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REGULATION OF THE LEGAL PROFESSION

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Abstract

This chapter reviews the contribution which economists, and others using economic modes of reasoning, have made to the analysis of the regulation of law firms. It particularly focuses on the analysis of self-regulation by the profession. The chapter begins by rehearsing the traditional cartel argument against self-regulation and its links with the modern private interest theory of regulation via capture theory. This is contrasted with the market failure view of regulation which in the context of the professions focuses on the information asymmetry between the professional and the client. There is then a brief discussion of the merits of self-regulation and inter-profession competition before turning to an examination of the instruments by which professional regulation is exercised: control of entry, control of advertising or other means of competition, control of fee levels, control of fee contracts and control of organisational form. In this context, prominence is given to recent empirical studies which test the effects of these regulatory controls or their removal. The focus throughout is on what the economics literature has had to say on the regulation of the practice of law. Thus more general treatments of the economics of the law firm are not discussed.

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1. Introduction

In most jurisdictions one or more of the following is regulated in some manner:

- a. the provision of advice about the law for financial reward;
- b. the use of specific professional titles indicating expertise in legal matters;
- c. the right to appear on behalf of one of the parties before the courts.

Whilst ultimately governed by statute and subject to oversight by some public official (judge, civil servant or politician) this regulation is frequently enforced and delimited by the profession itself (see further below). This article reviews the contribution which economists, and others using economic modes

of reasoning, have made to the analysis of such regulatory regimes. We begin by rehearsing the traditional cartel argument against self-regulation and its links with the modern private interest theory of regulation via capture theory. This is contrasted with the market failure view of regulation which in the context of the professions focuses on the information asymmetry between the professional and the client. There is then a brief discussion of the merits of self-regulation and inter-profession competition before turning to an examination of the instruments by which professional regulation is exercised: control of entry, control of advertising or other means of competition, control of fee levels, control of fee contracts and control of organisational form. In this context we give prominence to recent empirical studies which test the effects of these regulatory controls or their removal. The focus throughout is on what the economics literature has had to say on the *regulation* of the practice of law. Thus more general treatments of the economics of the law firm are not discussed.

A. Regulation of Professions, Capture and Cartels

2. Economists' Views

Economists, traditionally, have been highly critical of many aspects of professional regulation and self-regulation in particular (see, for example, Arnould, 1972; Arnould and Friedland, 1977; Benham and Benham, 1975; Faure et al., 1993; Friedman and Kuznets, 1945; Kessel, 1958; Lees, 1966; Leffler, 1978). Self-regulation is characterised as, potentially, having the effect of a cartel: by controlling entry to the market and setting an agreed price above the competitive price, members of the profession earn economic rents. Restrictions on advertising and prohibitions on using fee-levels to attract business restrain competition from 'breaking out' between existing suppliers. It has been argued that restricting fee competition, particularly by publishing mandatory or recommended fee scales, reduces competition and innovation and is against the public interest (Arnould, 1972; Arnould and Friedland, 1977; Domberger and Sherr, 1989; Monopolies and Mergers Commission, 1970; Van den Bergh and Faure, 1991). Whilst the earlier literature was written from a price theory/industrial organisation perspective, more recently critics have adopted a capture theory or public choice perspective (Van den Bergh and Faure, 1991; Faure, 1993; Van den Bergh, 1993). This is not surprising since in the development of the private interest theory of regulation from capture theory Posner (1974) made a direct link with the theory of cartels. Indeed, self-regulation has been described as the ultimate form of regulatory capture (Kay, 1988). From this perspective the regulation of markets for professional services is seen to arise or at least is sustained because it is in the interests of

the members of the profession. It legitimises or enforces their cartel-like behaviour.

3. Market Failure and Information Asymmetry

An older, though nowadays less fashionable, view of regulation is that it arises from a public interest in remedying market failure (Noll, 1989). Notwithstanding the origins or motivations underlying regulation, many would argue that there is a potential market failure in many professional markets.

The particular market failure that applies to professional markets in general, and the markets for legal services in particular, is that of information asymmetry. The asymmetry is between the professional on the one hand and the client on the other. For most clients legal services are credence goods (Darby and Karni, 1973) as opposed to search or experience goods. The client is usually less well informed about the nature of legal problems and their remedies than the lawyer and often relies on the lawyer to define the problem in the first place as well as recommending a course of action and implementing it (but see further below). Quinn (1982) distinguishes between two roles: the *agency function* (defining the client's needs and selecting appropriate strategies) and the *service function* (using technical expertise to implement the chosen strategy). Normally in the legal context the lawyer performs both functions. Thus there is a potentially severe principal-agent problem (potentially encompassing supplier-induced demand). The lawyer as agent has a pecuniary interest in recommending expensive strategies which he/she will be paid to implement. This demands some protection for the (infrequent) consumer of personal professional services (see, for example, Arruñada, 1996; Dingwall and Fenn, 1987; Evans and Trebilcock, 1982; Faure, 1993; Faure et al., 1993; Federal Trade Commission, 1984; Helligman, 1993; Herrmann, 1993; Kritzer, 1990; Levmore, 1993; Matthews, 1991; Smith and Cox, 1985; Sykes, 1993; Wolfram, 1984). Under these conditions the market will fail to produce the socially optimum quantity of the professional service. Protection of consumers frequently takes the form of regulation of the profession and its markets. In certain circumstances, contingent fee contracts may mitigate or overcome some aspects of this problem (see further Part E below).

It is important to recognise that the informational asymmetry identified here does not apply to all clients of lawyers. Many commercial clients are repeat purchasers in the market for legal services. Therefore they are able to acquire experience and knowledge of the market which reduces the asymmetry between lawyer and client. They are less in need of the agency function than infrequent purchasers. Furthermore in the case of repeat purchasers, lawyers must be aware of the loss of future business from behaving opportunistically. They must also be aware of reputational effects which may arise from social networks even

where individual consumers are not repeat purchasers. Thus the information asymmetry argument does not carry over to all segments of the market for legal services (Hudec and Trebilcock, 1982; Trebilcock, 1982). It has its principal relevance in the market for private clients and small businesses. Thus although the information asymmetry argument is now well recognised its application must be sensitive to the circumstances of the market concerned.

Recently, Emons (1997) has analysed a model of behaviour in a credence good market where, essentially, the service function cannot be provided separately from the agency function. He describes this as a situation of 'profound economies of scope between diagnosis and treatment'. Consumers attempt to infer sellers incentives from observation of market data. The analysis demonstrates that market equilibria inducing non-fraudulent behaviour can exist.

