uncertainty risk and enable the firms to offer more price certainty on these matters. (Section 2.6.1)
- Expanding the jurisdiction of Small Claims Court to cover higher-value disputes could have a similar effect. (Section 2.6.1)
- There is a persuasive case for a publicly administered – but not necessarily publicly funded – legal expense insurance regime. (Section 2.6.2)
- In regulating third party litigation funding, policy-makers and judges should consider its capacity to reduce the risk confronting firms and thereby facilitate price certainty. (Section 2.6.2)
- The government could offer interest-free litigation loans to personal plight clients. (Section 2.6.2)
- Time-billing personal plight practitioners may overestimate the labour requirement variability in their cases, and therefore overestimate the difficulty of setting economically sustainable flat fees. (Section 2.6.3)

○ RECOMMENDATIONS FROM CHAPTER 3: DEFERRED PAYMENT

- A personal plight firm that moves its retainers rightward on the Non-Payment Risk/Payment Timing Spectrum, while minimizing upward movement, will bring its services closer to the sweet spot. (Section 3.3)
- Accepting a smaller retainer deposit and/or accepting scheduled payments over time increases accessibility. (Section 3.3.2)
- Payment can be scheduled creatively to balance the client interest in deferred payment with the firm's interest in minimizing non-payment risk. (Section 3.3.2)
- Offering clients the benefit of payment after recovery might become feasible if third parties absorb some or all of the associated risk, or if personal plight firms are given more options to secure their accounts receivable. (Section 3.3.4)
- Law societies and legislators should consider whether legalizing and regulating the sale of personal plight claims to law firms would be favourable to the interests of personal plight claimants. (Section 3.3.5).
- Increasing personal plight firms' security in their work product, for example by offering lien-type rights over matrimonial homes and spousal support income streams, would reduce non-payment risk and increase the potential for offering more accessible payment scheduling to clients. (Section 3.4.1)
- Personal plight legal fees must continue to be regulated, because the nature of legal services leaves inexperienced individual consumers unable to adequately protect their own interests in an unregulated market. (Section 3.4.2)
- However, regulating fees with clear ex ante guidelines, which do not increase non-payment risk for compliant firms, would reduce non-payment risk and thereby lead to more accessible payment scheduling and lower fees overall. Delineating "safe harbour" billing practices which protect clients while eliminating fee "haircut" risk for firms would be helpful. (Section 3.4.2)
- In weighing relevant considerations to create and administer legal fee regulation, regulation's effect on nonpayment risk – and therefore on accessible service prices – should be among the factors on the policy scale. (Section 3.4.2)
- Tax law should permit billed-basis accounting for all deferred-payment accounts in law firms, in order to treat these arrangements fairly and avoid disincentivizing this access-enhancing practice. (Section 3.4.3)
- There is definitely room for improvement in contingency billing and its regulation, from a consumer welfare and access to justice point of view. (Section 3.4.4)
- However, regulators should consider removing impediments to the use of contingency fees in all personal plight cases where the client seeks purely monetary redress, including family law cases. (Section 3.4.4)

- There is a very real risk that some clients will pay far too much in contingency fees and regulators need to respond to this risk. However, capping contingency rates is a simplistic response to the problem, and one that may have unintended consequences. (Section 3.4.4)

○ **RECOMMENDATIONS FROM CHAPTER 4: DIVERSIFYING SERVICES**

- Firms should offer price/quality tiers to clients whenever they can, and legal services regulation should encourage them to do so. (Section 4.2.1)
- Class actions have powerful access to justice benefits and should be encouraged by regulators and legislators for appropriate matters. (Section 4.2.2)
- There are ways for firms to provide real, personalized advice to multiple clients simultaneously. The client workshop led by a lawyer is one such model. (Section 4.2.2).
- Unbundling lends itself well to flat or otherwise price-certain billing. (Section 4.4.1.1)
- Lawyers with experience in this area emphasize the importance of careful retainer drafting for unbundled retainers. (Section 4.4.2.2)
- Legislation should make it clear that judges must not compel lawyers who are in compliance with unbundled retainer obligations to their clients to do further work on the file. (Section 4.4.2.2)
- Personal plight firms should look for appropriate opportunities to offer more unbundled services. (Section 4.5)

○ **RECOMMENDATIONS FROM CHAPTER 5: VERTICAL DIVISION OF LABOUR**

- The accessibility benefits of delegating work down the pay scale are obvious in law firms that bill by the hour. Profitability in a time-billing firm generally also increases, and in flat and contingency-billed practices, the profit motive to delegate is even stronger. (Section 5.1, Section 5.2)
- Delegation may send tasks outside of the firm or even outside of the country, through processes such as offshoring and nearshoring. (Section 5.2)
- Unbundling can be considered a form of vertical division of labour. Costs are saved if the client's own opportunity cost to perform certain necessary tasks is less than what it would cost for the firm do it. (Section 5.3)
- The labour involved in personal plight legal practice can and should also be intelligently and selectively delegated to systems. Systematization, packaging, and commoditization represent progressively more ambitious delegations of legal tasks to non-human systems. (Section 5.4)
- Vertical division of labour creates time for lawyers and higher paid staff to use their skills to their best advantage. (Section 5.5)



- As with all good things, it is certainly possible to have too much delegation within a personal plight law firm (Section 5.6). However, on balance, a greater degree of delegation to humans and systems would be advantageous for many personal plight law firms and their clients. (Section 5.7)
- To encourage efficient vertical division of labour, regulators' codes of conduct could require time-billing firms to allocate tasks among available workers within the firm with exclusive reference to the best interest of the client, defined to include the client's interest in price as well as quality. (Section 5.7)
- Under time-based billing, offering a blended rate (in which all hours worked at the firm are charged at the same rate regardless of who works them) could incentivize rational delegation within a firm. (Section 5.7)
- Time-billing firms should consider billing non-lawyer labour to their clients, especially if they make commensurate reductions in their lawyers' billing rates. (Section 5.7)
- A legal recruiting firm could reduce firms' hiring risk by paying new employees itself for a trial period of employment, and then taking a larger fee from the firm if and only if the employee "works out" and remains employed after a number of months. (Section 5.8)

○ **RECOMMENDATIONS FROM CHAPTER 6: HORIZONTAL DIVISION OF LABOUR AMONG LEGAL PROFESSIONALS**

- "Jack of all trades" generalism is problematic and most personal plight clients would be better off with a specialist. (Section 6.1.1)
- However, the rise of specialization has complicated access to justice, even as it has improved service quality. Generalism continues to play an important role in an accessible personal plight bar, particularly in diagnoses and referrals. (Section 6.1.2)
- The "inability to see problems beyond one's own specialty" ... is a risk associated with specialization which should be resisted by personal plight practitioners. (Section 6.1.3)
- Especially in isolated communities, generalism should arguably go beyond diagnosis and referral, and take the form of "front-line" service provision offered in collaboration with remote specialists. (Section 6.1.3)
- Allocating each task within a personal plight file to the legal professional best trained and most apt to handle it is a valuable horizontal division of labour. (Section 6.2)
- Appropriately regulated referral fees can support efficient horizontal division of labour among legal professionals. Referral fees should continue to be permitted, but capped at the minimum level sufficient to appropriately compensate and incentivize referrals. (Section 6.3)

○ **RECOMMENDATIONS FROM CHAPTER 7: HORIZONTAL DIVISION OF LABOUR WITH NON-LEGAL PROFESSIONALS**

- Personal plight legal problems often come bundled with non-legal problems. Therefore, non-legal expertise is very often called for in meeting clients' needs. (Section 7.1)
- Having non-lawyers perform management tasks is one way to divide labour horizontally. (Section 7.2)
- Non-lawyer consultants and executives could play a key role in research and development work within personal plight law firms. (Section 7.3)
- Legal process analysis, perhaps carried out by non-lawyers, can facilitate efficient vertical and horizontal division of labour and sustainable price-certain fee models. (Section 7.4)
- Although not without its own problems, third party litigation finance is an example of horizontal division of labour reaching beyond the legal profession in order to access capital, that may be relatively scarce and expensive within the profession. (Section 7.5)
- Regulators should permit alternative business structures, in order to improve personal plight firms' access to non-lawyer sources of capital. (Section 7.5)
- Non-lawyer innovators and entrepreneurs might devise as-yet unimagined ways to deliver high quality, accessible, and profitable personal plight legal services. The legal profession and its regulators should facilitate this possibility. (Section 7.6)

○ **RECOMMENDATIONS FROM CHAPTER 8: FIRM SCALE**

- Growth can offer personal plight firms economies of scale, meaning that the average cost of delivering services will decrease as the quantity served increases. Being bigger also makes it easier for firms to absorb risks and make investments required for sweet spot innovations. Larger firms might find it easier than smaller ones to carry out the strategies proposed by this book. (Section 8.1)
- Rolling back insulating regulation and welcoming alternative business structures would allow personal plight firms to access capital and scale up, and thereby favour the emergence of "sweet spot" practice models. (Section 8.1)
- However, it would be a mistake to write off small firms and solo practitioners in the personal plight sector. (Section 8.2)
- Economies of scale in personal plight legal practice will remain relatively modest. (Section 8.2.1)
- Small firm and solo professionals have their own distinctive and effective approaches to mentorship, to smoothing the peaks and valleys of client demands over time, and to capturing the benefits of division of labour. (Section 8.2.2)



- It is becoming easier for small and solo firms to enjoy vertical and horizontal division of labour without the diversified pools of full-time employees found in large firms. (Section 8.2.2)
- There is room for both large and small firms in the personal plight sector. Firms of different sizes are ideal for different clients and different professionals in different contexts. (Section 8.3)
- Franchising has significant potential to combine the benefits of big and small. (Section 8.3)

○ APPENDIX 2 : RESEARCH METHODOLOGY

The overall goal of this research project was to identify practical opportunities for personal plight law firms to increase the accessibility of their services.⁸¹⁷ The methodology was designed with this goal in mind. In order to produce *practical* suggestions, the research had to be “realist” -- grounded in “a clear understanding of how lawyers actually behave... [in] their specific practice contexts.”⁸¹⁸ It needed to uncover the accessible models and innovations already deployed by personal plight law firms, as well as the business and professionalism dynamics of that affect the viability of such models and innovations in different personal plight practice contexts.

The methodology of *key informant interviews* was selected. Key informant interviews seek insight about a phenomenon from those who have such insight and are willing to share it with the researcher.⁸¹⁹ According to one oft-cited source, this approach is ideal in projects like this one where (i) generating recommendations is a central goal, (ii) qualitative as opposed to quantitative data is being sought, and (iii) “there is a need to understand motivation, behavior, and perspectives.”⁸²⁰

○ SAMPLING

The population under study was Ontario lawyers who help individual clients with legal needs arising from disputes (personal plight lawyers). Ten interviewees were selected through purposive sampling -- because their writing, public comments, or reputation suggested that they would be useful sources of ideas.⁸²¹ Three of these ten were personal plight lawyers not practicing in Ontario, and two were Ontario lawyers not actually practicing in personal plight niches. Although not technically members of the population under study, these individuals were included because of their insight into access to justice and innovation in private law firms.

A further 21 interviewees were selected through a stratified sampling approach, designed to ensure that all important subgroups within the study population were represented.⁸²² The Law Society of Upper Canada’s Lawyer & Paralegal Directory was used to identify candidates, to whom invitations were sent via email with telephone follow-ups as necessary.⁸²³ A Filemaker Pro database was used to track potential interviewees and their professional and demographic characteristics. In total, 48 individuals were asked for an interview, and 31 agreed to be interviewed. This is an appropriate sample size for key informant interviews according to the methodological literature.⁸²⁴

The resulting sample was reasonably representative of practicing Ontario personal plight lawyers, in terms of:

- Years of experience: 11 of the interviewees were within their 10 years of practice, 10 interviewees had between 10 and 25 years of practice, and 10 interviewees had been practicing for more than 25 years.
- Racialized status: Although interviewees were not asked to self-identify in terms of race or ethnicity, the author estimates that 7 out of the 31 (22.5%) would identify as non-white. 19.8% of Ontario lawyers identified as non-white in 2015.⁸²⁵
- Gender: 38.7% of the interviewees were female, compared to 42.6% of practicing Ontario lawyers.⁸²⁶

- Firm size: Nine interviewees were sole practitioners, 14 practiced in firms of seven or fewer lawyers, and the remainder practiced in larger firms. Little is known about the average firm size of the overall population of personal plight lawyers, but small firms and solos do predominate in this sector in North America.⁸²⁷
- Practice location community size: 15 of the 31 interviewees practiced in Toronto, as do 51% of Ontario lawyers (although probably a smaller proportion of Ontario personal plight lawyers).⁸²⁸ Nine practiced in other Ontario cities with population greater than 200,000, and three practiced in Ontario communities with population less than 100,000. The other four practiced outside of Ontario.
- Personal plight niches. The major personal plight niches were all represented, including family law (9 interviewees), personal injury law (8 interviewees), and estate litigation (4 interviewees). The sample was somewhat under-weight in employment law (3 interviewees) and criminal defense (2 interviewees). Other personal plight niches in which the interviewees worked included general civil litigation, refugee law, human rights. Two interviewees were primarily occupied in managing their law firms as opposed to personally practicing law.

○ INTERVIEWS

Between April 2015 and August 2016, these 31 lawyers were interviewed in a total of 28 interview sessions.⁸²⁹ The interviews typically lasted between 60 and 120 minutes. They were semi-structured, in the sense that the researcher used a list of topics and open-ended questions.⁸³⁰ Every effort was made to ask each interviewee the same questions. Two interviews were conducted via video-call and one via telephone, 22 were conducted in the interviewee's office, and six interviewees were conducted in public places or homes at the interviewee's request.

○ EMPIRICAL DATA ANALYSIS AND SECONDARY RESEARCH

The interviews were recorded with the informed consent of the participants,⁸³¹ and then transcribed by the author and two research assistants. The NVivo software package was used to code each transcript using 57 thematic nodes (such as "client sophistication," "screening out," and "settlement.") Any text that pertained to one of the thematic nodes was coded to associate it with that node. NVivo was then used to display all of the interview segments that related to each node, which was useful in gathering evidence pertaining to each theme.

A comprehensive review of the literature was conducted in tandem with the interviews. Interviewees were queried about ideas from the literature, and concepts raised by the interviewees were explored in the secondary sources. The law and economics literature was especially helpful in understanding the risks confronting personal plight law firms,⁸³² and in analyzing potential innovations as investments for firms.⁸³³ To understand lawyer-client relationships in personal plight matters, socio-legal literature grounded in qualitative research was essential.⁸³⁴ Throughout, policy-oriented access to justice work, especially that of the Canadian Bar Association's Futures Initiative and Access to Justice Committee, has been very helpful.

ENDNOTES

¹ J.D., Ph.D. Assistant Professor, University of Windsor Faculty of Law. www.noelsemple.ca. The empirical research for this book was generously supported by the Ontario Bar Association Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Research. I am grateful to Myla Picco and Victor Wong for research assistance. Thanks also to Jan Noel and Arthur Moss for thoughtful comments, and to Karin Galldin, Sarah Mackenzie, Fred Headon, and Leslie Lenton of the Canadian Bar Association for their unstinting support of this project. This work is dedicated to the best personal plight lawyer I know -- Angelique Moss of [Casey & Moss LLP](#).

² Edward O. Laumann and John P Heinz, "Specialization and Prestige in the Legal Profession: The Structure of Deference" (1977) 2 American Bar Foundation Research Journal 157.

³ John P. Heinz and Edward O. Laumann, "The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies" (1978) 76 Michigan Law Review 1111; John P. Heinz and Edward O. Laumann, *Chicago Lawyers: the Social Structure of the Bar* (New York: Russell Sage Foundation and American Bar Foundation, 1982). This hemispheric division by client type has been very influential for subsequent sociologists of the legal profession. See for example Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger Publishers, 1990); Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997); Dana Ann Remus, "Hemispheres Apart, a Profession Connected" (2014) 82 Fordham Law Review 2665. By contrast, Heinz & Laumann's subdivision of the personal client hemisphere into uncontested "personal business" and contested "personal plight" matters is much less frequently seen in the subsequent literature. However the premise of this paper is that, in terms of access to justice, personal plight legal practice is descriptively and normatively distinct from personal business legal practice.

⁴ The southern hemisphere of [Figure 1](#) includes state clients and large businesses that are not corporations.

⁵ CBA Legal Futures Initiative, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: CBA, 2014) [online: Canadian Bar Association](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf) <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> (last accessed: 2 June 2017) at 7.

⁶ For further explanation, please see Appendix 2 : Research Methodology. Authorized by University of Windsor Research Ethics Board Certificate Number 31927, granted February 25, 2015.

⁷ The dispute-related legal needs of owner-operated and small family corporations also belong in this category. Even when the client is technically a corporation, these cases share the characteristics of personal plight cases described below.

⁸ Neither the fact that the legal dimensions of a problem go unrecognized, nor the fact that the individual does not invoke any formal justice system processes to deal with the problem, prevent the need from being legal in nature so long as the law has the *potential* to assist: Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada* (Toronto: CFCJ, 2016) [online: Canadian Forum on Civil Justice](http://cfcj-fcjc.org/sites/default/files//publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf) <<http://cfcj-fcjc.org/sites/default/files//publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf>> (last accessed: 2 June 2017) at 1.

⁹ *Ibid.*; Trevor C.W. Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: CFCJ, 2016) [online: CFCJ](http://www.cfcj-fcjc.org/sites/default/files//Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf) <<http://www.cfcj-fcjc.org/sites/default/files//Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>> (last accessed: 2 June 2017) at 5.

¹⁰ "G20 Class Action," <<http://www.g20classaction.ca>> (last accessed: 2 June 2017).

¹¹ Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access To Justice* (Toronto: University of Toronto Press, 2012).

¹² Michael Trebilcock, Anthony Duggan and Lorne Sossin, "Introduction" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access To Justice* 2012) at 4; Canadian Bar Association (CBA) Standing Committee on Access to Justice, *Underexplored Alternatives for the Middle Class* (Ottawa: CBA, 2013) [online: CBA](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf) <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf> (last accessed: 2 June 2017). However, it certainly cannot be presumed that low-income people have all of their personal plight legal needs met by the state, especially in the case of those civil legal needs for which legal aid coverage is meager regardless of one's income: Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Ministry of the Attorney General (Ontario), 2008) [online: Ministry of the Attorney General \(Ontario\)](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/) <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>> (last accessed: 2 June 2017) at 76.

¹³ Indeed, access to legal services is arguably improving for corporate clients and for individuals with uncontested legal needs. Technology and the evolving legal services industry are creating more options than ever before for meeting such needs: CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online: <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf) at 19; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015).

¹⁴ Daphne Dumont aptly identifies the "double pressure" placed on clients by court case: they must learn both the law governing their particular need and they must learn the necessary legal procedure. They must do both quickly enough to make the necessary decisions: Daphne Dumont, "'Better . . . or Worse?' The Satisfactions and Frustrations of the Lawyer-Client Relationship" in David L. Blaikie, Thomas Cromwell & Darrel Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012) at 15.

¹⁵ Gillian K. Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 *Michigan Law Review* 953 at 965-8; Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It* (New York: Oxford University Press, 2016) at Chapter 7.

¹⁶ The term "civil" includes family law problems for the purpose of this book.

¹⁷ Consumer, debt and employment problems are most common, followed by neighbour, discrimination and family problems: Trevor C.W. Farrow et al., "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report." (Toronto: CFCJ, 2016), [online: <http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf) at 1, 7-8.

¹⁸ *Ibid.* at 11: "Nearly one-third (30%) of the respondents reported their problems had not been resolved and were ongoing. The majority (55%), however, reported that their problems had been resolved . . . Among those with problems that had been resolved, 46% said the outcome for one (or both) of their problems was unfair."

¹⁹ *Ibid.* at 9.

²⁰ Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93 *Canadian Bar Review* 639, [online: <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016>](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016) (last accessed: 2 June 2017).

²¹ Michael Trebilcock, "The Price of Justice" in Trevor Farrow & Les Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018); Gillian K. Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans" (2010) 37 *Fordham Urban Law Journal* 129, [online: <http://works.bepress.com/ghadfield/31>](http://works.bepress.com/ghadfield/31) (last accessed: 2 June 2017) at 136.

²² Martin Gramatikov, "A Framework for Measuring the Costs of Paths to Justice" (2009) 2 *The Journal Jurisprudence* 111, [online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279397>](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279397) (last accessed: 2 June 2017); Noel Semple, "The Cost of Seeking Civil Justice in Canada," (2015) 93 *Canadian Bar Review* 639, [online: <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016>](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016) at 642.

²³ Section 3.4.3, below.

²⁴ Ontario Trial Lawyers Association, *Submission on Alternative Business Structures* (Toronto: OTLA, 2014) [online: OTLA <https://www.lsuc.on.ca/uploadedFiles/Ontario%20Trial%20Lawyers%20Association.pdf>](https://www.lsuc.on.ca/uploadedFiles/Ontario%20Trial%20Lawyers%20Association.pdf) (last accessed: 2 June 2017) at 32.

²⁵ Noel Semple, “[Personal Legal Services: Mending the Market \(Working Paper, April 2017\)](https://ssrn.com/abstract=2958845),” [<https://ssrn.com/abstract=2958845>](https://ssrn.com/abstract=2958845) (last accessed: 2 June 2017) at section 2.2.

²⁶ Section 3.4.3, below.

²⁷ *R. v. Rowbotham*, 41 CCC (3d) 1; 63 CR (3d) 113; [1988] CarswellOnt 48; [1988] OJ No 271; *New Brunswick (Minister of Health and Community Services) . G. (J.)*, [1999] 3 S.C.R. 46.

²⁸ Suzanne Bouclin, Jena McGill and Amy Salyzyn, “Mobile and Web-Based Legal Apps: Opportunities, Risks and Information Gaps” (2017) *Canadian Journal of Law and Technology*, [online: <https://ssrn.com/abstract=2960207>](https://ssrn.com/abstract=2960207) (last accessed: 2 June 2017) at Part I.

²⁹ The most dramatic example is the inadequate criminal defence of Donald Marshall Jr., who was wrongfully convicted and imprisoned for 11 years. The Marshall Inquiry found that poor work by Marshall’s lawyers contributed to this miscarriage of justice, and that his aboriginal status was part of the reason why he received a “totally inadequate defence.” (Alexander Hickman, Lawrence A. Poitras and Gregory T. Evans, *The Marshall Inquiry: Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Province of Nova Scotia, 1989) [online: Province of Nova Scotia <https://novascotia.ca/just/marshall_inquiry/>](https://novascotia.ca/just/marshall_inquiry/) (last accessed: 2 June 2017)). For a more recent account, see Yedida Zalik, *Aboriginal Peoples and Access to Legal Information* (Toronto: Community Legal Education Ontario, 2006) [online: CLEO <http://www.plelearningexchange.ca/wp-content/uploads/2014/03/Aboriginal-Peoples-and-Access-to-Legal-Information-Report.pdf>](http://www.plelearningexchange.ca/wp-content/uploads/2014/03/Aboriginal-Peoples-and-Access-to-Legal-Information-Report.pdf) (last accessed: 2 June 2017) at 22: “respondents discussed the lack of services and limited access to counsel for Aboriginal clients. They indicated that frequently individuals are unrepresented because they are denied legal aid coverage, or there are no lawyers who practice in rural or remote areas.” Regarding the inaccessibility of legal services to homeless Canadians, see Suzanne Bouclin, “Regulated Out of Existence: A Case Study of Ottawa’s Ticket Defence Program” (2014) 11 *Journal of Law and Equality* 35, [online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465976>](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465976) (last accessed: 2 June 2017).

³⁰ Michael Trebilcock, “The Price of Justice” in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018).

³¹ Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: ACAJCFM, 2013) [online: ACAJCFM <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf) (last accessed: 2 June 2017); Action Committee on Access to Justice in Civil and Family Matters, *Access To Civil & Family Justice: A Roadmap for Change* (Toronto: Canadian Forum on Civil Justice, 2013) [online: CFCJ <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) (last accessed: 2 June 2017); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: LCO, 2013) [online: LCO <http://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/>](http://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/) (last accessed: 2 June 2017); Advocates’ Society, *Family Justice Reform Project* (Toronto: The Advocates’ Society (Ontario), 2014) [online: The Advocates’ Society \(Ontario\) <http://www.advocates.ca/assets/files/pdf/news/Family_Justice_Reform_Paper-Grassroots_Project_oct6.pdf>](http://www.advocates.ca/assets/files/pdf/news/Family_Justice_Reform_Paper-Grassroots_Project_oct6.pdf) (last accessed: 2 June 2017); Barbara Landau et al., *Home Court Advantage: Creating a Family Law Process That Works (Final Report and Recommendations from The Home Court Advantage Summit)* (Toronto: Ontario Bar Association, 2009) [online: OBA <https://www.oba.on.ca/>](https://www.oba.on.ca/); Noel Semple and Nicholas Bala, *Reforming the Family Justice System: An Evidence-Based Approach (Report commissioned by the Association of Family and Conciliation Courts, Ontario Chapter)* (Toronto: AFCC Ontario Chapter, 2013) [online: SSRN <https://ssrn.com/abstract=2366934>](https://ssrn.com/abstract=2366934) (last accessed: 2 June 2017).

³² Much of the leading work on structuring private practice to enhance access to justice has come from the Canadian Bar Association: CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>>; CBA Access to Justice Committee, *Reaching Equal Justice: An Invitation To Envision And Act* (Ottawa: CBA, 2013) [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): CBA <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> (last accessed: 2 June 2017)2013.

³³ Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants" (2013) 91 *Canadian Bar Review* 67 at 75-6; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Kingsville, Ontario: Representing Yourself in a Legal Process, 2013) [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): RYLP <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> (last accessed: 2 June 2017).

³⁴ Rebecca Sandefur's meta-analysis found a "potentially very large impact of lawyer representation on lawyer case outcomes... expanding access to attorneys could radically change the outcomes of adjudicated civil cases" Rebecca Sandefur, "Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact" (2015) 80 *American Sociological Review* 909. For an example of this finding in the Canadian context, see e.g. Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 *Osgoode Hall Law Journal* 71.

³⁵ Noel Semple, "The Cost of Seeking Civil Justice in Canada," (2015) 93 *Canadian Bar Review* 639, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> .

³⁶ Lawyers should aspire to serve as many potential clients as possible, because it is our duty to make justice accessible (Law Society of Upper Canada, "[Barristers' Oath](http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=9720)," <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=9720>> (last accessed: 2 June 2017)) but also because it is also in our economic interest to do so.

³⁷ Philip Marsden and Peter Whelan, "'Consumer Detriment' and its Application in EC and UK Competition Law" (2006) 2006 *European Competition Law Review* 569. Given the special nature of the lawyer-client relationship clients are more than merely the simplistic consumers of economic theory, however they are *still* consumers with typical consumer interests: Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015)at 20, 27.

