

Measuring Legal Service Value

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1 Introduction

Annie is going through a contested divorce. She is trying to choose one of the five family law firms in her town to represent her in the proceeding. Bal needs a will drafted. He is considering two solo practitioners who work in the area, but he might choose an automated online will-drafting service instead. Cerise is general counsel at a mid-sized corporation. She wants to find a new firm to represent the corporation in an acquisition transaction. Daniel chairs a bar association committee. He is trying to draft the criteria for certifying lawyers as specialists in different niches.

What do Annie, Bal, Cerise and Daniel have in common? Each of them would benefit from an objective method to compare different legal service providers and make choices among them. In order to help people in this position, this article proposes a theoretical foundation for measuring legal service value.

1.1 The Mystery of Legal Service Value

Compared to many other things of value, legal services have proved resistant to quantitative valuation and comparison.² They have credence characteristics, meaning that consumers have difficulty evaluating their quality both before and after consuming them.³ A person who buys a garment or stays in a hotel is generally able, afterwards, to judge the quality of what they received based on their experience of it. This is often not the case with a person who has consumed a legal service, especially if that person does so infrequently. That is in part because the outcome of a certain legal service episode often depends on many factors other than the quality of the service provided.⁴

Along with quality, price is the other essential component of value.⁵ In most markets for consumer goods (e.g. a supermarket or Amazon.com), it is taken for granted that prices will be conspicuous, easy to understand, and easy to compare. However, the prices of legal services are often quoted in a form that is uninformative and difficult to compare, such as hourly rates or contingency percentages.⁶

Nevertheless, some have refused to accept that legal service value is an unquantifiable mystery. Directories such as Lexpert and Chambers & Partners divide firms and lawyers into

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² Ron Dolin, "Getting to New Law: Standardized Quality Metrics,"; Mark A. Cohen, "What's a Quality Law Firm? (Legal Mosaic, January 7, 2016)" (2016) ; Jordan Furlong, "Is Your Law Firm Fulfilling Its Purpose? (Slaw.Ca, June 2d 2017)" (2017) [Furlong, *Law is a Buyer's Market*].

³ Uwe Dulleck and Rudolf Kerschbamer, "On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods" (2006) 44 *Journal of Economic Literature* 5 at 23; Men-Andri Benz, *Strategies in Markets for Experience and Credence Goods* (Berlin: Deutscher Universitäts-Verlag, 2007); Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) [Semple, *Justitia's Legions*] at 23-4.

⁴ Section Validity Problems with Output Metrics, *below*.

⁵ Dolin, above note 2.

⁶ Furlong, *Law is a Buyer's Market*, above note 2 at Kindle Location 282.

practice niches and then rank them.⁷ Large corporate clients have internal methodologies for identifying preferred firms, and some of these have been made public.⁸ Consultants and corporate counsel groups have proposed lists of metrics for comparing firms.⁹ In the consumer and small-business legal sector, Avvo.com has created a 10 point "Avvo Rating" system for American lawyers,¹⁰ and UK comparison sites now offer some price information as well as client reviews of law firms.¹¹ Meanwhile, legal scholars have pursued a related although distinct agenda: identifying and measuring the attributes of high-value individual lawyers.¹² Defining competence and ethical practice in lawyers, often with a view to ensuring that more of them possess it, has been a longstanding focus of legal educators, regulators, and voluntary professional groups.¹³

The effort to measure legal service quality is, perhaps, best developed in the context of publicly-funded legal aid.¹⁴ In the United Kingdom, a series of empirical studies has compared the services of different legally-aided solicitors using file review and client interview methodology.¹⁵ In the United States, clients have been extensively questioned to evaluate the

⁷Lloyd Pearson, "2017 Review – Legal Directories & Media (393 Communications, December 22, 2017),"; Chambers and Partners, "Methodology" (2017) . Startup Qualmet Legal is taking a different approach to the market for information about corporate legal services. To help corporate clients evaluate outside counsel, it offers a "Qualmet Value Index" along with rankings from various sources. This information is provided on a subscription basis. See <http://www.qualmetlegal.com/products-pricing/> .

⁸Allstate, "Premier Law Firm Program Survey,"; Association of Corporate Counsel, *Guide to Managing Outside Counsel* 2011) <; Silvio J. Decarli and Andrew L. Schaeffer, *The New Reality: Turning Risk into Opportunity through the Dupont Legal Model* (Wilmington, Delaware: E.I. du Pont de Nemours and Company, 2009) at Chapter 12.

⁹Dolin, above note 2; Kenneth Grady, "Quality Is What Your Clients Say It Is (Seytlines, August 12, 2014),"; Valorem Law Group, "Metrics" (2017) .

¹⁰Avvo.com, "What Is the Avvo Rating?,".

¹¹E.g. <https://www.thelawsuperstore.co.uk> and <https://www.justbeagle.com/>.

¹²E.g. Marjorie M. Shultz and Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering* (Berkeley, California: University of Berkeley, 2008) <; Neil Hamilton and Verna Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law" (2011) 24 *Geo. J. Legal Ethics* 139; Alli Gerkman and Logan Cornett, *Foundations for Practice* (Denver: Institute for the Advancement of the American Legal System, 2016) <; Douglas O. Linder and Nancy Levit, *The Good Lawyer: Seeking Quality in the Practice of Law* (New York: Oxford University Press, 2014).

¹³Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence" (2017) Canadian Bar Review Forthcoming; Bryant G. Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective" (1983) 1983 *Wis. L. Rev.* 639 at 644; Rick J Carlson, "Measuring the Quality of Legal Services: An Idea Whose Time Has Not yet Come" (1976) 11 *Law and Society Review* 287; Sarah Buhler, "Reading Law and Imagining Justice in the Wahkohtowin Classroom" (2017) 34 *Windsor Yearbook of Access to Justice* ; Canadian Bar Association (CBA), "Ethical Practices Self Evaluation Tool,"; Jeremy Cooper, "What Is Legal Competence?" (1991) 54 *Modern Law Review* 112; John O. Mudd, "Beyond Rationalism: Performance-Referenced Legal Education" (1986) 36 *Journal of Legal Education* .

¹⁴See e.g. Margaret A. Gressens and Daryl V. Atkinson, *North Carolina Systems Evaluation Project Performance Measures Guide* (Durham, NC: North Carolina Office of Indigent Defense Services, 2012) <; Frederick Zemans and James Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment" (2008) 46 *Osgoode Hall L.J.* 697.

¹⁵Alan Paterson and National Consumer Council (UK), *Professional Competence in Legal Services: What Is It and How Do You Measure It?* (London: 1990) < [Paterson, *Professional Competence in Legal Services*]; Richard Moorhead, Avrom Sherr and Alan Paterson, "Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity" (1994) 1 *International Journal of the Legal Profession* 191 [Moorhead, "Judging on Results?"; Avrom Sherr, Richard Moorhead and Alan Paterson, "Assessing the Quality of Legal Work: Measuring Process" *ibid.* 135 [Sherr et al, "Assessing the Quality of Legal Work"]; Hilary Sommerlad and David Wall, *Legally*

quality of the legal services that they received from public defenders, and determine what leads to client satisfaction.¹⁶

1.2 The Model

The model proposed in this article has several distinctive features, in the context of existing literature. First, this model is applicable to legal services generally. It applies to services for contested as well as for uncontested legal needs, and services with corporate as well as individual clients. The appropriate array of value metrics depends on the niche, but this article seeks to establish a general theoretical foundation for legal service valuation.

Second, this model applies to legal services,¹⁷ not to individual lawyers.¹⁸ For this reason, it could be used to compare the value offered by very different service providers – including entirely automated "robo-lawyers,"¹⁹ and organizations relying on other workers assisted by artificial intelligence.²⁰ Substitutes for traditional law firms are emerging rapidly,²¹ but we lack methods to systematically compare the new entrants against the old standbys.

Third, this model aims to *quantify* four elements of value that matter to clients.²² Extant approaches generally provide only "all-in" quality rankings without reference to price,²³ or

Aided Clients and Their Solicitors: Qualitative Perspectives on Quality and Legal Aid (London: The Law Society (England & Wales), 1999) < [Sommerlad, "Legally Aided Clients and their Solicitors"]; Avrom Sherr, "The Value of Experience in Legal Competence" (2000) 7 *International Journal of the Legal Profession* 95 [Sherr, "The Value of Experience in Legal Competence"]; Richard Moorhead, Avrom Sherr and Alan Paterson, "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales" (2003) 37 *Law & Society Review* 765; Richard Moorhead, "Lawyer Specialization—Managing the Professional Paradox" (2010) 32 *Law & Policy* 226.

¹⁶ Janet Moore *et al.*, "Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders" (2015) 33 *Behavioral Sciences & the Law*; Marla Sandys and Heather Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency" (2017) 14 *Ohio St. J. Crim. L.* 431; Marcus T. Boccaccini, Jennifer L. Boothby and Stanley L. Brodsky, "Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development" (2004) 22 *Behavioral Sciences and the Law* 197; Marcus T. Boccaccini and Stanley L. Brodsky, "Attorney–Client Trust among Convicted Criminal Defendants: Preliminary Examination of the Attorney–Client Trust Scale" (2002) 20 *Behavioral Sciences & the Law* 69.

¹⁷ See Carlson, above note 13 at 307 regarding measurement on an "episode of service" basis. See also Tamara Goriely, "Debating the Quality of Legal Services: Differing Models of the Good Lawyer" (1994) 1 *Int'l J. Legal Prof.* 159.

¹⁸ A third alternative, not pursued here, is to evaluate the value of services provided by the legal *system*. See e.g. Carlson, above note 13; Sommerlad, "Legally Aided Clients and their Solicitors" above note 15; Gressens & Atkinson, above note 14 at 1.

¹⁹ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 2.4.

²⁰ Benjamin Alarie, Anthony Niblett and Albert H. Yoon, "Law in the Future" (2017) 66 *University of Toronto Law Journal*; Benjamin H. Barton and Deborah Rhode, "Legal Services Regulation in the United States- a Tale of Two Models" in Andrew Boon ed., *International Perspectives on the Regulation of Lawyers and Legal Services* (Oxford, UK: Hart, 2017) at 41-2; Dana Remus and Frank Levy, "Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law" (2017) 30 *Geo. J. Legal Ethics* 501; Mitch Kowalski, *The Great Legal Reformation* (Chicago: American Bar Association, 2017).

²¹ See Furlong, *Law is a Buyer's Market*, above note 2 at Chapter 2 and Chapter 3. See also Susskind and Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, *supra* note; John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services" (2014) 82 *Fordham Law Review* 3041.

²² Arguing that legal service quality must be evaluated from the consumer's point of view, see Garth, above note 13 at 667.