The information asymmetry between professional and client also gives rise to another potential source of market failure due to the client's inability to judge, *ex ante*, the quality of the professional. In the extreme this can give rise to a 'lemons' problem (Akerlof, 1970). The use of licensing to avoid this problem is analysed in Leland (1979). The author concludes that the optimal supply of quality will not be produced in a market with asymmetry between client and supplier and that minimum quality standards may solve the problem. Clearly it will be in the interests of the profession to avoid a 'lemons' problem arising. However, Leland's analysis suggests that if the setting of minimum standards is by the professional group itself it is likely to be set too high.

4. Professional Self-Regulation

Dingwall and Fenn (1987) consider a number of possible responses to the information asymmetry problem. First, society could subsidise high quality suppliers to ensure that they remain in the market. Secondly, penalties could be imposed on those suppliers who do not meet some quality threshold. Thirdly, entry to the market could be restricted to those meeting some minimum standard. They consider the first implausible since it does not guarantee that the higher quality service will actually be supplied. The second and third response requires a regulatory agency which must avoid capture and be able to do what the individual client cannot: assess quality and signal it to potential consumers. Self-regulation can do the latter but runs the risk of being the ultimate form of regulatory capture. However, they argue that if self-regulation was so problematic why does it persist in most jurisdictions? If it were inefficient someone would benefit from its removal otherwise democracy itself would be inefficient.

Dingwall and Fenn (1987) see self-regulation as arising from the social institution of trust: a social contract between society and the profession

mitigates the moral hazard problem arising from the information asymmetry. However, they recognise that safeguards are required, particularly to ensure that the profession does not operate as a cartel. They also feel that the various professions will act as watchdogs on each other.

The case for self-regulation has been examined in detail also in Ogus (1995). He points to a number of reasons why self-regulation might be preferred to regulation by some body external to the profession. In particular, self-regulation may reduce the cost of the regulator acquiring information and makes adjustments to regulations easier. These benefits need to be compared to the potential efficiency losses due to the potential for cartel-like behaviour. Curran (1993) reports J.C. Miller, Chairman of the Federal Trade Commission in the Reagan administration, making similar arguments for self-regulation (Miller, 1983). Even where regulation by a professional body is deemed an appropriate solution Ogus (1995) has argued that the public interest would be protected best by having a number of professional bodies in competition with each other. As implied in the foregoing, in many jurisdictions the regulation of a profession is in the hands of the members of the profession itself, either nationally or locally. This is usually the case with the legal profession (Arruñada, 1996; Curran, 1993; Dingwall and Fenn, 1987; Evans and Trebilcock, 1982; Faure, 1993; Federal Trade Commission, 1984; Finsinger, 1993; Helligman, 1993; Herrmann, 1993; Lees, 1966; Ogus, 1993; Pashigian, 1979; Stephen, 1994; Stephen and Love, 1996; Stephen, Love and Paterson, 1994; Van den Bergh, 1993).

A more formal treatment of professional self-regulation is provided in Shaked and Sutton (1981a) which examines the effects on welfare of a self-regulating profession and also the effect on welfare of the existence of a lower quality para-profession. Shaked and Sutton (1982) focuses on the perceived quality of a profession and the availability of information. In particular, information available to consumers is related to the size of the profession: a larger profession increases the heterogeneity of information available to consumers and increases the demand at a given price. A small profession (whose quality is higher) will produce less information and reduce demand. Thus increased quality may be associated with lower price. In this work the motive force comes from the consumer side.

5. Alternatives to Self-Regulation

Regulation may not be the only solution to the information asymmetry problem. Independent rating agencies have been suggested as a solution or the use of repeat purchasers to perform the agency function on behalf of infrequent purchasers (Stephen, Love and Paterson, 1994; Stephen and Love, 1996). Others suggest that competition will generate its own quality signals (Klein and

Leffler, 1981; Leffler, 1978). Fama and Jensen (1983a, 1983b) and Carr and Mathewson (1990) suggest that the existence of partnerships with unlimited liability signals the quality of legal advice to consumers because each partner is willing to risk his/her wealth on the competence of the other partners (see further below for the development of this argument). Even if the information asymmetry problem is large its removal via professional self-regulation may introduce other, greater, distortions (Curran, 1993).

6. Deregulation of Professional Service Markets

In both academic and policy discussion there has been a gradual shift against regulation, a shift which has quickened in pace in recent years. Markets for legal services have been the subject of varying degrees of deregulation in USA, Europe and elsewhere (see, for example, Bowles, 1994; Cox, 1989; Curran, 1993; Domberger and Sherr, 1987; Faure, 1993; Federal Trade Commission, 1984; Helligman, 1993; Herrman, 1993; Ogus, 1993; Paterson and Stephen, 1990; Shinnick, 1995; Stephen and Love, 1996; and Scottish Home and Health Department, 1989). In several jurisdictions there have been proposals by government to remove the general exemption of professions from anti-trust or restrictive practices legislation. However, not all such attempts have reached the statute book (for example England and Wales, Ireland, Scotland, Spain).

7. Instruments of Self-Regulation

The current state of the discussion in the conceptual literature is such that although some authors recognise the potential problem arising from the asymmetry of information between client and professional, considerable scepticism remains on whether traditional self-regulation is a solution to the problem or a source of even greater welfare loss. The remainder of this paper considers that part of the literature which examines the instruments used by self-regulatory bodies for the legal profession to regulate the market. In particular, we emphasise empirical studies of regulation and de-regulation. The lack of discussion in the economics literature on some aspects of self-regulatory systems such as complaints procedures, controls on quality of training and requirements for continuing professional development and so on is reflected in their absence in what follows.

