

**Restrictions on Lawyer Advertising and the
Market for Legal Services**

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Introduction

In Canada, the cost of legal services represents a formidable barrier to accessing justice. As Chief Justice Beverley McLachlin said in a 2007 address to the Empire Club of Canada, “Many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyer... Others simply give up.”¹

If the costs of legal services continue to escalate, then only the very wealthy in Canadian society will be able to afford legal services; potentially, leaving millions of Canadians’ legal rights in jeopardy. One must question the success of a legal system that fails to provide justice to the very people it was intended to serve.²

This paper will address the issue of access to justice by examining the effect that restrictions on lawyer advertising have had on the Ontarian marketplace for legal services. Part I of the essay will examine the underlying rationales for lawyer self-regulation and restrictions on lawyer advertising. Part II of the essay will examine the effect of lawyer advertising deregulation on the legal marketplace in other jurisdictions. Part III of the essay will discuss the projected impact that the deregulation of lawyer advertising will have on the cost of legal services and increasing access to justice in Ontario.

Part I: Lawyer Self-regulation

Why Regulate?

The legal profession is self-regulated. Regulation is necessary because of market failure in the market for legal services. Market failure occurs in the market for legal services primarily

¹ Beverley McLachlin, “The Challenges We Face” (Remarks of the Right Honourable Beverley McLachlin, P.C. Presented at the Empire Club of Canada, Toronto, 8 March 2007), <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

² *Ibid.*

due to asymmetric information.³ Asymmetric information leads to market failure because consumers do not possess sufficient information to accurately assess the quality of the services they desire to purchase.⁴ In order to generate efficient market outcomes, consumers must know what is available from different suppliers in the market in order to be in a position to make judgments about the quality of the services provided and make a price/quality trade off⁵ in the same manner that suppliers of the goods are able to make. Failure to do so results in a reduction of consumer and social welfare relative to full-information market equilibrium.⁶

The nature of legal services prevents consumers from making accurate price/quality tradeoffs in the market for legal services. Legal services are complex, making it difficult for consumers to assess the quality of service provided. Moreover, consumers may draw imperfect conclusions about the service quality, based on the tenuous relationship between professionals' abilities and the results achieved.⁷ In other words, legal services are credence goods. It is difficult, if not impossible, for consumers to assess the quality of the goods and services provided even after consumption.⁸

The inability of consumers to accurately make a price/quality trade off due to asymmetric information holds the potential to create skewed incentives for service providers to act for their own benefit and contrary to the consumers' best interests.⁹ In particular, there may be the

³ Frank Stephen, *An Economic Perspective on the Regulation of Legal Service Markets*, evidence submitted to the Justice 1 Committee's Inquiry into the Regulation of the Legal Profession (2003) at para. 4 [Stephen, "An Economic Perspective"].

⁴ Competition Bureau of Canada, "Self-regulated professions—balancing competition and regulation," (11 December 2007), available at <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>> at 18.

⁵ Stephen, "An Economic Perspective," *supra* note 3 at para. 6.

⁶ Love, James H. and Stephen, Frank H. (1996) "Advertising, Price and Quality in Self-regulating Professions: A Survey," (1996) 3:2 *International Journal of the Economics of Business* 227 at 228 [*Love and Stephen*, "Advertising, Price and Quality"].

⁷ Competition bureau, *supra* note 4 at 18.

⁸ *Ibid.* at 18.

⁹ Competition bureau, *supra* note 4 at 19.

problem of supplier-induced demand¹⁰ or moral hazard.¹¹ Unlike in well-functioning, competitive markets with informed consumers, the incentives of buyers and sellers may diverge. When consumers cannot communicate their preferred combination of price and quality, service providers may seek to oversupply quality in order to charge higher prices.¹² This is likely to generate a level of professional services which is above the optimal level and represents a market failure.¹³ In short, it allows the producers of the professional goods to raise the overall prices for the goods in the market, while at the same time allowing for that inflated price to serve as a signalling device for greater quality. Such a situation is clearly detrimental for consumers, as it represents an increase in cost without the ability to make the aforementioned price/quality trade off.