²³ Chambers and Partners, "Methodology," *supra* note; "Lexpert: Business of Law,"

evaluate binary distinctions in legal services such as competence/incompetence or negligence/non-negligence.²⁴ Catherine Albiston and Rebecca Sandefur write that legal services offer value "across many dimensions," with "far-reaching effects," and the value they create is capable of measurement.²⁵ This article is a response to Albiston and Sandefur's call for an "explicit theory... from which these empirical measures may be derived."²⁶ As this article will suggest, better quantification of legal service value could inform and empower consumers of all kinds, improve legal professionalism, and rationalize legal service regulation.²⁷

1.3 Outline of the Paper

In visual form, the legal service value model proposed in this paper is as follows:

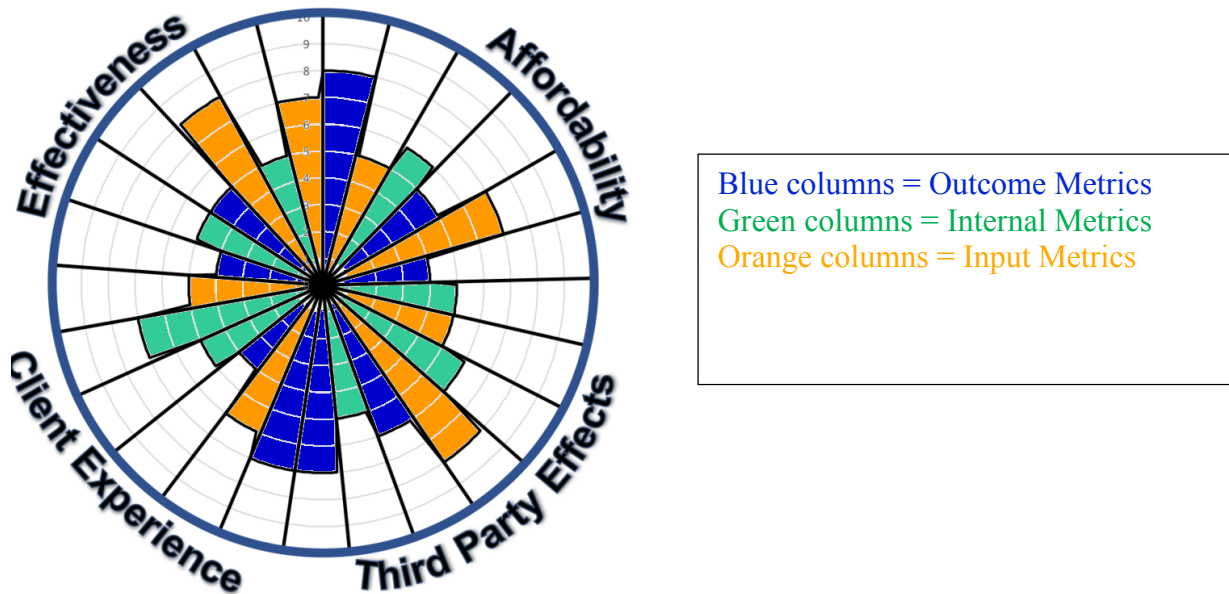


Figure 1

The value of any legal service depends on its **effectiveness**,²⁸ and on its **affordability**.²⁹ It also depends on the **experience** the service creates for its clients.³⁰ **Third party effects** – the impact the service-provider has on people other than the client—can also be important in some niches.³¹

²⁴ Paterson, *Professional Competence in Legal Services*, above note 15 at 7.

²⁵ Catherine R. Albiston and Rebecca L. Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) 2013 Wisconsin Law Review 101 at 113. Regarding the perils of creating high-stakes measurement schemes that capture only some elements of value while ignoring others, see Jerry Z. Muller, *The Tyranny of Metrics* (Princeton, New Jersey: Princeton University Press, 2018) at location 1799.

²⁶ Albiston & Sandefur, above note 25 at 113.

²⁷ Section 5.3, below.

²⁸ Section 2.1, below.

²⁹ Section 2.2, below.

³⁰ Section 2.3, below.

³¹ Section 2.4, below. For alternative ways to categorize elements of legal service value, see Access to Justice BC, *Access to Justice Measurement Framework* and Benjamin Lesjak and Dušan Lesjak, "Informal Quality Assessment of Legal Services (by Citizens) in Slovenia (Paper Presented to Active Citizenship by Knowledge Mobilization and Innovation Conference. Zadar, Croatia, June 2013)," at section 2.3.

How can these four elements of value be quantified? Clients must be consulted.³² However, non-client sources such as professional peers, adjudicators, and regulators are also essential, especially with regard to effectiveness value.³³

The four elements of legal service value can be quantified through various metrics applied to firms or entities that provide the service. **Output metrics** evaluate either the actual real-world impact of a legal service service, or the written and oral work products of the firm.³⁴ Outputs are what consumers and clients care about most. However, creating valid and reliable output metrics for the various elements of legal service value is often impossible.³⁵ In such cases, two other sets of metrics are available. **Internal metrics** check for processes or structures within a firm that demonstrably support high value outputs. **Input metrics** focus on the attributes and credentials of the individuals who provide the service.³⁶ These methods can generate numerical scores, allowing clients and consumers to compare the performance of different firms on different elements of value.

This article concludes that measuring legal service value is challenging, and may be dangerous if done poorly.³⁷ It is very important to avoid subjecting legal professionals, and the society they serve, to a "tyranny" of misleading or counterproductive metrics.³⁸ Nevertheless, the rewards justify the challenge. Higher quality legal professionalism, more effective and less burdensome regulation, and consumer empowerment are among the payoffs if we can find better ways to measure legal service value.³⁹ Entrepreneurs are already pursuing these goals; the article concludes by suggesting that regulators also have an essential role to play.⁴⁰

2 What Is Legal Service Value?

2.1 Effectiveness

Effectiveness in accomplishing clients' legal goals and protecting clients' legal interests is the first element of value for a legal service.⁴¹ In personal injury practice, more effective legal service can be expected to recover more compensation for a given plaintiff. In criminal defence, highly efficacious legal service will lead to clients being convicted less frequently, and receiving lighter sentences, compared to similarly-situated clients who receive less effective services.⁴² In uncontested matters, effectiveness means accomplishing the client's legal goals (e.g. merger of corporations, or distribution of one's assets on death),⁴³ and minimizing all associated risks, to the greatest extent permitted by law and the client's instructions.

Obviously, the client goals and interests that legal services are meant to accomplish and protect differ between legal niches. Less obviously, they may also differ between clients within

³² Section 3.1, below.

³³ Section 3.2, below.

³⁴ Section 4.1, below.

³⁵ Sections 4.1.4.1 and 4.1.4.2, below.

³⁶ Section 4.3, below.

³⁷ Section 5.1, below.

³⁸ Muller, *The Tyranny of Metrics*, *supra* note.

³⁹ Section 5.2, below.

⁴⁰ Section 5.2.4

⁴¹ Goriely, 1994, above note 15 at 160; Hamilton and Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law," *supra* note at 157.

⁴² Gressens & Atkinson, above note 14.

⁴³ Carlson, above note 13 at 308.

a niche. For example, clients in corporate transactions differ in terms of how aggressively they want their firms to seek the transfer of risks to other contracting parties.⁴⁴ Plaintiffs in medical malpractice suits differ in terms of the relative emphasis they place on (i) financial recovery, and (ii) nonfinancial goals such as obtaining an apology or explanation from the defendant.⁴⁵

In some niches, evidence exists of very large variations in effectiveness between different firms. For example, Sean Rehaag found that different firms have very different rates of success when they seek judicial review of refugee application denials in the Federal Court of Canada.⁴⁶ Other legal services may be "routine," – for example the drafting of simple wills and straightforward regulatory filings. For such services, there may be relatively little variation between service-providers in effectiveness. Aggregate service value in these niches will depend more on the other three elements discussed below.

2.2 Affordability

Affordability is the second element of legal service value. A legal service provider with lower prices delivers better value, all else being equal. This is true whether the price is paid by the client, or by a consumer who is not the client (as in the case of state-funded legal aid).

Affordability value comes not only from prices that are low in absolute terms, but also from prices that are structured in an affordable way.⁴⁷ Price certainty increases affordability value.⁴⁸ An \$8,000 legal service that is guaranteed at the initial consultation to cost no more than \$8,000 offers better affordability value than an \$8,000 legal service that could have costed \$12,000, because the firm uses open-ended time-based billing.⁴⁹ Affordability is enhanced by a "no-win no-fee" guarantee in plaintiff litigation services,⁵⁰ and by outside counsel's adherence to pre-established yearly budgets in the corporate context.⁵¹

Deferred payment terms also increase affordability value. An \$8,000 legal service that is paid for by deducting \$8,000 from the client's final recovery offers better affordability value than one which must be paid for in \$2,000 installments over the course of the retainer. Still less affordable is the \$8,000 legal service that is paid for with a \$10,000 cash retainer at the outset, with \$2,000 being returned to the client at the conclusion.⁵² Finally, affordability value increases

⁴⁴ Regarding the tension between effective realization of legal rights and other non-legal goals that may be more important to the client, see Julie Macfarlane, *The New Lawyer, Second Edition : How Clients Are Transforming the Practice of Law* (Vancouver: University of British Columbia Press, 2017) at location 3073, and Muneer I. Ahmad, "Interpreting Communities: Lawyering across Language Difference" (2007) 54 *UCLA L. Rev.* 999 at 1076-8.

⁴⁵ Tamara Relis, *Perceptions in Litigation and Mediation : Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge ; New York: Cambridge University Press, 2009).

⁴⁶ Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 *Osgoode Hall Law Journal* 71; Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 *Queen's Law Journal* 1. Regarding the possibility that differential success rates do not actually reflect different levels of effectiveness value, see section 4.1.4.1, below.

⁴⁷ Association of Corporate Counsel, above note 8 at 20 et seq.

⁴⁸ Jim Hassett, "The Acc Value Index (Lexisnexis Legal Newsroom, July 20, 2011)"

⁴⁹ Noel Semple, *Accessibility, Quality, and Profitability for Personal Plight Law Firms: Hitting the Sweet Spot* (Ottawa: Canadian Bar Association, 2017) < at Chapter 2 [Semple, *Hitting the Sweet Spot*].

⁵⁰ Semple *ibid.*

⁵¹ E.g. see Association of Corporate Counsel, above note 8: "Actual spending vs. budgeted spending, by matter." See also Valorem Law Group, "Metrics," *supra* note.

⁵² Semple, *Hitting the Sweet Spot*, above note 49 at Chapter 3.

when a firm offers price/quality tiers to clients. This means multiple options, all meeting baseline quality thresholds, at different price points.⁵³

2.3 Client Experience

The third element of legal service value relates to client experience.⁵⁴ How does the manner in which the service is delivered affect the client? How does interacting with the service-provider affect the client's stock of temporal and psychological resources?

Timeliness matters to most clients, both individual and corporate. How do the practices of a given firm affect the amount of time likely to pass before the matter is resolved?⁵⁵ How do these practices affect the number of the client's own hours that must be spent on the matter while it is ongoing?⁵⁶

Communication is also essential to client experience value. A firm that clearly understands and is clearly understood by its clients delivers better client experience value than one that is not.⁵⁷ Clear communication is essential regarding the terms and scope of the retainer, the status of the file, and the client's instructions.⁵⁸

Although timeliness and communication are always important, client experience value manifests differently in different niches. Research has made it clear that, for individuals, client experience value hinges on listening,⁵⁹ responding appropriately to emotion,⁶⁰ and other "interpersonal" aspects of service.⁶¹ Individual clients of English solicitors were asked by researcher Hilary Sommerlad to define the ideal solicitor, and rate their own solicitors against that benchmark. Respondents emphasized the "procedural" elements of service quality. They

⁵³ Macfarlane, *The New Lawyer*, *supra* note at 3424; Semple, *Hitting the Sweet Spot*, above note 49, Chapter 4; Garth, above note 13.