Commentators (Cox, 1989; Curran, 1993; Domberger and Sherr, 1987, 1989; Evans and Trebilcock, 1982; Faure, 1993; Finsinger, 1993; Federal Trade Commission, 1984; Scottish Home and Health Department, 1989; Stephen, 1994; Stephen and Love, 1996; Stephen, Love and Paterson, 1994;

Van den Bergh, 1993) have identified a number of instruments typically used by self-regulators of the legal profession which may work against the public interest: (i) restrictions on entry; (ii) restrictions on advertising and other means of promoting a competitive process within the profession; (iii) restrictions on fee competition; and (iv) restrictions on organisational form. A separate although connected literature has developed on restrictions on the nature of fee contracts between lawyers and clients. This particularly focuses on contingent fee contracts (see, for example, Clermont and Currivan, 1973; Dana and Spier, 1993; Danzon, 1983; Fisher, 1988; Gravelle and Waterson, 1993; Halpern and Turnbull, 1981; Hay, 1996; Kritzer, et al., 1984; Lynk, 1990; Miceli, 1994; Miceli and Segerson, 1991; Rickman, 1994; Rubinfeld and Scotchmer, 1993; Schwartz and Mitchell, 1970; Smith, 1992; Thomason, 1991; Watts, 1994). We now discuss each of these methods of self-regulatory control in turn.

B. Entry Restrictions

8. Entry to the Profession

Economists (for example Friedman and Kuznets, 1945; Leffler, 1978) have criticised restrictions on entry to a profession or restrictions on providing a particular service by persons not recognised by a particular professional body. This can undoubtedly lead to supply shortages and hence the earning of substantial economic rents by members the profession. However, it not only requires a monopoly right for the profession over a particular service but also numerical restrictions on entry to the profession. Thus an excess demand for the services of the profession is maintained. The monopoly right ensures that an adjustment in supply from outside the profession cannot take place in response to the profession's high incomes. In the most famous study, Friedman and Kuznets (1945) estimated economic rents of 15-110 percent being earned by professionals in the US during the 1929-36 period. This is the global effect of self-regulation and is not solely attributable to entry restrictions.

Entry to the legal profession has continued to grow (for Europe see Bowles, 1994; Faure, 1993; Helligman, 1993; Herrmann, 1993; Ogus, 1993) for USA see Curran (1993) and Lueck, Olsen and Ransom (1995). Indeed as Curran (1993) points out the American Bar Association has been less successful than its medical counterpart in limiting the growth of the profession. It has not regulated the numbers qualifying to practice in the same way as the American Medical Association. Of course, established members of the profession may have an interest in encouraging an expansion of new entry to the lower reaches of the profession as this might reduce the salaries paid to new entrants due to excess supply. However, this argument only holds so long as the new entrants

to the profession are unable to provide the basis for an increase in the number of law firms and thus compete away the rents earned by existing firms.

However, the absence of severe restrictions on entry to the profession in general does not necessarily imply competition in specific service markets. Professional service markets, particularly of a personal nature, tend to be spatially localised. What may be important are geographical restrictions on movement which imply barriers to entry into specific service markets for existing members of the profession. In a number of jurisdictions lawyers may only appear before courts in the local area to whose bar they have been admitted (USA, Belgium, Germany, for example).

In the case of legal advice, even when there are no formal restrictions on practising in a given locality, other restrictions on behaviour such as prohibiting advertising may raise the cost of entry (through an inability to quickly generate goodwill) and thus constitute a barrier to entering a specific spatial market. Alternatively prohibitions on 'undercutting' or 'supplanting' existing suppliers may reduce the incentive to enter a local market where rents are being earned. Thus, although there may be no formal barriers to entering a local market, such markets may not be contestable.

9. Empirical Studies of Entry to the Profession

Economists' empirical studies of the effects of such mobility restrictions for the legal profession are restricted to the USA. They find, for example, that lack of reciprocity between state bar associations leads lower numbers of practising lawyers and higher lawyer incomes (Holen, 1965; Kleiner, Gay and Green, 1982; Pashigian, 1977). However, a recent empirical study by Lueck, Olsen and Ransom (1995) finds little support for the view that licensing restrictions affect the price of legal services. Their evidence suggests that it is what they describe as 'market forces' which are most important. Licensing restrictions are proxied by requirements to pass a state bar exam, state bar exam pass rates, state residency requirements and requirement of an ABA recognised law school degree. Although they find that there is a relationship between state lawyer density, state bar exam pass rates and the requirement of an ABA recognised degree the effect is in the opposite direction to that hypothesised by the capture theory, that is, the lower the pass rate the higher is lawyer density, and the latter is higher in states requiring an ABA recognised degree. Although the authors argue that their evidence runs counter to the implications of the capture theory they do find that the higher are state bar exam pass rates the lower are lawyer fees.

10. Professional 'Monopoly Rights'

The preceding paragraphs have focused on controls on entry to the legal profession itself. Often, as discussed above, this has been accompanied by the exclusive rights given to the legal profession over certain services. Many writers commenting on the regulatory regimes governing the legal profession draw attention to 'monopoly rights' in certain areas of work and criticise this on *a priori* grounds. However, little empirical work has been done by economists to estimate the effects of professional monopoly rights and the existence of para-professions. This may be due, in part, to the absence of data sets which allow variations in such monopoly rights either over time or location to be studied. Even during the current deregulation wave there has been little empirical work estimating the effects of relaxing monopoly rights.

Para-professions sometimes exist alongside professions with the right to provide services which overlap with some of those provided by a profession. There has been limited analysis of profession/para-profession interaction. Shaked and Sutton (1981a) examines the effects on welfare of the existence of a lower quality para-profession operating alongside a self-regulating profession. Shaked and Sutton (1981b) looks at the viability of a para-profession when there are consumers with different incomes but identical preferences. In this context the para-profession's viability depends on the relative sizes of the two income groups of consumers.

A series of studies of the deregulation of legal services in England and Wales between 1985 and 1992 which focuses on conveyancing (title transfer) services provides some limited insights on the relaxation of a profession's monopoly rights and the impact of a para-profession. Until the mid-1980s solicitors had the exclusive right to provide conveyancing services for financial reward. This monopoly was revoked in 1985 and by 1987 the first licensed conveyancers (non-solicitors licensed to provide these services) were offering services in competition with solicitors in some areas of the country (Stephen and Love, 1996; Stephen, Love and Paterson, 1994). Paterson et al. (1988) report that solicitors surveyed in 1986 were reducing fees in anticipation of licensed conveyancer entry. Later surveys, however, provide a more complex picture of the effects of entry. Survey data for 1989 revealed solicitors' conveyancing fees in a sample of locations where licensed conveyancers had entered as compared to those where there were no licensed conveyancers were lower (Love et al., 1992) and were less likely to involve price discrimination (Stephen et al., 1993). These results appear to support the conventional view that monopoly rights will operate to the disadvantage of clients of lawyers. A subsequent survey conducted in 1992 and covering the same locations as the earlier surveys produced results less conducive to the traditional economic view. Both the conveyancing fees of solicitors in markets where there were

licensed conveyancers and those of licensed conveyancers had risen between 1989 and 1992 by more than those in markets where there were no licensed conveyancers; in addition licensed conveyancers' feeing practices were more like those of solicitors than before (Stephen, Love and Paterson, 1994). There is the suggestion that the threat of entry is a more powerful restraint on solicitors' behaviour than actual entry. Stephen and Love (1996) have sought to explain these results by the fact that licensed conveyancers produce a limited range of services and therefore have the same interest as lawyer conveyancers in maintaining high fees and also that the risks to licensed conveyancers are greater than those of solicitors. These results should caution against the assumption that multiple professional bodies will necessarily be to the benefit of consumers. However, the limited effects of removing a monopoly in a restricted field, as in this case, may not carry over to a more general removal of monopoly rights.