Thus, regulation is needed to correct for the market failure caused by the discrepancy in available information between supplier and consumer. Ideally, the regulation selected would enhance consumers' ability to choose their preferred combination of price and quality and dissuade professions from exploiting consumers' lack of information, knowledge, and expertise.

Self-Regulation

In Ontario, the legal profession is self-regulated by the Law Society of Upper Canada (the "Law Society"). The governing body of the Law Society is almost entirely composed of lawyers.¹⁴ The Law Society is responsible for implementing regulations, restrictions and rules to correct for market failures that arise in the legal profession. When carrying out these functions,

¹⁰ Stephen, "An Economic Perspective", *supra* note 3 at para. 9.

¹¹ Competition bureau, *supra* note 4 at 19.

¹² *Ibid.* at 19.

¹³ Stephen, "An Economic Perspective", *supra* note 3 at para. 9.

¹⁴ In 2004, the Law Society of Upper Canada was governed by 48 directors known as "benchers," 40 of whom were lawyers elected to the position of benchers by other lawyers in Ontario. The remaining 8 benchers are non-lawyers appointed by the Ontario government and are known as "lay benchers." (Graham, *infra* note 20 at 171.

the Law Society is imbued with the responsibilities to act so as to facilitate access to justice for the people of Ontario and to protect the public interest.¹⁵

However, a potential conflict of interest appears to arise.¹⁶ The legal profession is both entrusted with the guardianship of the justice system and so imbued with the qualities of public service, but it also facilitates the distribution of legal services via commercial, private markets.¹⁷ This places law societies in a difficult position that forces the law societies to implement policies in favour of public policy while ignoring underlying economic incentives to maximize the profession's economic welfare.

This conflict of interest is potentially augmented by the fact that the Law Society, like other self-regulatory agencies, is permitted to implement restrictive practices that would normally run afoul to competition policy, in order to correct for the market failure in their professional market.¹⁸ Self-regulators are given this privilege because assurances are required regarding the professional competence of service providers. However, critics argue that such agencies often implement policies that more often than not serve the profession's self-interest rather than the interests of the general public.¹⁹

Lawyers, like everyone else, are governed by self-interest and will predictably seek to maximize their personal utility. When designing the regulations for the profession, it should be little surprise that the actions of the governing body can be predicted by economic reasoning and, further, that the regulations selected can be explained by reference to economic notions of self-

¹⁵ *Law Society Act, R.S.O. 1990, c. L.8.* at §4.

¹⁶ Competition bureau, *supra* note 4 at vii.

¹⁷ Gillian K. Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (1999-2000) 98 *Michigan Law Review* 953 at 995.

¹⁸ Love and Stephen, "Advertising, Price and Quality," *supra* note 6 at 227.

¹⁹ *Ibid.* at 228.

interest and utility maximization.²⁰ Thus, while the Law Society has the statutory duty to act on behalf of the public interest and facilitate access to justice, it will undoubtedly act in a way that also seeks to serve the self-interest and utility maximization of the profession.

There are many instances in which the interests of the Law Society and the interests of the public coincide. These interests are reflected in the Law Society's regulations and, in such cases, are effective in promoting the public welfare.²¹ These include restrictions on lawyer conduct with clients, minimum education requirements for lawyers, and various advocacy regulations to name but a few. However, historically there have been some regulations on lawyer conduct, though frequently expressed and justified by law societies as acting in the name of public interest, which can be seen as serving lawyers' economic self-interest.²² This paper will focus exclusively on the restrictions placed by law societies on lawyer advertising.

Restrictions on Legal Advertising in Ontario

Prior to 27 November 2008, Rule 3.04(1)(c) of the Law Society of Upper Canada's *Rules of Professional Conduct*²³ prohibited lawyers from using advertisements that compare a lawyer's fees to the fees of other lawyers. Since false and misleading advertisement was already prohibited by Rule 3.04(1)(a), Rule 3.04(1)(c) essentially banned information that was true, not misleading and compared the price of a lawyer's services with the prices that are charged by other lawyers.²⁴ It is difficult to understand how such prohibitions could possibly have benefited the public good. As will be discussed, from an economics of information perspective, consumers

²⁰ Randall Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (Toronto: Edmond Montgomery Publications, 2004) at 171.

²¹ *Ibid.* at 171.