⁵⁴ Furlong, *Law is a Buyer's Market*, above note 2 at kindle location 2858.

⁵⁵ Valorem Law Group, "Metrics," *supra* note.

⁵⁶ See Dolin, online: and Kenneth Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)" (2015) and Albiston & Sandefur, above note 25 at 111.

⁵⁷ For example, Sandys and Pruss found that the overall level of satisfaction of criminal defendants with their lawyers correlated with the scores they gave their lawyers on communication measures. These measures included "my lawyer said confusing things," "my lawyer explained what was going to happen next," and "my lawyer interrupts me when I'm speaking." (Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note)

⁵⁸ Canadian Bar Association (CBA), online: at 3.

⁵⁹ Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 at vii; Karen Barton *et al.*, "Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence" (2006) 13 *Clinical L. Rev.* 1 at 4; Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note 443: "The view that case outcome is not the sole consideration of defendants is consistent with the procedural justice literature that again points to the importance of quality communication."

⁶⁰ After interviewing ntd 163 family lawyers in Maine and New Hampshire, Mather et al. found that the majority were at least partially "client-adjustment oriented," meaning that they attended to the "emotional needs and problems" of their clients in addition to legal needs: Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford ; New York: Oxford University Press, 2001) at 165-6. See also Goriely, 1994, above note 15 at 164-5.

⁶¹ Macfarlane, *The New Lawyer*, *supra* note at 3631; Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 at iv; Angela L Melville, Frank H Stephen and Tammy Krause, "'He Did Everything He Possibly Could for Me...' Medical Malpractice Claimants' Experiences of Legal Services" (2014) 21 *International Journal of the Legal Profession* 171.

wanted their solicitors to communicate clearly and honestly,⁶² and to treat them with respect.⁶³ From this research, it seems clear that these aspects of legal services are valuable to clients in and of themselves, whether or not they contribute to effectiveness.⁶⁴ In personal plight matters, procedural justice research shows that the experience of having been heard and treated fairly is at least as important to litigants as the outcome of their disputes.⁶⁵ The sense of procedural justice, in turn, depends not only on how one is treated by the tribunal, but also on how one is treated by one's own law firm,⁶⁶ and in particular on whether one feels like an active participant in the process.⁶⁷

For corporate clients, client experience value manifests somewhat differently. Interpersonal "handholding" elements are not necessarily as important, but corporate clients certainly do value things like promptness in reporting or responding to clients,⁶⁸ and transparency.⁶⁹ In-house lawyers report that they value an outside firm's willingness to learn the client's business and its internal processes.⁷⁰

Suppose corporate law firms A and B are equally effective in maximizing value and minimizing risk during initial public offerings for their clients. Firms A and B also charge the

⁶² Hilary Sommerlad, "English Perspectives on Quality: The Client-Led Model of Quality--a Third Way" (2000) 33 U. Brit. Colum. L. Rev. 491 at 505: "the attribute which clients cited most commonly, and which they also most frequently identified as *key* to a quality legal service, was communication."

⁶³ Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 at 11: "a predominant theme for most clients in the accounts of their initial dealings with their solicitor, as with their first impressions of the firm, was that they should be listened to, and be treated with respect, courtesy and as equals."

⁶⁴ There is evidence that these elements do in fact contribute to effectiveness, see e.g. Moore *et al.*, "Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders," *supra* note at 754. Obviously, if effectiveness depends on accomplishing the client's true goals within the bounds of the law, understanding those goals is essential.

⁶⁵ E. Allan Lind and Tom R. Tyler., *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); William Felstiner, "Professional Inattention: Origins and Consequences" in Keith Hawkins ed., *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford: Clarendon, 1997) at 123 Jane H. Aiken and Stephen Wizner, "Measuring Justice" (2013) 79 Wis. L. Rev. 81;

Moore *et al.*, "Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders," *supra* note several examples found in the literature show that satisfaction is not based on outcome favorability (Casper *et al.*, 1988; Greenberg, 1993; Lind & Tyler, 1988, 1992; Tyler, 1990; Tyler *et al.*, 2007).

⁶⁶ Aiken and Wizner, "Measuring Justice," *supra* note 90: "winning was not the only indicator of how a client felt about his or her experience. Having a lawyer who listened and tried to understand had a substantial effect on the client's satisfaction with the experience. "

⁶⁷ Boccaccini, Boothby & Brodsky, above note 16 : "the opportunity to participate in a decision-making process increases satisfaction with the outcome of that process independent of the nature of its outcome (see Lind & Tyler, 1988)" Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice*. New York: Plenum. Regarding the negative psychological impacts of litigation, and the role of lawyers in mitigating them, see Michaela Keet, Heather Heavin and Shawna Sparrow, "Anticipating and Managing the Psychological Cost of Civil Litigation" (2018) Windsor Yearbook of Access to Justice Forthcoming

⁶⁸ Allstate, online: ; Association of Corporate Counsel, above note 8. See also Hassett, "The Acc Value Index (Lexisnexis Legal Newsroom, July 20, 2011)," *supra* note, identifying "reponsiveness/communication" as one of six factors in the Association of Corporate Counsel Value Index.

⁶⁹ Valorem Law Group, "Metrics," *supra* note; Macfarlane, *The New Lawyer*, *supra* note at 3464.

⁷⁰ Hamilton and Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law," *supra* note at 161. Allstate, online: "How would you rate the firm [insert firm name] in...Knowledge of relevant Allstate business and processes." "understands client objectives/expectations" = 1 of 6 factors in ACC Value Index (Hassett, "The Acc Value Index (Lexisnexis Legal Newsroom, July 20, 2011)," *supra* note) ; Mark A. Cohen, "What's a Quality Law Firm? (January 7, 2016)," "client business comprehension"

same fees, with the same payment terms. Effectiveness and affordability value would be equal for the two firms. Still, if Firm B requires the client's executives to spend less of their own time during the process, and demonstrates a better awareness of the client's goals and business, then Firm B may deliver better overall value than Firm A, by outperforming on the client experience element of value.⁷¹

2.4 Third Party Effects

Third party effects represent the fourth and final element in this model of legal service value. The client and the service provider are the two immediate parties to a legal service transaction. However, various other people can be affected positively or negatively by the service and the way the work is done.⁷² Firms that produce more positive third party effects, and/or fewer negative ones, offer better value.

Diversity in the legal profession is a third party effect that many large corporate clients now value.⁷³ To this end, data such as the demographic profile of a firm's lawyers is analyzed and factored into retainer decisions.⁷⁴ Workforce diversity may be relevant to effectiveness, affordability, or client experience, but it is also a social goal that these clients want to advance through their decisions. A firm that shares its legal expertise in publications and public presentations offers third party value, by contributing to the spread of knowledge. Clients may also value a law firm's access to justice work,⁷⁵ or its charitable contributions, even if they provide no immediate benefit to the client.⁷⁶ This is the premise behind "social enterprise" law firms such as Salvos Law, which dedicate a portion of profits and/or a portion of their lawyers' time to charitable causes.⁷⁷

In the context of publicly-funded legal services, different third party effects are likely to be valued. Albiston and Sandefur identify benefits of high-quality criminal defence representation that go beyond the client's interests, including "increased legitimacy for the legal system when citizens perceive it to be fair and accessible, improved skills and expertise for the law students providing representation, or judicial education and reduction in court workloads resulting from well-presented claims."⁷⁸ Gessens et al. discuss the value produced by public

⁷¹ Dolin, online: "DuPont came up with several factors involving early case assessment where outcome goals included not only final payout but also other characteristics important to management, such as how much time was taken by managers involved in the litigation."

⁷² Ben Heineman Jr., William F. Lee and David B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century* (Cambridge, Mass.: Centre for the Legal Profession at Harvard Law School, 2014) < at 12-13.

⁷³ See e.g. Decarli & Schaeffer, above note 8 at Chapter 8.

⁷⁴ Asher Alkoby and Pnina Alon-Shenker, "Out of the Closet and up the Ladder? Diversity in Ontario's Big Law Firms" (2018) Windsor Yearbook of Access to Justice at section VI. A; Cohen, online: ; Jennifer Brown, "Half of Canadian Ge's Consider Diversity When Hiring External Law Firms: Poll (Canadian Lawyer Magazine, June 5, 2012),"; "Legal Leaders for Diversity and Inclusion" (2018) ; Valorem Law Group, "Metrics," *supra* note; Allstate, online: ; Decarli & Schaeffer, *ibid* at 60.

⁷⁵ Roy Stuckey, *Best Practices for Legal Education: A Vision and a Road Map* (Columbia, South Carolina: University of South Carolina School of Law, 2007) < at 24-6.

⁷⁶ Cohen, online: "pro bono/community involvement."

⁷⁷ Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice" (2015) 32 Windsor Yearbook of Access to Justice ; Gail E Henderson, "Could Community Contribution Companies Improve Access to Justice?" (2016) 94 Canadian Bar Review ; David Wiseman, "Poverty Law, the Future of Legal Services and Access to Justice: Towards Abs+" (2015) 3 Canadian Journal of Poverty Law 10.

⁷⁸ Albiston & Sandefur, above note 25 at 108.

defenders who prevent unnecessary pretrial incarceration of their clients. This value includes benefits for third parties such as employers of the clients (whose employees are able show up to work because they are not imprisoned) and the state itself (due to reduced prison budgets).⁷⁹

Systemic advocacy, defined by Gemma Smyth as legal "work that operates to challenge existing systems,"⁸⁰ is another form of valuable third party effect. Systemic advocacy includes both law reform and community-led social change.⁸¹ Clients such as unions and legal aid funders may prefer firms or clinics that effectively build on their advocacy work in order to create change that goes beyond the interests of their immediate clients.⁸²

Third party effects are more likely to be valued by corporate clients (including state clients) than they are by individual clients. If Microsoft pays a bit extra to give business to a law firm with a highly effective *pro bono* program, the premium equates to a negligible fraction of a penny cut from the dividend of each Microsoft share. Bal, introduced at the outset of this article, who needs a simple will drafted, is much less likely to accept sacrifices in effectiveness, affordability, or client experience in order to advance such goals.⁸³

2.5 The Value Profiles of Different Service-Providers

Effectiveness, affordability, client experience, and third party effects are the four elements of legal service value in this model. Value can be figured as the space occupied by a given service provider inside Figure 2. The greater the area, the greater the total value offered by the service-provider.