C. Restrictions on Advertising

11. Professional Advertising and Competition

The second tool used by self-regulated professions has been the restriction or total ban on advertising by members of the profession. This has often been accompanied by restrictions on other aids to competition such as quoting of fees in advance of carrying out the work and so on (Cox, 1989; Curran, 1993; Domberger and Sherr, 1987, 1989; Evans and Trebilcock, 1982; Faure, 1993; Federal Trade Commission, 1984; Finsinger, 1993; Helligman, 1993; Herrman, 1993; Ogus, 1993; Paterson and Stephen, 1990; Scottish Home and Health Department, 1989; Shinnick, 1995; Stephen, 1994; Stephen and Love, 1996; Stephen, Love and Paterson, 1994). During the recent deregulation wave, restrictions on lawyer advertising have been relaxed to varying degrees in different jurisdictions. These deregulatory moves have been prompted by court decisions, consumer lobby pressure and activities of competition authorities.

Economic analysis of restrictions on advertising by professionals has been carried out from an economics of information perspective based on the insights of Stigler's (1961) analysis. Stigler argued that producer advertising was equivalent to a large amount of search by a large number of consumers. Consequently it reduced price dispersions and enhanced competition. Writers on the professions therefore argued that restrictions on advertising by professions imposed by self-regulatory bodies were designed to reduce competition by increasing the cost of consumer search (see for example, Benham and Benham, 1975). Removal of such restrictions would enhance competition and be in the interests of efficiency. In the 1960s and 1970s severe

restrictions on advertising by lawyers was quite widespread (see for example, Federal Trade Commission, 1984; Cox, 1989; Monopolies and Mergers Commission, 1976; and contributions to Faure et al., 1993). Such severe restrictions still applied in Belgium and Germany until recently. (Faure, 1993; Herrmann, 1993).

It is frequently asserted by critics of professional advertising that advertising will drive down the quality of services provided. Economists have examined the relationship between advertising and quality. Rogerson (1988) shows formally that even if price can communicate no information directly about quality, it can do so indirectly because price serves as a positive signal of quality *when price advertising is allowed*. Price advertising is therefore welfare enhancing because it improves consumer choice. A problem arises, however, if price advertising is undertaken exclusively, or at least principally, by low-price/low-quality suppliers. Price advertising therefore becomes an adverse signal on quality. This is a general argument, and does not depend on price being a clear signal on quality. Rizzo and Zeckhauser (1992) point out that consumers who are unable to assess quality *ex ante* (and possibly even *ex post*) and who observe a low price for a non-standardised service may assume that more knowledgeable purchasers have assessed the service as being of low quality. Professionals are keen to avoid such adverse signals on quality, and so Rizzo and Zeckhauser conclude that price advertising will be uncommon in most professions. Thus not only may advertising have an effect on quality, perceptions of quality may have an effect on the form of advertising chosen by professionals.

12. Empirical Studies of Lawyer Advertising

An extensive empirical literature has developed on the restriction of advertising of professional services and what happens to fee levels when such restrictions are relaxed. A review of this literature is presented in Love and Stephen (1996). The general thrust of the evidence from this literature is that restrictions on advertising increase the fees charged for the profession's services and that the more advertising there is the lower are fees. The one study contradicting this result is Rizzo and Zeckhauser (1992). Love and Stephen (1996) note a number of limitations to these studies.

The empirical studies of advertising by members of the legal profession find that law firms which advertised charged, on the whole, lower fees than those that did not advertise (Cox, DeSerpa and Canby, 1982; Federal Trade Commission, 1984; Schroeter, Smith and Cox, 1987; Love et al., 1992; Stephen, 1994). Domberger and Sherr (1987, 1989) found that conveyancing fees in England and Wales had fallen since advertising and fee quoting had been permitted. Schroeter, Smith and Cox (1987), Love et al. (1992) and

Stephen (1994) found that the more advertising by lawyers there was in a locality the lower were the fees charge by all lawyers in the locality (at least for certain transactions). Stephen et al. (1992) found that that price discrimination by solicitors was lower the more advertising there was in a market. However, Love et al. (1992) for England and Wales and Stephen (1994) for Scotland found that this result was only valid for some forms of lawyer advertising. The other studies did not distinguish between different forms of advertising.

The hypothesis that non-price advertising will be much more common than price-advertising is supported by evidence from the legal profession in the UK and in the USA. Stephen, Love and Paterson (1994) show that within two years of advertising being permitted, the percentage of English solicitors' firms which had advertised within the six months prior to an extensive survey was 46 percent; but only 2 percent of firms had advertised the price of any service. Six years later (in 1992), the proportion of advertising firms had risen to 59 percent, but price advertising was carried out by just 4 percent of firms. In Scotland, Stephen (1994) estimates that within three years of being permitted to do so, over half of Scottish solicitors' firms engaged in advertising, but less than 3 per cent advertised the price of any service. The Federal Trade Commission (1984) study of attorney advertising found similar low levels of price advertising across US states.

Empirical work on the quality of legal services in the presence of lawyer advertising does not present such a clear-cut view as that on fees. Love and Stephen (1996) point out that there are variations in how quality is measured in these studies. Muris and McChesney (1979) find that high advertising legal clinics provided better quality services than traditional legal firms for a sample transaction. However, since advertising only enters their analysis indirectly it is difficult to judge the implications for policy on advertising. Murdock and White (1985) conclude that advertisers are more likely to be low quality firms. Thomas (1985) argues that such a conclusion is not warranted by Murdock and White's evidence. Cox, Schroeter and Smith (1986) find that quality is lower in those localities with greater lawyer advertising but find no statistically significant differences in the quality of work produced by advertisers and non-advertisers. Domberger and Sherr (1989) found that quality (measured by time taken) rose as a consequence of liberalisation of rules on advertising and competition in England and Wales.