³⁸ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 20.

³⁹ "Each customer has different value propositions. These may include costs, security, fear, social status, speed and delivery. Lawyers must dig down and discover what the customer really wants in order to deliver the best value to that customer. Determine the value the customer is looking for, and then exceed those expectations." (Lonny Balbi, "Flat-fee billing: replacing time with value ([The Lawyers Weekly, July 03 2009](http://www.lawyersweekly.ca/articles/954))," <<http://www.lawyersweekly.ca/articles/954>> (last accessed: 2 June 2017)).

⁴⁰ Not all personal plight clients are inexperienced. Criminal defense practice, for example, may include more clients with prior criminal justice system experience. Hamilton criminal defence lawyer A2 (who had been practicing in the area for less than two years) said "most of the people that I've been getting are repeat offenders so they sort of already understand the process. In some cases I think they know more than I do. They know what's going to happen." (Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

⁴¹ Rebecca L. Sandefur, "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); Competition & Markets Authority (UK), *Legal services market study: Final Report* (London: 2016) [online](https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-): CMA <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal->

services-market-study-final-report.pdf> (last accessed: 2 June 2017) at 48; Gillian K. Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans," (2010) 37 *Fordham Urban Law Journal* 129, [online: <http://works.bepress.com/ghadfield/31>](http://works.bepress.com/ghadfield/31) ; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 142; Ann Juergens, "Toward a More Effective and Accessible Solo and Small Firm Practice Model" in Samuel Estreicher & Joy Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) at 385.

⁴² Australian Government Productivity Commission, *Access to Justice Arrangements: Inquiry Report* (Canberra: ACPC, 2014) [online: ACPC <http://www.pc.gov.au/inquiries/completed/access-justice/report>](http://www.pc.gov.au/inquiries/completed/access-justice/report) (last accessed: 2 June 2017) at 192.

⁴³ "In the initial client interview, I get the sense that often they have never been to a lawyer before. They've certainly never been to the local lawyer usually for this particular issue that they've had in the estates world. They haven't shopped around in price and they're usually willing to sign the retainer agreement." (Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁴⁴ Even a person who has had a legal need and retained a law firm in the past is unlikely to have had the same kind of need or dealt with the same kind of firm. For example, having retained a lawyer for a straightforward residential property conveyance is not particularly helpful preparation for selecting a family law firm for a contested divorce.

⁴⁵ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 23.

⁴⁶ Clients "may be ill-equipped to diagnose or identify the precise nature of the problem or need they are confronting...even if they can identify the problem or need, they may be ill-equipped to choose an appropriate service provider, to exercise meaningful judgment over the appropriate service provider, and to monitor effectively performance by the service provider of the relevant procedure thereafter and the time and costs associated therewith." (Michael Trebilcock, "Report of the Legal Aid Review." (Toronto: (Ontario), 2008), [online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/)). See also Edward Shinnick, Fred Bruinsma and Christine Parker, "Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands" (2003) 10 *International Journal of the Legal Profession* 237; Canadian Bar Association (CBA) Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class." (Ottawa: CBA, 2013), [online: <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf>](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf) at 18. Evaluating price is especially difficult for inexperienced would-be clients when the price will be based on hours billed. If the firms charge by the hour, even if the hourly rates can be compared the final price will depend on the number of hours billed which is highly unpredictable. Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <https://ssrn.com/abstract=2958845>.

⁴⁷ Francisco Cabrillo and Sean Fitzpatrick, *The economics of courts and litigation* (Cheltenham, UK ; Northampton, MA: Edward Elgar, 2008); Larry E. Ribstein, "Ethical Rules, Agency Costs and Law Firm Structure" (1998) 84 *Virginia Law Review* 1707; Richard Moorhead, "Filthy lucre: lawyers' fees and lawyers' ethics – what is wrong with informed consent?" (2011) 31 *Legal Studies* 345 at 349-50; Julian Webb, "Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training" (2013) 24 *Stan. L. & Pol'y Rev.* 533 at 541.

⁴⁸ Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <https://ssrn.com/abstract=2958845>.

⁴⁹ This is in contrast to client sophistication as driving force in corporate market, according to Daniel Martin Katz, "Observations Regarding Innovation in the Legal Industry ([Slideshare, Sep 20, 2015](#))," http://www.slideshare.net/Danielkatz/law-tech-design-delivery-observations-regarding-innovation-in-the-legal-industry-professor-daniel-martin-katz/173-InternetofContractswhich_is_a_special_case (last accessed: 2 June 2017).

⁵⁰ According to Windsor litigator NN, clients often tell her “somebody said or I work with so and so and he didn’t have to do this. That’s where it gets dangerous. They get a little bit of knowledge ... [and] that little bit of knowledge is where it gets dangerous because they start speaking like they know and they don’t understand the concept. They got a snip bit of a concept and it gets difficult when they say you are telling me x but so and so that I work with said y.” (Interview with “NN” (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015).

⁵¹ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 92; Noel Semple, “Personal Plight Legal Services and Tomorrow’s Lawyers” (2014) *Journal of the Legal Profession* 25, [online](https://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> (last accessed: 2 June 2017).

⁵² Interview with “SS” (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

⁵³ Clark D. Cunningham, “Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse” (1992) 77 *Cornell L. Rev.* 1298, [online](http://scholarship.law.cornell.edu/clr/vol77/iss6/4): <http://scholarship.law.cornell.edu/clr/vol77/iss6/4> (last accessed: 2 June 2017); Noel Semple, “Personal Plight Legal Services and Tomorrow’s Lawyers,” (2014) *Journal of the Legal Profession* 25, [online](https://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> .

⁵⁴ Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 142.

⁵⁵ Mather *et. al.* aptly explain the demands: “even if the legal issues appear relatively simple... complexity derives largely from the difficult and uncertain relationship between achievable legal outcomes and the needs, interests, and emotions of individuals going through divorces. Attorneys must translate the human problems they encounter into the categories recognized by the legal system. This task places lawyers in role of intermediaries between their clients and the law as clients’ personal situations are transformed into plausible legal arguments and outcomes.” (Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 164). See also Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia, PA: Temple University Press 1996) at

⁵⁶ Marc Galanter, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Society Review* 59, [online](http://jan.ucc.nau.edu/~phelps/Galanter%201974.pdf): <jan.ucc.nau.edu/~phelps/Galanter%201974.pdf> (last accessed: 2 June 2017). See also Competition & Markets Authority (UK), “Legal services market study: Final Report.” (London: 2016), [online](https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf): <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> at 26.

⁵⁷ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 98-100. See also notes 75 and 76, below, and accompanying text. Section 6.1, below, pertains to specialization and generalism.

⁵⁸ [Figure 1](#), above, southwest quadrant.

⁵⁹ “Johnson” quoted in Jack Batten, *Lawyers* (Toronto: MacMillan, 1980) at 170-1.

⁶⁰ Noel Semple, “Personal Plight Legal Services and Tomorrow’s Lawyers,” (2014) *Journal of the Legal Profession* 25, [online](https://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> at 32; Herbert Jacob *et al.*, *Courts, Law, and Politics in Comparative Perspective* (New Haven, CT: Yale University Press, 1996) at 57.

⁶¹ Competition & Markets Authority (UK), “Legal services market study: Final Report.” (London: 2016), [online](https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf): <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> at 45. The Futures Report observes that clients are looking for “non-legal support as they go through the uncertainty, emotions, and complexities of a legal process... they want access, empathy, and personal contact with lawyers who can demonstrate a holistic understanding of the client’s circumstances and needs.” The Report goes on to note that “these

desires may not outweigh the attraction of a new service provider who offers robust advice at a considerably lower price. Lawyers' ability to extend empathy to their clients must necessarily be embedded in a competitive package." (CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online: <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf) at 20).

⁶² Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 102.

⁶³ Section 4.4.3, below. The emotive dimensions of personal plight legal needs, and the value of having a professional ally to deal with them, are reasons why a personal plight lawyer would not necessarily be well-advised to represent him or herself even in a matter pertaining to her own speciality.

⁶⁴ For example, three personal injury lawyers interviewed for this project emphasized that recovering from the accident was often more important to their clients than maximizing the amount recovered from the insurance company (Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015); Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015)). See also Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia, PA: Temple University Press 1996) at 107; Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 91; Centre for Innovative Justice, *Affordable Justice* (Melbourne: RMIT, 2013) [online: RMIT <mams.rmit.edu.au/qr7u4uejwols1.pdf>](http://mams.rmit.edu.au/qr7u4uejwols1.pdf) (last accessed: 2 June 2017) at 38.

⁶⁵ Canadian Bar Association and Jordan Furlong, *Do Law Differently: Futures for Young Lawyers* (Ottawa: CBA, 2016) [online: CBA Futures Initiative <http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers) (last accessed: 2 June 2017) at 18.

⁶⁶ Family lawyer JJ said: "I don't think people really understand how to listen for the things that are maybe the softer aspects. Sometimes people's interest isn't about money. They've got a different goal or interest. Unless you are really attuned to what their priorities are, you can miss those cues." (Interview with "JJ" (Family civil litigation practitioner, Samia, female, 24 years since call to the bar. Interviewed May 26, 2015)). With evidence that medical malpractice lawyers often ignore their clients' interests in nonmonetary remedies, see Tamara Relis, *Perceptions in litigation and mediation : lawyers, defendants, plaintiffs, and gendered parties* (Cambridge ; New York: Cambridge University Press, 2009) defendants, plaintiffs, and gendered parties (Cambridge ; New York: Cambridge University Press, 2009).

⁶⁷ Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

⁶⁸ It would not be entirely accurate to label these as "litigation" practices. While litigation is a central strategy for personal plight firms, some cases are resolved without any resort to formal litigation: for example through alternative dispute resolution.

⁶⁹ Termination-related employment law for employees and for owner-operated employers falls in the personal plight quadrant. Representation of larger employers falls in the southeast quadrant of [Figure 1](#), above, and representation of employees and employers negotiating employment contracts is in the western hemisphere of [Figure 1](#).

⁷⁰ This is not an exhaustive list.

⁷¹ Regarding specialization and generalism, see section 6.1 below.

⁷² Richard E. Susskind, *The End of Lawyers? : Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008) at 224; Canadian Bar Association (CBA) Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class." (Ottawa: CBA, 2013), [online: <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf>](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf) at 8.; Canadian Bar Association and Jordan

Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 16.

⁷³ Noel Semple, "Our Nostradamus (Review of recent books by Richard Susskind and Daniel Susskind)" (2016) 37 Windsor Rev. Legal & Soc. Issues 126, [online](http://www.noelsemple.ca/2016/05/our-nostradamus/): <<http://www.noelsemple.ca/2016/05/our-nostradamus/>> (last accessed: 2 June 2017).

⁷⁴ "Axess Law," <<http://www.axesslaw.com>> (last accessed: 2 June 2017); "Anderson Sinclair LLP," <<http://www.andsinc.com>> (last accessed: 2 June 2017).

⁷⁵ Daphne Dumont, ""Better . . . or Worse?" The Satisfaction and Frustrations of the Lawyer-Client Relationship" in Blaikie, Cromwell & Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012).

⁷⁶ John P. Heinz et al., *Urban Lawyers: The New Social Structure Of The Bar* (Chicago: University of Chicago Press, 2005) at 37; Harry W. Arthurs, "Will the Law Society of Alberta Celebrate its Bicentenary?" (2008) 45 Alberta Law Review 15, [online](http://digitalcommons.osgoode.yorku.ca/scholarly_works/857/): <http://digitalcommons.osgoode.yorku.ca/scholarly_works/857/> (last accessed: 2 June 2017); Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 98-100; Section 6.1.

⁷⁷ Ronit Dinovitzer, *Law And Beyond: A National Study Of Canadian Law Graduates* (Toronto: U, 2015) [online](http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf): [University of Toronto](http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf) <<http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf>> (last accessed: 2 June 2017) at 25. Specialization generally increases further over the course of a lawyer's career.

⁷⁸ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 66-71.

⁷⁹ Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2014) 38 International Review of Law and Economics 43 at 58; Andrew Grech and Tahlia Gordon, *Modern Law Firm Management: Should Non-Lawyer Ownership be Endorsed and Encouraged?* (Sydney, Australia: Creative Consequences, 2015) [online](http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management_Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf): [Creative Consequences](http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management_Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf) <http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management_Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf> (last accessed: 2 June 2017) Australia: Creative Consequences, 2015 at 15; John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services" (2014) 82 Fordham Law Review 3041 at 3058.

⁸⁰ Ilina Rejeva, "What Is NewLaw and How It Is Changing the Legal Industry Forever ([LegalTrek, Apr 26, 2016](http://legaltrek.com/blog/2016/04/what-is-newlaw-and-how-it-is-changing-the-legal-industry-forever/))," <<https://legaltrek.com/blog/2016/04/what-is-newlaw-and-how-it-is-changing-the-legal-industry-forever/>> (last accessed: 2 June 2017).

⁸¹ CBA Legal Futures Initiative, *Innovations in Legal Services: 14 Eye-Opening Cases* (Ottawa: CBA, 2014) [online](https://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Innovations-in-Legal-Services-14-Eye-Opening-Cases): [CBA](https://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Innovations-in-Legal-Services-14-Eye-Opening-Cases) <<https://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Innovations-in-Legal-Services-14-Eye-Opening-Cases>> (last accessed: 2 June 2017); CBA Futures Initiative, *14 Case Studies in Canadian Legal Innovation* (Ottawa: CBA, 2014) [online](https://www.cba.org/CBAMediaLibrary/cba_na/SecurePDF/CBA%20Legal%20Futures%20PDFS/CaseStudiesEng.pdf): [CBA](https://www.cba.org/CBAMediaLibrary/cba_na/SecurePDF/CBA%20Legal%20Futures%20PDFS/CaseStudiesEng.pdf) <https://www.cba.org/CBAMediaLibrary/cba_na/SecurePDF/CBA%20Legal%20Futures%20PDFS/CaseStudiesEng.pdf> (last accessed: 2 June 2017); Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>>.

⁸² These ventures seek to nurture start-ups in the legal field. Ryerson Legal Information Zone, "[About](http://www.legalinnovationzone.ca/about-us/)," <<http://www.legalinnovationzone.ca/about-us/>> (last accessed: 2 June 2017); Mars Discovery District, "[LegalX Cluster](https://www.marsdd.com/our-sectors/information-and-communications-technology/legalx-cluster/)," <<https://www.marsdd.com/our-sectors/information-and-communications-technology/legalx-cluster/>> (last accessed: 2 June 2017), Omar Ha-Redeye, "Cold, Hard Justice Lessons from the Fleet: Innovating from the bottom up" (2017) Windsor Yearbook of Access to Justice (forthcoming).

⁸³ Section 1.1, above.

⁸⁴ Federation of Law Societies of Canada, "[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/)," <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>> (last accessed: 2 June 2017), s. 3.1-1 ("Competence").

⁸⁵ *Ibid.*, *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401.

⁸⁶ Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <<https://ssrn.com/abstract=2958845>>.

⁸⁷ Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45 *Alberta Law Review* 107; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 30-33.

⁸⁸ Trevor C. W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto, Canada: University of Toronto Press, 2014); Alice Woolley and Trevor C. W. Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges" (2016) 3 *Texas A & M Law Review* 549.

⁸⁹ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 18.

⁹⁰ Andrew Pilliar, "Law and the Business of Justice: Access to Justice and the Profession/Business Divide" (2014) 11 *Journal of Law & Equality* 5 at 7.

⁹¹ Law Students' Society of Ontario, *Just or Bust? Results of the 2014 Survey of Ontario Law Students' Tuition, Debt, & Student Financial Aid Experiences* (Toronto: 2014) [online](http://lssso.ca/wp-content/uploads/2014/09/LSSO-Report-2014.pdf): LSSO <<http://lssso.ca/wp-content/uploads/2014/09/LSSO-Report-2014.pdf>> (last accessed: 2 June 2017).

⁹² Michael Trebilcock, "The Price of Justice" in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018).

⁹³ Personal plight clients must compete with corporate clients for the services of legal professionals At least in the United States, the proportion of lawyers serving individual as opposed to corporate clients has declined significantly in recent decades: Jordan Furlong, "How Access-to-Justice Efforts Are Changing the Consumer Legal Market ([Lawyerist.com, February 21st, 2017](#))," <<https://lawyerist.com/144695/access-justice-efforts-changing-consumer-legal-market/>> (last accessed: 2 June 2017).

⁹⁴ Malcolm Mercer, "So Many Lawyers, so Many Unmet Legal Needs (ABA Law Practice Magazine, July/August 2015)" (2015), [online](https://malcolmmercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/): <<https://malcolmmercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/>> (last accessed: 2 June 2017).

⁹⁵ CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf>2013 at 92. Proposing a means-tested "Access to Justice Levy" on practicing lawyers to support legal aid, see Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 282-5.

⁹⁶ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 135.

⁹⁷ Anna Lund and Andrew Pilliar, *What Do Lawyers Do? Examining The Types Of Pro Bono, Low Bono And Voluntary Work Provided By British Columbia Lawyers* (Vancouver: Law Foundation of British Columbia, 2014).

⁹⁸ Michael Trebilcock, "Report of the Legal Aid Review." (Toronto: (Ontario), 2008), [online](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/): <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>> at 115 et seq; William T. Hogan, "Re: Issues on the Future of Legal Services (Letter to The ABA Commission on the Future of Legal Services, December 20, 2014)," <https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services.pdf> (last accessed: 2 June 2017) at 3; Criminal lawyer C2, interviewed for this project, said: "What we've tried to do over the years is try to focus on a private practice and becoming less dependent on Legal Aid... It has reached a point now where I consider that *pro bono* work. It is really just cost recovery. When you factor in all the costs of doing research and office space and everything like that, you're lucky to be breaking even at the end of Legal Aid." (Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016))

⁹⁹ David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 220. Giving an example of the potential for cross-subsidization, Ottawa Lawyer D2 told the author: "Everybody in the community asked us. They said 'oh, you're a feminist practice, we need to do our wills, we really want you to do them!' If I was really smart or less stubborn, I'd be able to say, I'm having you in and you're going to pay a little bit more for this service but it's going to support work with community members that are dealing with issues that you believe in." (Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)). Regarding the similar concept of "social enterprise lawyering" (in which profits are given to another firm doing personal plight work, see Andrew Pilliar, "Exploring A Law Firm Business Model to Improve Access to Justice" (2015) 32 Windsor Yearbook of Access to Justice, [online](http://windsor.scholarsportal.info/ojs/leddy/index.php/WYAJ/article/view/4512): <<http://windsor.scholarsportal.info/ojs/leddy/index.php/WYAJ/article/view/4512>> (last accessed: 2 June 2017) at 6-8.

¹⁰⁰ Gail E Henderson, "Could Community Contribution Companies Improve Access To Justice?" (2016) 94 Canadian Bar Review, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016> (last accessed: 2 June 2017)

¹⁰¹ *New Brunswick (Minister of Health and Community Services) . G. (J.)*, [1999] 3 S.C.R. 46.

¹⁰² Sujit Choudhry, Michael Trebilcock and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012): "increasing public funding for legal aid on the scale required to serve the civil justice needs of the middle class, on a sustainable basis, is both an economic and political non-starter." See also Noel Semple, "Canada: Depending on the Kindness of Strangers— Access to Civil Justice" (2013) 16 Legal Ethics 373.

¹⁰³ Michael Trebilcock, "The Price of Justice" in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018). See also David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid," background study for the Ontario Legal Aid Task Force Report, 1996; Michael Trebilcock, Report of Legal Aid Review, 2008 (Ontario Ministry of the Attorney-General, pp. 61-70.

¹⁰⁴ Trebilcock, *ibid.*. However, if civil personal plight firms are able to devise more affordable ways to help low and middle income people – perhaps by deploying the innovations proposed in this book – then legal aid dollars will "go further." This might make funding legal aid might become a more attractive priority for governments.

¹⁰⁵ Trebilcock, *ibid.*

¹⁰⁶ "Ontario Small Claims Wizard," <<http://smallclaimswizard.com>> (last accessed: 2 June 2017).

¹⁰⁷ WeVorce, "WeVorce," <<https://www.wevorce.com/>> (last accessed: 2 June 2017); "MySupportCalculator," "Kinso," <<http://www.kinso.ca>> (last accessed: 2 June 2017). See also Chris Bentley et al., *Legal Innovation Zone's Family Reform Community Collaboration* (Toronto: Ryerson University, 2016) [online](http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf): Ryerson University <<http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf>> (last accessed: 2 June 2017), at Appendix 2.

¹⁰⁸ Suzanne Bouclin, Jena McGill and Amy Salzyn, "Mobile and Web-Based Legal Apps: Opportunities, Risks and Information Gaps," (2017) *Canadian Journal of Law and Technology*, [online](https://ssrn.com/abstract=2960207): <<https://ssrn.com/abstract=2960207>> . For a sophisticated example from overseas, see <https://unfairdismissal.slatergordon.com.au/> . This and similar initiatives are discussed at length in Section 5.4, below.

¹⁰⁹ As the CBA Futures report argues, "technology will render legal information and tools more accessible, and clients will gravitate to them as long as the providers offer assurances of quality." (CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 14).

¹¹⁰ Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," (2014) *Journal of the Legal Profession* 25, [online](https://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> .

¹¹¹ "The World's First Robot Lawyer," <<http://DoNotPay.co.uk>> (last accessed: 2 June 2017); Lisa Needham, "The Robot Lawyer That Fights Parking Tickets Is Quite Good at It (June 30th, 2016)," <<https://lawyerist.com/119847/robot-lawyer-fights-parking-tickets-good-at-it/>> (last accessed: 2 June 2017).

¹¹² Mary E. Vandenack, "Venture Capital Investments in Legal Services (ABA Law Practice Magazine, Vol. 39, No. 4)," <http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/venture-capital-investments-in-legal-services.html> (last accessed: 2 June 2017).

¹¹³ Section 1.3.2, above.

¹¹⁴ Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 11-12; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) ; John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services," (2014) 82 *Fordham Law Review* 3041; Simon Fodden, *Voices of Change: Canadian Social Media and Other Writings on the Future of Legal Practice* (Ottawa: CBA, 2013) [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Voices-Paper-Summary-Linked-eng.pdf): CBA <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Voices-Paper-Summary-Linked-eng.pdf> (last accessed: 2 June 2017) at 13-14.

¹¹⁵ Noel Semple, "Our Nostradamus (Review of recent books by Richard Susskind and Daniel Susskind)," (2016) 37 *Windsor Rev. Legal & Soc. Issues* 126, [online](http://www.noelsemple.ca/2016/05/our-nostradamus/): <<http://www.noelsemple.ca/2016/05/our-nostradamus/>> .

¹¹⁶ Section 2.3, above.

¹¹⁷ Sam Glover, "Access to Justice is a Lot More Complicated than Making Lawyers Affordable (Lawyerist, July 12th, 2016)," <<https://lawyerist.com/121014/access-justice-lot-complicated-making-lawyers-affordable/?platform=hootsuite>> (last accessed: 2 June 2017); Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants." (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 83, 121.

¹¹⁸ Criminal defence lawyer Sean Robichaud puts this point well: "Lawyers are seen to trade in information and knowledge in today's world. This is a commodity with very high supply and therefore little value. However, what people often neglect to understand is that knowing the correct legal answer is a very small component to successful representation." (Sean Robichaud, "Access to justice: a need for lawyers, not self-representation or legal information (Tuesday, November 4, 2014)," <<https://robichaudlaw.ca/unrepresented-court-access-to-justice/>> (last accessed: 2 June 2017)). Regarding the distinct "value-add" offered by trained legal professionals, see also CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 19-20.

¹¹⁹ CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 26 (note 13); R. Roy McMurtry et al., *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) [online](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf): [Law Society of Upper Canada](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf) <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> (last accessed: 2 June 2017); Michael Saini, Rachel Birnbaum and Nicholas Bala, "Access to Justice in Ontario's Family Courts: The Parents' Perspective" (2016) 37 Windsor Rev. Legal & Soc. Issues 1; Ipsos Reid, *Albertans Satisfied With Their Lawyers* (Public Release Date: May 18, 2010) <<https://www.ipsos-na.com/news-polls/pressrelease.aspx?id=4788>> (last accessed: 2 June 2017); Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants," (2013) 91 Canadian Bar Review 67 at 77. That being said, there is a pattern of client dissatisfaction regarding *communication* in personal plight work. See Section 5.7.1, below.

¹²⁰ Trevor C.W. Farrow et al., "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report." (Toronto: CFCJ, 2016), [online](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf): <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>> at 7; Canadian Forum on Civil Justice, *Everyday Legal Problems And The Cost Of Justice In Canada: Survey* (Toronto: CFCJ, 2016) [online](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Survey.pdf): [CFCJ](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Survey.pdf) <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Survey.pdf>> (last accessed: 2 June 2017) at 2.

¹²¹ The Law Society of Upper Canada, "[Complaints and Investigations](http://www.annualreport.lsuc.on.ca/2014/en/operational-trends/complaints.html)," <<http://www.annualreport.lsuc.on.ca/2014/en/operational-trends/complaints.html>> (last accessed: 2 June 2017).

¹²² Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," (2014) *Journal of the Legal Profession* 25, [online](http://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> . In the United States, personal client hemisphere lawyers experienced a precipitous drop in income during the 1980s, as their numbers increased much more quickly than demand: Jerry Van Hoy, "The Practice Dynamics of Solo and Small Firm Lawyers" (1997) 31 *Law & Soc'y Rev.* 377 at 7. However in the personal client hemisphere services prices, and presumably incomes, have remained significantly higher in Canada than in the United States: Noel Semple, "The Cost of Seeking Civil Justice in Canada," (2015) 93 *Canadian Bar Review* 639, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> .

¹²³ "The question of how rights can be asserted is bleeding more and more into people's lives and I think that until we in small practice environments figure out how to be able to connect with those needs, I think we are missing opportunities but also really doing a disservice to community members because they just don't have a way into the system." (Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)). See Section 1.1, above.

¹²⁴ Sam Glover, "Access to Justice is a Lot More Complicated than Making Lawyers Affordable ([Lawyerist, July 12th, 2016](http://lawyerist.com/121014/access-justice-lot-complicated-making-lawyers-affordable/?platform=hootsuite))," <<https://lawyerist.com/121014/access-justice-lot-complicated-making-lawyers-affordable/?platform=hootsuite>>

¹²⁵ CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 93; Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants." (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf>> at 121; Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants," (2013) 91 *Canadian Bar Review* 67; Paul Vayda, "Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada's Trial Lawyers Decision" (2015) 36 *Windsor Rev. Legal & Soc. Issues* 207 at 208; Canadian Bar Association (CBA) Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class." (Ottawa: CBA, 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf> at 6.