²² Entry restrictions on organization forms, restrictions on fee contracts and marketing and advertising are typically cited as such. See: *Garoupa, infra* note 30.

²³ Law Society of Upper Canada, *Rules of Professional Conduct*, online: Law Society of Upper Canada <<http://www.lsuc.on.ca/regulation/a/profconduct>>.

²⁴ Graham, *supra* note 20 at 232.

would be better off with greater information about the relative costs of a lawyer's services, rather than less.

Driven largely by the rise of the consumer rights movement²⁵ and by *Charter* decisions on other professionals' freedom of communication,²⁶ Canadian law societies have followed the trend of other law societies throughout North America and Europe, which have been moving away from harsh restrictions on lawyer advertising since the 1970s. On 27 November 2008, the Law Society of Upper Canada amended the *Rules of Professional Conduct* to allow for comparative pricing. Rule 3.02(3) now states that:

“A lawyer may advertise fees charged by the lawyer for legal services if (a) the advertising is reasonably precise as to the services offered for each fee quoted, (b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and (c) the lawyer adheres to the advertised fee.”

Why restrict lawyer advertising?

Typically restrictions on lawyer advertising have been normatively justified as protecting the image of the profession and the administration of justice. It is argued that advertising would force them to reveal themselves as nothing more than crass merchants, which in turn would tarnish the public's image of the profession and throw the administration of justice into disrepute. American Chief Justice Warren Burger said advertising legal services like “mustard, cosmetics and laxatives” was one of the most “unethical things a lawyer can do.”²⁷ However, one should be suspicious of such normative justifications, especially when those justifications are espoused by those who stand the most to benefit from them.

²⁵ David Luban & Deborah L. Rhode, *Legal Ethics*, 4th ed. (New York: Foundation Press, 2004) at 730.

²⁶ Allan Hutchinson, *Legal Ethics and Professional Responsibility* (Ontario: Irwin law, 1999) at 87.

²⁷ Deborah L. Rhode, *In the interests of justice: reforming the legal profession* (New York: Oxford University Press, 2000) at 148 [Rhode, *Interests of justice*].

Indeed, studies have shown that the traditional normative justifications given by those in the legal profession do not comport with the realities of consumer perception. In an ABA national survey, advertising was found to not be a major factor in shaping public impressions of the bar. Moreover, dignified advertisements were found to reflect favourably on the profession.²⁸ Of the surveyed American states, over 90% of all complaints about advertising came from other lawyers, while only 1 to 2% of consumers' complaints about lawyers involved advertising.²⁹

Why is Advertising Important?

Lawyer advertising is thought to benefit the public good by providing consumers with greater information about legal services. Traditional economic analysis on the benefits of advertising by professionals has been carried out from an economics of information perspective. From this perspective, advertising is thought to be a common method of providing information and should be permitted based on a social welfare perspective when it is productive. Advertising is believed to be productive when the advertising conveys important and relevant information about the professional service to consumers.³⁰ From this perspective, overly restrictive regulations on advertising serve to minimize competition and keep lawyers' fees unjustifiably high to the detriment of the service-seeking public.³¹ This is because producer advertising is taken to be the equivalent to a large amount of search by a large number of consumers. Consequently, provider advertising reduces price dispersions and enhances competition.³² Thus, the underlying intuition is that the removal of harsh restrictions on lawyer advertising would

²⁸ Rhode, *Interests of justice*, *supra* note 27 at 148.

²⁹ *Ibid.* at 148.

³⁰ Nuno Garoupa, "Providing a Framework for Reforming the Legal Profession: Insights from the European Experience" (2008) 9 *European Business Organization Law Review* 463 at 478.

³¹ Graham, *supra* note 20 at 171.

³² Stephen, "An Economic Perspective," *supra* note 3 at para. 26.

enhance competition, be in the interests of efficiency, and help correct for the market failure caused by asymmetrical information in the market for legal services.

Part II: The Effect of the Easing of Restrictions on Lawyer Advertising

Early Empirical Evidence and Explanations

Extensive empirical literature has developed on the impact of the deregulation of advertising restrictions on fee levels in professional services markets. In a 1996 survey of available studies, sixteen out of seventeen studies found that increased advertising had a downward effect on professional fees.³³ Not only did firms that advertise have lower fees, but the overall average price for legal services in markets where advertising was prevalent decreased. This empirical support provides strong evidence against the argument advanced by some proponents of restrictions on advertising that increased advertising will result in increased costs for producers of the services, which will be correspondingly passed on to consumers.