D. Regulation of Fees

13. Scale Fees

The third weapon in the armoury of the self-regulating profession is the regulation of fees. Traditionally fees have been subject to control by the profession itself, by the courts or by the state through mandatory fee schedules. In some jurisdictions these mandatory scales have been transformed into recommendations. During the recent deregulation wave even these recommendations have been swept away and replaced by the market. Most self-regulatory bodies, however, have retained powers to punish those who charge 'excessively' low fees for bringing the profession into disrepute. In Germany fees are still determined by State regulation (Herrmann, 1993). In Belgium and the Netherlands a recommended fee schedule is produced by the profession and in Belgium there is a recommended minimum (Faure, 1993; Helligman, 1993). A recommended scale is still produced by the solicitors' professional body in Ireland for conveyancing work (Shinnick, 1995) and one was in operation in Scotland until 1985 (Stephen and Love, 1996). The corresponding schedule was withdrawn in England and Wales in 1974, although Domberger and Sherr, 1992) argue that it still influenced feeing practices until the mid-1980s.

Observers of professional self-regulation are highly critical of scale fees:

In general, we regard a collective obligation not to compete in price, or a restriction collectively imposed which discourages such competition, as being one of the most effective restraints on competition. The introduction of price competition in the supply of a professional service where it is not at present permitted is likely to be the most effective single stimulant to greater efficiency and to innovation and variety of service and price that could be applied to that profession. (Monopolies and Mergers Commission, 1970, p. 78, see also Arnauld, 1972; Arnauld and Friedland, 1977, and Domberger and Sherr, 1989, 1992)

However, economists are generally sceptical about the ability of cartels to avoid their members selling output at prices below those agreed by the cartel. This practice has become known in the economics literature as 'chiselling' (see, for example, Cohen and Cyert, 1965, pp. 245-246). As has been pointed out many times (for example Stigler, 1966; Layard and Walters, 1978) the ability of a cartel to enforce its rules is inversely related to the number of members. Professional 'cartels' have many members.

Scale fees are often 'recommended' (Monopolies and Mergers Commission, 1970, pp. 21, 22; Arnauld, 1972, p. 498; Shinnick, 1995) rather than

mandatory or State-enforced charges. It is often argued that even where they are 'mere' recommendations they have the effect of raising fees:

There appears to us to be little difference between so-called mandatory and recommended scales in their practical effect ... although disciplinary action could not be taken specifically for breach of a recommended scale, the fact that the fees charged were not in accordance with the scale might in some circumstances be quoted in support of a charge of breach of some other rule such that the established practitioner would not depart more readily from a 'recommended' scale than from a mandatory scale. (Monopolies and Mergers Commission, 1970, p. 22, see also Arnould, 1972, p. 498)

14. Empirical Studies of Fee Schedules

In contrast to the considerable empirical research on the role of advertising (as discussed above) there would appear to have been little on the impact or effectiveness of recommended fee scales. This is somewhat surprising given the conflicting *a priori* positions taken by commentators on professional regulation and the writers of general treatises on microeconomics.

Arnould and Friedland (1977) examined the relationship between the incomes of a sample of lawyers and (*inter alia*) the minimum fee recommended (where there was one) for a simple transaction for a sample of lawyers in California and Pennsylvania. They found that lawyer income rose as the recommended fee rose. It should be noted that the dependent variable here is lawyer income not the fee for the standard transaction. For this to imply that fees also rose, demand for the standard transaction must be inelastic. Arnould and Friedland, however, argue that the influence of fee schedules on prices may be even greater than they demonstrate because high prices may induce entry which will moderate the effect on lawyer incomes. Strikingly, they also suggest that there may be widespread cheating on the fee schedule.

There is some limited evidence that such 'cheating' on recommended fee schedules for lawyers does exist. Stephen (1993) reports evidence from a sample of solicitors' conveyancing bills for 1984, when a scale of recommended fees was in force, that more than 40 percent of these solicitors charged conveyancing fees below that recommended by the Law Society of Scotland. Furthermore, statistically significant geographical patterns were identified in the determinants of these fees even although the fee schedule applied to all Scottish solicitors. However, this evidence must be qualified by the fact that large numbers of solicitors failed to co-operate in this study suggesting that the data analysed may not be representative of all solicitors.

Stronger evidence of chiselling is presented in Shinnick (1995). This paper examines the conveyancing fees of a large sample of Irish solicitors. At the time at which the survey was carried out the Incorporated Law Society of Ireland, the self-regulatory body for solicitors in Ireland, published a recommended scale of fees for conveyancing which applied throughout the country. Considerable variation from the recommended fee was found. Econometric tests reject the hypothesis that a single fee is charged throughout Ireland, indicating that this variation was not random.

The limited empirical evidence available suggests that the strong conclusions on scale fees arrived at on the basis of *a priori* reasoning by academic observers and competition authorities reported above may not have empirical support.

E. Restrictions on Fee Contracts

15. Contingency Fees

In many jurisdictions lawyers' fees are regulated by prohibiting certain forms of fee contract between lawyer and client. In particular, lawyers may be prohibited from entering into *contingent-fee* contracts with clients. Under such contracts the lawyer's fee is contingent on the outcome of the case. The most common form of contingent fee contract is that used between lawyer and plaintiff in many civil cases in the United States. If the case is lost the lawyer receives no fee but if it is won the lawyer receives a percentage of the damage award to the client. Such contingent-fee contracts are prohibited in many European jurisdictions (see Faure, 1993; Helligman, 1993; Herrmann, 1993; Rickman, 1994) but changes are taking place (see, for example, Gravelle and Waterson, 1993; Rickman, 1994) and Lord Chancellor's Department, 1998, on the introduction of conditional fees with a speculative mark-up in England and Wales).

Lynk (1990) has argued that contingency fees are an interesting issue for two reasons: their economic characteristics and their public policy implications. Their economic characteristics have been studied to examine whether they encourage lawyers to invest more or fewer hours in a case; the incentive to settle out of court; and various aspects of the principal agent problem between client and lawyer. The public policy issues focus on whether contingent fees increase the volume of litigation and whether they improve access to justice by removing wealth barriers. Both sets of issues have featured in the literature. A number of authors have used the insight from the agency literature that tying the agent's remuneration to the outcome is optimal to advocate the superiority of contingency fees in increasing the lawyer's effort (Danzon, 1983; Halpern and Turnbull, 1981; Hay, 1996; Rickman, 1994; Schwartz and Mitchell, 1970).