¹²⁶ Regarding this economic capture critique of lawyers' self-regulation, see Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 116-119.

¹²⁷ “An ongoing joke we shared with our colleagues was that we hoped we’d never need to hire a lawyer, because it would be so unaffordable.” (Natalie Clifford and Sarah Shields, quoted in Canadian Bar Association and Jordan Furlong, “Do Law Differently: Futures for Young Lawyers.” (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>>). Allan C. Hutchinson, “Putting up a Defence: Sex, Murder, and Videotapes” in Alice Woolley & Adam Dodek eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: University of British Columbia Press, 2016).

¹²⁸ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015) “a rude awakening that led us to go as self-reps because it was so expensive, even just the back and forth correspondence between counsel, how it racks up.”

¹²⁹ These untapped markets are sizeable. For example, a Ryerson Legal Innovation Zone report estimated that the untapped market of Ontario’s self-represented litigants could be worth \$40-\$200 million per year to law firms able to create viable service packages for these people: Chris Bentley et al., “Legal Innovation Zone’s Family Reform Community Collaboration.” (Toronto: University, 2016), [online](http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf): <<http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf>> at 10.

¹³⁰ Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

¹³¹ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

¹³² “Eighty-five percent of all the legal work done in Canada is still billed hourly, according to Richard Stock, a partner at Catalyst Consulting in Toronto.” (Ann Macaulay, “The Billable Hour – Here to Stay? (Canadian Bar Association PracticeLink March 12, 2014),” <<http://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-Billable-Hour—Here-to-Stay>> (last accessed: 2 June 2017)).

¹³³ Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 92.

¹³⁴ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015); Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015) “I do try and give them at least a rough ballpark on what a separation agreement or a court proceeding without complications might look like. No one came back to complain about that. They know it’s a ballpark.”

¹³⁵ Michael McKiernan, “The Going Rate: The 2015 Canadian Lawyer Legal Fees survey (Canadian Lawyer, June 2015),” <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf> (last accessed: 2 June 2017).

¹³⁶ \$26,591 was the average fee for a 5-day trial in a family law matter. (ibid.).

¹³⁷ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015) “they’re not surprised about hourly rates. What they’re surprised about is we’re not more easily able to estimate the cost of a litigation.” Conversely, “if a quote was given and a person was told that this was the pricing within 10% I am sure they would be very happy.” See also CBA Legal Futures Initiative, “Futures: Transforming the Delivery of Legal Services in Canada.” (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 20.

¹³⁸ Chris Bentley et al., “Legal Innovation Zone’s Family Reform Community Collaboration.” (Toronto: University, 2016), [online](http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf): <<http://www.legalinnovationzone.ca/wp-content/uploads/2015/10/Ryerson-LIZ-Family-Reform-Report.pdf>>; CBA Legal Futures Initiative, “Futures: Transforming the Delivery of Legal Services in Canada.”

(Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 20; CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 37; Josh King, "Price Transparency and Legal Services (Video, Reinvent Law Channel)," <<https://vimeo.com/98606909>> (last accessed: 2 June 2017); CBA Legal Futures Initiative, *The Clients' Perspective* (Ottawa: 2013) [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf): [Canadian Bar Association](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf) <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf> (last accessed: 2 June 2017) at 8-9.

¹³⁹ Regarding price uncertainty and corporate law firm clients, see Alice Woolley, "Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing" (2005) 12 *International Journal of the Legal Profession* 339 at 354.

¹⁴⁰ These are (i) uncontested personal business matters; (ii) corporate client non-contested matters, and (iii) corporate client litigation/ADR matters. See [Figure 1](#) in Chapter 1, above. Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

¹⁴¹ This is due to lower labour requirement risk: see section 1.3, below. According to the *Affordable Justice* report, Australian firms offer fee certainty most frequently "when a task has been repeated so often that both sides are comfortable with what the cost should be. Certainly transactional work, such as real estate, wills and estates and intellectual property lend themselves more easily to fixed-fee billing, since the outcome is fairly predictable and it's easier to estimate the amount of time each file will take. Files that involve a lot of repetition, such as drafting a patent application, are the most easily automated using form generation, which cuts down on time spent." (Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 17.)

¹⁴² Walmart, for example, faces hundreds of personal injury and wrongful dismissal lawsuits each year; the variable litigation costs for each suit do not prevent Walmart from having a relatively predictable annual litigation budget.

¹⁴³ "I think in the right case flat fee wouldn't be bad at all." (Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015))

¹⁴⁴ "Fixed fee only for really simple things," and uncontested e.g. uncontested divorce or legal opinion letter re foreign divorce. (Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015)). "NN" offers flat rates for family (separation and cohabitation) contracts. (Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015)). E2 reports: "I do some flat fee stuff. Not a lot of it. Stuff I'm highly experienced in. I know what time it takes. Some things are simple. Uncontested divorce in front of a judge 1500 bucks. Because I know exactly the kind of work it takes to get in and out of it. And it's very predictable. Settlement agreements. Some of them vary...but largely, 2000 dollars for a settlement agreement. Litigation's tough." (Robert Harvie, "Self Represented Litigants – Lawyer Delivery Lagging? ([Huckvale LLP blog, January 20, 2016](#))," <<https://huckvale.ca/family-law/self-represented-litigants-lawyer-delivery-lagging/>> (last accessed: 2 June 2017)). "A2" also reported using block rates on visa applications, "because if you are doing a visa application it is fairly predictable in terms of time to complete all the paperwork." (Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015)).

¹⁴⁵ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015) "It's hard for a client to accept. It's really hard for us to do. It's hard to estimate to cost of litigation. Because of variability." Similar comments from Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015) and Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015): "B2: Many civil litigation lawyers discover that it is challenging to estimate the final bill because of the unpredictable nature of litigation."

¹⁴⁶ Malcolm Mercer, "So Many Lawyers, so Many Unmet Legal Needs (*ABA Law Practice Magazine*, July/August 2015)," (2015), [online](https://malcolmmcercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/): <<https://malcolmmcercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/>> ; William Bishop,

“Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise” (1989) 52 *Modern Law Review* 326at 344–5; John S. Dzienkowski and Robert J. Peroni, “Multidisciplinary Practice and the American Legal Profession: A Market Approach To Regulating The Delivery Of Legal Services In The Twenty-First Century” (2000) 69 *Fordham Law Review* 83. Regarding the potential of firms to move toward “commodified” services, see section 5.4.3, below.

¹⁴⁷ Ray Worthy Campbell, “Rethinking Regulation And Innovation In The U.S. Legal Services Market” (2012) 9 *New York University Journal Of Law & Business* 1 at 61.

¹⁴⁸ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 165-6.

¹⁴⁹ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016) “there is sometimes more disclosure that becomes available. Further witnesses can come forward. More investigation needs to be done.” See also Michael Trebilcock, “The Price of Justice” in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018).

¹⁵⁰ “Of course your only [risk] is if you mis-assess the file or you have counsel on the other side that’s just going to dig their heels in and 3 years later you’re still working really hard on a file and you know you spent more time on what you’re ultimately going to garner on it.” (Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016). Criminal defender C2 said: “I would say the unpredictability comes more from the Crown because they hold the discretion to withdraw or not. Whether things proceed or get difficult really is up to the Crown. We try very hard to get as much material as we can to persuade the Crown to withdraw. Sometimes it is a back and forth from them. Maybe, maybe not. Those sorts of issues typically are a product of the Crown and whether things get prolonged.” (Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016)).

¹⁵¹ Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015): it’s the client interaction that’s the most time-consuming part of the practice. See also Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 95.

¹⁵² Federation of Law Societies of Canada, “[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/),” <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>>, s. 3.1-1(d).

¹⁵³ Ray Worthy Campbell, “Rethinking Regulation And Innovation In The U.S. Legal Services Market,” (2012) 9 *New York University Journal Of Law & Business* 1.

¹⁵⁴ Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

¹⁵⁵ Sean Robichaud, “Access to justice: a need for lawyers, not self-representation or legal information ([Tuesday, November 4, 2014](https://robichaudlaw.ca/unrepresented-court-access-to-justice/)),” <<https://robichaudlaw.ca/unrepresented-court-access-to-justice/>>; and see also these comments from “SS:” “Semple: for those reasons...is it possible to estimate the value of the settlement of the time? SS: It’s impossible. Impossible. It’s a question we get every time. “What’s my case worth?”. The two questions I can’t answer at the beginning: how long is this going to take, and how much and I going to get? And that’s the same 2 questions I get every time. And I tell people honestly I have no way of knowing.” (Interview with “SS” (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015)).

¹⁵⁶ Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

¹⁵⁷ Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 13.

¹⁵⁸ Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015) “The difference of small claims court is you don’t have motions and other things that go in between. In family court, you can get all kinds of motions. Somebody wants production or somebody wants support or somebody is not being reasonable or you need to bring a motion to get support.” Likewise, Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015)

¹⁵⁹ Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015): “I grossly under billed or undercharged my first 4-5 clients. If it was a new thing I was doing I didn’t know how long it would take. I did that enough times to change and develop. I feel like I kind of gotten good at small claims, tribunal stuff in terms of predicting fees and now I am doing a bit more Superior Court work stuff and I want to get good at knowing how to block fees there. That’s challenging because there are so many more steps in the procedure - discoveries and everything, motions that pop up. That’s much more challenging. It’s just going to come down to experience. The more you do it, the more you can tell the client here’s what I suspect will happen, here’s what could happen both positive and negative.”

¹⁶⁰ “Semple: What creates that extra complexity that extra time requirement? NN: Typically an unrepresented person on the other side. That will generally drive the legal fees up because there is no reasonable responses coming. Semple: So when there is counsel on the other side you can generally count? NN: Yes because they are getting advice and everybody knows the perimeters are here. We are not asking for something out there and if everyone gets there quickly there is not much back and forth. I stick within my estimate because of the usual transaction. If you’re not getting advice on the other side than it is a little more difficult to persuade someone” (Interview with “NN” (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015)).

¹⁶¹ “Usually when you meet someone you can tell if it will be someone who goes over the usual amount of time by their personality. This person is going to require more attention than others and price accordingly. Semple: What tells you that in the client meeting? NN: Less business thoughts as opposed to more personal. Usually they would have contacted our office multiple times before the initial consult. You know they are going to be more time intense and you may need to adjust your estimate for that reason.” ((ibid.))

¹⁶² Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015): “I could see doing a flat rate for something like pleadings where it is up to me to get the information and then process it into your documents. That I am pretty comfortable doing and likely can anticipate it. A motion might be really out there because some are pretty streamlined and then depending whose on the other side... I used to have a couple counsel in town who would affidavit you to death. It would be 100 paragraphs and 98 of it was crap, but you have to somehow respond to the crap or you leave your client exposed. You can all of a sudden rack up a huge bill even for a motion. Those ones I’d be a little more concerned about.”

¹⁶³ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

¹⁶⁴ Interview with “E2” (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

¹⁶⁵ Interview with “II” (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

¹⁶⁶ Interview with “E2” (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

¹⁶⁷ Section 3, below.

¹⁶⁸ Flatlaw, “[Litigation](https://www.flatlaw.ca/flatrate/All/Litigation/All),” <<https://www.flatlaw.ca/flatrate/All/Litigation/All>> (last accessed: 2 June 2017). Many are for a discrete task within a personal plight file (e.g. writing a demand letter According to Ottawa lawyer “D2,” “I really do see the human rights complain process as being conducive to flat fees because you can say there can be a flat fee up to mediation. Here’s everything I can wrap into this up to mediation. And

mediation is the point which you either administer another kind of flat fee or you negotiate another kind of agreement with the client. Whereas in a civil litigation file, there's so many uncertainties...." (Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)).

¹⁶⁹ Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015). Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016) "Semple: Is this type of approach very widespread in the criminal bar? C2: The block fee, very much so. Those who have private practices, very few operate within the hourly fee as I understand it. Whether it is a bail hearing, a trial, the only people that do are those that essentially operate with unlimited retainers. People that are extremely wealthy go to any lawyer of their choice. Another lawyer will do a good job, but if I had an unlimited retainer I will hire another associate. You guys get plugging away at it, that's your job for the year. We will send the client a \$75,000 bill at the end of the year and do an awesome job."

¹⁷⁰ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

¹⁷¹ See [Figure 4](#) and accompanying text.

¹⁷² Section 2.6, below.

¹⁷³ Lonny Balbi, "Flat-fee billing: replacing time with value ([The Lawyers Weekly, July 03 2009](#))," <<http://www.lawyersweekly.ca/articles/954>>.

¹⁷⁴ Notes 137 to 139, below. See also Legal Services Consumer Panel (UK), "Opening up data in legal services" (2016), [online](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDatainLegalServicesFinal.pdf): <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDatainLegalServicesFinal.pdf> (last accessed: 2 June 2017) at 22.

¹⁷⁵ Ray Worthy Campbell, "Rethinking Regulation And Innovation In The U.S. Legal Services Market," (2012) 9 New York University Journal Of Law & Business 1 at 59 : "There are two ways to look at alternative and flat fee pricing: flat and alternative fees simply shift the risk for runaway engagements to the law firm, or they require law firms to redesign their business model and processes for delivering services."

¹⁷⁶ Susskind: "hourly billing is an institutionalized disincentive to efficiency. It rewards lawyers who take longer to complete tasks than their more organized colleagues, and it penalizes legal advisers who operate swiftly and efficiently." See also Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015). "The tyranny of the billable hour' has also long been acknowledged, criticized by an increasing number within and outside the profession as discouraging efficiency and collaboration; encouraging procrastination and mediocrity; preventing any concerted approaches; and demoralising legal practitioners. When layers are remunerated by hourly rates, we just encourage inefficiency." (Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/q7u4uejwols1.pdf): <mams.rmit.edu.au/q7u4uejwols1.pdf> at 11). Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015): "The hourly model is not an incentive to being resourceful. Just human nature." Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015) "NS: A perverse incentive created by billing? II: Of course. NS: Does that explain why big firms take longer - 3 years as opposed to 6...? II: Right. I remember I had a conversation with a senior lawyer early on and what happens is in large law firms across the board I understand is that as a junior lawyer with a new file, you have to make sure you review rules of civil procedure to make sure timelines are accurate. You have to revisit the rules and practice direction to make sure that whatever the rules need to be complied and what not are streamlined. I said I think it is rather inefficient because why can't we dedicate one person in the firm whose job is to keep on top of all the rules and you basically contact that person and say what is the latest in this and is available to everybody as a resource. And that person turns around and says well how do you make money if we do that? You have to have a business and as long as the client is paying for it then that's fine. I think there is definitely some inefficiencies there?"

¹⁷⁷ A more ambitious vision, also incentivized by price-certain models, is the creation of systems and products which provide legal services to clients with little or no lawyer labour. See section 5.4 below and Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016).

¹⁷⁸ Section 2.2, above.

¹⁷⁹ Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015) "We're not billing by the hour. We have every reason to be as efficient as possible and that our system is designed to keep our clients informed, move the case ahead as quickly as reasonably as possible without compromising, without settling too quickly..."

¹⁸⁰ Interview with "E2" (Family law practitioner, Alberta, male, 19 years since call to the bar. Interviewed April 21, 2015) and Interview with "C2" (Criminal law practitioner, Toronto, male, 11 years since call to the bar. Interviewed April 13, 2016) "You don't need to do legal research on particular issues or sub-issues should they happen to arise, you just hope maybe if we tweak this, what if they got all these letters? You find ways to approach the Crown to get the charge withdrawn rather than have 10 days of litigation. For the access to justice point, the incentive too to a lawyer is to try and get a favourable result for the client within the budget presented. "

¹⁸¹ Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016).

¹⁸² Section 1.3.2, above.

¹⁸³ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015) I truly believe in the block fees. I think lawyers that aren't doing this are going to find themselves not competitive... I think that any smaller firm and I would say the majority of lawyers in this context to be competitive you have to think about different ways to bill and charge your client. I don't want to talk about it narrowly. I'd rather talk about it in the context of building a relationship with your client. I think lawyers need to think differently about building relationships with clients. Ultimately that's what it comes down to. Price is very important, but it's not as sensitive in the context of a good relationship with the client."

¹⁸⁴ Lawyers recognize that avoiding price surprise is the key to avoiding disputes: Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015); Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015); (Interview with "CC" (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015); Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015) "since each bill is to some extent a surprise (and usually more than expected) this creates a lot of anxiety for clients."

¹⁸⁵ Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

¹⁸⁶ Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015) .

¹⁸⁷ B2 added, "did I talk to my lawyer about how unhappy I was? No, I don't want to take time and be charged \$400 an hour to tell him I'm really kind of angry and unhappy because I don't like being charged this much?" (ibid.)

¹⁸⁸ Alice Woolley, "Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing," (2005) 12 *International Journal of the Legal Profession* 339 at 341.

¹⁸⁹ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015) “NS: Do you have the sense that some lawyers may be ragging the puck on the basis of time-based compensation? JJ: Yeah to be perfectly blunt. Yeah.”. Alice Woolley, “Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done About It” (2004) 83 *Canadian Bar Review* 859 at 864; Interview with “II” (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015): “in my practice I know what an appropriate settlement is very quickly and the defence lawyer knows what an appropriate settlement is. So the question is if we both know fairly in a range what is an appropriate [settlement] why can’t we just pick up the phone and settle it? I won’t make money and he won’t make money. We aren’t making money if we settle off the bat that quickly. There is an inherently component of your own personal interest involved. That’s one, the personal part”

¹⁹⁰ For example, the first 40 hours of work gathering evidence and drafting pleadings in a plaintiff’s wrongful dismissal case might produce a settlement offer of \$10,000 from the respondent. The plaintiff’s firm’s next 10 hours of work are not wasted: they make the case more persuasive, increasing the defendant’s fear of an adverse outcome and increasing the defendant’s settlement offer to \$12,000. However, if those additional 10 hours were billed to the client at \$400 each, then the client has been over-served insofar as their cost to the client exceeded their benefit to the client. “When lawyer performance is based on how much time is spent, inevitably there will be a temptation to spend as much time as possible on any given task.” (Spark LLP, “What’s Wrong With The Billable Hour?,” <<http://spark.law/whats-wrong-with-the-billable-hour/>> (last accessed: 2 June 2017)). Similar views were offered by lawyers GG and C2 (Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015); Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016)) See also Alice Woolley, “Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing,” (2005) 12 *International Journal of the Legal Profession* 339 at 340; Ann Macaulay, “The Billable Hour – Here to Stay? (Canadian Bar Association PracticeLink March 12, 2014),” <<http://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-Billable-Hour—Here-to-Stay>>; Australian Government Productivity Commission, “Access to Justice Arrangements: Inquiry Report.” (Canberra: ACPC, 2014), [online](http://www.pc.gov.au/inquiries/completed/access-justice/report): <<http://www.pc.gov.au/inquiries/completed/access-justice/report>> at 195.

¹⁹¹ Sean Robichaud, “What does it cost to hire a lawyer? The cost of liberty is not as expensive as you may think. (Dec 4, 2016),” <<https://robichaudlaw.ca/the-cost-of-liberty-lawyers-fees-in-criminal-law/>> (last accessed: 2 June 2017).

¹⁹² Allan C. Hutchinson, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario 2017* <<https://www.scribd.com/document/336923555/Hutchinson-Report>> (last accessed: 2 June 2017) at 5-6; citing Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981).

¹⁹³ Barreau du Québec, *La tarification horaire à l’heure de la réflexion* (Quebec: BDQ, 2016) [online](http://www.barreau.qc.ca/pdf/publications/2016-rapport-tarification.pdf): BDO <<http://www.barreau.qc.ca/pdf/publications/2016-rapport-tarification.pdf>> (last accessed: 2 June 2017) at 16. See also Lonny Balbi, “Flat-fee billing: replacing time with value (The Lawyers Weekly, July 03 2009),” <<http://www.lawyersweekly.ca/articles/954>>: “The value equation to the customer is the most important aspect in pricing. The cost to produce the good or service is not important to the customer. Focus on the customer’s needs, wants and values in order to determine an appropriate price.”

¹⁹⁴ The relative positions of the options are inexact; different options will affect accessibility and risk in different ways depending on the practice context.

¹⁹⁵ Alice Woolley, “Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing,” (2005) 12 *International Journal of the Legal Profession* 339 at 344: “For work that was not covered by the tariff the dominant basis for setting fees was the lawyer’s assessment of the value which he had provided to the client. In setting his account the lawyer would consider factors such as: the work which he had done on the client’s matter (which he would generally keep a loose record of in the file or in a daily ledger); the outcome for the client; the financial circumstances of the client; the market value of the services in question; and any other factors which he considered relevant in the circumstances to determine the amount of the client’s fee.”

¹⁹⁶ Such factors are relevant in the “fair and reasonable” test applied to lawyers’ fees by legal services regulators. See e.g. Federation of Law Societies of Canada, “[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/),” <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>>, R. 3.6-1, Commentary [1] and analogous provisions in the respective provincial Law Societies’ Codes of Conduct. In the long-term firm-client relationships characteristic of the corporate practice hemisphere, discretion arguably a larger legitimate place in billing arrangements. If the firm is strongly motivated to keep the client happy, that motivation constrains the abuse of discretion in billing. (Likewise, the long-term client has invested in the relationship with the firm and has an incentive to avoid unnecessary challenges to the bill). However, personal plight lawyer-client relationships tend to be one-shot. See section 1.2.2, above. “Value will depend on the effectiveness, efficiency, urgency, complexity and predictability of the work.” (Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 18)

See also Jordan Furlong, “[The new price wars](https://www.law21.ca/2011/02/the-new-price-wars/),” <<https://www.law21.ca/2011/02/the-new-price-wars/>> (last accessed: 2 June 2017) re pricing like an airline.

¹⁹⁷ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

¹⁹⁸ Alice Woolley, “Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing,” (2005) 12 *International Journal of the Legal Profession* 339 at 347: “With respect to value billing, the main issue was that value billing left the client dependent on the lawyer’s subjective judgment as to the value which the lawyer had provided.”

¹⁹⁹ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) ; Barbara A. Stark, “Value Billing-Matrimonial Attorney’s Fees in the 90’s” (1991) 7 *J. Am. Acad. Matrimonial Law*. 79

²⁰⁰ Interview with “KK” (Family law and estate litigation practitioner, Samia, female, 3 years since call to the bar. Interviewed May 26, 2015) “NS: So contingency for personal injury and time-based billing for family law. You mentioned also time-based for small claims, but it would be adjusted based on income? KK: That’s right. I would give them a set price. If somebody comes in I say up to this point I’ll charge you this much. If it goes to trial I charge so much per day per trial, but it might be less than what my hourly rate would normally be.”

²⁰¹ Chicago family law firm Endzel Law LLC offers “monthly flat fees” on certain cases: “If your case is a good fit for a monthly flat fee, we will propose a scope of representation and a small flat fee that is paid for each month we work on your case. This option is excellent for complex cases that may have several issues to resolve over a longer period of time. For example, a contested custody case or a divorce with substantial financial assets involved. This option gives us the ability to do the work required to successfully resolve more complex matters, while still offering you certainty and transparency in your legal fees. Monthly flat fees range from \$150 – \$550 and are best for cases that are expected to last longer than 6 months.” (<http://endzellawllc.com/services/>)

²⁰² The risk that the client will not pay the bill promptly and in full remains. This is topic of Section 3.2, below.

²⁰³ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

²⁰⁴ E.g. Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015); Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015); Interview with “UU” (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015); Interview with “VV” (Personal injury practitioner, Toronto, female, 3 years since call to the bar. Interviewed July 17, 2015); Interview with “WW” (Personal injury practitioner, Toronto, female, 13 years since call to the bar. Interviewed July 20, 2015); Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016). See also M. Steven Rastin

and Kristy Fleming, *Considerations Under Contingency Fees: What to Take on and When* (Presentation to Ontario Trial Lawyers Association, on file with author) (Barrie, Ontario: Rastin & Associates, 2012) online: Rastin & Associates <: "if you don't offer a contingency arrangement to a potential client, she will walk out the door and hire the lawyer down the street that is all too willing to offer it."

²⁰⁵ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015): "90% of them will choose the fixed price. We will give clients the choice, we will say you can do it on a fixed price or an hourly rate... 90% of clients will choose the seven-and-a-half, because the thing they value is certainty, that's what's important to them."

²⁰⁶ Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015) .RR offers time-based and contingency, and "probably 90 percent of [his] clientele go contingency fee because they recognize there's risk associated with civil litigation."

²⁰⁷ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

²⁰⁸ Section 2.1, above.

²⁰⁹ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015) "My practice is a combination of these models. At any given time I probably have 50% hourly fees. When I say hourly it is hourly, but I tell them by the time at mediation the cost will not be exceeding this amount. They know that this is going to be less than that. If my time goes above that I discount that."

²¹⁰ Sam Glover, "Why Are Lawyers So Expensive? I'll Tell You Why (Lawyerist, February 12th, 2016)" (2014), [online](https://lawyerist.com/77964/lawyers-expensive-ill-tell/): <<https://lawyerist.com/77964/lawyers-expensive-ill-tell/>> (last accessed: 2 June 2017).

²¹¹ Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015) "I don't need to because people don't really demand a flat fee... there have been some because... I had one client who asked for a cap, and there was another client who I offered a soft cap to. I think a soft cap works for people who are hesitant, because they'll say 'well, I'm ok with you being paid, I don't mind, I know you're doing a service for me, but how do I know you're not going to spend 100 hours, or 200 hours, or unlimited hours on my file? So in those files, I think there's one or two, I said 'look, probably the top end of my billings will be X amount, but if I go over that I'm ok to charge \$50 an hour, or something like that. So... I'm going to get something back, but it's not really going to make or break the bank for them."

²¹² Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015) "NS: Would you use flat fees for a contested matter? How is that structured? II: All the time. Not structured up to a stage. So pleadings and I know the case so I understand the pleading will take this many hours. For this defence or claim I will charge this much. For affidavit or documents, mediation I charge this much and if there is a contested motion I expect these could be the contested motion issues. It is essentially for substantive work." Interviewee QQ said "For example, there is a lady who requested this morning for me to put together an application record for her. She doesn't want to be represented in court, but she needs an application record, so I am working in my mind what I think this is going to cost... it allows her some certainty. She's not surprised with bills every month." (Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015)).

²¹³ Mick Hassell, "[Self Service Litigation Garage](http://trialcounsel.ca/self-service-litigation-garage/)," <<http://trialcounsel.ca/self-service-litigation-garage/>> (last accessed: 2 June 2017).

²¹⁴ Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

²¹⁵ Also known as "phase billing," per Herbert M. Kritzer, "Fee Regimes and the Cost of Civil Justice" (2009) 28 Civil Justice Quarterly 344.

²¹⁶ Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015) "NS: So contingency for personal injury and time-based billing for family law. You mentioned also time-based for small claims, but it would be adjusted based on income? KK: That's right. I would give them a set price. If somebody comes in I say up to this point I'll charge you this much. If it goes to trial I charge so much per day per trial, but it might be less than what my hourly rate would normally be."