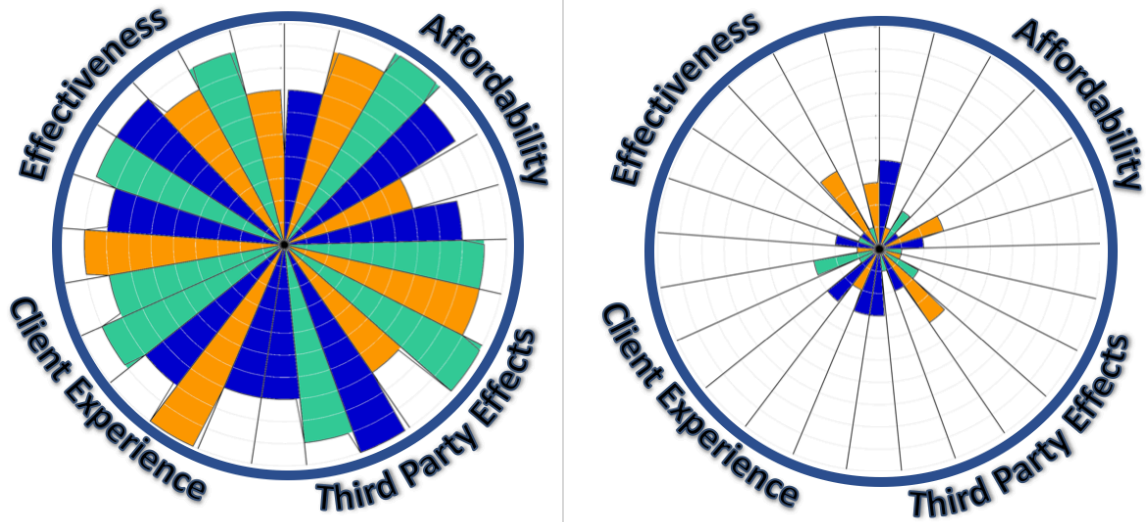
⁷⁹ Gressens & Atkinson, above note 14 at 4: "we intend to measure the impact of indigent defense performance on the criminal justice system and community well-being.... one objective of a high quality indigent defense system is to secure pretrial release for a defendant when the defendant is not a flight or public safety risk. Defendants on pretrial release maintain their jobs and housing and continue to provide for their families, which, in turn, mean cost savings to local and state governments from reduced jail populations and reductions in unemployment benefits and other social service costs, such as foster care, food stamps, or public housing subsidies. In addition, unincarcerated defendants maintain their jobs, which translate into increased tax revenues that go toward supporting the community. "

⁸⁰ Gemma Smyth, *Evaluating Systemic Advocacy: A Primer & Tools for Evaluating Systemic Advocacy in Ontario's Legal Clinics* (Windsor, Canada: Law Foundation of Ontario, 2017) < at 13

⁸¹ Smyth, "Evaluating Systemic Advocacy: A Primer & Tools for Evaluating Systemic Advocacy in Ontario's Legal Clinics," *supra* note at 12-13.

⁸² Sarah Buhler and Sarah Marsden, "Lawyer Competencies for Access to Justice: Two Empirical Studies" (2018) 34 Windsor Yearbook of Access to Justice . See also Aiken and Wizner, "Measuring Justice," *supra* note at 80, 95 : "Legal work that results in systemic change results in more than procedural justice or client satisfaction.... if justice is measured only by whether clients win their hearings or perceive the process is fair, we have assumed a system that delivers justice. "

⁸³ See also Heineman Jr., Lee and Wilkins, "Lawyers as Professionals and as Citizens:Key Roles and Responsibilities in the 21st Century," *supra* note at 12: "lawyers will sometimes be in the difficult position of choosing which of these responsibilities will take precedence in guiding specific courses of action. Criminal defense lawyers, for example, generally believe that they have, in particular matters, far greater obligations to protect the interests of their clients—and far fewer obligations to protect the rule of law or the public interest—than lawyers who are advising companies on prospective regulatory compliance, where the substantive and procedural context is very different. "



The firm on the left offers high aggregate value relative to its competitors, and would be a good candidate for a recognition such as Certified Specialist or Queen's Counsel. The firm on the right offers low-quality services, and charges a great deal for them. It might be a good target for regulatory intervention.

Different providers of a certain legal service have strengths and weaknesses in different elements of value. Quantifying elements of value separately, as this model seeks to do, allows consumers to make well-informed decisions, based on differing individual sensitivity to price and different aspects of value. Unlike a ranking, this method can help consumers who are hunting for bargains, or those who are interested in results above all else.



The "All About Results" Firm



The "No Frills" Firm



The "Service First" Firm



The "Model Citizen" Firm

The "All About Results" firm is the best of the four at getting the job done (high effectiveness value). The "No Frills" firm offers great affordability but modest scores on the other three elements of value. The third firm is "service first" – its effectiveness and affordability are mediocre but it offers an outstanding client experience. Finally, the "Model Citizen" firm offers wonderful contributions to social goals backed by solid, if unspectacular results on the other three elements of value.

3 Who can Provide Data about Legal Service Value?

To whom should one look for the data necessary to quantify legal service value? Consulting clients is essential, especially for insight on client experience value. Regulators, professional peers, and adjudicators are also valuable sources of insight on different elements of value. In the effort to measure the complex value of legal services, it is important to avoid crowding out qualitative human judgment with mathematical measurements devised by outsiders.⁸⁴ As Muller argues, often the best metrics for human performance are "developed from the bottom up, with input from teachers, nurses, and the cop on the beat."⁸⁵

⁸⁴ Muller identifies "belief that it is possible and desirable to replace judgment, acquired by personal experience and talent, with numerical indicators of comparative performance based upon standardized data" as a key component of the "metric fixation" that he decries. (Muller, *The Tyranny of Metrics*, *supra* note at location 288).

⁸⁵ Muller, *The Tyranny of Metrics*, *supra* note at location 2,292.

3.1 Client Sources of Data

Clients are essential informants about service quality. This is worth emphasizing, especially at a time when the legal profession is under pressure, on multiple fronts, to become more client-centric.⁸⁶ The old functionalist claim, that only professionals themselves can evaluate the quality of professional work,⁸⁷ is no longer convincing. Thus, approaches that purport to identify superior firms without consulting any of their clients – such as peer-reputation rankings and certified specialist designations in some jurisdictions– are questionable.

Large corporate and state clients, who have in-house legal expertise and purchase legal services repeatedly, are often well-positioned to offer data about all four elements of legal service value.⁸⁸ Other clients are individuals or small businesses, who generally lack legal training and purchase legal services only occasionally.⁸⁹ Individual clients are not necessarily good sources of data about a provider's effectiveness, price, or third party effects.⁹⁰ It is difficult for a "one-shooter" layperson to evaluate how efficacious an advocate was or how reasonable a price was, without having experienced the competitors' services.⁹¹ Satisfaction with a given result can be manipulated by a lawyer who effectively manages the client's expectations.⁹²

Personal clients are, however, an essential source of data about client experience value.⁹³ As Alan Paterson argued in his foundational paper, all "clients can validly rate their lawyers on communication skills, attitude, accessibility, willingness to keep in touch and to

⁸⁶ Macfarlane, *The New Lawyer*, *supra* note; Jordan Furlong, *Law Is a Buyer's Market: Building a Client-First Law Firm* (Toronto: Law21, 2017); Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note.

⁸⁷ Emile Durkheim, *The Division of Labour in Society* (New York: Free Press, [1902] 1964) at 5. Describing this approach, see also Russell Pearce, "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar" (1995) 70 N.Y.U. L. Rev. 1229 at 1239, Elizabeth H. Gorman and Rebecca L. Sandefur, "'Golden Age,' Quiescence, and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work" (2011) 38 Work and Occupations 275 at 278 and Semple, *Justitia's Legions*, above note 3 at 205.

⁸⁸ Association of Corporate Counsel, "How to Evaluate the Performance of Litigation Law Firms (Acc Value Challenge Tool Kit Resource)," ; Hassett, "The Acc Value Index (Lexisnexis Legal Newsroom, July 20, 2011)," *supra* note.

⁸⁹ Not all individual clients are legally inexperienced. In criminal defence, for example, a significant proportion of clients have been charged and retained counsel multiple times.

⁹⁰ Alan Paterson, "Peer Review and Quality Assurance" (2007) 13 Clinical L. Rev. 757 at 764; Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 at 7; Moorhead, "Judging on Results?" above note 15 at 194; Melville, Stephen and Krause, "'He Did Everything He Possibly Could for Me...'" Medical Malpractice Claimants' Experiences of Legal Services," *supra* note at 3; Sommerlad, "English Perspectives on Quality: The Client-Led Model of Quality--a Third Way," *supra* note at 499; Garth, above note 13 at 671. Grady suggests that clients who cannot directly judge effectiveness value use service quality instead, as a proxy. In other words, they assume that a firm which provides good client experience value is also effective. (Grady, online:)

⁹¹ Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 at 7.

⁹² "Customer satisfaction is often a measure of customer expectations. Where expectations are low, satisfaction is likely to be high." (Paterson, *Professional Competence in Legal Services*, above note 15). See also Herbert M. Kritzer, *Risks, Reputations, and Rewards : Contingency Fee Legal Practice in the United States* (Stanford, Calif.: Stanford University Press, 2004) at 119-124.

⁹³ Goriely, 1994, above note 15 at 164-5 : The only way of finding out whether this is done is to ask clients. "; Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note at 434 : "growing recognition that people who are represented by public defenders deserve a voice, and their views could be considered in conjunction with more traditional outcome measures. "; Aiken and Wizner, "Measuring Justice," *supra* note 82: " methods need to be employed that capture the experience from the client's perspective."

involve clients."⁹⁴ If asked the right questions, clients are able to isolate their satisfaction with these client experience factors from their satisfaction with the legal outcome.⁹⁵ Every client knows whether he or she was treated respectfully, and kept in the loop on the file.

3.1.1 Client Surveys

Surveys are the most plausible way to get client insight on these important aspects of value, according to observers such as Julie Macfarlane,⁹⁶ Clark Cunningham,⁹⁷ and the Canadian Bar Association.⁹⁸ Surveys can focus on the elements of value that lay clients are in a good position to evaluate.⁹⁹ Law societies and bar associations could create short client surveys with questions relevant to client experience value, and require each firm to provide a survey to each client at the end of each retainer.¹⁰⁰

3.1.2 Client Reviews

Some comparison websites aggregate reviews from clients, for example using a star rating out of five for how satisfied the client was or likely he or she would be to retain the firm again.¹⁰¹ This is a simple, low-cost way to give consumers comparative information of legal

⁹⁴ Paterson, *Professional Competence in Legal Services*, above note 15 at 15. See also Sherr, "The Value of Experience in Legal Competence," above note 15, regarding client interviews/surveys re satisfaction after initial interview.

⁹⁵ Clark D. Cunningham, "What Do Clients Want from Their Lawyers?" (2013) *Journal of Dispute Resolution* 143 at 146: "many lawyers equate client satisfaction with the outcome achieved; however studies over the past three decades in three different countries has produced impressive evidence that that clients evaluate their lawyers' competence more in terms of the process experienced by them in the representation than in the outcome." See also Sommerlad, "Legally Aided Clients and their Solicitors" above note 15 and Sommerlad 2000

⁹⁶ Macfarlane, *The New Lawyer*, *supra* note at location 3094 (Kindle Edition). For an good examples of client survey questions, see National Self-Represented Litigants Project, "Client Communication Feedback Survey" (2016)

⁹⁷ Clark D Cunningham, "Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform" (1999) 67 *Fordham L. Rev.* 1959: "Client evaluations [could] extend to practice settings, most likely beginning with publicly funded legal services programs-both because funders would be in a position to encourage their use and because such clients lack the ability of paying clients to "vote with their feet" if dissatisfied with their lawyers."