The explanation of why increased advertising leads to lower market prices is most often derived from the work of Stigler on the economics of information. Stigler's model is based on consumers seeking low prices amongst numerous suppliers where the consumer has an implicit or explicit conception of the probable distribution of prices.³⁴ The search strategy of consumers is affected by the extent of available advertising, because advertising is equated to a large amount of search by a larger number of consumers.

The application of the Stigler model to professional services advertising has shown that advertising in a market will increase the own-price elasticity of demand for firms in that market.³⁵ As a consequence of the increased own-price elasticity, prices for professional services

³³ Love and Stephen, "Advertising, Price and Quality," *supra* note 6 at 236.

³⁴ George. Stigler, "The Economics of Information," (1961) 69:2 *Journal of Political Economy* 213.

³⁵ Schroeter, J.R., Smith, S.L. and Cox, S.R., "Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation," (1987) 36 *Journal of Industrial Economics* 49.

drop in the presence of increased advertising. Thus, from a social welfare perspective, advertising has net utility gains for society as they reduce the cost of legal services and align such costs more accurately with the market equilibrium.

In other words, advertising reduces fee levels because it provides a useful source of information to consumers, which helps underpin competitive behaviour.³⁶ Advertising informs consumers about the existence of suppliers and assists consumers in judging the quality of the goods and services being offered.³⁷ The price for certain services is then more accurately allocated based on quality through the mechanisms of an open competitive market. This is welfare enhancing as it helps overcome the earlier discussed problems of asymmetrical information and enables consumers of legal services to make more accurate price/quality tradeoffs.

The Effects of Different Types of Lawyer Advertising

A 1992 study of legal markets in Wales and England found that some forms of legal advertising have a greater impact on achieving market equilibrium than others.³⁸ In the study, the researchers distinguished between two different kinds of advertising: non-price advertising and price advertising. Non-price advertising refers to various types of qualitative advertising. Price-advertising refers to the advertising of price, such as the comparative pricing that is now permitted by Rule 3.02(c) of the Law Society of Upper Canada's *Rules of Professional Conduct*. Non-price advertising has been permitted for longer than price advertising in Ontario, though restrictions on this form of advertising have been similarly relaxed in recent years. The study found that both types of advertising result in reduced costs of legal services in a particular

³⁶ Love and Stephen, "Advertising, Price and Quality," *supra* note 6 at 230.

³⁷ Lester G. Tesler, "Advertising and Competition" (1964) 72:6 *The Journal Of Political Economy* 537.

³⁸ James H. Love et al., "Spatial Aspects of Deregulation in the Market for Legal Services" (1992) 26:2 *Regional Studies* 137 [Love et al., "Spatial Aspects"].

marketplace. However, the impact of that decrease varied based on the type of advertising predominantly used in a particular marketplace for legal services.

Non-price advertising was found to decrease the costs for professional services in a particular marketplace.³⁹ The reasoning is intuitive. At a practical level, different kinds of advertisements allow for more individuals to be reached and to be notified of potential services available for purchase. This is likely to have the effect of notifying potential new clients who were previously unaware of a particular lawyer's services that the lawyer could be of assistance to that client in their personal matter. This has the effect of increasing the size of the market for lawyers, which in turn drives competition between lawyers to attract these new potential consumers. This, in turn, leads to reduced fees for legal services. Also, increased non-price advertising allows for new lawyers to enter the marketplace and notify the public of their services, which also serves to increase competition and lower the average cost of legal services in the marketplace. Though non-price advertising was found to lower the average cost of professional services, this form of advertising was found to be less significant in reducing the costs of legal services than price advertising.⁴⁰

Of all market-level factors examined, the price advertising variable was the most important in reducing the cost of legal prices within a market.⁴¹ This is not surprising. Price advertising plays an important role in helping to overcome inefficiencies in the market for professional services due to asymmetrical information. Price advertising is thought to provide more information to consumers because of the inability of non-price advertising to substantiate claims of quality. Price advertising is able to communicate both price and quality even when it fails to do so directly, because price itself acts as an indirect substantiate of quality in a

³⁹ Love et al., "Spatial Aspects," *supra* note 38 at 145.