²¹⁷ Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

²¹⁸ Ibid. "Then they say do you think it will go to trial and we say I don't know. I can say generally speaking this is not inside the range of cases that will get withdrawn. It's not likely, but from what you are telling me right now it does seem like this is leaning more towards, but I can't be sure. They say if it goes to trial how many days do you think it should take? It should only take a day but sometimes as a result of scheduling or witness complications it can take 2-3 or more. Then it starts to get a little nerve-racking for clients. If it is causing a concern for them I often say I will cap it out at no more than 2 days, even if it goes 3 or 4. Based on my experience I know that these things can only go so long"

²¹⁹ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 103.

²²⁰ Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

²²¹ Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015) "NS: Did you ever do any formal flat rate retainers?"

PP: Yeah divorces especially if I had done the separation agreement or in my early days I did some wills. I would just do a flat rate. Then I may not quote a flat rate but what I said about a motion in my mind was worth \$2500 so while I wouldn't quote it as a flat rate I would always bill it as a flat rate."

²²² Competition & Markets Authority (UK), "Legal services market study: Final Report." (London: 2016), [online: <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>](https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf) at 238. The closest thing the author was able to find was an advertisement on the FlatLaw page which offers to prepare for and attend a Small Claims Court trial for a flat fee of \$1500. (Flatlaw, "Litigation," <https://www.flatlaw.ca/flatrate/All/Litigation/All>).

²²³ Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015) "NS: In terms of the non-legally aided clients, is your fee structure on a time basis or a flat rate? A2: Mostly on a flat rate. For me so far most of the matters I have been retained on privately have been relatively small like domestic assaults or impaired driving cases. It's easy to give a block fee on that and figure out what it's going to cost. I haven't had a criminal file yet where I billed on an hourly basis but I like block fees because I think it is predictable for the client. NS: Are block fees standard among the criminal defence bar here?"

A2: I would say yes for the relatively simple matters."

²²⁴ Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 58-9.

²²⁵ Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015).

²²⁶ Flatlaw, "Litigation," <https://www.flatlaw.ca/flatrate/All/Litigation/All>; The Family Law Coach, "Self-rep Providers Directory," <http://thefamilylawcoach.com/self-rep-service-providers-directory/> (last accessed: 2 June 2017).

²²⁷ Flatlaw, *ibid*.

²²⁸ For example, the FLSC Model Code and Ontario's Law Society of Upper Canada state that the firm must "strictly adher[e] to the advertised fee in every applicable case." (Federation of Law Societies of Canada, "[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/)," <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>> at R. 4.2-2; Law Society of Upper Canada, *Rules of Professional Conduct (Ontario)* (Toronto: LSUC, 2014) [online: LSUC](http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159) <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>> (last accessed: 2 June 2017) at R. 4.2-2.)

²²⁹ It can also foster salutary price competition between firms: see Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <<https://ssrn.com/abstract=2958845>>.

²³⁰ Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015): Regarding flat fees with a cap on the firm's commitment, TT said "I've thought about trying to do that because that's hard again. Because what do I do? Do I put a cap on pages and say \$500 a page? To me, intuitively it seems like a really hard thing to achieve and I haven't been able to figure out what the right balancing act is. Because if you take a custody in access dispute, that may be a 5 page case conference brief is much simpler to draft than a complex financial case that's 5 pages. If there's complex transactions, you may have to spend a lot of time to understand the organization of that company and to explain it. So there's, again, different nuances there that to me has always made me feel like I don't know how to do it."

²³¹ Interview with "C2" (Criminal law practitioner, Toronto, male, 11 years since call to the bar. Interviewed April 13, 2016) "Any domestic is typically going to be what I just said. Your standard on the other hand if the domestic is such that assaulted you, ended up in the hospital, broke her leg, and there is also a complaint of sexual improprieties in the past, fees are different. I can say I can anticipate medical records, potentially have to call an expert, so then we try and structure it around that."

²³² Ibid.

²³³ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016): "with our family law services it is flat fee but because there is some variation, what we've done to workflow the process is we've made our own internal chart and therefore we know what the cost is. We can't put it down neatly on a menu so we provide it at the point before they've chosen to retain us."

²³⁷ Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).

²³⁸ Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

²³⁹ Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 58-59.

²⁴⁰ Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015).

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Section 2.1, above.

²⁴⁴ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 9.

²⁴⁵ Litigation risk is the legal claimant's risk that the claim will produce nothing or produce less than the claimed amount, and the defendant's risk of being required to pay something to a claimant: Jonathan T. Molot, "A Market in Litigation Risk" (2009) 76 *University of Chicago Law Review* 367. Litigation risk is a consequence of the impossibility of precisely predicting adjudicated outcomes : Vicki Waye, "Litigation Risk Transfer and Law Firm Financial Arrangements" (2015) 17 *Legal Ethics* at 110. It exists incorporate hemisphere litigation as much as it does in personal plight work. Absent a recovery-proportionate contingency fee or sale of the claim, litigation risk is borne by the client rather than the firm. Regarding litigation risk, personal injury lawyers such as SS and WW emphasized the unpredictability of a plaintiff's recovery during the period of litigation, which in turn makes the ultimate damage award unpredictable. (Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015); Interview with "WW" (Personal injury practitioner, Toronto, female, 13 years since call to the bar. Interviewed July 20, 2015)) Employment lawyer II identified litigation risk in a case as a factor affecting his willingness to quote a contingency fee: Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

²⁴⁶ Canadian Bar Association (CBA) Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class." (Ottawa: CBA, 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf> at 18; Herbert M. Kritzer, "Fee Regimes and the Cost of Civil Justice," (2009) 28 *Civil Justice Quarterly* 344.

²⁴⁷ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

²⁴⁸ "If somebody couldn't afford \$1000 a month, because that's a lot for most people, we say you pay \$500 a month, but if you win we'll take a 10% or %15 contingency. So it is a lower contingency than what a firm would normally charge and a lower flat rate to make it more accessible" (Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015)). Similar comments were made in the Interview with "AA" (Immigration and refugee law practitioner, Toronto, male, 1 year since call to the bar. Interviewed April 13, 2015)

²⁴⁹ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) ; Nora Freeman Engstrom, "Run-of-the-Mill Justice" (2009) 22 *Georgetown Journal of Legal Ethics* 1485.

²⁵⁰ Figure 4 Labour Requirement Risk/Price Certainty Spectrum, above.

²⁵¹ Professional Regulation Committee (Law Society of Upper Canada), *Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)* 2016) <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>> (last accessed: 2 June 2017) at 42. According to Allan Hutchinson, the majority of Ontario personal injury retainers leave the client responsible for disbursements. (Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario." 2017), [online](https://www.scribd.com/document/336923555/Hutchinson-Report): <<https://www.scribd.com/document/336923555/Hutchinson-Report>> at 18, Note 26).

²⁵² Jasminka Kalajdzic, "How Much is Too Much? Contingency Fees in Class Actions" (2014) 10 *Class Action* 615, [online](https://ssrn.com/abstract=2518646): <<https://ssrn.com/abstract=2518646>> (last accessed: 2 June 2017); Benjamin Alarie and Peter Flynn, "Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions" (2014) 9 *Canadian Class Action Review* 355, [online](https://ssrn.com/abstract=2363798): <<https://ssrn.com/abstract=2363798>> (last accessed: 2 June 2017).

²⁵³ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015) “But the other option that we offer using that example is if somebody couldn’t afford \$1000 a month because that’s a lot for most people we say you pay \$500 a month, but if you win we’ll take a 10% or 15% contingency. So it is a lower contingency than what a firm would normally charge and a lower flat rate to make it more accessible.”

²⁵⁴ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 10.

²⁵⁵ Interview with “CC” (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015) ; Interview with “II” (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

²⁵⁶ Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationery Office (UK), 2009) [online: The Stationery Office \(UK\) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf) (last accessed: 2 June 2017); M. Steven Rastin and Kristy Fleming, “Considerations Under Contingency Fees: What to Take on and When (Presentation to Ontario Trial Lawyers Association, on file with author).” (Barrie, Ontario: Associates, 2012); Michael J. Trebilcock, “The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Positions” (1989) 15 *Canadian Business Law Journal* 360.

²⁵⁷ LEI is also known as pre-paid legal services.

²⁵⁸ Matthias Kilian, “Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience” (2003) 30 *Journal of Law & Society* 31.

²⁵⁹ Paul Vayda, “Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada’s Trial Lawyers Decision,” (2015) 36 *Windsor Rev. Legal & Soc. Issues* 207 at 217 : “increased saturation of legal expense insurance into the Canadian marketplace could significantly reduce the cost barrier. It would prevent middle-income Canadians from paying out-of-pocket for unexpected legal expenses.”

²⁶⁰ Luis Millan, “Legal Insurance: While Europeans have embraced the concept, Canadians remain cool to pre-paid legal services” *The Lawyers Weekly* (May 1, 2009). According to the *Affordable Justice* report, “this is partly because the civil law tradition of these environments – that is, a body of law developed by civil codes, rather than predominantly judicial precedent – lends itself to greater cost predictability than the common law tradition... Amongst other things, this means that insurers and legal assistance schemes alike are far better able to manage risks, in turn reducing the fear of prohibitive costs, or of falling through the gap, for many users of European legal systems.170” (Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online: <mams.rmit.edu.au/qr7u4uejwols1.pdf>](http://mams.rmit.edu.au/qr7u4uejwols1.pdf) at 41).

²⁶¹ Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online: <mams.rmit.edu.au/qr7u4uejwols1.pdf>](http://mams.rmit.edu.au/qr7u4uejwols1.pdf) at 39-40.

²⁶² Unifor, “[Unifor Legal Services Plan](http://www.uniforlsp.com/covinfo.htm),” [<http://www.uniforlsp.com/covinfo.htm>](http://www.uniforlsp.com/covinfo.htm) (last accessed: 2 June 2017). See also “[Hyatt Legal Plans \(A MetLife Company\)](https://www.legalplans.com),” [<https://www.legalplans.com>](https://www.legalplans.com) (last accessed: 2 June 2017).

²⁶³ CBA Access to Justice Committee, “Reaching Equal Justice: An Invitation To Envision And Act.” (Ottawa: CBA, 2013), [online: <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf>](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf) 2013 at 102. For examples of LEI plans that exclude family law legal services, see Barreau du Quebec, “[Legal Insurance Bureau](http://www.legalinsurancebarreau.com/faq/index.html),” [<http://www.legalinsurancebarreau.com/faq/index.html>](http://www.legalinsurancebarreau.com/faq/index.html) (last accessed: 2 June 2017) and DAS Canada, “[DASGroup -- Personal](http://das.ca/Group-amp;-Association-Programs/Products-Services/DAS-em-group-Personal-em.aspx),” [<http://das.ca/Group-amp;-Association-Programs/Products-Services/DAS-em-group-Personal-em.aspx>](http://das.ca/Group-amp;-Association-Programs/Products-Services/DAS-em-group-Personal-em.aspx) (last accessed: 2 June 2017).

²⁶⁴ Many such plans also restrict or completely deny the client his or her choice of lawyer. A lawyer-client relationship that the client has not chosen is less likely to be a strong one, and this in turn undermines legal professionalism and service quality.

²⁶⁵ Sujit Choudhry, Michael Trebilcock and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

²⁶⁶ Note 169 and accompanying text, above.

²⁶⁷ Action Committee on Access to Justice in Civil and Family Matters, *Colloquium Report* (Toronto: Canadian Forum on Civil Justice, 2014) [online: CFCJ <http://www.cfcj-fcjc.org/sites/default/files//docs/2014/ac_colloquium_web_FINAL.pdf>](http://www.cfcj-fcjc.org/sites/default/files//docs/2014/ac_colloquium_web_FINAL.pdf) (last accessed: 2 June 2017) at 9: "Simplify rules, forms and procedures. Simplification would open the door for multiple other improvements in service, including helping lawyers better to predict the number of days that will be spent in court, thus allowing them to feel more confident charging flat fees."

²⁶⁸ Regarding recent reforms to this effect, see Shelley McGill, "The Evolution Of Small Claims Court: Rising Monetary Limits And Use Of Legal Representation " (2015) 32 Windsor Yearbook of Access to Justice 173, [online: <http://ojs.uwindsor.ca/ojs/ledy/index.php/WYAJ/article/view/4520/3767>](http://ojs.uwindsor.ca/ojs/ledy/index.php/WYAJ/article/view/4520/3767) (last accessed: 2 June 2017); Janet Walker and Lorne Sossin, *Civil litigation* (Toronto: Irwin Law, 2010) ch. 10 "Civil Justice Reforms."

²⁶⁹ Regarding procedural complexity as an access to justice problem, see CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online: <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf>](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf) 2013 at 47. Michael Trebilcock, "The Price of Justice" in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018) at Part III: "The more prolix and protracted civil proceedings are, the higher the monetary, temporal, and psychological costs experienced by many litigants, creating pressures on them to settle cases or to move disputes to less costly and more expeditious venues."

²⁷⁰ Robert Harvie, "Checking Our Egos and Accepting Our Part is Fundamental to Restoring Public Trust in the Justice System ([National Self-Represented Litigants Project Blog, December 3, 2014](https://representingyourselfcanada.com/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/))," [<https://representingyourselfcanada.com/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/>](https://representingyourselfcanada.com/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/) (last accessed: 2 June 2017).

²⁷¹ Sujit Choudhry, Michael Trebilcock and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); Michael Trebilcock, "Report of the Legal Aid Review." (Toronto: (Ontario), 2008), [online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/).

²⁷² TPLF is considered further at section 7.5, below. See also Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" (2013) 61 *American Journal of Comparative Law* 93; Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online: <mams.rmit.edu.au/qr7u4uejwols1.pdf>](http://mams.rmit.edu.au/qr7u4uejwols1.pdf) at 25; David S. Abrams and Daniel L. Chen, "A Market for Justice: A First Empirical Look at ird Party Litigation Funding" (2013) 15 *University of Pennsylvania Business Law Journal* 1075, [online: <http://scholarship.law.upenn.edu/faculty_scholarship/875>](http://scholarship.law.upenn.edu/faculty_scholarship/875) (last accessed: 2 June 2017).

²⁷³ Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online: <mams.rmit.edu.au/qr7u4uejwols1.pdf>](http://mams.rmit.edu.au/qr7u4uejwols1.pdf) at 25 and sources cited therein.

²⁷⁴ See section 2.5.8, above.

²⁷⁵ See also David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 225: "a modified version of the contingent fee has been proposed that would shift the risk from both the client and the lawyer to a risk-sharing commission (Megarry 1980). This version, sometimes called

the 'group contingent fee.' would be based on an agency that would agree to pay a lawyer a normal fee to conduct a case, while the client would agree with the agency that it would receive a percentage of the award, if any. The risk is therefore 'mutualized' by the agency which should be able to reduce the contingent proportion below the usual 35 to 40 per cent, by screening out frivolous cases and more accurately assessing the degree of risk of outcome."

²⁷⁶ Jordan Furlong, "Why lawyers don't innovate ([Law21, August 20th, 2013](https://www.law21.ca/2013/08/why-lawyers-dont-innovate/))," <<https://www.law21.ca/2013/08/why-lawyers-dont-innovate/>> (last accessed: 2 June 2017); Jonathan Fields, "Why Most Lawyers Make Terrible Entrepreneurs," <<http://www.jonathanfields.com/why-most-lawyers-make-terrible-entrepreneurs/>> (last accessed: 2 June 2017).

²⁷⁷ Distinguishing litigation risk from other types of risk involved in a personal plight file, see Vicki Waye, *Trading in Legal Claims* (Adelaide, Australia: Presidian Legal Publications, 2008) at 35, above note 163.

²⁷⁸ Section 2.4.1, above.

²⁷⁹ Interview with "AA" (Immigration and refugee law practitioner, Toronto, male, 1 year since call to the bar. Interviewed April 13, 2015): "Flat fee exposes you to runaway engagement risk? Yes. Experience with a civil litigation file where he took on flat retainer to get through a certain stage of litigation. Unexpected motions took up many many hours. This was a learning experience. Future retainers will be drafted with escape hatches etc."

²⁸⁰ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015). See also Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015): "I need to fine tune it because I don't think I have been charging enough money thus far." ... "I think over time the more experience I get the better I will get at predicting what it costs." See also these comments from the Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016): "I was able to do it from the outset of my career and it doesn't take a lot of experience, it is just that I guess it takes a bit of experience to understand what cases become more complicated and what ones aren't. If you are just generally operating on the principle of, okay, it is \$5000 for a domestic, you're okay. It's just several will come along where you never thought of that issue and now you're spending 3-4 days on trial thinking." Family lawyer E2 said: "you can sit down and say 'what's does it really cost me to get through to questioning or discovery?' and 'what does it cost me to get through discovery to steps of trial?' and 'what does it cost me for trial on average', so at least you have the predictability...you have to start with that and really get a handle on what does it cost and then you can say to a client 'OK, I'll charge you this much to get from A to B' and you have a pretty good idea that is going to be in the ballpark. And then what happens is, if you can deliver that product in less time, now it becomes a return on your quote." (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015)).

²⁸¹ Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015)

²⁸² Ibid.

²⁸³ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015) "With fixed fees, " the risk is on the lawyer... it's just the nature of the adversarial process, it's unpredictable... as lawyers we have to figure out how to deal with that..."

²⁸⁴ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015) DD said that personal injury, likewise, is "very predictable, in the right hands there's very little risk or there should be very little risk."

²⁸⁵ Ibid.

²⁸⁶ Section 8.1.1, below.

²⁸⁷ Lorne Sossin and Samreen Beg, "Should Legal Services be Unbundled?" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 9: "legal expenses tend also to be unexpected. While anyone who owns a house knows they will have to replace the roof every 10-15 years, and while most people know they will eventually go through sickness, litigation is not an expense that is planned for (or, presently, insured for)."

²⁸⁸ Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016) "Semple: So the money is all deposited in cash retainers beforehand?"

C2: Right. Well not everyone, but that's certainly our policy. The rule generally in criminal law is what you have in trust when a file ends is what you get paid. That's just kind of a known fact. You pursue someone for \$2000 while they are in jail or pursue someone who has been acquitted."

²⁸⁹ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

²⁹⁰ Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015); Interview with "NN" (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015); Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016) "We operate on the premise that what we have in trust in the end is what we get paid. It's not like working with businesses where you send an invoice and get paid."

²⁹¹ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 142. "Another 39 percent reported occasional collection problems."

²⁹² Lonny Balbi, "Flat-fee billing: replacing time with value ([The Lawyers Weekly, July 03 2009](http://www.lawyersweekly.ca/articles/954))," <<http://www.lawyersweekly.ca/articles/954>> Italics in original source.

²⁹³ Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

²⁹⁴ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015); Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015): "I know that the \$200 for the consultation fee is tough. I get it and I know that that might seem like a lot of money. The question you should really be asking yourself is what if you come out of this consultation and there is something you can do and how are you going to fund that? If you are concerned about \$200 what will happen when I tell you what it will take to represent you in this case."

²⁹⁵ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

²⁹⁶ Noel Semple, "The Cost of Seeking Civil Justice in Canada," (2015) 93 Canadian Bar Review 639, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> at section B(3), page 658.

²⁹⁷ For example, family lawyer "E2" told me: "my general minimum retainer is \$5000. If I know it's going to be highly contested, \$10,000." (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

²⁹⁸ See e.g. Law Society of Upper Canada, "[By-Law 9: Financial Accounts and Transactions](http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485024)," <www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485024> (last accessed: 2 June 2017) at s. 7(1).

²⁹⁹ “If you are expecting a \$5000 retainer upfront, there are not many female clients who can do that at the beginning of their separation.” (Interview with “NN” (Estates and family law practitioner, Windsor, female, 14 years since call to the bar. Interviewed June 9, 2015)).

³⁰⁰ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015); Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015): “They want a good fit and part of it is price - the retainer - the first thing they ask is what my retainer is. I’ve had to explain to people [that], the real difference is in the hourly rate.” However, clients nevertheless “look at the retainer. When somebody hears that you need a \$5000 retainer they go ugh. If I say I only need \$2000 or \$3000 it’s well that doesn’t sound too bad. I have to explain that it is part of the cost...”

³⁰¹ Michael McKiernan, “The Going Rate: The 2015 Canadian Lawyer Legal Fees survey ([Canadian Lawyer, June 2015](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf)),” <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>.

³⁰² Noel Semple, “The Cost of Seeking Civil Justice in Canada,” (2015) 93 Canadian Bar Review 639, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> ; Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015): “most lawyers will do a free consult or at least just say hello and what’s the issue in my experience anyway. When you don’t have to I guess you don’t and some lawyers don’t have to.”

³⁰³ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015). Interestingly, another employment lawyer defended his initial consultation charge on the grounds that the preliminary opinion on the merits of the case has substantial value to the client, insofar as the client can use that evaluation to extract a favourable settlement from the employer. This contrasts to the estimate from a plumber or house-painter, which does not have inherent value to the client: (Interview with “II” (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

³⁰⁴ Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015) : “ If somebody maybe doesn’t have the money upfront they ask if I can make other arrangements like a payment schedule. I have done it where I ask for a portion of the retainer upfront and payments for the retainer for the next few months. In that respect they negotiate it.”

³⁰⁵ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015): regarding retainer fees, “we’ve had negotiations on how much you really need...usually we’re willing to play ball on that depending on the client.” See also Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 149.

³⁰⁶ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016): “What I often tell clients is, let’s say the retainer is \$5000 they’ll say do I pay all that upfront. I typically say we require half of the minimum retainer fee. Again I am flexible. If they have \$1000 is that enough? I might have to make an assessment. Generally what I am looking for – is this person serious? Are they going to pay their bills? There’s all sorts of mechanisms. Some people will have postdated cheques and if one bounces then they will say first one bounces, okay. Second one bounces then we are getting off the record.”

³⁰⁷ Interview with “A2” (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

³⁰⁸ For example, a case might be predicted to have a fee of \$30,000 and require 10 months to get to a hearing if it does not settle beforehand. YY’s client will pay \$3,000 (\$30,000 divided by 10) per month until the matter settles if it does so.

³⁰⁹ Employment law cases may involve less variability than family law cases in terms of both labour requirements and time to completion. For example, Toronto employment lawyer II said: “Statistically most cases settle in this time period. You may settle in 3 weeks. Most likely it will settle here, but if it doesn’t it will go all the way

here. They have an understanding of what is this time period, middle time period, and if it goes all the way to trial. ... As the matter goes along, you get a better sense and look at the defence to figure out whether it will go to trial or not at times. You can tell how much effort and how much depth the pleadings have to tell you the mindset of the other side and what they want out of the process. You can make an informed guess." (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)).

³¹⁰ Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).

³¹¹ Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 13.

³¹² René J. Basque, *RE: Budget 2017 Proposal to Eliminate Billed-Basis Accounting: Potential Impact on Access to Justice and Implementation Fairness* (Ottawa: Canadian Bar Association, 2017) [online](http://www.cba.org/CMSPages/GetFile.aspx?guid=fd1d8c15-6e35-4238-bdf6-fda3997ed93f): CBA <http://www.cba.org/CMSPages/GetFile.aspx?guid=fd1d8c15-6e35-4238-bdf6-fda3997ed93f> (last accessed: 2 June 2017), Appendix A. Regarding the relationship between billed-basis accounting and deferred payment, see section 3.4.3, below.

³¹³ Interview with "UU" (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015).

³¹⁴ See notes 253 and 254 and accompanying text, above. Toronto estate litigator HH explained how "on spec" retainers work: "with a will challenge, when you're representing the challenger and potentially if they win or reach a settlement, these are also fees that are, in those cases, if we think there's a strong claim, what we'll often ... we'll often take a direction if we know there's going to be money coming out of the estate, there's a strong chance to settle during mediation, let's take a direction to have no payment of these fees until the settlement, and then we get our fees from the settlement funds." (Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015). Similar comments were made in the Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015) and the Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

³¹⁵ One possible drawback of payment-on-recovery was identified by three time-billing lawyers. They suggested that payment-on-recovery leads to unrealistic client demands on the lawyer's time because the client has a diminished sense of the value of time: Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015)). However this might be addressed by providing ongoing accounting of the amount which will eventually be deducted from recovery.

³¹⁶ In cases of non-payment, Mather et al reported that "by far the most common option" among the family lawyers they interviewed "was to accept monthly payments, which might be as little as 'five dollars a month forever' on a bill of several thousand dollars." (Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 143).

³¹⁷ Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 26).

³¹⁸ Regarding sale of claim generally, see Peter Charles Choharis, "A Comprehensive Market Strategy For Tort Reform" (1995) 12 Yale J. on Reg. 435 and Isaac Marcushamer, "Selling Your Torts: Creating a Market for Tort Claims and Liability" (2005) 33 Hofstra Law Review 1543, [online](http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss4/11): <http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss4/11> (last accessed: 2 June 2017) and Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf>.