⁹⁸ Paterson, *Professional Competence in Legal Services*, above note 15 at 764; Canadian Bar Association (CBA), online: . See also Nika Kabiri, "How Good a Job Are You Doing? Client Surveys Are the Only Way to Know (Lawernomics, March 22, 2017)," regarding the Net Promoter Score and Joel A. Rose, "Clients' Silent Dissatisfaction Is Bad for a Firm's Business: Conducting Client Surveys (Thrive, May 30, 2012)" (2012) . For examples of law firms and legal aid agencies using client surveys, see e.g.

<http://www.sdsbusinesslawfirm.com/client-satisfaction-survey/> and

<http://www.lss.bc.ca/about/LSSClientSurveyAug2015.pdf>

⁹⁹ See for example the survey research described in Lesjak & Lesjak, above note 31 at 1206-7.

¹⁰⁰ Cunningham, "Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform," *supra* note; Sommerlad, "English Perspectives on Quality: The Client-Led Model of Quality--a Third Way," *supra* note at 514; Semple, *Legal Services Regulation at the Crossroads*, *supra* note at 251. A paper version of the survey could be printed on a postcard addressed to the regulator with prepaid postage. An electronic version of the survey could be an email with a unique link to a secure online survey site. Responses would be gathered directly from clients by the regulator. Each postcard or invitation to the online survey would include a unique ID number, to connect it to the firm that provided the services. All responses from each licensee's clients would be provided to that licensee, aggregate client satisfaction data would be posted online, and persistent problems with a given licensee could be the basis for an intervention by the regulator.

¹⁰¹ Avvo.com; Renee Newman Knake, "The Commercialization of Legal Ethics" (2016) 29 *Georgetown Journal of Legal Ethics* . Lawyers are also reviewed on general rating sites such as Yelp and LinkedIn : Angela Goodrum, "How to Maneuver in the World of Negative Online Reviews, the Important Ethical Considerations for Attorneys, and Changes Needed to Protect the Legal Profession" (2015) 24 *Information & Communications Technology Law* .

service value. However, for niches with inexperienced personal clients, all-in ratings are methodologically inferior to surveys that focus on client experience factors within the firm's control. Because individual clients are not usually in a good position to judge effectiveness, affordability, or third party value, "all-in" star rating systems may reward firms that manage expectations effectively, or punish firms that take on tougher cases.¹⁰² In addition to these law-specific issues, online rating systems (especially those with relatively low numbers of reviews) face well-known problems,¹⁰³ such as over-representation of extreme opinions,¹⁰⁴ manipulation by the reviewed party or the reviewers,¹⁰⁵ and financial motives for ratings websites to keep their customers happy by removing negative reviews.

3.2 Non-Client Sources of Data

Professional peers who practice in the same niche may have sophisticated insight. For contested matters, adjudicators have a unique and helpful perspective. In the criminal courts of England & Wales, judges systematically rate the advocates who appear before them and this data is used to qualify advocates to take on more serious cases.¹⁰⁶ Legal services regulators have a wealth of data to this task, including practice audit results, disciplinary records, and bar exam scores.¹⁰⁷ Regulators are also well-positioned to gather more data.¹⁰⁸ This includes quality and price information from firms,¹⁰⁹ as well as claims information from professional indemnity insurers or compensation funds.¹¹⁰ Further to their public interest mandate, legal services

Regarding metrics based on client satisfaction or likelihood to re-engage, see Cohen, online: ; Valorem Law Group, "Metrics," *supra* note, Kabiri, online: .

¹⁰² Some clients who leave negative reviews may have had unrealistic expectations of the firm. Lawyers are ethically required to keep client information confidential, which can prevent them from responding to inaccurate negative reviews left by former clients: Competition & Markets Authority (UK), *Legal Services Market Study: Final Report* (London: 2016) < at 69, 242.

¹⁰³ CBA Legal Futures Initiative, *The Clients' Perspective* (Ottawa: 2013) < at 11; Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 68.

¹⁰⁴ It takes time and effort to write a review. Highly satisfied and highly dissatisfied clients are more likely to invest this effort than average clients are, which skews the sample: Knake, "The Commercialization of Legal Ethics," *supra* note at 722, citing Michael Moyer, *Manipulation of the Crowd: How Trustworthy Are Online Ratings?*, SCI. AM. (June 1, 2010), <http://www.scientificamerican.com/article/manipulation-of-the-crowd/?page=1>. See also Noi Sian Koh, Nan Hu and Eric K. Clemons, "Do Online Reviews Reflect a Product's True Perceived Quality? An Investigation of Online Movie Reviews across Cultures" (2010) 9 *Electronic Commerce Research and Applications* 374.

¹⁰⁵ Michael Moyer, "Manipulation of the Crowd" (2010) 303 *Scientific American* . It is difficult for ratings websites to know if favourable reviews were actually left by the reviewee or by his/her friends or employees: Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 242. It is also difficult to know if multiple negative reviews were left or orchestrated by a single furious client: ntd <http://www.slaw.ca/2016/06/20/stars-in-their-eyes-the-growing-influence-of-online-lawyer-reviews/>

¹⁰⁶ Regarding this Quality Assurance Scheme for Advocates, see note **Error! Bookmark not defined.** and accompanying text, below.

¹⁰⁷ E.g., regarding the Solicitors Regulation Authority in the UK, see Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 72-3.

¹⁰⁸ Amy Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap" (Slaw, December 13th 2016) (2016) .

¹⁰⁹ "To help clients and third-parties evaluate law firms and outcomes – law firms should disclose audited client-centric data and metrics" Peter Aprile, "How Do You Find the Right Tax Lawyer? Look at the Numbers,." Barton and Rhode, at 36: "lawyers should be required to provide information to clients or to centralised databanks concerning their disciplinary and malpractice records" : See also Richard L. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (New York: Oxford University Press, 2008).

¹¹⁰ Ntd LSUC Comp fund; Kritzer on this

regulators should judiciously share this information, to help those who want to quantify legal service value.¹¹¹

Thus, while all comprehensive efforts to quantify legal service value must consult clients, they should focus such feedback on client experience value. Other data sources should be included for insight about the other three elements of value. This is especially true regarding niches with inexperienced individual clients.

4 How to Quantify Value?

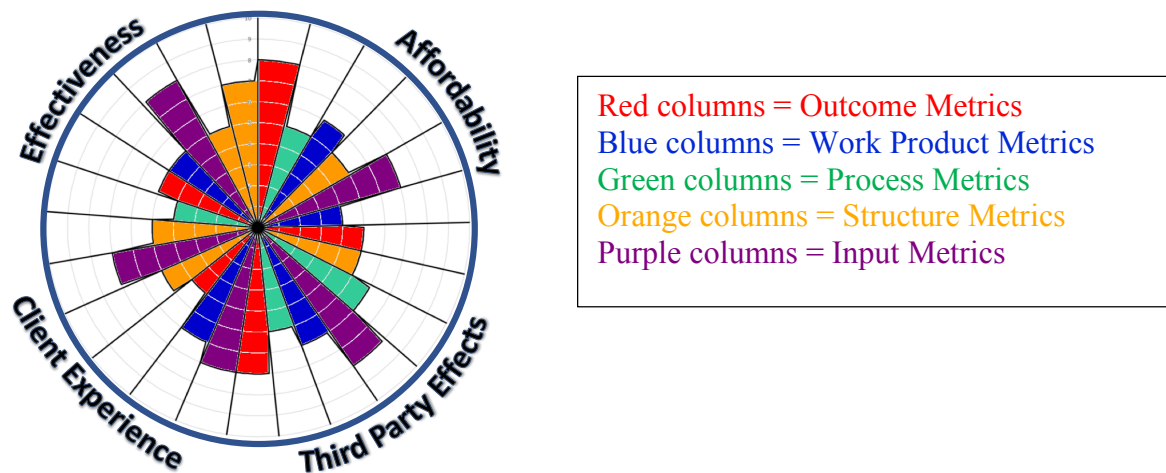
How can one gather client and non-client data in order to quantify the extent to which competing legal service providers provide different elements of value? The value propositions offered by legal service providers are complex. Multiple metrics are needed, to capture different aspects of the value offered by different competitors.¹¹² If a "high stakes" measurement system (i.e. a system whose scores have important consequences for the parties being measured) omits important aspects of value, the system can encourage the measured parties to focus on what's measured and ignore what's not.¹¹³

The appropriate array of metrics will differ depending on the legal niche in which value is being measured. Ideally, metrics should be found to represent each of the four elements of value. Ideally, more than one metric will be found for each. For example, if one seeks to measure the client experience value offered by different family law firms, the average time each firm takes to respond to client communications might be one useful metric. Still, it would tell one nothing about the substance of the firm's responses, and so other metrics (e.g. client satisfaction at the termination of the matter) would be necessary to get a reasonable picture of client effectiveness.

¹¹¹ Disciplinary findings regarding a practitioner must be disclosed. Whether to disclose complaints that were resolved in some fashion short of a formal finding of fault is a more difficult question. See Malcolm Mercer, "Disclosure and Investigated Complaints (Slaw.Ca, April 28th 2017),"; Leslie C. Levin, 'The Case for Less Secrecy in Lawyer Discipline,' 20 Geo. J. Legal Ethics (2007); Deborah L. Rhode, 'Professional Regulation and Public Service: An Unfinished Agenda,' in *The Paradox of Professionalism: Lawyers and the Possibility of Justice* 163–4 (Scott Cummings ed., Cambridge University Press: Cambridge, 2011); Deborah L. Rhode and Alice Woolley, 'Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada,' 80 Fordham L. Rev. 2761, 2768 (2012). In the author's view it would be misleading to publicize complaints about a lawyer which have not been formally found to have merit: Semple, *Justitia's Legions*, above note 3.

¹¹² Doing so increases validity : "content validity depends on the extent to which an empirical measurement reflects a specific domain of content. For example, a test in arithmetical operations would not be content valid if the test problems focused only on addition, thus neglecting subtraction, multiplication, and division." (Edward G. Carmines and Richard A. Zeller, *Reliability and Validity Assessment* (Thousand Oaks, California: Sage, 1979), Chapter 2)

¹¹³ Muller, *The Tyranny of Metrics*, *supra* note at 299; see also note 228 below and accompanying text.



The columns on Figure 1 are colour-coded, to illustrate five methodologies for Quantifying legal service value. This model adapts the four-part methodological classification of metrics that was proposed by Alan Paterson in 1990,¹¹⁴ and developed in subsequent work by Paterson, Richard Moorhead and Avrom Sherr.¹¹⁵ This section begins by describing output metrics – a theoretically ideal, but methodologically challenging way to measure value. It will then consider the alternatives -- internal and input methodologies for quantifying elements of value.