⁴⁰ *Ibid.* at 145.

⁴¹ *Ibid.* at 145.

marketplace with full information. However, the ability of price advertising to accurately reflect price/quality tradeoffs may be more limited where non-routine legal services are being purchased. Notwithstanding this limitation an increase in price advertising seems to be an important step in the right direction towards correcting for the market failure arising from asymmetric information.

Barriers to the Effectiveness of Price Advertising in the Market for Legal Services

The actual reduction in the price found in the England and Wales study was rather paltry compared to the suspected impact of increased information developed by the theoretical models.⁴² In fact, it has been found that price advertising has had a relatively paltry impact on decreasing the cost of legal services even in countries with the most relaxed restrictions on price advertising such as the United States.⁴³ This is because a problem arises when price advertising is undertaken exclusively, or at least, principally by low-price/low-quality suppliers. In these circumstances price advertising becomes an adverse signal on quality.⁴⁴ The underlying reasoning being that consumers who are unable to assess quality in an *ex ante* or *ex post* manner and observe a low price for a non-standardised service assume that more knowledgeable purchasers have assessed the services and concluded them to be of low quality.⁴⁵ Thus, professionals are keen to avoid such adverse signals on quality and are consequently reluctant, or refuse, to advertise using price advertising.⁴⁶ Thus, perceptions of quality essentially effect the form of advertising chosen by professionals and act as a barrier to increased information for the public regarding professional services. The resulting decrease in information available to

⁴² Love et al., “Spatial Aspects”, *supra* note 38 at 145.

⁴³ *Garoupa*, *supra* note 30 at 480.

⁴⁴ Stephen, “An Economic Perspective”, *supra* note 3 at para. 30.

⁴⁵ *Ibid.* at para. 29.

⁴⁶ *Ibid.* at para. 29.

consumers prevents the deregulation of lawyer advertising from having a significant impact on correcting the market failure in the market for legal services caused by asymmetric information.

Following deregulation of lawyer advertising, non-price advertising became and continues to be much more common than price advertising in both the United Kingdom and the United States. Within two years of advertising being permitted, 46% of English solicitors' firms had advertised in the previous six months; but only 2% of firms had advertised the price of any service. Six years later, the proportion of advertising had risen to 59%, but price advertising was carried out by only 4% of all firms.⁴⁷ In Scotland, within three years of being permitted to do so, over half of Scottish solicitors' firms engaged in advertising, but less than 3% advertised the price of any service.⁴⁸ A United States Federal Trade Commission study of attorney advertising found similar low levels of price advertising across American states.⁴⁹ These low incidences of price advertising by lawyers significantly reduces the effectiveness of lawyer advertising deregulation from achieving the desired results of correcting for market failure in legal markets caused by information asymmetry.

Further Structural Barriers to the Effectiveness of Price Advertising

Other possible explanations exist for why the easing of restrictions on price advertising have had less than a dramatic impact on generating an efficient market equilibrium. For instance, this may be a result of the historical legacy that advertising restrictions have had on the market for legal services. In an even more nuanced study on the impact of deregulation of advertising restrictions, economist Frank H. Stephen found that only certain forms of advertising had the suspected impact of reducing fees for only a sub-group of consumers in the market for legal

⁴⁷ Frank H. Stephen, James H. Love and Alan A. Paterson, "Deregulation of Conveyancing Markets in England and Wales" (1994) 15:4 *Fiscal Studies* 102 at 108 [Stephen, Love and Paterson, "Deregulation of Conveyancing"].

⁴⁸ Stephen, "An Economic Perspective," *supra* note 3 at para. 30.

⁴⁹ *Ibid.* at para. 30.

services in Scotland.⁵⁰ In particular, Stephen found that the advertising as information hypothesis was only supported for forms of non-price advertising in the markets for lower-priced legal services.⁵¹ In the market for higher-priced legal services, Stephen found that neither form of lawyer advertising had any effect on the costs of legal services that were purchased.⁵² In other words the elasticity of demand for richer clients was insensitive to changes in search costs brought about by either form of advertising, while the elasticity of demand for poorer clients was sensitive to search costs brought about by non-price advertising.