³¹⁹ Vicki Wayne, *Trading in Legal Claims* (Adelaide, Australia: Presidian Legal Publications, 2008)

- ³²⁰ Ibid. at 35. A monopsony is a situation in which there is only one buyer for something.
- ³²¹ Regarding litigation risk, see note 244, above.
- ³²² Section 7.5, below. This includes not only personal injury claimants, but also, for example, homemaker spouses in divorce litigation and employees in wrongful dismissal litigation.
- ³²³ A similar temptation may lead the firm to recommend premature settlement. See section 7.5, below.
- ³²⁴ In a few niches, for example insolvency proceedings, there is a limited possibility of selling claims.
- ³²⁵ Regarding information asymmetry, see section 1.2.1 above and Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 22-27.
- ³²⁶ Vicki Waye, *Trading in Legal Claims* (Adelaide, Australia: Presidian Legal Publications, 2008) at 52.
- ³²⁷ Ibid. at 39: "one problem associated with broadening access to justice is the likelihood that claims will be discounted below socially optimal levels."
- ³²⁸ Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <<https://ssrn.com/abstract=2958845>>.
- ³²⁹ Vicki Waye, *Trading in Legal Claims* (Adelaide, Australia: Presidian Legal Publications, 2008) at 47.
- ³³⁰ Ibid.
- ³³¹ Vicki Waye, *Trading in Legal Claims* (Adelaide, Australia: Presidian Legal Publications, 2008) at 49; Owen Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073.
- ³³² Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](#): <mams.rmit.edu.au/qr7u4uejwols1.pdf>
- ³³³ Section 3.2, above.
- ³³⁴ This firm has over 300 staff working in three locations: Co-operative Legal Services Limited, "[About Us](#)," <<https://www.co-oplegalservices.co.uk/about-us/>> (last accessed: 2 June 2017).
- ³³⁵ Section 2.6.2, above.
- ³³⁶ Law Society of Manitoba, "[Family Law Access Centre](#)," <<http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre>> (last accessed: 2 June 2017). Reviewing this and other "modest means" programs offering discounted rates, see Lucy B. Bansal, "A Lawyer for John Doe: Alternative Models for Representing Maryland's Middle Class" (2013) 13 *University of Maryland Law Journal of Race, Religion, Gender and Class* at 169. Offering reduced rates to clients known to have limited capacity to pay can be a profitable strategy as well as an altruistic one for law firms: Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 277.
- ³³⁷ Law Society of British Columbia, *Solicitors' Liens and Charging Orders – Your Fees and Your Clients* (Victoria, BC: LSBC, 2013) [online](#): LSBC <<http://www.lawsociety.bc.ca/docs/practice/resources/solicitors-liens.pdf>> (last accessed: 2 June 2017).
- ³³⁸ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 144.
- ³³⁹ Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

- ³⁴⁰ "Solicitors Act (Ontario), R.S.O. 1990, c. S.15," <<https://www.ontario.ca/laws/statute/90s15>> (last accessed: 2 June 2017) ss. 4–14; Erik S. Knutsen and Janet Walker, "What is the Cost of Litigating in Canada?" in Christopher Hodges, Stephan Vogenauer & Magdalena Tulibacka eds., *The Costs And Funding Of Civil Litigation: A Comparative Perspective* (Portland, Oregon: Hart, 2010); Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done About It" (2004) 83 Can. Bar Rev. 859
- ³⁴¹ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) .
- ³⁴² Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).
- ³⁴³ Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Trevor Farrow & Les Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2017), [online](https://ssrn.com/abstract=2959477): <<https://ssrn.com/abstract=2959477>> (last accessed: 2 June 2017) at section 3.1.2.
- ³⁴⁴ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 267-8.
- ³⁴⁵ *Ibid.* at 268-273.
- ³⁴⁶ *Batalla v St. Michael's Hospital*, 2016 ONSC 1513 (CanLII); Tom Blackwell, "Judge slashes Toronto lawyer's 'excessive' fee to give more money to injured child in malpractice suit ([National Post, April 3, 2016](http://news.nationalpost.com/news/canada/judge-slashes-excessive-payout-for-toronto-lawyer-in-malpractice-suit-saying-more-mony-should-go-to-injured-child))," <<http://news.nationalpost.com/news/canada/judge-slashes-excessive-payout-for-toronto-lawyer-in-malpractice-suit-saying-more-mony-should-go-to-injured-child>> (last accessed: 2 June 2017).
- ³⁴⁷ [Income Tax Act](http://laws-lois.justice.gc.ca/eng/acts/l-3.3/page-24.html#docCont), R.S.C., 1985, c. 1 (5th Supp.), <<http://laws-lois.justice.gc.ca/eng/acts/l-3.3/page-24.html#docCont>>.s. 34.
- ³⁴⁸ Recording and valuing work-in-progress also involves an administrative burden, which may be particularly difficult to bear for the small firms that predominate in the personal plight quadrant. René J. Basque, "RE: Budget 2017 Proposal to Eliminate Billed-Basis Accounting: Potential Impact on Access to Justice and Implementation Fairness." (Ottawa: Association, 2017), [online](http://www.cba.org/CMSPages/GetFile.aspx?guid=fd1d8c15-6e35-4238-bdf6-fda3997ed93f): <<http://www.cba.org/CMSPages/GetFile.aspx?guid=fd1d8c15-6e35-4238-bdf6-fda3997ed93f>> at 1, 6. In the words of one lawyer quoted in this document, "I am a sole practitioner and as a result have to do everything myself. I am not able to take the wildest guess at how to evaluate my work in progress"(at page 10).
- ³⁴⁹ *Ibid.* at 2.
- ³⁵⁰ Bill Morneau, *Building a Strong Middle Class (Government of Canada Budget 2017)* (Ottawa: Government of Canada, 2017) [online](http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf): [Canada](http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf) <<http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf>> (last accessed: 2 June 2017) at 209.
- ³⁵¹ Canada Revenue Agency, "[Billed-Basis Accounting](http://www.cra-arc.gc.ca/gncy/bdgt/2017/qa11-eng.html)," <<http://www.cra-arc.gc.ca/gncy/bdgt/2017/qa11-eng.html>> (last accessed: 2 June 2017).
- ³⁵² See section 3.3.3, above.
- ³⁵³ The CRA Submission refers to these as "de facto contingency fee arrangements" (Basque, *supra* note 347 at 2).
- ³⁵⁴ *Ibid.* at 3.
- ³⁵⁵ *Ibid.* at 9.
- ³⁵⁶ Section 2.5.6, above.
- ³⁵⁷ Lester Brickman, *Lawyer barons : what their contingency fees really cost America* (New York: Cambridge University Press, 2011).

³⁵⁸ Ibid. at 35-36.

³⁵⁹ Employment lawyer "II" described the appeal of contingency fees to clients of modest means as follows: "Mostly clients who want contingency are not wealthy. Means are less and they don't want to think about paying the lawyer. They let you make your money and you make our money, but we don't want to hear about hourly, hear about flat fees...they just become nervous so they prefer contingency model. Those are labourers, factory workers, junior employees, even some managerial employees too. It is basically their comfort level." (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)). Toronto civil litigator and former personal injury lawyer BB said: "I think [contingency billing] is really the only way for access to justice in many cases. I mean I suppose if the legal aid budget were unlimited then you wouldn't need it, but without that happening..." (Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015)). See also M. Steven Rastin and Kristy Fleming, "Considerations Under Contingency Fees: What to Take on and When (Presentation to Ontario Trial Lawyers Association, on file with author)." (Barrie, Ontario: Associates, 2012).

³⁶⁰ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 17.

³⁶¹ Bert Kritzer, *The justice broker: lawyers and ordinary litigation* (New York: Oxford University Press, 1990) at 58.

³⁶² Michael J. Trebilcock, "The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Positions," (1989) 15 *Canadian Business Law Journal* 360 at 361. See also the comments of interviewee BB: "I think lawyers are like many other professionals, and if there's a reward people take risks. And if you're a skilled lawyer you know that you're worth it, you would be engaged in sort of cases that would compensate you accordingly." (Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015))

³⁶³ As Allan Hutchinson puts the point, "rational lawyers under CFAs [contingency fee arrangements] will strive to maximize their compensation by constantly assessing the cost-benefit of proceeding further in the case." (Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario." 2017), [online](https://www.scribd.com/document/336923555/Hutchinson-Report): <<https://www.scribd.com/document/336923555/Hutchinson-Report>>).

³⁶⁴ For example, criminal defender C2's view was that contingency fees in criminal law would "foste[r] a lot of unethical behaviour. You think I can double my fees if I just tweaked these facts a little or lied to the Crown in a subtle way. It is a hard thing to say that every criminal lawyer, lawyer or person is not going to take those leniencies when there is always an incentive. There's an ethical component to that too where you incentivizes winning as opposed to incentivize being a really good criminal lawyer... Same ethical dilemmas that arise for defence lawyers. That's why you should be part of it. You are not retained to win. You are retained to defend this person as best as possible." ((Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016). See also Olivia Carville, "Lawyers fight 'archaic' ban on no-win no-fee arrangements in family court ([Toronto Star, May 31, 2015](https://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html))," <<https://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html>> (last accessed: 2 June 2017).

³⁶⁵ Michael J. Trebilcock, "The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Positions," (1989) 15 *Canadian Business Law Journal* 360.

³⁶⁶ See note 178, above.

³⁶⁷ Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2017).

³⁶⁸ M. Steven Rastin and Kristy Fleming, "Considerations Under Contingency Fees: What to Take on and When (Presentation to Ontario Trial Lawyers Association, on file with author)." (Barrie, Ontario: Associates, 2012); Professional Regulation Committee (Law Society of Upper Canada), "Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016)." 2016), [online](https://www.lsuc.on.ca/uploadedFiles/): <<https://www.lsuc.on.ca/uploadedFiles/>

Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>; Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario." 2017), [online](https://www.scribd.com/document/336923555/Hutchinson-Report): <<https://www.scribd.com/document/336923555/Hutchinson-Report>>.

³⁶⁹ Noel Semple, "Personal Legal Services: Mending the Market (Working Paper, April 2017)," <<https://ssrn.com/abstract=2958845>>.

³⁷⁰ William T. Hogan, "Re: Issues on the Future of Legal Services (Letter to The ABA Commission on the Future of Legal Services, December 20, 2014)," <https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services.pdf> at 2.

³⁷¹ "Solicitors Act (Ontario), R.S.O. 1990, c. S.15," <<https://www.ontario.ca/laws/statute/90s15>>, s. 28.1(3)(b)

³⁷² Folkins, *ibid.*

³⁷³ Tali Folkins, "Time for contingency fees in family law? ([Law Times \(Ontario\), June 8 2015](http://lawtimesnews.com/201506084735/headline-news/time-for-contingency-fees-in-family-law))," <<http://lawtimesnews.com/201506084735/headline-news/time-for-contingency-fees-in-family-law>> (last accessed: 2 June 2017); Olivia Carville, "Lawyers fight 'archaic' ban on no-win no-fee arrangements in family court ([Toronto Star, May 31, 2015](http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html))," <[https://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html](http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html)>. Windsor family lawyer PP said: "I would be concerned that the money that gets paid is child support or spousal support or division of an asset. That's somebody's retirement plan, so how do you have contingency fees when those are really what the settlements are. I might be very successful as a lawyer and get a lump sum payment on child or spousal support because the person hasn't paid. One of my cases is an order for \$16000 today. Should that lawyer get a percentage of that money? That's child support. ..." (Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015)).

³⁷⁴ There would certainly be complications in applying contingency fees to family law cases. While a personal injury or class action suit seeks a single payment from the defendant, a family law client often seeks a more complex remedy. Some remedies are lump sums (e.g. a matrimonial property settlement) and could be readily subjected to a proportionate fee as in tort cases. Other family law remedies are income streams (e.g. child and/or spousal support). A proportionate fee could also be deducted from each support payment going forward, but to secure the fee it might be necessary for the payments to be made to the firm in trust instead of the ultimate recipient. Finally, some family law remedies (e.g. child custody and access rights and restraining orders) are non-monetary and this is a challenge for contingency billing. These would have to be billed in some other way. See Tali Folkins, "Time for contingency fees in family law? ([Law Times \(Ontario\), June 8 2015](http://lawtimesnews.com/201506084735/headline-news/time-for-contingency-fees-in-family-law))," <<http://lawtimesnews.com/201506084735/headline-news/time-for-contingency-fees-in-family-law>>.

³⁷⁵ Law Society of British Columbia, *Law Society Rules* (Vancouver: LSBC, 2015) [online](https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/): LSBC <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/>> (last accessed: 2 June 2017) at 8-2(1)(a).

³⁷⁶ "Solicitors Act (Ontario), R.S.O. 1990, c. S.15," <<https://www.ontario.ca/laws/statute/90s15>>

³⁷⁷ Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario." 2017), [online](https://www.scribd.com/document/336923555/Hutchinson-Report): <<https://www.scribd.com/document/336923555/Hutchinson-Report>> at 10.

³⁷⁸ Arguing against legislative caps on contingency fees, see Herbert M. Kritzer, *Risks, reputations, and rewards: contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 263-265. See also Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2017) at 3.1.1.

³⁷⁹ Lord Chancellor MacKay, cited in John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding* (London: Palgrave, 2014) at 28.

³⁸⁰ Regarding information asymmetry, see section 1.2.1 above.

³⁸¹ Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2017).

³⁸² Michael J. Trebilcock, "The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Positions," (1989) 15 *Canadian Business Law Journal* 360 at 366.

³⁸³ Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <<https://ssrn.com/abstract=2958845>>, Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2017).

³⁸⁴ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 10.

³⁸⁵ Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

³⁸⁶ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 244-5.

³⁸⁷ "Many self-reps find it difficult to travel to a lawyer's office. There may be an issue of distance or transportation. There may be a problem of getting time off work, or of finding childcare. There may be the discomfort some people have about travelling 'downtown' to a fancy office." (Joel Miller, *1 Insight, 6 Truths and 3 Pillars : A fresh approach to serving self-reps in Family Court* (Presentation to Family Dispute Resolution Institute of Ontario. May 4, 2015, document on file with author) (Toronto: FDRIO, 2015)) at 5. Opening offices in shopping malls and strip malls was one of the strategies of the American personal plight "franchise" firms which flourished in the 1990s: Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 28. Two respondents indicated that they have opened lightly-staffed "satellite" or "consultation" offices to serve clients in a different area. (Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015)).

³⁸⁸ See for example Australian firm Nest Legal, "Australia's first online after-hours lawyer for busy families." ("[Nest Legal](#)," <<https://www.nestlegal.com.au>> (last accessed: 2 June 2017).

³⁸⁹ Joel Miller, "1 Insight, 6 Truths and 3 Pillars : A fresh approach to serving self-reps in Family Court (Presentation to Family Dispute Resolution Institute of Ontario. May 4, 2015, document on file with author)." (Toronto: FDRIO, 2015) at 7, calling for "Anywhere service. The self-rep consumer must be able to access the service from anywhere by email, phone, or Skype. No going to an office is required. It's all remote."

³⁹⁰ Value stance or ideology is another dimension along which personal plight legal services can be variegated. For an intriguing example, see this discussion of Galldin & Roberts, a feminist law firm: Karin Galldin, Leslie Robertson and Andrea Tredenick, "Starting a Feminist Law Firm (Contours: Voices of Women in Law) " (2015), [online](https://contours-mcgill.com/2015/04/01/vol3startingafeministlawfirm/): <<https://contours-mcgill.com/2015/04/01/vol3startingafeministlawfirm/>> (last accessed: 2 June 2017). In some cases, perhaps especially in family law, some clients may prefer to work with a legal professional who has a certain gender or sexual orientation.

³⁹¹ Offering choices in pricing models, see Infinity Law, "[Legal Pricing](#)," <<https://www.infinlaw.com/legal-pricing/>> (last accessed: 2 June 2017). Interviewee RR does likewise: "I offer people a contingency fee, a retainer or a fee-for-service retainer. I try to explain to them the pro- and the con- of each and then I say to them 'you pick'. I don't care whatever way you want to arrange payment because as far as I'm concerned one retainer is just as bad as the other. They're both bad because they're both way too expensive... NS: the fee-for-service retainer, would that be a time based retainer? RR: Yeah, it's x-dollars per hour times the number of hours and at the end whatever time your case has taken it's multiplied out and it's all done by computer and the secretaries take care of it... on personal injury I always offer them both. The other cases basically boils down to how strong of a case I think they have. If I think they have a strong case, sure

I'm willing to go contingency and take my chances. If I think they have a lousy case, I'll tell them that and I'll insist on a fee for service retainer. Sometimes they agree and sometimes they leave." (Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015)).

³⁹² Section 4.4.3.1 and 4.4.3.2, below.

³⁹³ Competition & Markets Authority (UK), "Legal services market study: Final Report." (London: 2016), [online: <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>](https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf) at 202.

³⁹⁴ Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional regulation : a staff study of accountancy, architecture, engineering and law in Ontario prepared for the Professional Organization Committee* (Toronto: Ministry of the Attorney General, 1979) at 78-9; Bryant G. Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective" (1983) 1983 Wisconsin Law Review 639; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 21-22.

³⁹⁵ Michael McKiernan, "The Going Rate: The 2015 Canadian Lawyer Legal Fees survey ([Canadian Lawyer, June 2015](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf))," http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf.

³⁹⁶ E.g. Interview with "CC" (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015); Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

³⁹⁷ Alberta family lawyer E2 said "I have a clerical assistant, a legal assistant who can do it well under my supervision and I charge her around 125 dollars an hour as opposed to my 500 dollars an hour. I will make judgment calls on when that's appropriate, [and ask the client] 'do you have a problem with that?' Unanimously my clients are happy that they're having someone do an affidavit of records where some of the tedious stuff, organizing undertakings from examinations, gathering financial disclosure, she'll do that. So when she's working independent of me, I'll bill her time independently and transparently to the clients. And I think it is good for them. I think, to be honest I think it's a big part of where family law needs to go. I don't think as a practice we're doing it extremely well." (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015)).

³⁹⁸ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 140.

³⁹⁹ Daphne Dumont, "'Better . . . or Worse?' The Satisfactions and Frustrations of the Lawyer-Client Relationship" in Blaikie, Cromwell & Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012) at 24: "After the problem is explained, after the client's fears are expressed, and after the details of the legal problem are thoroughly talked over... the lawyer, confident in her knowledge of procedure and her estimate of the justice of the client's claim, begins to take up the strain of solving the client's problem. The lawyer accepts the responsibility, and the process of seeking justice gets underway." As Sossin and Beg explain it, "the traditional legal service delivery model of full representation relies on a lawyer taking on all aspects of a client's legal issue." (Lorne Sossin and Samreen Beg, "Should Legal Services be Unbundled?" in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 199).

⁴⁰⁰ Ann Juergens, "Toward a More Effective and Accessible Solo and Small Firm Practice Model" in Estreicher & Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) at 386.

⁴⁰¹ See e.g. "YouCounsel," <http://youcounsel.ca> (last accessed: 2 June 2017).

⁴⁰² See section 1.3.3.2, above.

⁴⁰³ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁴⁰⁴ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

⁴⁰⁵ Ibid.

⁴⁰⁶ Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

⁴⁰⁷ “Vertical unbundling breaks up the lawyer’s role into a number of limited legal services, empowering the client to select only those needed. Horizontal unbundling limits the lawyer’s involvement to a single issue or court process.” (Forrest S. Mosten, “Unbundled Legal Services Today - and Predictions for the Future” (2012) 35 *Family Advocate* 14, [online](http://www.mostenmediation.com/books/articles/Unbundled_Legal_Services_Today_and_Predictions.pdf): <http://www.mostenmediation.com/books/articles/Unbundled_Legal_Services_Today_and_Predictions.pdf> (last accessed: 2 June 2017)). See also Lucy B. Bansal, “A Lawyer for John Doe: Alternative Models for Representing Maryland’s Middle Class,” (2013) 13 *University of Maryland Law Journal of Race, Religion, Gender and Class* at 173 et seq.

⁴⁰⁸ Toronto civil litigator Mick Hassel’s “Self Service Litigation Garage” combines price certainty with price/tier options. It includes four packages, varying from “On Call” (\$250 flat fee for 5 phone calls with the lawyer in a month) up to “Rent a Lawyer” (\$750 flat fee for representation in one court appearance.) Mick Hassel, “[Self Service Litigation Garage](http://trialcounsel.ca/self-service-litigation-garage/),” <<http://trialcounsel.ca/self-service-litigation-garage/>>. Windsor litigator QQ gave another example: “there is a lady who requested this morning for me to put together an application record for her. She doesn’t want to be represented in court, but she needs an application record, so I am working in my mind what I think this is going to cost.” (Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015)).

⁴⁰⁹ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015) ; *ibid.*

Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 80-81; See pp. 208-9 in Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

⁴¹⁰ Nikki Gersh bain, “A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family Litigants ([Presentation to County of Carleton Law Association, April 19 2017](https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0)),” <<https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0>> (last accessed: 2 June 2017); National Self-Represented Litigants Project, “[The Lawyer as Coach? A New Model of Unbundling in Family Law](https://representingyourselfcanada.com/legal-coaching/),” <<https://representingyourselfcanada.com/legal-coaching/>> (last accessed: 2 June 2017). Lynn Mather et al found this practice among Maine and New Hampshire family lawyers in the 1990s: Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 141.

⁴¹¹ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015). See also Interview with “RR” (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015): “For small claims court ... occasionally I will agree to accept what I called a ‘limited service retainer’ where I’ll tell them what to do, where to go, what form to get, and they’ll do all the running around and paying the fees. And when they finish that stage they’ll come back and now what. And I’ll bill them for whatever time it takes for me to guide them through the system.”

⁴¹² Nikki Gersh bain, “A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family

Litigants (Presentation to County of Carleton Law Association, April 19 2017),” <<https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0>> at 5.

⁴¹³ <http://www.familylawhelp.ca/family-law-services>

⁴¹⁴ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with “RR” (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015); Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015); Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

⁴¹⁵ The Family Law Coach, “Self-rep Providers Directory,” <<http://thefamilylawcoach.com/self-rep-service-providers-directory/>>.

⁴¹⁶ *Ibid.* See also <http://www.courtassist.ca/services.html>.

⁴¹⁷ Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 121; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 276.

⁴¹⁸ Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

⁴¹⁹ Waymark Law, “Services,” <<http://waymarklaw.ca/law-services/>> (last accessed: 2 June 2017) Waymark offers one-on-one coaching for \$150/hr, as well as “pinch hit” representation in court for \$250/hour.

⁴²⁰ The Family Law Coach, “Self-rep Providers Directory,” <<http://thefamilylawcoach.com/self-rep-service-providers-directory/>>; Mick Hassell, “Self Service Litigation Garage,” <<http://trialcounsel.ca/self-service-litigation-garage/>>

⁴²¹ See for example “Affording Justice,” an Australian firm advertising a variety of unbundled services: “ Formed by two high profile Queensland practitioners, Affording Justice is a law practice that aims to be ‘an affordable and independent first step for everyone’ and to give ‘step by step guidance to people who can’t afford full legal representation’. Affording Justice is a predominantly virtual firm with low overheads, and its website offers three forms of service. The first is Legal Diagnosis, which provides advice about the law that applies to a person’s situation and the processes available to help. Where a person can resolve the matter themselves, they can elect to use the Legal Advice and Legal Task Help services, which offer assistance with defined tasks for fixed prices. Where it is apparent that a person needs full representation, they are offered a referral to another solicitor, or to an associated practice, Doyle Family Law.” Affording Justice, “How Much Does It Cost?” (2016), [online](http://affordingjustice.com.au/our-fees/): <<http://affordingjustice.com.au/our-fees/>> (last accessed: 2 June 2017).

⁴²² Doing so presumably reduces the labour requirement for the firm.

⁴²³ Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 92

⁴²⁴ Chapter 1, above.

⁴²⁵ Ipsos Mori, *Qualitative Research Exploring Experiences and Perceptions of Unbundled Legal Services* (London: Legal Services Board and Legal Services Consumer panel (England & Wales), 2015) [online](https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf): LSB/LSCB <https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf> (last accessed: 2 June 2017) at 1.

⁴²⁶ Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle*

Income Access to Justice (Toronto: University of Toronto Press, 2012): “Unbundled services would soften the harshness of the “all or nothing approach” by being a mid- way point between full representation and no representation.”

⁴²⁷ “Clients want the opportunity to do some more routine work themselves to keep costs down.” (CBA Legal Futures Initiative, “The Clients’ Perspective.” (Ottawa: 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf> at 9).

⁴²⁸ See also section 5.3 considering unbundling as a form of vertical division of labour.

⁴²⁹ E.g. Waymark Law, “[Services](http://waymarklaw.ca/law-services/),” <<http://waymarklaw.ca/law-services/>>.

⁴³⁰ Joel Miller, “1 Insight, 6 Truths and 3 Pillars : A fresh approach to serving self-reps in Family Court (Presentation to Family Dispute Resolution Institute of Ontario. May 4, 2015, document on file with author).” (Toronto: FDRIO, 2015); Josh King, “Price Transparency and Legal Services ([Video, Reinvent Law Channel](https://vimeo.com/98606909)),” <<https://vimeo.com/98606909>>.

⁴³¹ It may however vary based on unexpected legal and factual wrinkles not apparent at the initial consultation.

⁴³² Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁴³³ Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

⁴³⁴ Interview with “KK” (Family law and estate litigation practitioner, Samia, female, 3 years since call to the bar. Interviewed May 26, 2015).

⁴³⁵ CBA Access to Justice Committee, “Reaching Equal Justice: An Invitation To Envision And Act.” (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 93-4. See also comments from Toronto family lawyer FF: “when you have a lawyer in a situation, and they only have a limited scope in which they’re supposed to operate, and they do the very best that they possibly can under the circumstances... there’s probably going to be something that gets missed, because you’re not handling the case from beginning to end. You’re not familiar with everything, you can’t necessarily rely on ... what the client is telling you. You don’t have that context of the interactions with opposing counsel, or in some cases the materials... ” (Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015)).

⁴³⁶ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁴³⁷ Interview with “RR” (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015): re coaching model, “The unfortunate part of that one though is once they get close to trial, frequently they get nervous and they start insisting that I represent them.”

⁴³⁸ Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 214: “the “on-again, off-again” nature of the representation may result in inconsistencies within the litigant’s file. This may especially be the case where more than one lawyer is retained at different points by a litigant resulting in conflicting strategies and approaches to the legal problem.”

⁴³⁹ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

⁴⁴⁰ Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015). See also Interview with “CC” (Family law and estate litigation practitioner, Toronto, male,

44 years since call to the bar. Interviewed April 16, 2015): “if you are just there on the periphery, things are going to be happening, you’re not going to know they’re there... when things go wrong they’re going to blame you anyway.”

⁴⁴¹ Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012): “it might be difficult for a lawyer retained on a limited basis to get “up to speed” on a file in a timely fashion.”

⁴⁴² If multiple firms are retained in succession on a single file, the problem is compounded. C2 said that retaining multiple consecutive firms is highly problematic in a criminal defence case: “every lawyer has such a different perspective of a case and the way it unfolds is so dynamic that to come in at some point and say ‘you should do this’... it actually can negatively affect the overall process. Imagine you had 7 coaches who offer 5 different opinions along the way of a playoff game of the NHL. They’re like okay guys let’s switch to the Russian model now... What would happen with the unbundled method is two things: the lawyer who comes in late will go back and criticize the previous lawyer saying you shouldn’t have done this. Whereas earlier stage lawyers say this is how you need to do it.” (Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁴⁴³ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁴⁴⁴ Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 28: Unbundling “appears to offer a significant benefit to legal practices, who are able to attract more clients by offering such services, and still be paid for their time, making it a ‘win-win’ scenario for all involved.”

⁴⁴⁵ Chapter 1, above.

⁴⁴⁶ Canadian Bar Association and Jordan Furlong, “Do Law Differently: Futures for Young Lawyers.” (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 15.

⁴⁴⁷ Interview with “F2” (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016).

⁴⁴⁸ Section 2.5.3, above.

⁴⁴⁹ “If somebody’s going to [challenge your bill] on a \$5,000 file, the risk is minimal, the time is minimal for the preparation. In a \$100,000 file, there’s more preparation, there’s greater risk.” (Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015)).

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016). This instinct also reduces the risk of law suits, according to Alberta family lawyer E2: “From a civil litigation point of view, from a liability point of view, the guy that does the 8 hours of research is much less likely to get sued than the guy that does no research” before drafting or offering advice. (Interview with “E2” (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015)).

⁴⁵³ National Self-Represented Litigants Project, “Making it Legal: Some Simple Steps for Moving Unbundling to the Next Stage (July 12, 2016),” <<https://representingyourselfcanada.com/making-it-legal-some-simple-steps-for-moving-unbundling-to-the-next-stage/>> (last accessed: 2 June 2017).