The incentive properties of contingent-fee contracts and hourly contracts more generally have been analyzed by many writers (Clermont and Curriuan, 1973; Dana and Spier, 1993; Danzon, 1983; Fisher, 1988; Gravelle and Waterson, 1993; Halpern and Turnbull, 1981; Hay, 1996; Kritzer et al., 1985; Lynk, 1990; Miceli and Segerson, 1991; Rickman, 1994; Rubinfeld and Scotchmer, 1993; Schwartz and Mitchell, 1970; Smith, 1992; Swanson, 1991; Thomason, 1991).

16. Settlement Conflicts

In many jurisdictions a fundamental argument put against contingency fees is that they conflict with the principle that lawyers should not have an interest in the cases which they handle (see for example, Rickman, 1994; Faure, 1993 and Helligman, 1993). Such a situation can produce a conflict of interest between client and lawyer over when to settle. In particular, whether the plaintiff in a tort case should accept an out of court settlement rather than go to court. This argument neglects the fact that such a conflict of interest can still exist under the conventional hourly-fee system; it is simply that the lawyer's private interest is reversed. Under an hourly-fee system the lawyer earns more the greater the number of hours put into the case. It will thus be attractive to the lawyer to continue the case provided that the hourly rate is greater than the opportunity cost of the lawyer's effort, *that is*, if super-normal profits are being made. Consequently, the lawyer has an interest in convincing the client to continue the case, *ceteris paribus*, rather than settle (Johnson, 1981). The opposite may be true under a contingency fee. Here the lawyer receives a predetermined share of any damages awarded but bears all costs incurred on behalf of the client. Thus when a pre-trial offer is made by the defendant to settle out of court the interests of the plaintiff and the plaintiff's lawyer can conflict (Gravelle and Waterson, 1993; Johnson, 1981; Miller, 1987; Rickman, 1994; Schwartz and Mitchell, 1970; Swanson, 1991; Watts, 1994). Indeed, the higher the offer the more likely the interests of plaintiff and lawyer are to conflict under a contingent-fee system (Gravelle and Waterson, 1993).

The foregoing analysis implicitly assumes that the client relies totally on the lawyer's decision over settlement and that the lawyer is motivated by pure self-interest. Gravelle and Waterson (1993) allow for the variation of this assumption by incorporating a parameter in their model which varies as the client is better informed or as the lawyer is more altruistic. They find that the more informed the client is (or the more altruistic the lawyer is) the less likely a given offer will be accepted pre-trial under a contingency fee. Indeed, if the lawyer is more altruistic than selfish the probability of pre-trial settlement will be lower under a contingency fee than under an hourly fee. This result emphasises the crucial importance of the asymmetric information issue in

determining the choice of fee contract. Well-informed clients are likely to prefer an hourly rate. Furthermore, the more imbued with a client service ethic lawyers are (the more altruistic) the more suitable is the hourly-fee contract to the client's interest. There is some limited empirical evidence supporting this result in that Kritzer (1990) reports that for a sample of tort and contract cases where the plaintiff was an organisation 81 percent of the fee contracts were on an hourly basis whilst when the plaintiff was an individual 59 percent of the fee contracts were on a contingency basis. It is to be expected that organisations are more likely to be experienced litigants than individuals.

Returning to the more standard setting where the lawyer is assumed to be self-interested, Gravelle and Waterson's (1993) result is somewhat modified if the context is changed slightly and bargaining introduced to the model (Rickman, 1994; Swanson, 1991). Under these circumstances, it is argued that with the contingency fee contract the lawyer has a greater incentive to bargain hard. The lawyer's behaviour may be affected in ways other than hours at a given effort level. Consequently even a relatively selfish lawyer settling out of court may improve the client's award as against that attainable under an hourly fee contract where the incentive to bargain hard is less.

17. Volume of Litigation

It is frequently argued by those supporting the ban on contingency fees in European jurisdictions that permitting contingency fees will increase the volume of litigation. The higher volume of litigation in the US where contingency fees are permitted is often cited in support of this view. However most of the economic modelling suggests the opposite conclusion (Clermont and Currivan, 1973; Dana and Spier, 1993; Danzon, 1983; Halpern and Turnbull, 1981; Miceli, 1994; Miceli and Segerson, 1991; Rubinfeld and Scotchmer, 1993). Miceli (1994) examines the impact of contingent fees on the pursuit of frivolous cases and finds no support for the view that contingent fees will encourage frivolous suits. Gravelle and Waterson (1993) develop a model in which both the probability of accident and the probability of settlement are endogenous. Thus they extend the model beyond the decision to litigate or settle *given that an accident has occurred* to one where the care taken by potential tortfeasors is influenced by the nature of contracts between potential victims and their lawyers and thus post-accident behavior. They find that the effect of a switch from hourly fee to a contingency fee has an ambiguous effect on the volume of litigation in this model and on welfare.

18. Access to Justice

A number of authors argue that a benefit of contingency fees is that risk averse or wealth-constrained victims of torts who under an hourly fee contract may be unwilling to pursue a claim will now do so because the risk is shifted to their lawyer. Some predict a consequent increase in the volume of litigation under contingency fees (Miceli and Segerson, 1991; Rubinfeld and Scotchmer, 1993) but Dana and Spier (1993) suggest that to the extent that victims may be overoptimistic about their chance of success contingency fees may actually reduce the number of suits. Neither of these views takes account of the deterrence (or otherwise) effects of a change from hourly to contingent contracts as predicted by Gravelle and Waterson (1993). However, it would seem that victims are likely to be better off one-way-or-another under contingency fees even although the overall welfare effects may be ambiguous.

F. Restrictions on Organizational Form

19. Choice of Organizational Form

Thus far in this paper we have discussed the relationship between lawyer and client abstracting from the organisational form through which lawyers provide their services. We have focused on lawyer-client relations and relations between the profession as a whole and others in society. In most jurisdictions lawyers provide their services to the public through 'firms'. However the nature and form of these law firms is regulated in many jurisdictions. Lawyers are not free in their choice of organizational form. Some organizational forms are prohibited. In this section we evaluate the economic rationale for such regulation of organizational form. We begin by considering the factors which might influence a lawyer's choice of organizational form.