Although Stephen fails to elaborate on the suspected reasons for these results, the characterization of the sub-groups might provide some insight on these somewhat surprising findings. As identified by Galanter, poorer consumers of legal services, although not exclusively, tend to be “one-shotters,” or those with infrequent recourse to the justice system.⁵³ As a consequence, “one-shotters” will be more likely to use a form of non-price advertising to select their lawyer of choice because (a) they have fewer resources to dedicate to search costs; (b) they have less expertise than those who use the legal system frequently in assessing what they require in terms of legal services; and, (c) as previously discussed, incidences of price advertising signals poor quality when price advertising is conducted primarily by low quality providers. Since non-price advertising will be a principal method of selection for these clients, firms who are willing to offer legal services for less will be forced to compete vigorously for clients in this segment of the market. The greater the competition, the lower the price will go. The ability to non-price advertise and make services available to potential clients may also

⁵⁰ Frank H. Stephen, “Advertising, consumer search costs and prices in a professional service market” (1994) 26:12 *Applied Economics* 1177. [Stephen, “Consumer Search Costs”].

⁵¹ *Ibid.* 1186.

⁵² *Ibid.* 1186.

⁵³ Marc Galanter, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” in Roger Cotterrell, ed., *Law and Society* (England: Dartmouth Publishing Co. Ltd., 1994) 165 at 167.

increase the number of suppliers in the market. This in turn would also have a downward effect on the price for legal services in the market sub-group of poorer clients.

Conversely, richer clients, although not exclusively, tend to be “repeat players”.⁵⁴ Unlike the “one-shotters”, “repeat players” have much experience using the legal system and often anticipate using the legal system repeatedly in the future. “Repeat players” previous involvement with the legal system represents a significant search cost. This may explain why the demand elasticity of richer clients in Stephen’s study was not receptive to either forms of advertising. Indeed Stephen posits that clients in the more affluent sub-market do not search any further because they have such a high opportunity cost of conducting another search.⁵⁵ Personal experience is the strongest source of consumer information since it enables a consumer to evaluate a good or service on the basis of that experience and in light of the consumer’s own unique preferences.⁵⁶ Forfeiting these search costs would represent a huge opportunity cost since they have already invested so much of their resources in assessing the price/quality trade off through their previous personal consumption.

This essentially creates a locked in effect and permits the continuance of price discrimination against richer clients. More importantly for the purposes of this essay, since richer clients are unreceptive to increased informational advertising, firms that serve large, rich and “repeat player” consumers have little to no incentive to make information available. This in turn prevents other firms servicing both sub-markets from offering price advertising in the market legal services, since price becomes, as previously mentioned, a signaller for lower quality.

⁵⁴ Galanter, *supra* note 53 at 168.

⁵⁵ Stephen, “Consumer Search Costs,” *supra* 50 at 1186.

⁵⁶ Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, “Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Service” (1983) 58 *New York University Law Review* 1084 at 1094.

This situation is problematic because it essentially serves as a strong structural barrier to overcoming the market failure caused by asymmetrical information in the market for legal services. Lawyer advertising, in particular price advertising, is unable to significantly achieve the expected results of correcting for market failure caused by asymmetric information in the market for legal services because the economics of information model is largely premised on market wide informational advertising. Indeed a study carried out by Schroeter et al. based on a subset of the United States Federal Trade Commission's database in 1984 found support for the thesis that the greater the proportion of firms in a market which advertise, the lower are the quoted fees of all firms in the market.⁵⁷ It is expected that the greater the information available to the market, the more accurate the prices will reflect the actual quality of services. Conversely, it is expected that when a lower proportion of firms advertise in a market, the effect of lowering quoted fees in a marketplace is diminished. This helps to explain the persistence of the market failure in markets for legal services that have long permitted more liberal forms of lawyer advertising than in Canada, such as the United States.