⁴⁵⁴ See also Nikki Gershbain, “A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family Litigants (Presentation to County of Carleton Law Association, April 19 2017),” <<https://www.dropbox.com/s/>>

hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0> at 9. Scope creep was the practice management challenge associated with coaching that was identified most frequently by respondents to a survey of lawyers offering this service.

⁴⁵⁵ Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015); See "Engagement Letters and Acknowledgment Forms" in Lorne Sossin and Samreen Beg, "Should Legal Services be Unbundled?" in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

⁴⁵⁶ Nikki Gershbnain, "A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family Litigants (Presentation to County of Carleton Law Association, April 19 2017)," <<https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0>> at 9.

⁴⁵⁷ Ipsos Mori, "Qualitative Research Exploring Experiences and Perceptions of Unbundled Legal Services." (London: Wales), 2015), [online](https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf): <https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf> at 3. Hamilton criminal defence lawyer A2 worried that in an unbundled retainer "sometimes you'll give them some advice over the telephone and they'll go off do something different, end up in a big mess and blame it on you." (Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

⁴⁵⁸ For example, family lawyer TT said: "we owe the same standard of care in every case, but the problem is we're not doing the same due diligence. And we try to carve that out in our opinion letter. If a client says: 'I don't want you looking at any of the disclosure... I did the NFP [Net Family Property] statement, I want you to go help me with the negotiations.' OK, but we have to confirm that we are not looking at that because you've instructed us not to and you don't want to pay for it, and we're starting on the assumption that the NFP statement you gave us is correct... And there needs to be ... a greater particularity in terms of our rules that is very clear on, if a client doesn't want us to look at things, it's understood that we're not necessarily looking at the whole file, because the client doesn't want us to. So we'll take the time to confirm that we didn't." (Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015)).

⁴⁵⁹ Dan Pinnington, "LAWPRO concerned that unbundled legal services will mean more claims (Avoid-a-Claim Blog, December 6, 2010)," <<http://avoidaclaim.com/2010/lawpro-concerned-that-unbundled-legal-services-will-mean-more-claims/>> (last accessed: 2 June 2017).

⁴⁶⁰ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015), Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015): "NS: Some people say there's impediments to the provision of unbundled legal services and lawyers are afraid they will get trapped or what they say will be misrepresented to the court... PP: I think both are real."

⁴⁶¹ Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

⁴⁶² Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

⁴⁶³ The author has not been able to find any empirical evidence comparing these risks under the two models.

⁴⁶⁴ Two identified risk of liability arising from unbundled legal service provision: Interview with "CC" (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015), Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

⁴⁶⁵ Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015).

⁴⁶⁶ Regarding information asymmetry, see section 1.2.1 above. Externalities are the consequences of a transaction that are borne by people other than the parties to that transaction. Legal services can create both positive externalities (e.g. precedents) and negative externalities (e.g. the loss suffered by the intended beneficiaries of negligently-drafted will.) See Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at pp. 18-34.

⁴⁶⁷ Regarding efficacy and other measures of legal service quality, see Noel Semple, "Personal Legal Services: Mending the Market ([Working Paper, April 2017](#))," <<https://ssrn.com/abstract=2958845>>.

⁴⁶⁸ Jessica K. Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 *Georgetown Journal on Poverty Law & Policy* 453. See also Ipsos Mori, "Qualitative Research Exploring Experiences and Perceptions of Unbundled Legal Services." (London: Wales), 2015), [online](https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf): <https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf> at 3 regarding lawyers' perception that clients with unbundled retainers may do damage to their own cases.

⁴⁶⁹ Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015).

⁴⁷⁰ *Ibid.*

⁴⁷¹ Yamri Taddese, "Lawyers get primer on options for unbundled services ([Law Times, Feb. 9 2015](#))," <digital. lawtimesnews.com/i/458737-february-9-2015/2> (last accessed: 2 June 2017).

⁴⁷² Kristin Huston, "The Lawyer as Savior: What Literature Says about the Attorney's Role in Redemption" (2004) 73 *UMKC L. Rev.* 161.

⁴⁷³ Nika Kabiri, "What clients want: To hire you as they need you" (2016), [online](http://lawyernomics.avvo.com/client-intake/what-clients-want-to-hire-you-as-they-need-you.html): <<http://lawyernomics.avvo.com/client-intake/what-clients-want-to-hire-you-as-they-need-you.html>> (last accessed: 2 June 2017).

⁴⁷⁴ Bert Kritzer, *The justice broker: lawyers and ordinary litigation* (New York: Oxford University Press, 1990) at 61.

⁴⁷⁵ "In this framework, the relationship of lawyer to client is inevitably one of (substantive) expert to naïf." Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 125.

⁴⁷⁶ Daphne Dumont, "'Better . . . or Worse?' The Satisfactions and Frustrations of the Lawyer-Client Relationship" in Blaikie, Cromwell & Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012) at 24. Emphasis added.

⁴⁷⁷ Sam Glover, "Why Are Lawyers So Expensive? I'll Tell You Why (Lawyerist, February 12th, 2016)," (2014), [online](https://lawyerist.com/77964/lawyers-expensive-ill-tell/): <<https://lawyerist.com/77964/lawyers-expensive-ill-tell/>>

⁴⁷⁸ This "classical model... emphasizes a claim to professional expertise coupled with compliance from clients." (Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia, PA: Temple University Press 1996) at 106-7).

⁴⁷⁹ Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 126: "lawyers are accustomed to their clients giving up their own judgment and handing the decision making over to them."

⁴⁸⁰ Douglas E. Rosenthal, *Lawyer and client, who's in charge?* (New Brunswick, N.J.: Transaction Books, 1977) at 7.

⁴⁸¹ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

⁴⁸² Robert W. Gordon, "The Independence of Lawyers" (1988) 68 *Boston University Law Review* 1; Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia, PA: Temple University Press

1996) at 107.

⁴⁸³ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁴⁸⁴ E.g. Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) . Criticizing lawyers’ “misplaced savior complex,” see Katie Rose Guest Pryal, “American lawyers have an Atticus Finch complex, and it’s killing the profession ([Quartz, March 31, 2016](https://qz.com/651270/the-american-legal-system-has-an-atticus-finch-complex-and-its-killing-the-profession/)),” <<https://qz.com/651270/the-american-legal-system-has-an-atticus-finch-complex-and-its-killing-the-profession/>> (last accessed: 2 June 2017).

⁴⁸⁵ Section 1.2, above.

⁴⁸⁶ Daphne Dumont, ““Better . . . or Worse?” The Satisfactions and Frustrations of the Lawyer-Client Relationship” in Blaikie, Cromwell & Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012); Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 127.

⁴⁸⁷ Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015).

⁴⁸⁸ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Nika Kabiri, “What clients want: To hire you as they need you,” (2016), [online](http://lawyernomics.avvo.com/client-intake/what-clients-want-to-hire-you-as-they-need-you.html): <<http://lawyernomics.avvo.com/client-intake/what-clients-want-to-hire-you-as-they-need-you.html>>

⁴⁹¹ The underlying assumption is that “both client and consultant gain from a sharing of control over many of the decisions arising out of the relationship.” (Douglas E. Rosenthal, *Lawyer and client, who’s in charge?* (New Brunswick, N.J.: Transaction Books, 1977) at 7).

⁴⁹² Of course, the salvation and assistance models are poles on a continuum: most real-life lawyer-client relationships have elements of both as well as many other complexities: Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 126. See also Nikki Gershbain, “A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family Litigants ([Presentation to County of Carleton Law Association, April 19 2017](https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0)),” <<https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0>> at 8.

⁴⁹³ This attitude may be more common among young people today. Toronto employment lawyer II reported that he “was talking to my nephew, who is this young guy into start-up worlds in silicon valley in that scene. He said I am a smart guy, why do I need a lawyer for anything? It does not make sense for me to hire a lawyer. I said you cannot work the system and know the nuances. He’s like I don’t buy that. I understand what you are saying but I think that’s going to change because I refuse to be a smart person and depend on a lawyer and not do my research online and figure out things on my own to sort it out.” (Interview with “II” (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)).

⁴⁹⁴ Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 130; John Craig, “Production values: Building shared autonomy” in John Craig ed., *Production Values: Futures for Professionalism* (London: Demos, 2006), [online](http://www.demos.co.uk/files/productionvalues1.pdf?1240939425): <<http://www.demos.co.uk/files/productionvalues1.pdf?1240939425>> (last accessed: 2 June 2017).

⁴⁹⁵ Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) at 135-138.

⁴⁹⁶ Jordan Furlong, “Client Change: The Age of Consumer Self-Navigation” in Paul A.

Haskins ed., *The Relevant Lawyer: Reimagining the Future of the Legal Profession* (Chicago: American Bar Association, 2016) at 38. Furlong argues that there has been a “dynamic and relatively sudden shift in the posture of legal consumers from passive recipients of legal services to active participants in a market of legal resource options.” (at 37).

⁴⁹⁷ CBA Access to Justice Committee, “Reaching Equal Justice: An Invitation To Envision And Act.” (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 37. See also CBA Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues Report* (Ottawa: Canadian Bar Association, 2013) [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-issues-eng.pdf): [Canadian Bar Association](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-issues-eng.pdf) <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-issues-eng.pdf> (last accessed: 2 June 2017) at 16: “clients want more information on services, more involvement in decision-making and greater knowledge of the risks and potential outcomes of various legal strategies.” A client consultation conducted by the CBA Futures Commission found a “noted an increase in the “do-it-yourself” mindset.” (CBA Legal Futures Initiative, “The Clients’ Perspective.” (Ottawa: 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf> at 9).

⁴⁹⁸ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁴⁹⁹ “A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions.” (Federation of Law Societies of Canada, “[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/),” <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>>, R. 3.2-9, Commentary 1).

⁵⁰⁰ Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁵⁰¹ Ipsos Mori, “Qualitative Research Exploring Experiences and Perceptions of Unbundled Legal Services.” (London: Wales), 2015), [online](https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf): <https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf> at 1.

⁵⁰² Regarding the client “empowerment” that can result from unbundled legal services, see Lorne Sossin and Samreen Beg, “Should Legal Services be Unbundled?” in Trebilcock, Duggan & Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012). See also Centre for Innovative Justice, “Affordable Justice.” (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 27.

⁵⁰³ Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015).

⁵⁰⁴ Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015).

⁵⁰⁵ Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁵⁰⁶ “Another thing I’ve found about SRLs with the work that I’ve been doing is that they’re really appreciative. As opposed to the traditional paradigm where its ‘how come it’s not happening faster’, ‘why didn’t you do this’...all that stuff, don’t get that. Because now they’re doing the work, and they realize how things work. How slow things work, and all the obstacles you face like how you have to wait for a trial date and they know it. They’re just so happy and appreciative of the work, of the help you give them. It’s a much nicer way to practice.” (Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015)).

⁵⁰⁷ Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁵⁰⁸ Robert Harvie, “Checking Our Egos and Accepting Our Part is Fundamental to Restoring Public Trust in the Justice

System ([National Self-Represented Litigants Project Blog, December 3, 2014](https://representingyourselfcanada.com/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/)),” <<https://representingyourselfcanada.com/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/>>.

⁵⁰⁹ Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016); Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015). See also Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) .

⁵¹⁰ CBA Access to Justice Committee, “Reaching Equal Justice: An Invitation To Envision And Act.” (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf>2013 at 94-5.

⁵¹¹ Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015); Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015); Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016); Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015). For lawyers’ perceptions of cases in which unbundling is inappropriate, see Nikki Gershbn, “A Coach in Your Corner: Legal Coaching as an Alternative to Full Representation for Family Litigants ([Presentation to County of Carleton Law Association, April 19 2017](https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0))”, <<https://www.dropbox.com/s/hrd88vp1cd3dgbt/FINAL%20CCLA%20Legal%20Coaching%20April%2019%202017%20PPT%20%5BAutosaved%5D.pptx?dl=0>>at 10-13.

⁵¹² Mitch Kowalski, “De-Constructing Legal Services (Slaw.ca, March 7th 2013)” (2013), [online](http://www.slaw.ca/2013/03/07/de-segmenting-legal-services/): <<http://www.slaw.ca/2013/03/07/de-segmenting-legal-services/>> (last accessed: 2 June 2017).

⁵¹³ Interview with “CC” (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015); Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵¹⁴ Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁵¹⁵ “Clients want simpler, basic tasks to be done by non-lawyers at a lower cost and then reviewed by a lawyer. They expect to pay according to who does the work.” (CBA Legal Futures Initiative, “The Clients’ Perspective.” (Ottawa: 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf> at 8). See also David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 195-6.

⁵¹⁶ “I recognize I am utterly incompetent in what I called the administrative aspects of my practice: bookkeeping, ordering supplies, paying bills, all of those kinds of things. Secondly, I don’t want to do it, I’m a lawyer. That’s what I do. So I hire and I pay people to do all of those things. And I expect them to do their job and I’m so grateful for the help and the assistance of the people who have worked for me over the years because I’ve been very lucky and I have had very competent support staff and accounting advice. And I’ve been able to turn all of that over to those people who know what they’re doing in those areas and that of course frees me up to do what I do.” (Interview with “RR” (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁵¹⁷ Interviewee HH said “I’m not going to review all the medical documents in the same level of detail or maybe I can’t review them. I’m going have to push them down to someone else to review them. Maybe I get my law clerk to do a first look to flag her to look for these words and highlight those words if those pop up and hope that that kind of first review will cut through a lot of the time I would have spent.” (Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵¹⁸ For example, YY: “I would say on average I probably get 20 calls a day and if I answer the calls they typically last 10 minutes - just the initial call to see if you want to come for a consultation. If I am doing that I don’t get any work done. Previously our receptionist would screen all the calls and now I have an individual coming in on

a part time basis to do that." (Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015)) See also comments from interviewee "II:" "I know one employment law firm with high volume of people calling, [so] they hired a non-lawyer person and taught her to ask the right questions - initial screening. Get that information, then you basically feed that information to lawyers. Then they are not wasting their half an hour figuring out that information and then assessing it. You collect data, then get the lawyer, which is a smart way of doing that. Their business has increased. They are providing services in a more cost-effective way than many of their competitors." (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015).

⁵¹⁹ "There is no reason why we can't make those steps efficient. If we know this is an estate litigation and passing of accounts will take place, then passing accounts will take place. Let's make that process efficient. They provide you documents, you gather documents. Make sure the lawyer isn't spending hundreds of hours on those documents. You have the support staff to do that stuff." (Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015)). "The client who lasts 3-4 years comes to trust the assistant, they will provide information to the assistant instead of the lawyer." (Interview with "CC" (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015))

⁵²⁰ Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

⁵²¹ Interview with "FF" (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015); Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵²² Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 124.

⁵²³ Ibid.

⁵²⁴ E.g. Jeff Grey, "Bay Street law firm launches legal 'incubator' in Halifax ([The Globe and Mail, Wednesday, Jul. 02, 2014](http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/bay-street-law-firm-launches-legal-incubator-in-halifax/article19405816/))," <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/bay-street-law-firm-launches-legal-incubator-in-halifax/article19405816/>> (last accessed: 2 June 2017).

⁵²⁵ Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 35.

⁵²⁶ "Typical plaintiff-side personal injury firm you do need the assistants, because the volume of paperwork is a lot. Because if you have to obtain medical records from ten different doctors, it is better that you have staff that do that" (Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015)). See also Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 137 and Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 14: "plaintiffs' personal injury lawyers delegate virtually all tasks, except depositions and court appearances, to paralegals or secretaries."

⁵²⁷ "We have the office broken into teams ... On my team I have 2 junior partners... as well as an associate... so we're the lawyers on the team. We have 4 accident benefit coordinators...so they deal with first party benefit claims...there are 3 law clerks who do the clerking so they work on litigation, the tort side of the files, and then we have 7 legal assistants. So that's people that are just strictly who are 100% working on my team. And the new have a bunch of shared staff. We have a directors of operations and her department – they do the administrative, the accounting. There's a marketing group involved in the marketing of the firm. They staff firm events." (Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015)).

⁵²⁸ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed

April 20, 2015).

⁵²⁹ See comments from YY in note 517, above. Ottawa litigator D2 asked “What’s the way in which I could systematize some sort of intake system that gives people the right information, meets the need of people but also allows me to assess and take on the files that are right for my practice?” (Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)).

⁵³⁰ In the personal injury firms where he previously worked, BB said that “clerks would get a rough feel for some clients, the more marginal ones. I think if someone called in and said ‘oh I broke my hip’ or something like that, then the lawyer would get involved right away, because for sure that would be a case that the firm would take. But if it was more marginal then a clerk would do the front end of that. ” (Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015). MM: “We decided about 10 years ago to hire a person to devote strictly to the process of handling incoming inquiries, not the receptionist, but someone who would be trained to know key things to undertake those preliminary analyses of the case. That person’s function is solely to either help people be sent somewhere else if they have a problem that we were not suited to handle or broaden the office if it is a situation [to which] we thought we could add value.” (Interview with “MM” (Personal injury practitioner, Windsor, male, 36 years since call to the bar. Interviewed June 9, 2015). VV: “we don’t deal directly with the intakes... the office receptionist/ administrator, she handles a lot of the calls...[she takes calls after hours for] clients who are looking for firms after work... we figured that would be a great way that people can actually speak with someone.” (Interview with “VV” (Personal injury practitioner, Toronto, female, 3 years since call to the bar. Interviewed July 17, 2015)).

⁵³¹ “It doesn’t make sense at a certain level of business to do everything yourself. Your niche is as a lawyer, your skill set is as a lawyer, you should be spending the majority of time doing lawyer work... it makes sense to share assistance, support staff, to hire students... hire a bunch of immigration consultants... putting something together that makes sense as a business” (Interview with “AA” (Immigration and refugee law practitioner, Toronto, male, 1 year since call to the bar. Interviewed April 13, 2015)). Interviewee D2 said “partnered with a paralegal, I could have done a lot more work. I could have provided a lot more work to community members and probably could have altered my involvement with the file so that my involvement had best value and the person I was working with would have been able to do more of the front end stuff.” (Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)).

⁵³² Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 40 and 54.

⁵³³ *Ibid.* at 71.

⁵³⁴ *Ibid.* at 21.

⁵³⁵ See section 5.6.2, below. See also Noel Semple, “Personal Plight Legal Services and Tomorrow’s Lawyers,” (2014) *Journal of the Legal Profession* 25, [online](https://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> .

⁵³⁶ Ann Juergens, “Toward a More Effective and Accessible Solo and Small Firm Practice Model” in Estreicher & Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) at 386.

⁵³⁷ Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁵³⁸ Oxford English Dictionary, “System” definition 3(c)(a). Advocating the use of systems in personal plight law firms, see Lee Rosen, “How Dog Poop and Law Firms Are Alike” (2015), [online](https://divorcediscourse.com/how-dog-poop-and-law-firms-are-alike/): <https://divorcediscourse.com/how-dog-poop-and-law-firms-are-alike/> (last accessed: 2 June 2017). Rosen argues that “Everything we do more than once can be integrated into a documented system or process.”

⁵³⁹ Richard E. Susskind, *Tomorrow’s lawyers : an introduction to your future* (Oxford, United Kingdom:

Oxford University Press, 2013) at 25; Interview with "KK" (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015); Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 69; Ann Juergens, "Toward a More Effective and Accessible Solo and Small Firm Practice Model" in Estreicher & Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) at 387.

⁵⁴⁰ Malcolm Mercer, "So Many Lawyers, so Many Unmet Legal Needs (ABA Law Practice Magazine, July/August 2015)," (2015), [online: <https://malcolmmercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/>](https://malcolmmercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/) ; CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online: <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf) at 20; William T. Hogan, "Re: Issues on the Future of Legal Services (Letter to The ABA Commission on the Future of Legal Services, December 20, 2014)," https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services.pdf at 8: "The Committee, however, is focused more on technology as a tool that facilitates lawyers to provide their personal legal services faster, cheaper and more efficiently. "

⁵⁴¹ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 125. See also Daniel Martin Katz' suggestion that in legal services, as in other fields, "ensembles" of humans and machines will increasingly replace reliance on individual human experts. (Daniel Martin Katz, "Observations Regarding Innovation in the Legal Industry (Slideshare, Sep 20, 2015)," http://www.slideshare.net/Danielkatz/law-tech-design-delivery-observations-regarding-innovation-in-the-legal-industry-professor-daniel-martin-katz/173-InternetofContractswhich_is_a_special_case) at slides 172-3.

⁵⁴² Daniel Martin Katz, "Quantitative Legal Prediction, or How I Learned to Stop Worrying and Start Preparing for the Data Driven Future of the Legal Services Industry" (2013) 62 *Emory Law Journal* 909; John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services," (2014) 82 *Fordham Law Review* 3041.

⁵⁴³ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 178-9.

⁵⁴⁴ Ibid.

⁵⁴⁵ Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 25.

⁵⁴⁶ Ibid. at 25.

⁵⁴⁷ Dina Tutungi, *Interview conducted by Laura Snyder*. (Paris: Not Just for Lawyers, 2017) [online: NJFL <http://notjustforlawyers.com/dina-tutungi/>](http://notjustforlawyers.com/dina-tutungi/) (last accessed: 2 June 2017).

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

⁵⁵⁰ Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016).

⁵⁵¹ The automated interactive form can also allow the client him or herself do more of the work.

⁵⁵² Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 26.

⁵⁵³ Ibid. at 26.

⁵⁵⁴ Ibid. at 26.

⁵⁵⁵ "Online Unfair Dismissal Lawyers (Slater and Gordon)," <<https://unfairdismissal.slatergordon.com.au/>> (last accessed: 2 June 2017).

⁵⁵⁶ Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 27.

⁵⁵⁷ See e.g. Ray Worthy Campbell, "Rethinking Regulation And Innovation In The U.S. Legal Services Market," (2012) 9 New York University Journal Of Law & Business 1.

⁵⁵⁸ Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016). Andrew Grech, CEO of Slater & Gordon, likewise has said that his firm is trying to "commoditize legal process." Andrew Grech, *Interview conducted by Laura Snyder*. (Paris: Not Just for Lawyers, 2017) [online: NJFL <http://notjustforlawyers.com/andrew-grech/>](http://notjustforlawyers.com/andrew-grech/) (last accessed: 2 June 2017).

⁵⁵⁹ Section 5.6.2, below.

⁵⁶⁰ Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016).

⁵⁶¹ Jordan Furlong, "9 Emerging truths about legal service delivery (Law Matters [Canadian Bar Association, Alberta Branch], April 2016)," <<http://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Spring-2016/9-Emerging-Truths-About-Legal-Service-Delivery>> (last accessed: 2 June 2017).

⁵⁶² He argued that, with regard to other tasks, the lawyer's role should be management of non-lawyers rather than frontline service-delivery. (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

⁵⁶³ Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 57.

⁵⁶⁴ Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment," (2011) 49 Osgoode Hall Law Journal 71 at 89.

⁵⁶⁵ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

⁵⁶⁶ In arguing for delegation of routine matters to systems, Lee Rosen observes that "when you're not busy answering questions from a staff member about how to assemble a trial notebook, you're freed up to think about the application of the latest case law to the problem you're trying to solve." (Lee Rosen, "How Dog Poop and Law Firms Are Alike," (2015), [online: <https://divorcediscourse.com/how-dog-poop-and-law-firms-are-alike/>](https://divorcediscourse.com/how-dog-poop-and-law-firms-are-alike/)

⁵⁶⁷ "You need mentoring... because there are actually a lot of little bits of knowledge that you need that are not found in any textbooks or guides that is only passed on by word of mouth, from lawyer to lawyer, or by experience ... there's so much knowledge that's passed on by mentoring... I didn't really have mentoring, so I was at a significant disadvantage, and I didn't really want to practice on the clients" (Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015)). See also Interview with "A2" (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015).

⁵⁶⁸ Lori L. Keating and Amy Timmer, "Mentoring: No App for That" in Paul A. Haskins ed., *The Relevant Lawyer* (Chicago: American Bar Association, 2016): "mentoring is essential to preserving a feeling of community among lawyers, as well as to conveying and teaching expectations of competence, civility, and professionalism."

⁵⁶⁹ Regarding unbundling, see Chapter 4, above.

⁵⁷⁰ Interview with "B2" (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁵⁷¹ Ibid.

⁵⁷² Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment," (2011) 49 Osgoode Hall Law Journal 71. See also Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 125. In addition to practicing as a family lawyer, interviewee EE has also served as a Bencher of the Law Society of Alberta. From that point of view, he observed what he considered a consequence of over-delegation in real estate practice: "as a regulator, I've seen, for example in the area of real estate ... lawyers want to make easy money without doing the work. So they delegate things to a greater extent than is reasonable... But I think there's a happy median where we can have assistants do more independent work reducing costs to clients." (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

⁵⁷³ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

⁵⁷⁴ Ibid.

⁵⁷⁵ Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁵⁷⁶ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵⁷⁷ Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁵⁷⁸ Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015).

⁵⁷⁹ Ibid.

⁵⁸⁰ Federation of Law Societies of Canada, "[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/)," <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>> at 6.1-1/

⁵⁸¹ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵⁸² Interview with "BB" (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Sections 1.2.1 and 1.2.2, above.

⁵⁸⁶ Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," (2014) *Journal of the Legal Profession* 25, [online](http://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> .

⁵⁸⁷ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 122-124; CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 20. As family lawyer JJ put the point: "The size of files we've got here, mostly you're going to manage them yourselves and it's going to be that one on one relationship with your client. I don't tend to find a lot of economies of scale." (Interview with "JJ" (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015).

⁵⁸⁸ For example, Integreon and Deloitte Legal Project Solutions.

⁵⁸⁹ Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

⁵⁹⁰ E.g. the "salvation" mode of personal plight legal practice: see 4.4.3.1, above.

⁵⁹¹ Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015).

⁵⁹² Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

⁵⁹³ Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016). That criminal defence lawyers are less likely to delegate than other personal plight litigators was also reported in Jerry Van Hoy's study: Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 16. See also the comments of personal injury lawyer WW: "if you're an advocate and you advocate for that individual, I almost become a family member. By the time we're in court I know everyone in the family. I know every witness, I've met with everybody. You can't replace that with economies of scale." (Interview with "WW" (Personal injury practitioner, Toronto, female, 13 years since call to the bar. Interviewed July 20, 2015).

⁵⁹⁴ Section 2.2, above.

⁵⁹⁵ F2: "litigation is the one area that is going to be very difficult to commoditize... Generally with contention, workflow is difficult to do. It's just a bit trickier and that's why it's taking longer." Interview with "F2" (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016)).

⁵⁹⁶ Interview with "HH" (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁵⁹⁷ Doug Jasinski, "Stars in Their Eyes: the Growing Influence of Online Lawyer Reviews ([Slaw.ca](http://www.slaw.ca), June 20th 2016)," <<http://www.slaw.ca/2016/06/20/stars-in-their-eyes-the-growing-influence-of-online-lawyer-reviews/>> (last accessed: 2 June 2017).

⁵⁹⁸ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 122.

⁵⁹⁹ David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 226-7 and Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013) at 7 and 45-6.