4.1 Output Metrics (Outcome and Work Product)

Output metrics are based on what comes out of a legal service provider. *Outcome* metrics are ideal in principle. Outcome metrics identify the real world benefit that a legal service actually delivers.¹¹⁶ Win/loss rate is a viable outcome metric for the effectiveness value of law firms in certain litigation niches.¹¹⁷ For client experience value, the Attorney–Client Trust Scale (ACTS) is an example of an outcome metric.¹¹⁸ The ACTS asks criminal defendants about their level of agreement with a series of 24 questions,¹¹⁹ in order to quantify the level of trust that they have in their lawyers.

¹¹⁴ Paterson, *Professional Competence in Legal Services*, above note 15.

¹¹⁵ Sherr, "The Value of Experience in Legal Competence," *supra* note; Avrom Sherr, Richard Moorhead and Alan Paterson, "Assessing the Quality of Legal Work: Measuring Process" (1994) 1 *ibid.* 135; Paterson, *Professional Competence in Legal Services*, above note 15 at 9, Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 142, Paterson, "Peer Review and Quality Assurance," *supra* note. The present model subdivides Paterson's "output" measures into "outcome" measures and "work product" measures.

¹¹⁶ Paterson, *Professional Competence in Legal Services*, above note 15 at 13: "what the lawyer achieves for the client," including the "settlement, award, or sentence" in a contested matter.

¹¹⁷ Toby Unwin, *Law's Secrets Revealed: A Big Data Look at Litigation* (Miami: 2016) <. James Grenier and Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (2012) 121 *Yale Law Journal* 2118 at 2135; Valorem Law Group, "Metrics," *supra* note; Rebecca Sandefur, "Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact" (2015) 80 *American Sociological Review* 909. See also <https://lexmachina.com/legal-analytics-apps/> and <http://premonition.ai>

¹¹⁸ Boccaccini & Brodsky, above note 16.

¹¹⁹ e.g. " My attorney can be counted on," and " My attorney and I have a sharing relationship." Boccaccini & Brodsky, above note 16 at 74.

Outcome metrics are, in principle, the best way to measure and quantify a certain element value.¹²⁰ The best proof of a pudding is in the eating, and the effect of a service on outcomes is what the average client or consumers cares about most.¹²¹ The availability of outcome metrics to compare and quantify value is taken for granted in many other markets. A consumer comparing cars for fuel efficiency expects to see data about how far each car will actually travel for each litre of gas in the tank. This outcome information is much more valuable to the consumer than descriptions of the efficiency-promoting technologies in the different cars, or surveys showing past consumers' satisfaction with the fuel efficiency of the cars they purchased.

Likewise, if an outcome metric allows a potential client to be confident that a certain refugee law office will have a very high likelihood of success in contesting any deportation proceeding (relative to its competitors), then that individual can be confident of the firm's effectiveness value. There will be no need to consider how the firm's advocates behave in court, the work processes the firm uses, the nature of its office environment, or the credentials of its staff.¹²²

4.1.1 Outcome Measures in Contested and Uncontested Matters

Most contested matters produce outcomes with mixed success,¹²³ and in these legal niches outcome measures must be more sophisticated than win/loss rate. For example, Nora Freeman Engstrom argues that, for personal injury cases, the ratio between the client's total economic loss and the gross recovery attained for that client is a legitimate measure of legal service value in a given case.¹²⁴

Ratios can also be used to quantify the effectiveness value of legal services for defendants or respondents in civil matters. The clients of Counter LLP, a Canadian tax litigation firm, generally want to pay the Canadian Revenue Agency (CRA) less than money than the CRA has demanded from them. Thus, to demonstrate the effectiveness value of its services using an outcome measure, Counter calculated for each 2015 file the amount initially demanded by the CRA, and the amount the client ultimately paid after using Counter LLP's services. According to this calculation, the average client "saved" 82% of the demanded amount.¹²⁵ "Average Savings" might be a legitimate outcome measure to compare the effectiveness of tax litigation firms, subject to the validity and reliability issues discussed below.¹²⁶

Outcome metrics have also been devised to measure the effectiveness of non-contested legal services. When firms draft contracts, Kenneth Grady suggests that their effectiveness might

¹²⁰ Moorhead, "Judging on Results?" above note 15 at 195; Gressens & Atkinson, above note 14 at 4; Aprile, online:

¹²¹ Some consumers of legal services are not clients, because they purchase them for others. Insurers and legal aid authorities are examples.

¹²² As noted above, effectiveness is only one of four elements of legal service value. All of these factors might be relevant to other elements of the firm's value proposition.

¹²³ Aprile, online: .

¹²⁴ Engstrom defines total economic loss as "medical bills, lost wages, and other past and estimated future pecuniary expenditures." Nora Freeman Engstrom, "Sunlight and Settlement Mills" (2011) 86 N.Y.U. L. Rev. 805 at 867-8.

¹²⁵ Aprile, online: ;

https://www.countertax.ca/hubfs/Countertax_2016/Numbers/CounterTaxLawyers_PCAR_2015.pdf?t=15160509095

13

¹²⁶ As well as practical issues such as the fact that settlement outcomes are typically confidential: Aprile, online: .

be measured based on whether or not those contracts result in disputes, and how expensive any resulting disputes are to resolve.¹²⁷ Some legal services are designed to help corporations comply with regulation; their effectiveness might be assessed based on the number of regulatory problems the clients of different firms subsequently experienced.

Outcome measures may also be available for third party effect value – the respective contributions of different firms to goals unrelated to the immediate interests of clients. *Pro bono* successes of different firms (such as overturning wrongful convictions or winning major cases on behalf of justice-seekers) would indicate this sort of value. Reducing career barriers confronting racialized legal professionals is a goal adopted by the Law Society of Ontario (LSO). The Law Society will gather data about the proportion of lawyers in large firms who belong to racialized groups as a way to measure contributions to this outcome, although the data will not be made public.¹²⁸

4.1.2 Picking Outcomes to Measure

The best outcome metrics focus on things that *all* clients receiving a certain type of legal service will value. People accused of crimes can be presumed to value liberty. Thus, a major quantification project in North Carolina identified "percentage of clients incarcerated throughout the proceedings" and "number of days of pretrial incarceration" as good outcome measures of legal service effectiveness value.¹²⁹ Clients can be presumed to value their own time, so a variety of outcome metrics for client experience have been proposed based on the respective records of different firms in terms of timely completion.¹³⁰

Turning to affordability value, consumers can be presumed to prefer services with lower prices. From a consumer's point of view, the most useful information about affordability value pertains to the total service price, not hourly rates or contingency percentages.¹³¹ Outcome metrics of affordability value might therefore be based on the total final bills paid by past clients for a certain legal service. For legal services advertised and priced on a flat basis (e.g. some residential property and immigration matters), it is relatively straightforward to obtain this data. For legal services with time-based or contingent fees, outcome affordability metrics are more difficult to devise. It would be necessary to obtain total legal fee information from comparable past cases, and this approach is subject to significant methodological challenges described below.¹³²

Some quantifiable outcomes paint a misleading picture of value because they are not desirable to all clients. In family law, for example, client outcomes such as monetary support or property payments, or hours of parenting time in a separation agreement, are inappropriate

¹²⁷ Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)," *supra* note

¹²⁸ Law Society of Upper Canada Challenges Faced by Racialized Licensees Working Group, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (Toronto: Law Society of Upper Canada, 2016) < at 32-34.

¹²⁹ Gressens & Atkinson, above note 14.

¹³⁰ Cycle time = # of days a matter is open (Valorem Law Group, "Metrics," *supra* note); Average case length: Unwin, "Law's Secrets Revealed: A Big Data Look at Litigation," *supra* note . Valorem Law Group, "Metrics," *supra* note: "% of claims resolved within 30 days of claim (pre-lawsuit, by claims handler)".

¹³¹ Legal Services Consumer Panel (UK), "Opening up Data in Legal Services" (2016) at 3, 21; Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 58; Richard Moorhead, "Filthy Lucre: Lawyers' Fees and Lawyers' Ethics – What Is Wrong with Informed Consent?" (2011) 31 *Legal Studies* 345 at 361.

¹³² Ntd below

measures of law firm effectiveness. Family law clients often instruct their lawyers to compromise on quantifiable outcomes, out of concern for the well-being of other family members or in order to obtain personal psychological benefits such as reduced stress. Indeed, encouraging appropriate compromises on quantifiable outcomes is an essential attribute of high-quality family lawyers. As Paterson put the point, "the lawyer who extracts the maximum settlement for his or her client at the cost of bitterness and rancor between the parties that affects the children [is not] necessarily delivering a higher quality service than the lawyer who settles for less but smoothes the way to an amicable parting."¹³³ Any metric suggesting otherwise would be inaccurate and perverse.¹³⁴

4.1.3 Work Product Metrics

Another type of output measure focuses on work product -- the "deliverables" produced by a legal service provider. Work products of legal services are often documents, such as contracts, wills, or pleadings. These documents can be scrutinized for errors, or for readability.¹³⁵ Legal start-up Judicata has created software that rates litigation briefs in terms of how effectively they use precedents.¹³⁶ More subjectively, advocacy documents can be assessed for persuasiveness. Advice to clients is a product included in most legal service packages. Advice can be examined for accuracy as a work product effectiveness metric.¹³⁷

Oral advocacy, in a negotiation or tribunal, is also a work product which can be scrutinized for evidence of effectiveness value. Neutral parties (judges, tribunal adjudicators, and mediators) can be asked to assess the effectiveness value of advocates who appear before them. In England & Wales, a Quality Assurance Scheme for Advocates is now in place, under which judges rate lawyers in criminal trials.¹³⁸

Client experience value can also be assessed through work product measures. Average firm response time to client communications is one possibility. Written communication from firms to their clients could be assessed for clarity and readability.¹³⁹ Unlike the outcome measures discussed above, this would not indicate if a firm's clients actually understood what they received. Nonetheless, if the methodology were to be carefully formulated, it might give one a reasonable sense of which firms' communications are most likely to be understood by the average client within that legal niche. Kenneth Grady proposes "the number of times a contract must go back and forth between drafters before completion" as a value metric for law firms that

¹³³ Paterson, "Peer Review and Quality Assurance," *supra* note at 763

¹³⁴ Mather, McEwen and Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice*, *supra* note at 159.

¹³⁵ Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)," *supra* note .

¹³⁶ Joe Borstein, "Alt.Legal: The Stickiness of Biglaw Prestige, and the Disruptive Potential of Technology (Part II) (Abovethelaw, Mar 14, 2018)," .

¹³⁷ Goriely, 1994, above note 15 at 160; Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 66; Allstate, online: , Valorem Law Group, "Metrics," *supra* note Aiken and Wizner, "Measuring Justice," *supra* note at 80, 83, 86.

¹³⁸ The evaluation form is available at "Criminal Advocacy Evaluation Form (Quality Assurance Scheme for Advocates)," . Regarding judicial resistance to this role, see Paterson, "Peer Review and Quality Assurance," *supra* note at 767. The reliability of work product measures based on subjective human judgments is threatened by bias. If a reader knows and feels well-disposed to a certain author or speaker, he or she is likely to rate the work more highly. Anonymization is one way to deal with this problem.