Part III: The Likely Impact of Deregulation of Lawyer Advertising in Ontario

The effect on the advertising deregulation and the cost of legal services in Ontario

Based on the aforementioned studies carried out in the United Kingdom and the United States, the Law Society of Upper Canada's amended rules will likely have some effect on decreasing the overall average cost of legal services in Ontario. The amended rules permit both the use of comparative advertising and further relaxed restrictions concerning the qualitative way in which lawyers are able to advertise in Ontario. Consistent with the Stigler economic model of information and with studies primarily carried out in the United States on the impact of professional advertising on professional services' markets, the likely impact of the easing of

⁵⁷ Schroeter et al., *supra* note 35 at 59.

restrictions on both types of advertising will be to decrease the average cost of legal services in Ontario. The decrease in the average cost of legal services in Ontario is likely to occur because consumers will be better informed and there will be greater competition between law firms for business from consumers.

However, the decrease in the average cost of legal services will be far from significant. In particular, it is extremely unlikely that the easing of lawyer advertising restrictions in Ontario will come close to correcting for the market failure caused by asymmetric information that arises in the market for legal services. As seen in Stephen's study of the impact of price advertising on the cost for legal services in the Scottish legal market, price advertising is not likely to have a significant impact on the cost for legal services, because firms that provide more expensive services to richer clients have little to no incentive to increase the amount of information they put out in the market. This is because such firms' clients are inelastic to increased information provided through advertising due to the high search costs that such clients have already spent in selecting a firm. The failure for the larger firms to advertise will provide a disincentive for other non-low quality firms to engage in comparative advertising. As has already been discussed, when only low-price/low-quality firms engage in price advertising, such advertising serves as an adverse signal on quality to consumers.

These structural forces will in turn prevent the amended rules permitting lawyer comparative price advertising from having a significant impact on the market, as only limited information will be passed on to the consumers despite the relaxing of the restrictions. Consequently, the information asymmetry that leads to market failure in the market for legal services will persist and an efficient market equilibrium will not be reached.

Consequences and Solutions

The likely impact of lawyer advertising deregulation in Ontario as discussed above suggests that the amended rules adopted by the Law Society of Upper Canada will be unable to achieve their intended results. In particular, the analysis suggests that the easing of restrictions on lawyer advertising will be insufficient to achieve significant progress in correcting for market failure caused by asymmetric information or to significantly improve access to justice in Ontario. Previous restrictions on price advertising have created powerful lasting market disincentives for firms to price advertise. As a result, the abolishing of restrictions on price advertising is unlikely to be able to provide significantly better information to consumers and, further, is unlikely to have a significantly positive effect on consumers of legal services in Ontario. This suggests that much more should be done by the Law Society of Upper Canada to correct for market failure in the market for legal services in Ontario.

One potential solution would be for the Law Society of Upper Canada to force law firms to release greater information into the market for legal services in Ontario. While such an approach is undoubtedly radical in the market for legal services, this approach has been adopted in markets for other goods. Driven by the impetus of investor protection,⁵⁸ the securities regulation regime in Ontario compels public companies to disclose various terms of their businesses. The underlying rationale of forcing the disclosure of certain information is that the market price will better reflect the actual quality and value of the security being offered in the market. Though, admittedly, the market for securities and the market for legal services are quite distinct, if more information about the price of legal services is forced to be made available to the public, the more likely the price of the legal services will accurately reflect the quality of legal services. If the market is given full information about the price for legal services being offered,

⁵⁸ *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1.

then claims about the quality of the services can be better substantiated as they will be reflected in the price for legal services that the market is willing to pay for those specific legal services.

Of course, this will not solve all of the problems associated with the market for legal services. Unethical lawyers offering a lower quality of legal services could always charge less per hour than their higher quality counterparts, but bill for more hours. Indeed, the threat of moral hazard will always continue to exist in the market for legal services due to the fact that legal services are credence goods. However, as the theoretical models and the majority of studies suggest, the more information that can be disseminated into the market, the more likely that the price of legal services is to reach market equilibrium. As has been suggested, one of the stumbling blocks to reaching market equilibrium in the market for legal services following the easing of restrictions on lawyer advertising has been the structural barriers created by the historical legacy of law societies preventing forms of informational advertising from being used by lawyers. The most fruitful way in doing so would be to enforce mandatory disclosure of legal fees. It is only through such a drastic measure that the market for legal services will move closer towards market equilibrium. This in turn, at least to some degree, will help rectify the problems associated with access to justice in Ontario.

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