Increases in firm size can be justified on a number of grounds. The most general of these is that economies of scale can be captured the greater the output of the firm. Every introductory textbook in economics lists sources of economies of scale. Principal among these are those emanating from specialization of labor and more efficient use of capital. The former of these may apply to legal services but the latter is more doubtful, at least where it is physical capital that is involved. The physical capital requirements of legal services are quite small and are likely to involve limited economies of scale. Legal services are essentially human (rather than physical) capital intensive. Provision of legal services through group practice allows specialization of lawyers in particular aspects of law, therefore, lowering the cost of providing

services. Practices of lawyers with different specialties have the further benefit of risk spreading. Different specialties may face different business cycles and thus fluctuations in specialist income may be smoothed across the group. Furthermore, economies of scope may exist when a client has a range of legal service needs which can be serviced by specialists within the firm or when a legal problem has dimensions involving a range of specialties. Economies of scope are available to the sole practitioner but in the multi-lawyer firm they are combined with economies of specialization. The more complex the issues the more likely that specialists will dominate because the benefits of economies of specialization outweigh the economies of scope to the sole practitioner. Economies of scope or benefits from risk sharing in the multi-lawyer specialist firm will lead to multi-lawyer firms dominating. Similar arguments apply where the specialists involved are outside the legal profession in what is often referred to as multi-disciplinary practice (MDP). It has often been argued that clients would benefit from economies of scope where a professional firm included lawyers, accountants, surveyors and so on; so-called 'one stop shopping'. We do not discuss this issue further here but a general discussion of the issue in a different context may be obtained from Smith and Hay (1997).

Thus far we have only considered production costs. We have not considered agency costs which may arise from the asymmetry of information between client and lawyer. The analysis here may be helped by using Quinn's (1982) distinction between the agency function and the service function discussed earlier in this paper. Earlier we pointed to the moral hazard problem that arises after a lawyer performs the agency function in diagnosing a client's legal problem and recommending a course of action. This arises because it is assumed that the same lawyer will perform the consequent service function. The agency cost increases when it is recognized that there are economies of specialization. Many circumstances will arise under which the lawyer performing the agency function is not the least cost supplier of the service function required. This may be particularly so in the sole practitioner firm.

In a multi-lawyer firm it is, perhaps, more likely that there will be a specialist within the firm who is the least-cost provider of the service function. The probability of this being so may increase the more lawyers there are in the firm. However, the fewer the number of partners and the more specialized the service function required the more likely that the firm will not be the least-cost supplier. This may even be the more so if the firm is an MDP. Nevertheless, it is likely that the lawyer performing the agency function will pass the client to a specialist within the firm: first, because the lawyer providing the agency function will share in the income of the firm generated from the provision of the specialized services; secondly, because recommending the client to another firm may mean that the client's future business will also be lost.

In many jurisdictions there are restrictions on the organisational forms which can be adopted by providers of legal services. Traditionally these restrictions appear to have been motivated by a desire to keep at arm's length commercial or profit considerations on the part of lawyers, reflecting the agency problem which has been a central consideration throughout this paper. Thus for many years lawyers in most jurisdictions could only operate as sole practitioners or in partnerships with other lawyers and could not incorporate (see Bishop, 1989; Faure, 1993; Helligman, 1993; Herrmann, 1993; Ogus, 1993; Prichard, 1982, and Quinn, 1982). Furthermore, in the UK and Ireland providers of legal services are divided into two distinct professions with their own professional bodies and self-regulatory functions: solicitors and barristers (in Scotland known as advocates). Until 1990 in the UK only barristers (advocates) could appear before the higher courts and they could only take instructions from a solicitor and not directly from a client (see Bowles, 1994, and Ogus, 1993). There is a limited economic literature which examines such restrictions on organisational form. We first examine the issues surrounded the divided profession before moving on to the issue of firm size and organisational form.

20. A Divided Profession

In England and Wales, Northern Ireland and Scotland (each of which is a separate legal jurisdiction) as well as the Republic of Ireland and certain states in Australia, what is elsewhere a single legal profession is split into two branches: solicitors and barristers (in Scotland, advocates). Solicitors provide legal advice to the public on the whole range of legal matters and have rights of audience in the lower courts. Barristers have rights of audience in the higher courts and provide consultancy services to solicitors. The rules governing each of the professions prohibits its members from practising as members of the other profession. Judges (as opposed to magistrates) are drawn almost exclusively from the ranks of barristers (advocates) (Bishop, 1989; Bowles, 1994; Ogus, 1993; Shinnick, 1995). Although rights of audience in the higher courts in Scotland and England and Wales have changed recently as a consequence of legislation to allow solicitors who meet certain tests of experience in advocacy in the lower courts to appear in the higher courts, there has been no move to fuse the professions. From an economic perspective the question is whether the division into two professions is efficiency enhancing or is a mere restrictive practice.

It should be noted that specialisation in advocacy may exist within a fused profession. Within law firms some practitioners may specialise in court advocacy while others specialise in diagnosis and case management. Some firms may specialise in advocacy, particularly in the criminal field. Outside the criminal field in-house advocates may lack expertise in a particular area of law

in spite of having enhanced advocacy skills. The issue then becomes whether or not any benefits from formally separating the roles outweigh the costs.

Bishop (1989) analyses the separation into two professions as a prohibition on vertical integration between successive stages in a production process: the preparation of a case and its prosecution through advocacy in the courts. He argues along lines similar to those of Quinn (1982) that the conflict between the agency function and the service function is particularly severe due to the large benefits which accrue from specialisation in trial advocacy. The existence of a cadre of specialist consultants and litigators (barristers/advocates) removes the temptation to supply higher cost in-house advocacy. Not only this, it may provide competition in the downstream market. Thus one benefit of a divided profession is that the client gets higher quality advocacy than would be available from an in-house advocate. However, this benefit is not costless. Bishop argues that the cost will be the dead-weight loss to sophisticated buyers of legal services who do not require the intermediation of a solicitor. An additional cost might be the differential transaction costs associated with employing both solicitor and barrister rather than two solicitors within the same firm. This would be the case if economies of scope existed when the two legal advisors were from the same firm/office. An evaluation of the division in the profession cannot be resolved on these *a priori* arguments. It is a question of the relative magnitudes of the costs and benefits. However, their empirical measurement is fraught with difficulty.