⁶⁰⁰ "What we need to do is find better ways to leverage staff to help us get there. As opposed to us doing all the work ... I think doing too much as opposed to too little is, my opinion, is more typical than atypical." (Interview with "E2" (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015)).

⁶⁰¹ Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).

⁶⁰² According to QQ, “the billable model... motivates us maybe to do work that maybe an assistant can do or could be outsourced. Not to say it is unethical or wrong either way, but there’s different motivations at play and there are different demands from clients.” (Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁶⁰³ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 271.

⁶⁰⁴ Ann Macaulay, “The Billable Hour – Here to Stay? ([Canadian Bar Association PracticeLink March 12, 2014](http://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-Billable-Hour—Here-to-Stay)),” <<http://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-Billable-Hour—Here-to-Stay>>.

⁶⁰⁵ “Some of the stuff [my assistant] does is just billed under my hourly rate. But I also talk to my clients – and I’ve probably done it more in recent years – and I’ll say to them directly, certain things I can do, but I have a clerical assistant, a legal assistant who can do it well under my supervision and I charge her around \$125 an hour as opposed to my \$500 an hour. I will make judgement calls on when that’s appropriate, ‘do you have a problem with that?’ Unanimously my clients are happy ... having someone [else] do ... some of the tedious stuff. ... So when she’s working independent of me, I’ll bill her time independently and transparently to the clients. And I think it is good for them. I think, to be honest I think it’s a big part of where family law needs to go. I don’t think as a practice we’re doing it extremely well.” (Interview with “E2” (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).

⁶⁰⁶ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at xvii.

⁶⁰⁷ Tim Lemieux, “Is Anyone Listening? ([PracticePRO Magazine, Volume 10, Issue 2, Fall 2011](http://www.practicepro.ca/LawPROmag/Communications-claims-causes.pdf)),” <<http://www.practicepro.ca/LawPROmag/Communications-claims-causes.pdf>> (last accessed: 2 June 2017).

⁶⁰⁸ Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 46: “There is an extraordinarily widespread sentiment among many respondents that their former legal counsel did ‘nothing’ to advance their case towards a realistic outcome. The word ‘nothing’ appears repeatedly throughout the interview transcripts – for example, ‘nothing happened’; ‘my lawyer did nothing’; ‘nothing had been done’; ‘nothing was resolved.’” In her interviews with over 200 self-represented litigants (many of whom were former clients of lawyers,) MacFarlane found many ex-clients dissatisfied by communication with their former law firms. See also Interview with “GG” (Family law and poverty law practitioner, Nanaimo, female, 32 years since call to bar. Interviewed May 11, 2015); Interview with “B2” (Civil litigation practitioner, Toronto, female, 4 years since call to the bar. Interviewed September 4, 2015).

⁶⁰⁹ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 142. The ubiquity of electronic communication has arguably increased client expectations for one-on-one lawyer communication today, especially via email. See also Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants.” (Kingsville, Ontario: Process, 2013), [online](https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf): <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> at 45: “Many SRLs described difficulty getting updates from their lawyer as the weeks and months ticked by, despite repeated efforts to contact them.”

⁶¹⁰ Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁶¹¹ Interview with “SS” (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

- ⁶¹² Interview with “PP” (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015).
- ⁶¹³ PP: “One of the best things the Law Society ever did is make sure everybody understood as a lawyer to copy your client. When I started out that wasn’t the norm. Then it became if you did file review with the Law Society you had to show you sent your client a copy. A basic way to communicate.” (ibid.)
- ⁶¹⁴ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 176.
- ⁶¹⁵ Sean Doherty, “Client Portals In Clio,” <<http://abovethelaw.com/2015/11/client-portals-in-clio/>> (last accessed: 2 June 2017); Donna Seyle, “Expand Your Solo or Small Firm Practice Using Client Portals By (Law Practice Today, December 2011),” <http://www.americanbar.org/content/dam/aba/publications/law_practice_today/expand-your-solo-or-small-firm-practice-using-client-portals.authcheckdam.pdf> (last accessed: 2 June 2017).
- ⁶¹⁶ CBA Legal Futures Initiative, “The Clients’ Perspective.” (Ottawa: 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf> at 8.
- ⁶¹⁷ Time costs also confront a lawyer who wants to try to train an existing staff person to take on more advanced tasks. See for example the comments of E2. Referring to his time-based billing practice, E2 said “I’m on the hamster wheel too.” He praised his assistant, but acknowledged that she was not “working at the level where she probably could. And the problem now is she’s probably 5 years from retirement and we don’t have another ‘her’ set up in our office to really start doing that. And to be honest I don’t know how far I’m from retirement so I’m not sure I’m inclined to want to completely get off the wheel to train somebody else.” Also acknowledging that a time investment would be necessary to take advantage of her clerk’s full capacity, see Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015).
- ⁶¹⁸ Interview with “E2” (Family law practitioner, Alberta, male. 19 years since call to the bar. Interviewed April 21, 2015).
- ⁶¹⁹ See notes 554 to 547, above, and accompanying text.
- ⁶²⁰ Dina Tutungi, “Interview conducted by Laura Snyder.” (Paris: Lawyers, 2017), [online](http://notjustforlawyers.com/dina-tutungi/): <<http://notjustforlawyers.com/dina-tutungi/>>.
- ⁶²¹ Section 2.6 and section 3.4, above.
- ⁶²² Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015).
- ⁶²³ Richard Moorhead, “Lawyer Specialization—Managing the Professional Paradox” (2010) 32 *Law & Policy* 226 at 230.
- ⁶²⁴ John P. Heinz and Edward O. Laumann, *Chicago Lawyers : the Social Structure of the Bar* (New York: Russell Sage Foundation and American Bar Foundation, 1982) ; John P. Heinz et al., *Urban Lawyers: The New Social Structure Of The Bar* (Chicago: University of Chicago Press, 2005) at 71-2; Harry W. Arthurs, “Will the Law Society of Alberta Celebrate its Bicentenary?,” (2008) 45 *Alberta Law Review* 15, [online](http://digitalcommons.osgoode.yorku.ca/scholarly_works/857/): <http://digitalcommons.osgoode.yorku.ca/scholarly_works/857/> ; Ronit Dinovitzer et al., *After the JD II: Second Results from a National Study of Legal Careers* (Chicago: American Bar Foundation and The NALP Foundation for Law Career Research and Education, 2009) [online](http://www.nalp.org/): University of Denver < at 32; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 98-99.
- ⁶²⁵ Sole Practitioner and Small Firm Task Force (Law Society of Upper Canada), *Final Report* (Toronto: LSUC, 2005) [online](http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf): LSUC <<http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>> (last accessed: 2 June 2017) at 42.

- ⁶²⁶ Ronit Dinovitzer, "Law And Beyond: A National Study Of Canadian Law Graduates." (Toronto: U, 2015), [online: <http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf>](http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf) at 25.
- ⁶²⁷ E.g. Interview with "CC" (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015).
- ⁶²⁸ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).
- ⁶²⁹ Richard Moorhead, Richard Harding and Avrom Sherr, *Quality and access: Specialist and tolerance work under civil contracts* (London: The Stationery Office., 2004) [online: The Stationery Office <http://discovery.ucl.ac.uk/1365436/>](http://discovery.ucl.ac.uk/1365436/) (last accessed: 2 June 2017), cited in Richard Moorhead, "Lawyer Specialization—Managing the Professional Paradox," (2010) 32 *Law & Policy* 226. The lawyers whom they studied were providing legally-aided advice on personal plight matters (specifically debt, housing, and welfare benefit disputes). Trained peer reviewers compared the files of specialist firms with those of non-specialists. Specialty certification had been conferred on these firms by the legal aid provider.
- ⁶³⁰ Richard Moorhead, "Lawyer Specialization—Managing the Professional Paradox," (2010) 32 *Law & Policy* 226 at 238.
- ⁶³¹ *Ibid* at 240. The peer reviewers also rated file quality, and again found specialists outperforming other solicitors on this measure (at 242).
- ⁶³² *Ibid*.
- ⁶³³ Herbert M. Kritzer, *"First thing we do, let's replace all the lawyers" : a comparison of lawyers and nonlawyers as advocates* (Madison: Institute for Legal Studies, University of Wisconsin-Madison, 1995); Herbert Kritzer, *Legal advocacy : lawyers and nonlawyers at work* (Ann Arbor: University of Michigan Press, 1998).
- ⁶³⁴ Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).
- ⁶³⁵ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 98.
- ⁶³⁶ Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016); Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).
- ⁶³⁷ Richard Moorhead, "Lawyer Specialization—Managing the Professional Paradox," (2010) 32 *Law & Policy* 226 at 243.
- ⁶³⁸ David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 167: "increasing knowledge of the field enables a practitioner to deal with any given issue more quickly." See also 195-6 regarding the effect of specialization in lowering service price.
- ⁶³⁹ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).
- ⁶⁴⁰ *Ibid*.
- ⁶⁴¹ *Ibid*.
- ⁶⁴² Interview with "TT" (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).
- ⁶⁴³ *Ibid*.

⁶⁴⁴ “The other way you are always having to learn. You always have to know what the current law is and you are doing a lot of research. ... That’s how I am feeling now - overwhelmed. I am having to research everything I do. I’m finding with a bit more focus on the family law, I’m starting to feel like I learned a lot more and I have a better handle on what should be happening and what I can do for my clients.” (Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015)). Similar comments in Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁶⁴⁵ Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015); Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016). CC said “the practice of law has changed. When [the firm] got started, you could almost do everything. We did almost do everything.” But at end of his career, CC did only estate litigation and family law. (Interview with “CC” (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015)) See also Sole Practitioner and Small Firm Task Force (Law Society of Upper Canada), “Final Report.” (Toronto: LSUC, 2005), [online](http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf): <<http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>> at 42.

⁶⁴⁶ “...if you are in one specific area everything is going to be geared to that. All of your software is geared to that. I think when you work one area it is a lot easier to learn the law, so you can get faster at doing it.” (Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015). See also Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁶⁴⁷ “The sole and small practitioner doesn’t like taking on the head scratching stuff. It’s not efficient...it’s a waste of your time where you make your efficiencies is doing your routine and doing the work very familiar to you and with your peers. So much leverage is exerted with opposing counsel and the decisions makers and the reputation you’ve established with them and your ability to move forward more quickly as you become better known.” (Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁶⁴⁸ “As soon as I cut out family law my income skyrocketed. Because I was able to do what I really like to do and that’s personal injury law.” (Interview with “RR” (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁶⁴⁹ Lee Rosen, “[When Is the Right Time to Narrow Your Focus?](https://divorcediscourse.com/right-time-narrow-focus/?utm_campaign=coschedule&utm_source=twitter&utm_medium=LeeRosen&utm_content=When%20Is%20the%20Right%20Time%20to%20Narrow%20Your%20Focus%3F),” <https://divorcediscourse.com/right-time-narrow-focus/?utm_campaign=coschedule&utm_source=twitter&utm_medium=LeeRosen&utm_content=When%20Is%20the%20Right%20Time%20to%20Narrow%20Your%20Focus%3F> (last accessed: 2 June 2017).

⁶⁵⁰ Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 43; Marc Galanter, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change,” (1974) 9 *Law & Society Review* 59, [online](http://jan.ucc.nau.edu/~phelps/Galanter%201974.pdf): <jan.ucc.nau.edu/~phelps/Galanter%201974.pdf> .

⁶⁵¹ Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 222. Along the same lines were the comments of SS: “Insurance lawyers, all the defence lawyers know this is a guy who will or won’t go to trial.” Therefore, SS suggested, many generalists therefore never get good offers for their clients because “they just settle. They settle every single case.” (Interview with “SS” (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015)).

⁶⁵² Interview with “SS” (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

⁶⁵³ *Ibid.*

⁶⁵⁴ Ted Schneyer, “Empirical Research with a Policy Payoff: Market Dynamics for Lawyers Who Represent Plaintiffs for a Contingent Fee” (2002) 80 *Tex. L. Rev.* 1829 at 1833.

- ⁶⁵⁵ Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger Publishers, 1990) at 47.
- ⁶⁵⁶ Interview with “CC” (Family law and estate litigation practitioner, Toronto, male, 44 years since call to the bar. Interviewed April 16, 2015); Interview with “PP” (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015); Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015); Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).
- ⁶⁵⁷ Richard Moorhead, “Lawyer Specialization—Managing the Professional Paradox,” (2010) 32 *Law & Policy* 226 at 250.
- ⁶⁵⁸ Section 1.2.1, above.
- ⁶⁵⁹ See note 40, above.
- ⁶⁶⁰ Noel Semple, “Personal Legal Services: Mending the Market (Working Paper, April 2017),” <<https://ssrn.com/abstract=2958845>>.
- ⁶⁶¹ Interview with “UU” (Personal injury practitioner, Toronto, female, 4 years since call to the bar. Interviewed July 17, 2015).
- ⁶⁶² “[The Law Superstore](https://www.thelawsuperstore.co.uk),” <<https://www.thelawsuperstore.co.uk>> (last accessed: 2 June 2017).
- ⁶⁶³ “[Law Society Referral Service](https://lsrs.lsuc.on.ca),” <<https://lsrs.lsuc.on.ca>> (last accessed: 2 June 2017). Two interview respondents said that the LSUC lawyer referral service has been a useful source of clients: Interview with “A2” (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015); Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).
- ⁶⁶⁴ “[Avvo](https://www.avvo.com),” <<https://www.avvo.com>> (last accessed: 2 June 2017).
- ⁶⁶⁵ Ken Le, Peter Nacsa and Rebecca Phillips, *Smart Legal Start: Access To Justice Innovation Challenge Proposal (Ryerson Law Practice Program)*. Document on file with author. (Toronto: Ryerson University Law Practice Program, 2016).
- ⁶⁶⁶ Pascoe Pleasence et al., “Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators” (2004) 1 *Journal of Empirical Legal Studies* 301; Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa 2007) [online: Department of Justice Canada](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf) <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf> (last accessed: 2 June 2017) Extent and Consequences of Justiciable Problems Experienced by Canadians (Ottawa 2007 at Chapter 5; Law Commission of Ontario, “Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity.” (Toronto: LCO, 2013), [online: <http://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/>](http://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/).
- ⁶⁶⁷ Richard Moorhead, “Lawyer Specialization—Managing the Professional Paradox,” (2010) 32 *Law & Policy* 226 at 227.
- ⁶⁶⁸ Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger Publishers, 1990) at 28; Richard Moorhead, “Lawyer Specialization—Managing the Professional Paradox,” (2010) 32 *Law & Policy* 226.
- ⁶⁶⁹ Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015). In a metropolis it is possible to specialize even more narrowly, for example in a family law sub-niche such as religious family law.
- ⁶⁷⁰ Law Society of Upper Canada Sole Practitioner and Small Firm Task Force, *Final Report* (Toronto: 2005) [online: Law Society of Upper Canada](http://www.lsuc.on.ca/media/convmr05solepractitioner.pdf) <<http://www.lsuc.on.ca/media/convmr05solepractitioner.pdf>> (last accessed: 2 June 2017) at 45. See also Donald D. Landon, “Law Careers and Community Context: A Comparison of Rural and Urban Experience” (1992) 49 *Great Plains Research: A Journal of Natural and Social Sciences*, [online: <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1048&context=greatplainsresearch>](http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1048&context=greatplainsresearch) (last accessed: 2 June 2017).

⁶⁷¹ Canadian Bar Association (CBA) Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class." (Ottawa: CBA, 2013), [online](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf): <http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf> at 17-18.

⁶⁷² Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Toronto: Law Foundation of Ontario, 2008) [online](http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf): LFO <<http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf>> (last accessed: 2 June 2017)

⁶⁷³ "Cultural competence is a set of congruent behaviors, attitudes, and policies that [enable] professionals to work effectively in cross-cultural situations." (T. Cross et al., *Towards A Culturally Competent System of Care: Volume I* (Washington, DC: The National Technical Assistance Center for Children's Mental Health, 1989)). See also Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2005) 84 Can. Bar Rev. 563 and Faisal Bhabha, "Towards a Pedagogy of Diversity in Legal Education" (2014) 52 Osgoode Hall Law Journal 59, [online](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2792&context=ohlj): <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2792&context=ohlj> (last accessed: 2 June 2017).

⁶⁷⁴ This may extend to non-legal services. Donald Landon, comparing urban and rural lawyers, suggested that the rural bar "appeared to devote more time to what they called 'handholding' with their clients. Their offices were models of accessibility: their doors were usually open, with or without appointment. And they spent a considerable proportion of their time in general counselling: about family problems, children's troubles, business difficulties, and moral dilemmas." (Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger Publishers, 1990) at 128).

⁶⁷⁵ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 15.

⁶⁷⁶ Karen Cohl and George Thomson, "Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services." (Toronto: Ontario, 2008), [online](http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf): <<http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf>> at 39.

⁶⁷⁷ Jamie Baxter and Albert Yoon, "No Lawyer for a Hundred Miles? Mapping the New Geography of Access of Justice in Canada" (2014) 52 Osgoode Hall Law Journal 9.

⁶⁷⁸ Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 14-15: "Future solos will be niche specialists rather than broad generalists... They will draw clients not just from across town, but also across the country." See also Lucille A. Jewel, "The Indie Lawyer of the Future: How New Technology, Cultural Trends, and Market Forces Can Transform the Solo Practice of Law" (2015) XVII SMU Science and Technology Law Review 325, [online](http://ssrn.com/abstract=2622242): <<http://ssrn.com/abstract=2622242>> (last accessed: 2 June 2017), regarding the potential for lawyers to access the niche "long-tail markets" enabled by the internet.

⁶⁷⁹ In this model, the locally-embedded professional would not necessarily have to be a lawyer.

Julian Franch has suggested that accountants in rural areas could be sources of referral and collaboration with urban specialist lawyers: Julian Franch, "Small Law Firm Revenue Generation Through Strategic Networking In Rural Communities (Unpublished manuscript, on file with the author)" (2016)

⁶⁸⁰ David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 167.

⁶⁸¹ Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁶⁸² Mick Hassell, "Self Service Litigation Garage," <<http://trialcounsel.ca/self-service-litigation-garage/>>.

⁶⁸³ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁶⁸⁴ Noel Semple, “The Cost of Seeking Civil Justice in Canada,” (2015) 93 Canadian Bar Review 639, [online](https://cbaarps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaarps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> .

⁶⁸⁵ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 165-6. See also page 168, reporting sharp divergences among interviewed lawyers re whether they like being in court. Some said they love trials, others said they were not fighters by instinct, but rather were peacemakers.

⁶⁸⁶ Interview with “C2” (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁶⁸⁷ Federation of Law Societies of Canada, “[Model Code of Professional Conduct](http://flsc.ca/national-initiatives/model-code-of-professional-conduct/),” <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>> at 3.6-6 and 3.6-7. There are three conditions on lawyer-to-lawyer referral fees in the Model Code Rule which has been adopted in most provinces. First, the referral fee must be paid “because of the expertise and ability of the other lawyer to handle the matter” not because of a conflict of interest. Second, the referral fee must be “reasonable,” and “not increase the total amount of the fee charged to the client.” Third, the client must be informed of the fee by the referred-to firm, and must consent to the payment.

⁶⁸⁸ *Ibid.* at Rule 3.6-7.

⁶⁸⁹ Shannon Kari, “The battle for the personal injury dollar ([Canadian Lawyer, November 12, 2012](#)),” <<http://www.canadianlawyermag.com/4402/The-battle-for-the-personal-injury-dollar.html>> (last accessed: 2 June 2017).

⁶⁹⁰ Professional Regulation Committee (Law Society of Upper Canada), “Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016).” 2016), [online](https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf): <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>> at 8.

⁶⁹¹ Shannon Kari, “The battle for the personal injury dollar ([Canadian Lawyer, November 12, 2012](#)),” <<http://www.canadianlawyermag.com/4402/The-battle-for-the-personal-injury-dollar.html>>

⁶⁹² In a time-billed matter, unfortunately there is no necessary correlation between the fee collected by the referred-to firm and the success of the client.

⁶⁹³ Professional Regulation Committee (Law Society of Upper Canada), *Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation February 23, 2017)* 2017) <https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf> (last accessed: 2 June 2017) at 62.

⁶⁹⁴ Professional Regulation Committee (Law Society of Upper Canada), “Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016).” 2016), [online](https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf): <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>>.

⁶⁹⁵ For referral fees calculated on a percentage basis for contingency-billed work, a cap of 5% or 10% of the service-providing firm’s fee might be appropriate. Noel Semple, *Submission to the LSUC Advertising & Fee Arrangements Issues Working Group Report* (Toronto: SSRN, 2016) [online](https://ssrn.com/abstract=2954124): SSRN <<https://ssrn.com/abstract=2954124>> (last accessed: 2 June 2017).

⁶⁹⁶ Professional Regulation Committee (Law Society of Upper Canada), “Advertising and Fee Arrangements Issues Working Group Report (Report to Convocation June 23, 2016).” 2016), [online](https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf): <<https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf>>; Semple, *ibid.*

⁶⁹⁷ Andrew Grech, "Interview conducted by Laura Snyder." (Paris: Lawyers, 2017), [online](http://notjustforlawyers.com/andrew-grech/): <<http://notjustforlawyers.com/andrew-grech/>>.

⁶⁹⁸ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at 132-3.

⁶⁹⁹ "When I was at the firms there was always a firm bookkeeper, so they did books for my stuff too. I never considered that person as working 'under' me." (Interview with "PP" (Child protection and family law practitioner, Windsor, female, 30 years since call to the bar. Interviewed June 10, 2015)).

⁷⁰⁰ CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation To Envision And Act." (Ottawa: CBA, 2013), [online](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf): <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> 2013 at 93: "growing understanding that legal problems are often intertwined with non-legal problems has led to a demand for more holistic approaches that meld legal and non-legal services."

⁷⁰¹ *Ibid.* at 95. "Teams," the report argues, "can deliver more comprehensive and holistic services tailored to people's needs."

⁷⁰² This firm is not currently practicing in Canada.

⁷⁰³ Interview with "DD" (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

⁷⁰⁴ James E. Moliterno, *The American Legal Profession in Crisis: Resistance and Responses to Change* (New York: Oxford University Press, 2013) at 162; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 164.

⁷⁰⁵ Semple, *ibid.* at 62-64.

⁷⁰⁶ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) ; Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013) .

⁷⁰⁷ "It's very onerous to administer a trust account... because your bank can't levy fees from the trust account... it has to come out of your other account because your money comes from your client ...it requires exquisitely careful bookkeeping which you don't have which you paying someone to do. So you have paper work, so every time you have a trust transfer you do a bill. There's a delivery component, the Law Society requires proof every time you deliver it to a client...it requires a written document... in the context of small amounts of money for small files it's really onerous." (Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016)).

⁷⁰⁸ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at 129.

⁷⁰⁹ "Typically the average lawyer in the region are less sophisticated in terms of their ability to manage their practice. So if you help them build better management practice and centralize the accounting, it is for them an added value:" Interview with "ZZ" (Montreal, male. Interviewed April 5, 2015). See also Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger Publishers, 1990) at 52, describing small and solo rural law practices: "the practitioner must proceed under a double imperative -- building a practice while needing to earn a living. Creating a niche for oneself in a market already served by other practitioners requires deliberate strategy and strong initiative."

⁷¹⁰ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at 129; Deena Shanker, "Why are lawyers such terrible managers? ([Fortune, Jan 11, 2013](http://fortune.com/2013/01/11/why-are-lawyers-such-terrible-managers/))," <<http://fortune.com/2013/01/11/why-are-lawyers-such-terrible-managers/>> (last accessed: 2 June 2017).

⁷¹¹ “Management, payment of things, keeping on top of things, technology... All of that takes a lot of time, so if you devote your day working hours to developing a website as opposed to farming that out, that to me is not a good efficiency. You’re not a good businessperson. It’s cheaper to hire somebody. Many lawyers choose to do it themselves because they think they are saving money.” (Interview with “AA” (Immigration and refugee law practitioner, Toronto, male, 1 year since call to the bar. Interviewed April 13, 2015) .

⁷¹² Interview with “D2” (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁷¹³ Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015).

⁷¹⁴ Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

⁷¹⁵ Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015); Interview with “AA” (Immigration and refugee law practitioner, Toronto, male, 1 year since call to the bar. Interviewed April 13, 2015) ; Interview with “TT” (Family law practitioner, Greater Toronto Area, male, 22 years since call to the bar. Interviewed July 9, 2015).

⁷¹⁶ Noel Semple, “Personal Plight Legal Services and Tomorrow’s Lawyers,” (2014) *Journal of the Legal Profession* 25, [online](http://ssrn.com/abstract=2436438): <ssrn.com/abstract=2436438> at 44. Social science research suggests that larger law firms offer higher earnings, promotional opportunities, and challenging work: see e.g. Fiona M. Kay and Jean E. Wallace, “Are Small Firms More Beautiful or Is Bigger Better? A Study of Compensating Differentials and Law Firm Internal Labor Markets” (2009) 50 *The Sociological Quarterly* 474. In her survey of Canadians recently called to the bar, Ronit Dinovitzer found that the proportion who were happy that they had become lawyers generally increased with the size of the firms in which they worked: Ronit Dinovitzer, “Law And Beyond: A National Study Of Canadian Law Graduates.” (Toronto: U, 2015), [online](http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf): <<http://individual.utoronto.ca/dinovitzer/images/LABReport.pdf>> at 39.) The lowest rate of reported satisfaction in Dinovitzer’s survey was among those working as sole practitioners, of whom 79% reported that they were satisfied with the decision to become lawyers.

⁷¹⁷ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015).

⁷¹⁸ Jordan Furlong, “Why law firms need R&D investment ([Law21, August 19, 2014](http://www.law21.ca/2014/08/law-firms-need-rd-investment)),” <<http://www.law21.ca/2014/08/law-firms-need-rd-investment>> (last accessed: 2 June 2017).

⁷¹⁹ *Ibid.*

⁷²⁰ Barreau du Québec, “La tarification horaire à l’heure de la réflexion.” (Quebec: BDQ, 2016), [online](http://www.barreau.qc.ca/pdf/publications/2016-rapport-tarification.pdf): <<http://www.barreau.qc.ca/pdf/publications/2016-rapport-tarification.pdf>> at 15.

⁷²¹ For example, DD’s personal plight law firm retained market research consultants to study the needs of separating people before expanding into family law services: Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015). See also Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 174-9.

⁷²² Richard E. Susskind, *Tomorrow’s lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at 113; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 266.

⁷²³ Canadian Bar Association and Jordan Furlong, “Do Law Differently: Futures for Young Lawyers.” (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 18.

⁷²⁴ Section 2.3, above.

⁷²⁵ Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016).

⁷²⁶ Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), [online](http://mams.rmit.edu.au/qr7u4uejwols1.pdf): <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 38. Emphasis added. "Careful and considered development of an appropriate business model is needed ... development that reduces overheads and maximizes efficiencies which can, in turn, be passed on to clients."