¹³⁹ Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)," *supra* note "methods for scoring the readability of texts (I frequently use the Flesch-Kincaid method which scores readability according to school grade level). Set a standard (e.g. 8th grade) and require that all written contracts meet or beat the standard."

draft these documents.¹⁴⁰ If aggregated over a sufficiently large number of files this might be a good proxy for the ability of the firm's work product to accurately reflect, or anticipate the client's instructions.¹⁴¹

Peer willingness-to-refer is a common way to measure effectiveness value based on work product. Legal directories such as Chambers and Partners and BestLawyers ask lawyers practicing in a certain niche how likely they would be to refer a case to various lawyers or firms working in the same niche.¹⁴² Practitioners are then ranked on the basis of how many of their peers would recommend them. The peer reviewers may know a bit about the outcomes obtained by different firms, but presumably their information comes mostly from work product – what the members of the firms under review have written or said while working on previous files.

Professional peers are, in principle, well-positioned to evaluate effectiveness and other elements of value. For services in contested matters, a possible variation is to have lawyers rate their adversaries' services.¹⁴³ For example, the most informative reviews of a plaintiff-side personal injury law firm may come from insurance defence lawyers. Defendants' counsel observe plaintiffs' work product more frequently than other plaintiff firms do. Moreover, defendants are required to think seriously about how effective the work of the plaintiff firm would be, in order to determine appropriate settlement offers.¹⁴⁴

4.1.4 Methodological Problems

Output metrics measure value based on what comes out of a law firm. Output metrics – especially those based on real world outcomes – have great appeal because they focus on things that clients and consumers actually care about. Unfortunately, they are also prone to serious methodological problems.

4.1.4.1 Validity Problems with Output Metrics

Validity problems afflict many output metrics. Validity is the degree to which "a particular indicator measures what it is supposed to measure rather than reflecting some other phenomenon."¹⁴⁵ Non-random error in a certain measurement-- consistent skew of its results in a certain direction – undermines validity. For example, a simple calculation of the average length of custodial sentences received by defendant clients is probably an invalid measure of the effectiveness value of different criminal defence firms. Firms whose clients have committed more serious offences will consistently receive longer sentences. Therefore, firms' scores on this

¹⁴⁰ Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)," *supra* note

¹⁴¹ On the other hand, a bad score on this metric could reflect an indecisive client with fluctuating instructions. It is an example of a metric whose value is correlated with the size of the sample – the number of files and clients used to calculate the score.

¹⁴² <https://www.bestlawyers.com/methodology>

¹⁴³ Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 143.

¹⁴⁴ Because a more effective plaintiff firm presents a larger risk to the defendant if the case proceeds to adjudication, the level of risk after adjudication informs the size of settlement offers that can be recommended to defendants. ntd "SS", Interview with "Ss" (Personal Injury Practitioner, Toronto, Male, 20 Years since Call to the Bar. Interviewed June 17, 2015). 2015. NOTE: The downloaded/imported citation did not fit with any Interview that is handled by the GCULC Output Style. Please enter the citation manually using one of the Interviews set up for the GCULC Output Style.: "it's really hard to get cases to trial – so that's another factor. Are you a lawyer who tries cases? If you are you're going to get higher settlements than a lawyer who's never been inside a courtroom. Because the bar's pretty small. Insurance lawyers, all the defence lawyers know this is a guy who will or won't go to trial..."

¹⁴⁵ Carmines and Zeller, *Reliability and Validity Assessment*, *supra* note at Chapter 2.

metric would likely reflect the profile of their clients and cases, rather than the firms' effectiveness.

A case outcome depends on a wide range of factors other than the inherent value of the legal service provided.¹⁴⁶ Valid outcome metrics therefore require controls for other factors in a firm's caseload. This is most obviously true in contested matters, where the outcome of a client's case depends on the strength of the case, and the behaviour of other parties as well as the quality of the legal service the client receives.¹⁴⁷ Metrics that disregard this reality can be very misleading. For example, one of the eligibility benchmarks for the "Trial Lawyers' Board of Regents 2015 Litigator Awards" was that a firm have achieved a verdict or settlement in excess of a certain amount within a certain time period.¹⁴⁸ There is however no apparent attention paid in this methodology to the inherent strength of the cases in which these results were obtained. As one Toronto personal injury said, "you can be an average lawyer and take an \$8 million case and settle it for \$5 million, you're still walking around saying 'I got a \$5 million result.'"¹⁴⁹ This boast, like the "Litigator Award" mentioned above, provides no evidence that prospective clients will get a better outcome if they choose that firm instead of another one.

Invalid metrics encourage "creaming," Muller's term for the process in which "practitioners find simpler targets or prefer clients with less challenging circumstances" in order to get higher scores.¹⁵⁰ The temptation to cream off the easiest cases increases as the stakes become higher for the measured firm. If a legal aid entity were to start selecting criminal defence lawyers based on the average period of incarceration experienced by their clients, firms would have a perverse incentive to refuse retainers with clients facing more serious charges and therefore likely to be incarcerated for longer periods.¹⁵¹

Validity problems also affect some potential outcome measures for the other three elements of value (affordability, client experience, and third party effects). For example, a straightforward outcome measure of the affordability value offered by estate litigation firms would be the average total legal fee paid by the last 10 clients represented by each firm in will-challenge proceedings. However, if Firm A's result on this measure is \$5,000 and Firm B's result is \$8,000, it does not necessarily follow that Firm A offers clients better affordability value. Firm B may tend to have clients with more complex, high-conflict cases than Firm A does. Thus, a consumer who infers from this measure that she will pay a lower price if she chooses Firm A for her particular will challenge is likely to be mistaken. Likewise, while average time-to-disposition for a firm's past files is a tempting outcome measure for one aspect of client

¹⁴⁶ Dolin, online: ; Jennifer A. Leitch, "Looking for Quality: The Empirical Debate in Access to Justice Research" (2013) Windsor Yearbook of Access to Justice at 242; See Paterson, *Professional Competence in Legal Services*, above note 15 at 14.

¹⁴⁷ Australian Government Productivity Commission, *Access to Justice Arrangements: Inquiry Report* (Canberra: ACPC, 2014) < at 184.

¹⁴⁸ Litigator Awards, "Eligibility Benchmarks,".

¹⁴⁹ "SS". NOTE: The downloaded or imported citation did not fit with any that is handled by this GCULC Output Style. Please enter the citation manually using one of the set up for the GCULC Output Style. By "\$8 million case," the lawyer meant a case which could have produced an \$8 million settlement or judgment in the right hands.

¹⁵⁰ Muller, *The Tyranny of Metrics*, *supra* note at location 364.

¹⁵¹ See Moorhead, "Judging on Results?" above note 15 at 200 regarding the "adverse selection" problem with outcome measures.

experience value,¹⁵² this might also unfairly punish those firms that take on tougher cases (which take longer to finish), or firms that operate in a jurisdiction with more systemic court delay.¹⁵³

Work product metrics can also have validity problems. Peer willingness-to-refer may depend on name recognition within the peer group more than on actual work product quality.¹⁵⁴ Professional networking and marketing build name recognition among one's peers, may and translate into peer rankings without necessarily creating any value. Mutual backscratching is an issue with peer willingness-to-refer. If lawyer X gives lawyer Y a high rating and lets Y know that he or she did so, lawyer Y may be likely to return the favour regardless of her true opinion of X's quality. Conversely, envy or rivalry might skew a peer rating downwards

4.1.4.2 *Reliability Problems with Outcome Metrics*

Reliability problems can also undermine legal service value metrics. Reliability is the extent to which a measurement will consistently produce the same results.¹⁵⁵ A scale that always reports weight as five pounds less than true weight provides measurements that are reliable, but not valid. If the Attorney–Client Trust Scale (ACTS),¹⁵⁶ when administered to all of the clients of a certain lawyer, consistently produces the same score, then the ACTS is a highly reliable measure. If, however, different clients of the same lawyer give very different answers to the ACTS questionnaire, then the test is less reliable. The rate of random error, whereby the test results deviate from the "true" result in both directions, is inversely related to reliability.¹⁵⁷

The reliability of a measure generally increases along with the sample size.¹⁵⁸ Many potential outcome measurements for legal service value would require very large sample sizes in order to achieve reliability.¹⁵⁹ Consider a survey, asking past clients of different firms about their level of agreement with the statement "The law firm answered my questions appropriately and explained things in a way that I could understand." This would appear to be a valid outcome measure of client experience value, insofar as having clients feel this way is valuable in of itself. Nevertheless, there are a number of methodological problems that could undermine its reliability. If only five of Firm A's clients are surveyed, and five of Firm B's clients, then the sample size will likely be too small to allow a reliable comparison of the two firms' average scores. This is because clients have idiosyncratic expectations of their lawyers, and some clients may offer biased evaluations due to factors such as racial prejudice.¹⁶⁰

¹⁵² Moorhead, "Judging on Results?" above note 15 at 198.

¹⁵³ "delays in hearings are likely to vary between court districts due to the operation of 'local legal cultures'." (Paterson, "Peer Review and Quality Assurance," *supra* note 763)

¹⁵⁴ Paterson, *Professional Competence in Legal Services*, above note 15 at 9: "peer assessment... tend[s] to measure social relationships rather than performance." See also Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 143

¹⁵⁵ Carmines and Zeller, *Reliability and Validity Assessment*, *supra* note. This scale is reliable, because it will give the same result on two days for an individual whose weight has not changed. It will also give the same result for two people who have the same actual weight. However the scale's measurements are not valid, because they do not actually measure what they purport to measure (weight).

¹⁵⁶ Note 118 and accompanying text, above.

¹⁵⁷ Carmines and Zeller, *Reliability and Validity Assessment*, *supra* note.

¹⁵⁸ Jorge Faber and Lilian Martins Fonseca, "How Sample Size Influences Research Outcomes" (2014) 19 Dental Press Journal of Orthodontics 27; Jon Zamboni, "The Advantages of a Large Sample Size (Sciencing, March 13, 2018),".

¹⁵⁹ Paterson, "Peer Review and Quality Assurance," *supra* note at 763.

¹⁶⁰ Lesjak & Lesjak, above note 31 at 1206.

Conversely, prejudice or bias on the firm's part can also undermine the reliability of outcome metrics. Suppose a firm provides poor value to racialized clients,¹⁶¹ or to low-income clients.¹⁶² If the last 100 clients of the firm were middle class white people, examining the outcomes in past cases will not reveal this important lack of cultural competence.¹⁶³

One response is to use trained laypeople as mystery shoppers. An individual posing as a client can visit multiple firms, present the same facts, and evaluate the intake interviews based on pre-established criteria reflecting best practices.¹⁶⁴ Arguably, a mystery shopper's personal attributes and markers should *not* be those of the average client of the firms being evaluated. Instead, the mystery shopper should have an unusual set of facts, and personal markers (e.g. racialized status or a disability) that would "test" the firm's ability to provide high value to all clients.¹⁶⁵ Model clients have been used with good results in legal education.¹⁶⁶ The drawback is that this approach wastes the time of the firms, unless they choose to participate voluntarily or are compensated.