Ogus (1993) clearly doubts that the balance lies in favour of division but adduces additional points against division. If, he argues, division were efficient, why is it that when fusion is not prohibited we invariably observe fusion. Further, enforced division removes choice from informed consumers who might prefer lower quality but cheaper in-house advocacy to high quality but high price external advocacy. On the other hand Bishop points out that in some Australian states where there is fusion there is *de facto* separation as some specialist pleaders operate, in effect, as barristers.

Bishop (1989) also discusses external effects which have a bearing on the division issue. The first of these is that the division into two specialist branches allows more effective policing of lawyer misbehaviour (particularly in the case of barristers) due to a 'club' effect. This reduction in dishonesty will benefit future honest litigants because it will reduce the cost of achieving justice. However the implication is that Bishop regards the division of the professions as an expensive means of achieving this benefit. The division may also allow the monitoring of the performance of the members of each profession by the members of the other. A further external effect is public capital formation through the production of high quality precedent. The existence of highly specialised and qualified advocates should produce better argued cases and more valuable precedent. Furthermore the recruitment of the judiciary from the

ranks of the best of these specialist advocates, not only ensures that those recruited to the bench have proven their worth as trial lawyers but should further ensure high quality precedents. A final external effect identified by Bishop (1989) is a lowering of the cost of judicial administration. Here the main beneficiary is not the client but the trial judge. Poor advocacy places a burden on the trial judge to ensure that the decision reached is not influenced by inadequate advocacy. With highly specialised and skilled advocates this problem does not arise. Barristers also act as gatekeepers to the courts. They ensure that cases are sifted and well-prepared before reaching the court thus reducing the cost of adjudication. Similar external effects are adduced by Arruñada (1996) in his examination of Spanish Notaries.

It is not easy to find empirical evidence to test propositions like those of Bishop. He cites the former Chief Justice of the United States, Warren Burger, in support of the higher quality of advocacy and the higher quality of the judiciary in England as compared to the US. However, Bishop does not regard this testimony as determinative. He then discusses at length the spontaneous evolution of barrister-like specialists in Australian states where there is *de jure* a fused profession. The final sources of evidence cited by Bishop are the extensive use of English precedents throughout the common-law world and the choice of London and English law to settle international legal issues. Both of these might be seen as suggesting a higher quality of legal services resulting from specialisation in the branches of the profession.

Notwithstanding the above arguments Bishop does concede that it will only be where the stakes are high that the higher cost of specialisation may be worth incurring implying that rights of audience in lower courts should not be restricted to specialist advocates.

21. Sole Practitioners, Partnerships and Incorporation

A more common organizational restriction in many jurisdiction is that providers of legal services must operate as independent providers or in partnership with other qualified lawyers. Even where incorporation is permitted restrictions are frequently imposed maintaining unlimited liability and that the directors of the firm must all be lawyers (see Bishop, 1989; Faure, 1993; Helligman, 1993; Herrmann, 1993; Ogus, 1993; Prichard, 1982, and Quinn, 1982). However, some US states permit incorporation under limited liability (Carr and Mathewson, 1988).

Fama and Jensen (1983a, 1983b) have argued that professional partnership accompanied by unlimited liability is a solution to the moral hazard problem posed by the asymmetry between client and professional. The willingness of one professional to risk his or her wealth by entering into such a partnership with another professional signals to clients the trustworthiness of members of the

partnership and provides a guarantee that there will be mutual monitoring among partners. Stephen and Gillanders (1993) present evidence that little mutual monitoring takes place within UK law firms and that *ex ante* screening of prospective partners is likely to dominate *ex post* monitoring. The persistence of sole practitioner firms in legal practice also seems to run counter to this signalling function of partnership: around 50 percent of law firms in the US are sole practitioners and around 40 percent of solicitors' firms in England and Wales. However, Carr and Mathewson (1990) point out that the proportion of sole practitioner firms in the US has been declining for a number of years.

Carr and Mathewson (1990) model the choice of organisational form for law firms in a competitive market subject to information asymmetries. They conclude that 'partnerships dominate solo lawyers when client cases are large and the detection of chiselling is low' (p. 328). They also point out that for large corporations it may pay to have in-house counsel to monitor legal services. However, they find that limited liability becomes attractive as it reduces the cost of capital to partnerships. In Carr and Mathewson (1988) they argue that the increased cost of capital when unlimited liability is small leads to inefficiently small law firms where complex cases are involved. They find empirical support for this conclusion from differences in law firm size across US states being related to whether or not limited liability is available. Their regressions support the view that law firm size rises where limited liability is permitted. Gilson (1991) suggests that the relationship runs in the opposite direction because of the tax advantages of incorporation: large firms derive a greater tax advantage from incorporation. Carr and Mathewson (1991) respond that their empirical results allow for a distinction between incorporation and limited liability since not all corporate law firms enjoy limited liability.

G. Conclusion

22. Summing Up

This chapter has reviewed the extensive economic literature on the regulation of the legal profession. The case for regulation has been seen to be based on the moral hazard problem which arises from the information asymmetry between the lawyer and the infrequent user of legal services. The justification for self-regulation is seen to be based on reducing the costs of regulation. Nevertheless, much of the literature on self-regulation sees it working in the interests of the members of the profession by raising fees and professional incomes.

A number of instruments through which self-regulation operates to restrict competition were identified. Theoretical work by economists tends to point to

these working in the interests of the profession and against the interests of clients. The empirical literature testing such predictions is limited but produces mixed support for the theoretical predictions. For example, whilst there is some support from aggregate data for the view that restrictions on entry to the legal profession lead to higher incomes for lawyers, the microeconomic evidence on the effect of restrictions on fees runs counter to theory. The evidence from the removal of the conveyancing monopoly in England and Wales is at least ambiguous. Similarly, the limited empirical evidence on recommended scale fees for solicitors suggests significant deviations from these scales. The evidence on the effects of restrictions on advertising tends to support the theory, although it has been suggested that when different types of advertising are considered the evidence is less unambiguous. On the issues of contingent fees and restrictions on organisational form the empirical evidence is very limited.

This survey of the literature suggests a need for more empirical studies. The theoretical literature, on the whole, suggests fairly strong recommendations to policymakers regarding self-regulation. On the other hand, the limited empirical evidence does not always support such strong theoretical predictions. More evidence would clarify whether the conflict arises from the limitations of the current evidence or from the theory.

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