⁷²⁷ Non-lawyers are currently forbidden to have ownership interests in law firms, or be equal partners with lawyers in them. Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 61-65 and 158-161. See also CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf> at 33-4.

⁷²⁸ Section 8.1, above.

⁷²⁹ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 158-161.

⁷³⁰ Chapter 3 (above) argued that deferring payment often makes personal plight legal services much more accessible to clients.

⁷³¹ Section 3.3.3, above.

⁷³² WW, a Toronto personal injury lawyer, described the significant investment necessary to begin a case even without expert evidence: "to open the file for you without considering my fees or my overhead, I have to pay certain things. I have to pay over \$100 to get a motor vehicle accident report, additional \$68 to get a witness statement and that is not made available at the time of the accident. Then I have to go in terms of issuing a statement of claim, issuing a jury notice - I have to pay. These documents have to be served personally so I hire a processor. I spend my own money because majority of people don't have money to pay for that. They are already suffering. Their income is in jeopardy. They pay for transportation to clinics, take time off and have no extra income to pay for any of this. At the very minimum we are looking at 2.5-3 thousand dollars out of my own pocket, not calculating my fees. Okay for me to prove your case I will need you to be looked at by a doctor, but in order for me to do that I have to gather all of your medical records from way before the accident and now, how did you mitigate your losses, what investigations have been done, where are the diagnoses. Then we are looking at additional fees for clinical records, which range anywhere from 250-450 dollars. When I collect all of that plus prescriptions from pharmacies we are looking at an additional 3-4 thousand dollars. We are at the 6 thousand mark and I don't have an expert opinion." (Interview with "WW" (Personal injury practitioner, Toronto, female, 13 years since call to the bar. Interviewed July 20, 2015)).

⁷³³ Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁷³⁴ Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

⁷³⁵ Interview with "RR" (Personal injury and general civil litigation practitioner, Chatham, male, 31 years since call to the bar. Interviewed June 11, 2015).

⁷³⁶ Wayne puts the argument as follows: "corporatised law firms underwritten by private equity and hedge funds are likely to be more proactive users of sophisticated financial and risk shifting solutions than the fully owned partnerships that historically dominated the legal profession, and continue to dominate the legal profession in the United States." (Vicki Wayne, "Litigation Risk Transfer and Law Firm Financial Arrangements," (2015) 17 *Legal Ethics* at 113).

⁷³⁷ Nora Freeman Engstrom, "Run-of-the-Mill Justice," (2009) 22 *Georgetown Journal of Legal Ethics* 1485; Nora Freeman Engstrom, "Lawyer Lending: Costs And Consequences" (2014) 63 *DePaul L. Rev.* forthcoming; Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) ; Nora Freeman Engstrom, "Lawyer Lending: Costs And Consequences," (2014) 63 *DePaul L. Rev.* forthcoming; Nora Freeman Engstrom, "Run-of-the-Mill Justice," (2009) 22 *Georgetown Journal of Legal Ethics* 1485 at 66.

⁷³⁸ Interview with "SS" (Personal injury practitioner, Toronto, male, 20 years since call to the bar. Interviewed June 17, 2015).

⁷³⁹ Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding," (2013) 61 *American Journal of Comparative Law* 93; Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, *Innovating Regulation* (Edmonton, Winnipeg, Regina: LSM LSA, LSS, 2015) [online: LSS](https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf) <<https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf>> (last accessed: 2 June 2017) at 48; Sunny Freeman, "This company lends money to pay for your divorce ([Toronto Star](https://www.thestar.com/business/2016/04/19/this-company-lends-money-to-pay-for-your-divorce.html), April 19, 2016)," <<https://www.thestar.com/business/2016/04/19/this-company-lends-money-to-pay-for-your-divorce.html>> (last accessed: 2 June 2017).

⁷⁴⁰ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at xix.

⁷⁴¹ Short of full liberalization of ownership rules on the UK/Australian model, regulators can also permit non-lawyer investment with conditions pertaining to the proportion of shares that can be held by non-lawyers, or the requirement that alternative business structure firms pursue goals other than the maximization of profit: Gail E Henderson, "Could Community Contribution Companies Improve Access To Justice?," (2016) 94 *Canadian Bar Review*, [online: <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016>](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016) , David Wiseman, "Access to Justice and Legal Profession Regulation in Canada: to ABS, to not ABS, or to ABS+?" (2015) 18 *Legal Ethics* 78, Law Society of Upper Canada, *Alternative Business Structures Working Group Report* (Toronto: 2015) [online: LSUC](http://www.lsuc.on.ca/uploadedFiles/ABS-full-report.pdf) <<http://www.lsuc.on.ca/uploadedFiles/ABS-full-report.pdf>> (last accessed: 2 June 2017).

⁷⁴² This is currently illegal. North American legal services regulation currently forbids non-lawyers to own or manage law firms or to be equal partners with lawyers within them.

⁷⁴³ The author's view is that, with regard to personal plight legal services, this day when off-shoring or technology replaces domestic professionals is far in the future: Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," (2014) *Journal of the Legal Profession* 25, [online: <ssrn.com/abstract=2436438>](http://ssrn.com/abstract=2436438) ; Section 1.3.1 above.

⁷⁴⁴ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), [online: <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf) at 18.

⁷⁴⁵ Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," (2014) *Journal of the Legal Profession* 25, [online: <ssrn.com/abstract=2436438>](http://ssrn.com/abstract=2436438) .

⁷⁴⁶ Mitch Kowalski, *Avoiding extinction : reimagining legal services for the 21st century* (Chicago, Ill.: American Bar Association, 2012) at 150.

⁷⁴⁷ See section 7.2, above. Regarding the economic opportunities that non-lawyer investment could create for lawyers, see Stephen Gillers, "What We Talked about When We Talked about Ethics: A Critical View of the Model Rules" (1985) 46 *Ohio State Law Journal* 243.

⁷⁴⁸ Interview with "YY" (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

⁷⁴⁹ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 61.

⁷⁵⁰ John S. Dzienkowski and Robert J. Peroni, "Multidisciplinary Practice and the American Legal Profession: A Market Approach To Regulating The Delivery Of Legal Services In The Twenty-First Century," (2000) 69 *Fordham Law Review* 83.

⁷⁵¹ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), online: <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>>; Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), online: <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>>.

⁷⁵² Ryerson Legal Information Zone, "About," <<http://www.legalinnovationzone.ca/about-us/>>; Mars Discovery District, "LegalX Cluster," <<https://www.marsdd.com/our-sectors/information-and-communications-technology/legalx-cluster/>>. See also Mitch Kowalski, "Innovation finally sprouts in Canada's legal garden following a pessimistic February (*Financial Post*, May 24, 2016)," <<http://business.financialpost.com/legal-post/innovation-finally-sprouts-in-canadas-legal-garden-following-a-pessimistic-february>> (last accessed: 2 June 2017).

⁷⁵³ E.g. Gillian Hadfield, "Equipping the Garage Guys in Law" (2011) 70 *Maryland Law Review* 484; Renee Newman Knake, "Cultivating Learners Who Will Invent the Future of Law Practice: Some Thoughts on Educating Entrepreneurial and Innovative Lawyers " (2012) 38 *Ohio Northern University Law Review* 847. For survey data on Canadian lawyers' perceptions of their firms innovativeness, see Aly R Hájí, *The Illusion of Innovation at Canadian Law Firms* (Montreal: Juniper, 2017) online: Juniper <<https://jnper.com/wp-content/uploads/2017/01/Law-Firm-Innovation-1.pdf>> (last accessed: 2 June 2017) and Mitch Kowalski, "McGill study reveals the 'illusion' of innovation at Canadian law firms (*Financial Post*, January 26, 2017)," <<http://business.financialpost.com/legal-post/mitch-kowalski-mcgill-study-reveals-the-illusion-of-innovation-at-canadian-law-firms>> (last accessed: 2 June 2017); Centre for Innovative Justice, "Affordable Justice." (Melbourne: RMIT, 2013), online: <mams.rmit.edu.au/qr7u4uejwols1.pdf> at 23-24; Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), online: <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 18.

⁷⁵⁴ CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada." (Ottawa: CBA, 2014), online: <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 36. See also Mitch Kowalski, "Time for a Canadian-Based Think Tank on Legal Innovation and Competitiveness (*slaw.ca*, January 25th 2013)," <<http://www.slaw.ca/2013/01/25/time-for-a-canadian-based-think-tank-on-legal-innovation-and-competitiveness/>> (last accessed: 2 June 2017).

⁷⁵⁵ Michael Trebilcock, "The Price of Justice" in Farrow & Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018) at Section 4.

⁷⁵⁶ Jordan Furlong, "Why lawyers don't innovate (*Law21*, August 20th, 2013)," <<https://www.law21.ca/2013/08/why-lawyers-dont-innovate/>>; Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law," (2014) 38 *International Review of Law and Economics* 43. In earlier work, Furlong describes lawyers as "knowledgeable, creative and trustworthy professionals who, unfortunately, suffer from poor business acumen, terrible management skills, wildly disproportionate aversion to risk, outsized revenue expectations, and a business model about 25 years out of date" (Jordan Furlong, "Goodbye to all that (*Law Twenty One*, August 26, 2011)," <<https://www.law21.ca/2011/08/goodbye-to-all-that/>> (last accessed: 2 June 2017).

⁷⁵⁷ Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It* (New York: Oxford University Press, 2016) at Chapter 9 (Location 4294 in Kindle version.) Simon Fodden suggests that "the natural tendency ...to assume that history will repeat itself, that what has happened yesterday and the day before will happen as well tomorrow and the day after... is all the more the case for a practice and a profession in which the past is a touchstone of sorts within an intellectual structure — think precedent and the fact that laws are always matters of history — and for which predictability is an important desideratum." (Simon Fodden, "Voices of Change: Canadian Social Media and Other Writings on the Future of Legal Practice." (Ottawa: CBA, 2013), online: <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Voices-Paper-Summary-Linked-eng.pdf>.)

⁷⁵⁸ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with “EE” (Mortgage lending and residential real estate practitioner, Mississauga, male, 33 years since call to bar. Interviewed May 19, 2015); Interview with “FF” (Family law practitioner, Toronto, female, 5 years since call to bar. Interviewed May 5, 2015); Interview with “BB” (Personal Injury and civil litigation practitioner, Toronto, male, 7 years since call to the bar. Interviewed April 15, 2015); Interview with “EE” (Mortgage lending and residential real estate practitioner, Mississauga, male, 33 years since call to bar. Interviewed May 19, 2015).

⁷⁵⁹ E.g. Interview with “QQ” (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁷⁶⁰ CBA Legal Futures Initiative, “Futures: Transforming the Delivery of Legal Services in Canada.” (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 26. This reflects the market. Canada has fewer legal professionals per capita than comparable jurisdictions such as the United States and the United Kingdom: Marc Galanter, “More lawyers than people: the global multiplication of legal professionals” in Scott L. Cummings ed., *The paradox of professionalism : lawyers and the possibility of justice* (Cambridge ; New York: Cambridge University Press, 2011). Hourly fees for personal plight legal services, and presumably lawyer incomes, are higher here than they are south of the border: Noel Semple, “The Cost of Seeking Civil Justice in Canada,” (2015) 93 Canadian Bar Review 639, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=04/01/2016> at 653. For example, KK said: “If you are talking about family law specifically, they come to me because I am new and there is a lack of family law players in Sarnia. Really it is the people that are on legal aid and can’t find someone else that will take legal aid or... that’s really it - they can’t find a lawyer generally.” (Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015)). JJ made similar comments (Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015)). See also Zara Suleman, *Not with a ten-foot pole: Law Students’ Perceptions of Family Law Practice. A Report from West Coast LEAF’s Family law Project* (Victoria, BC: 2010).

⁷⁶¹ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at xx and Chapter 5; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) ; Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?” (2013) 21 International Journal of the Legal Profession 267, [online](http://ssrn.com/abstract=2303987): <<http://ssrn.com/abstract=2303987>> (last accessed: 2 June 2017).

⁷⁶² Section 7.6, above.

⁷⁶³ Interview with “F2” (Co-founder of multi-location consumer law firm, Greater Toronto Law Area, male, 14 years since call to the bar. Interviewed August 4, 2016).

⁷⁶⁴ Andrew Grech and Tahlia Gordon, “Modern Law Firm Management: Should Non-Lawyer Ownership be Endorsed and Encouraged?” (Sydney, Australia: Consequences, 2015), [online](http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management_Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf): <http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management_Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf>.

⁷⁶⁵ CBA Legal Futures Initiative, “Futures: Transforming the Delivery of Legal Services in Canada.” (Ottawa: CBA, 2014), [online](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf): <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> at 41-2; Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?,” (2013) 21 International Journal of the Legal Profession 267, [online](http://ssrn.com/abstract=2303987): <<http://ssrn.com/abstract=2303987>> ; Edward Iacobucci and M. J. Trebilcock, “An Economic Analysis Of Alternative Business Structures For The Practice Of Law” (2014) 92 Canadian Bar Review 57, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016> (last accessed: 2 June 2017) at 97; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 300-303.

⁷⁶⁶ Law Society of Upper Canada Sole Practitioner and Small Firm Task Force, “Final Report.” (Toronto: 2005), [online](http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf): <<http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>>; Noel Semple, “A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism” (2017) 34 Windsor Yearbook of Access to Justice Forthcoming, [online](http://ssrn.com/abstract=2832877): <<http://ssrn.com/abstract=2832877>> (last accessed: 2 June 2017).

⁷⁶⁷ “Slater and Gordon Group is a market- leading consumer legal services organisation with 4,640 staff operating in 86 locations across Australia and the UK. ” (Slater & Gordon Group, *Annual Report 2016* (Melbourne: Slater & Gordon, 2016) [online: Slater & Gordon <https://media.slatergordon.com.au/sgh-2016-annual-report.pdf>](https://media.slatergordon.com.au/sgh-2016-annual-report.pdf) (last accessed: 2 June 2017) at 18).

⁷⁶⁸ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 161-2.

⁷⁶⁹ Gillian K. Hadfield, “The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law,” (2014) 38 *International Review of Law and Economics* 43; Gillian K. Hadfield, “Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets” (2014) 143 *Daedalus* 83; Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It* (New York: Oxford University Press, 2016) .

⁷⁷⁰ Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013)

⁷⁷¹ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) e.g. at 64-5.

⁷⁷² Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?,” (2013) 21 *International Journal of the Legal Profession* 267, [online: <http://ssrn.com/abstract=2303987>](http://ssrn.com/abstract=2303987) ; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 161-171; Noel Semple, “A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism,” (2017) 34 *Windsor Yearbook of Access to Justice* Forthcoming, [online: <https://ssrn.com/abstract=2832877>](https://ssrn.com/abstract=2832877) .

⁷⁷³ See e.g. Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) e.g. at 178.

⁷⁷⁴ Section 2.2, above.

⁷⁷⁵ Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books, 1997) at 17 and 58-9.

⁷⁷⁶ Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015). DD also said “we’ve had to invest a bundle of money to get the pricing right, to get the marketing right, to build the workflows, to do fixed pricing.”

⁷⁷⁷ Section 2.6.3, above. For example, estate litigator HH said: “if you were a bigger firm, or if you had the resources to track this over time, if you looked at the file that would be something we could do, based on past experience, is go through all the files we’ve had for the past six years and look at the type of file, divide it up and figure out how much on average this kind of application costs.” (Interview with “HH” (Estate litigation practitioner, Toronto, female, 11 years since call to the bar. Interviewed May 22, 2015)). See also Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 165-6.

⁷⁷⁸ Laura Snyder, *Democratizing Legal Services: Obstacles and Opportunities* (New York: Lexington Books, 2016) at 68.

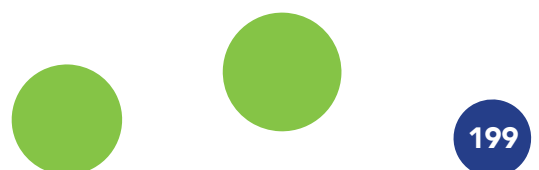
⁷⁷⁹ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 166.

⁷⁸⁰ Section 3.1, above.

⁷⁸¹ Section 3.2, above.

⁷⁸² Section 3.4.3, above.

⁷⁸³ See note 244, above, and accompanying text.



⁷⁸⁴ Interview with “YY” (Employment and human rights law practitioner, Toronto, male, 9 years since call to the bar. Interviewed July 31, 2015).

⁷⁸⁵ Section Chapter 4, above.

⁷⁸⁶ See section 5.4.1, above.

⁷⁸⁷ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 170-1.

⁷⁸⁸ Interview with “JJ” (Family civil litigation practitioner, Sarnia, female, 24 years since call to the bar. Interviewed May 26, 2015).

⁷⁸⁹ (Interview with “DD” (Personal plight law firm leader, Australia & UK, male, 27 years since call to the bar. Interviewed April 20, 2015).

⁷⁹⁰ Larger firms also arguably have advantages in retaining institutional knowledge. Family lawyer KK observed a risk that “every small firm has to reinvent the wheel” in order to develop precedents and workflows, as well as obtain the unwritten knowledge necessary to succeed in personal plight practice: Interview with “KK” (Family law and estate litigation practitioner, Sarnia, female, 3 years since call to the bar. Interviewed May 26, 2015).

⁷⁹¹ Chapter 5, above.

⁷⁹² Section 5.8, above.

⁷⁹³ David Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 167 and 195-6; Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 153; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 167-8. Criminal defence lawyer A2, who had previously worked for a corporate clientele, found that his new practice involved significantly more peaks and valleys of workflow. “You never know from one day to the next what you are going to have. If you are someone who picks up a big insurance company as a client you can be pretty sure you are getting 5 files every month. If you are a criminal lawyer you don’t know, right? You might have 4 guys come in for assault or impaired driving or a breach.” (Interview with “A2” (Criminal law and immigration law practitioner, Hamilton, male, 30 years since call to the bar. Interviewed August 7, 2015). See also the comments of a family lawyer interviewed by Mather et al.: “there are times when there are crises in cases, and things happen, and it all happens at once, and there is only so much of you.” (Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) at 142). A larger firm provides a way to share work and thereby smooth the peaks and valleys.

⁷⁹⁴ Regarding the importance of mentorship, see section 5.5, above.

⁷⁹⁵ See Chapter 6 and Chapter 7, above.

⁷⁹⁶ Specialization at the individual practitioner level improves service quality (Section 6.1.1, above), but a legally inexperienced personal plight client benefits greatly from a generalist firm’s ability to comprehend and assist with all aspects of the client’s often complex situation (sections 6.1.2, 6.1.3, 6.1.4, above).

⁷⁹⁷ Section 6.2, above.

⁷⁹⁸ Regarding insulating regulation, see notes 726 and 764, above. For the argument in favour of alternative business structures, see Edward Iacobucci and M. J. Trebilcock, “An Economic Analysis Of Alternative Business Structures For The Practice Of Law,” (2014) 92 Canadian Bar Review 57, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016> ; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions*

(Cheltenham, UK: Edward Elgar, 2015) at 164-7; Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?," (2013) 21 *International Journal of the Legal Profession* 267, [online](http://ssrn.com/abstract=2303987): <<http://ssrn.com/abstract=2303987>> .

⁷⁹⁹ Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books, 1997) .

⁸⁰⁰ E.g. Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016); Interview with "JJ" (Family civil litigation practitioner, Samia, female, 24 years since call to the bar. Interviewed May 26, 2015); Interview with "C2" (Criminal law practitioner, Toronto, male. 11 years since call to the bar. Interviewed April 13, 2016).

⁸⁰¹ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015); Interview with "QQ" (Civil and commercial employment litigation practitioner, Windsor, male, 2 years since call to the bar. Interviewed June 10, 2015).

⁸⁰² For example, because sole proprietorship unites ownership and management in one individual, it eliminates owners' difficulties in supervising and incentivizing managers: Edward Iacobucci and M. J. Trebilcock, "An Economic Analysis Of Alternative Business Structures For The Practice Of Law," (2014) 92 *Canadian Bar Review* 57, [online](https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016): <https://cbaapps.org/cba_barreview/Search.aspx?VolDate=12%2f01%2f2016> at 84.

⁸⁰³ Urbis, *2014 Law Society National Profile: Final Report* (Sydney: Law Society of New South Wales, 2015) [online](https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf): [Law Society of New South Wales](https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf>> (last accessed: 2 June 2017) at iii.

⁸⁰⁴ Mitch Kowalski, "Why small is beautiful for exchanging ideas, tips and experiences (National Post, June 21, 2016)," , Omar Ha-Redeye, "Cold, Hard Justice Lessons from the Fleet: Innovating from the bottom up," (2017) *Windsor Yearbook of Access to Justice* (forthcoming).

⁸⁰⁵ Interview with "II" (Employment law practitioner, Toronto, male, 9 years since call to the bar. Interviewed May 22, 2015). Many forms of information technology are equally available to large and small firms: Albert H. Yoon, "The post-modern lawyer: Technology and the democratization of legal representation" (2016) *Albert H Yoon*

66 *University of Toronto Law Journal* 456 at 470. Technology can therefore act as an equalizer between these two forms of practice organization.

⁸⁰⁶ Joel Miller, "1 Insight, 6 Truths and 3 Pillars : A fresh approach to serving self-reps in Family Court (Presentation to Family Dispute Resolution Institute of Ontario. May 4, 2015, document on file with author)." (Toronto: FDRIO, 2015) at 5.

⁸⁰⁷ Regarding this expense and risk, see section 5.8, above.

⁸⁰⁸ Anthony J. Casey and Anthony Niblett, "Self-Driving Laws" (2016) 66 *University of Toronto Law Journal*, [online](http://ssrn.com/abstract=2804674): <ssrn.com/abstract=2804674> (last accessed: 2 June 2017) at section 3.2.

⁸⁰⁹ Regarding this "starfish model" law firm, see Dan Pinnington, "[The future of law: The challenges and opportunities of practising law in a global village](http://www.practicepro.ca/LawPROmag/Pinnington-Future-of-Law.pdf)," <<http://www.practicepro.ca/LawPROmag/Pinnington-Future-of-Law.pdf>> (last accessed: 2 June 2017).

⁸¹⁰ New York Times Editorial Board, "The Gig Economy's False Promise ([April 10, 2017](https://www.nytimes.com/2017/04/10/opinion/the-gig-economys-false-promise.html))," <<https://www.nytimes.com/2017/04/10/opinion/the-gig-economys-false-promise.html>> (last accessed: 2 June 2017).

⁸¹¹ See also Jordan Furlong's prediction that "Future solos will be niche specialists rather than broad generalists, collaborators rather than lone wolves, and increasingly virtual rather than bricked-and-mortared. They will draw clients not just from across town, but also across the country." (Canadian Bar Association and Jordan Furlong, "Do Law Differently: Futures for Young Lawyers." (Ottawa: CBA, 2016), [online](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers): <<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>> at 15).

- ⁸¹² Chrissie Lightfoot, "The two faces of the law ([Legal Futures, 1 September 2011](#))," <<http://www.legalfutures.co.uk/news/the-two-faces-of-the-law>> (last accessed: 2 June 2017)
- ⁸¹³ Section 7.4, above.
- ⁸¹⁴ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 171.
- ⁸¹⁵ D2 wants "a unified platform that manages my website, that has a call based computing system, that does my bookkeeping and accounting, and possibly even is involved in payroll for people that I work with, has a system for doing client intake, offers me technologies for managing my workload...I know there are young people entering the profession who know how to do all those things and that's amazing, but I feel sheepish about not having any expertise in any of those things, but the truth is I'm not trained for any of those things." (Interview with "D2" (Former human rights and tort law practitioner, Ottawa, female, 10 years since call to the bar. Interviewed June 19, 2016))
- ⁸¹⁶ Interview with "ZZ" (Montreal, male. Interviewed April 5, 2015).
- ⁸¹⁷ A secondary goal was to make policy recommendations to regulators and professional groups interested in helping firms to be more accessible.
- ⁸¹⁸ Steven Vaughan and Emma Oakley, "Gorilla exceptions' and the ethically apathetic corporate lawyer" (2016) 19 *Legal Ethics* 50 at 51.
- ⁸¹⁹ Martha Simmons, "Applying Innovation Theory On A Micro Level In Dispute Resolution: The Contribution Of Collaborative Law" (2016) 34 *Windsor Yearbook of Access to Justice* Forthcoming.
- ⁸²⁰ USAID Centre for Development Information and Evaluation, *Conducting Key Informant Interviews* (Washington, DC: U.S. Agency for International Development, 1996) [online: USAID](#) <http://pdf.usaid.gov/pdf_docs/pnabs541.pdf> (last accessed: 2 June 2017).
- ⁸²¹ Janice M. Morse, "Purposive Sampling" in Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao eds., *The SAGE Encyclopedia of Social Science Research Methods* (Thousand Oaks, California: 2004)
- ⁸²² Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Herbert M. Kritzer eds., *The Oxford handbook of empirical legal research* (Oxford ; New York: Oxford University Press, 2010) at section III(A).
- ⁸²³ Law Society of Upper Canada, "[Lawyer and Paralegal Directory](#)," <<http://www2.lsuc.on.ca/LawyerParalegalDirectory/loadSearchPage.do>> (last accessed: 2 June 2017).
- ⁸²⁴ USAID Centre for Development Information and Evaluation, "Conducting Key Informant Interviews." (Washington, DC: Development, 1996), [online](#): <http://pdf.usaid.gov/pdf_docs/pnabs541.pdf>
- ⁸²⁵ Law Society of Upper Canada, "[2015 Annual Report Data Membership Statistics: Lawyers by age and gender](#)," <<http://annualreport.lsuc.on.ca/2015/en/annual-report-data.html#LawyersGenderTotal>> (last accessed: 2 June 2017)
- ⁸²⁶ *Ibid.*
- ⁸²⁷ See note 765, above, and accompanying text.
- ⁸²⁸ Law Society of Upper Canada, "[2015 Annual Report Data Membership Statistics: Lawyers by age and gender](#)," <<http://annualreport.lsuc.on.ca/2015/en/annual-report-data.html#LawyersGenderTotal>>.
- ⁸²⁹ Three interviews involved two lawyers from the same law firm.

⁸³⁰ Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Cane & Kritzer eds., *The Oxford handbook of empirical legal research* (Oxford ; New York: Oxford University Press, 2010) at section IV.(A).

⁸³¹ The consent form and all other aspects of this research involving human subjects were authorized by University of Windsor Research Ethics Board Certificate Number 31927, granted February 25, 2015.

⁸³² E.g. labour requirement risk (sections 2.2 and 2.6), non-payment risk (sections 3.2 and 3.4), and litigation risk (note 244, above).

⁸³³ See e.g. section 5.8 (Vertical Division of Labour as Investment) and section 8.1.

⁸³⁴ E.g. section 4.4.3 and section 5.2.