Reliability and sample size are important considerations for work product measures, just as they are for output measures. There are significant differences of opinion between judges, and peers about what constitutes good, better, and best value. Therefore, the most reliable results will be averages of large numbers of individual evaluations of a firm's work product.

Output measures include outcome metrics (based on real world impact) and work product metrics based on the the firm's deliverables. When they are feasible, output measures are an excellent way to measure legal service value. However, validity and reliability issues often render them infeasible.¹⁶⁷ Thus, other methodologies for measuring legal service value – based on internal and input data -- must be considered.

4.2 Internal Metrics

Internal metrics look at what happens within a law firm. Unlike outputs, a firm's internal processes and structures are not inherently valuable to most legal service consumers. However, certain practices, if consistently followed, demonstrably increase the chance that high-value services will be delivered. This insight, popularized by Atul Gawande's book *The Checklist*

¹⁶¹ Canadian Bar Association, 2015, above note 58: "Do lawyers and other members of the firm have adequate awareness, knowledge and training in order to ensure that clients with disabilities and other equality-seeking groups receive competent legal services?"

¹⁶² Felstiner, at 127.

¹⁶³ Cultural competence, in this context, refers to the ability to provide high-value services to clients with different backgrounds, markers, and attributes. See Amy Salyzyn, "Cultural Competence and the Next Generation of Lawyers and Lawyer Regulation (Slaw.Ca, February 16th 2017),"; Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2005) 84 Can. Bar Rev. 563; Ritu Bhasin and Nora Rock, "Cultural Competence: An Essential Skill in an Increasingly Diverse World (Practicepro, September 2014),".

¹⁶⁴ Paterson, *Professional Competence in Legal Services*, above note 15 at 16; Paterson, "Peer Review and Quality Assurance," *supra* note; Carlson, above note 13 at 302. See also Moorhead, Sherr and Paterson, "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales," *supra* note at 780-2 and Legal Services Consumer Panel (UK), "Opening up Data in Legal Services," *supra* note, reporting on mystery shopping exercises by other UK regulators, such as the Financial Services Authority evaluating banks.

¹⁶⁵ The assumption here is that those professionals who treat people with markers of social disadvantage well will also treat those without such markers well.

¹⁶⁶ Paul Maharg, "Experiential Learning & Simulated Clients (December 2, 2015),"; Barton *et al.*, "Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence," *supra* note.

¹⁶⁷ Moorhead, "Judging on Results?" above note 15 at 200.

Manifesto,¹⁶⁸ has been adopted by some law firms as a way to improve their operations.¹⁶⁹ It can also assist those who wish to quantify and compare legal service value, because firms with these characteristics are more likely to consistently produce high value.¹⁷⁰

With regard to effectiveness value, Carlson suggests that internal metrics are more useful for uncontested matters than for contested ones.¹⁷¹ Following best practices may almost guarantee that a firm can produce an error-free, iron-clad simple will that gives full effect to all of the testator's legally-permissible goals. However, the degree of compliance to process may have only limited correlation to effectiveness as a civil litigator, where intangible skills play a greater role.¹⁷²

Where can we look to identify these value-promoting internal firm characteristics? Rules of professional conduct, which identify practices found over time to foster legal service value, are one place to start.¹⁷³ Some Rules support effectiveness value, others support client experience value, and still others help firms create positive (and avoid negative) third party effects.¹⁷⁴ A service provider's record of compliance with applicable Rules – as reflected in disciplinary proceedings – factors into legal service valuation methodologies used by Avvo.com and the Litigator Awards.¹⁷⁵ Best practices can also be found in codes applicable to specific practice niches,¹⁷⁶ and in the Canadian Bar Association's *Ethical Practices Self-Evaluation*

¹⁶⁸ Atul Gawande, *The Checklist Manifesto* (New York: Henry Holt & company, 2009).

¹⁶⁹ Peter Aprile, "The Legal Checklist Manifesto ".

¹⁷⁰ Carlson, above note 13 at 295.

¹⁷¹ Carlson, above note 13 at 310-11.

¹⁷² " Does the firm engage in fair and equitable hiring practices? " Hiring done in a way that reduces effect of racial discrimination? : CBA Check-List

¹⁷³ Federation of Law Societies of Canada, "Interactive Model Code of Professional Conduct,"; American Bar Association, "Model Rules of Professional Conduct," online:

<http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct> (last accessed: 3 June 2016).

¹⁷⁴ Unfortunately, Rules supporting good affordability value are few and far between. Semple, *Justitia's Legions*, above note 3 at 268. "Professional codes ... are generally less eloquent and often less than explicit on the necessity to protect the client's financial interest in terms of minimizing the cost of services purchased." (Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional Regulation : A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario Prepared for the Professional Organization Committee* (Toronto: Ministry of the Attorney General, 1979) at 53).

¹⁷⁵ <https://support.avvo.com/hc/en-us/articles/208478156-What-is-the-Avvo-Rating-> ;

<http://www.litigatorawards.com/pages/eligibility-benchmarks> Regulators have a wealth of data on legal practitioners which is relevant to their effectiveness. E.g., regarding the Solicitors Regulation Authority in the UK, see Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 72-3. Malpractice suits, settlements

¹⁷⁶ https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html ;

<https://s3.amazonaws.com/membercentralcdn/sitedocuments/on/on/0832/754832.pdf?AWSAccessKeyId=0D2JQDSRJ497X9B2QRR2&Expires=1517424314&Signature=1Hr7OUNrJ6CSrN2mQlStiIqHjzE%3D&response-content-disposition=inline%3B%20filename%3D%22Code%20of%20Conduct%20144%2Epdf%22%3B%20filename%2A%3DUTF%2D8%27%27Code%2520of%2520Conduct%2520144%252Epdf>

Tool.¹⁷⁷ Quality marks, such as the UK's Lexcel, provide detailed standards for law firm management of information, money, people, and risk, as well as client care.¹⁷⁸

4.2.1 Internal Process Metrics

Some internal metrics focus on processes -- what lawyers, and other people involved in legal service provision, actually *do* when working for a client.¹⁷⁹ They may also measure "the strength of the systems that lawyers have in place to ensure good quality service to clients."¹⁸⁰ In criminal defence practice, client communication processes have been identified that reliably support client experience value.¹⁸¹ Boccaccini et al.'s empirical research with incarcerated clients shows that they had more trust in, and were generally more satisfied with, lawyers who listened to and solicited their suggestions about how to handle their cases.¹⁸² Moore et al. found other criminal defence lawyer processes that correlated with client satisfaction, including focusing on the client's case during meetings and informing the client about potential future developments.¹⁸³

Other communication processes, even if they have not been empirically verified in this way, are plausibly supportive of both client experience and effectiveness. Client intake questionnaires have been identified as a way to ensure that all legally relevant information is recorded and nothing is missed in a high-volume practice.¹⁸⁴ Processes for responding to client complaints are emphasized in the UK literature.¹⁸⁵ Written retainer letters and protocols for updating clients are other processes that can be checked for if one wants to know which firms are most likely to consistently produce strong value.¹⁸⁶

Affordability value, in time-billed practices, may be predicted by examining processes. A comparison of hourly rates at firms would be one straightforward source of data. Lawyer comparison websites such as MySupportCalculator.ca and Avvo.com include hourly rate ranges from some of the firms in their directories, because this gives consumers some indication of which are likely to be more expensive.¹⁸⁷ However, the final price of a time-billed service

¹⁷⁷ Canadian Bar Association, 2015, above note 58.

¹⁷⁸ Law Society (England & Wales), "Lexcel - Excellence in Legal Practice Management and Client Care,"; Law Society (England & Wales), *Lexcel England and Wales V6 Standard for Legal Practices* (London: TLS, 2014) <.

¹⁷⁹ Paterson, *Professional Competence in Legal Services*, above note 15 at 10; Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 142.

¹⁸⁰ Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap (Slaw, December 13th 2016)," *supra* note

¹⁸¹ See e.g. Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note at 443.

¹⁸² Boccaccini, Boothby & Brodsky, above note 16. This result applies to inmates who wished to participate in this way; not all of them did. See also Sandys and Pruss, "Correlates of Satisfaction among Clients of a Public Defender Agency," *supra* note.

¹⁸³ Moore *et al.*, "Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders," *supra* note at 758

¹⁸⁴ Aprile, online: at 1.

¹⁸⁵ Canadian Bar Association, 2015, above note 58 at 3; ntd the UK stuff on this including CMA?

¹⁸⁶ Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap (Slaw, December 13th 2016)," *supra* note

¹⁸⁷ Regarding disclosure of typical contingency percentages by firms that use this method, see Law Society of Upper Canada Advertising & Fee Arrangments Issues Working Group, *Seventh Report* (Toronto: LSUC, 2017) < and Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective " in Trevor Farrow & Les Jacobs eds.,

depends not only on the firm's tariff of hourly rates but also on the number of hours billed and who within the firm ends up billing them.¹⁸⁸ For this reason, the output measures of affordability discussed above are superior, if they can be reliably calculated.¹⁸⁹ If not, other process metrics can help predict which firms are likely to be most affordable. Docketing in smaller increments (e.g. 1 or 2 minutes) can be expected to lead to lower bills than docketing in rounded-up 6 or 15 minute increments.¹⁹⁰

4.2.2 Internal Structure Metrics

The internal structure metric, a second species in the family of internal metrics, evaluates "the environment in which performance takes place," and how conducive that environment is to high-value service provision.¹⁹¹ Technology is certainly relevant in this regard. Firms with appropriate technology for conducting research, meeting deadlines,¹⁹² tracking money, and avoiding conflicts of interest are in a better position to consistently generate high-value legal services. Sufficient access to capital is an important structural factor for plaintiff-side personal injury and class action firms. Undercapitalized firms will face financial pressure to settle prematurely, undermining their effectiveness in maximizing the client's compensation.¹⁹³

The interpersonal environment is equally important. Internal structural factors include the level of harassment, racism, sexism, conflict, and turnover within a workplace.¹⁹⁴ A harmonious and mutually respectful workplace environment increases the likelihood that a firm will consistently provide high-value services.¹⁹⁵ Firms are less prone to value-destroying ethical breaches when they have good "ethical infrastructure," defined as "institutional policies, procedures, structures and workplace culture within a law practice that help lawyers fulfill their ethical duties."¹⁹⁶

Internal structural metrics can also predict affordability. Billable hour expectations within different firms might be a source of insight regarding the affordability value that they will likely offer. A structural expectation of 2200 billable hours per year from each associate might

The Cost and Value of Justice (Vancouver: University of British Columbia Press, forthcoming 2018) <https://ssrn.com/abstract=2959477> (last accessed: 3 June 2016).

¹⁸⁸ Australian Government Productivity Commission, "Access to Justice Arrangements: Inquiry Report," *supra* note at 192; Legal Services Consumer Panel (UK), "Opening up Data in Legal Services," *supra* note at 21

¹⁸⁹ See notes 131 and 132, and accompanying text, above.

¹⁹⁰ Suppose Firm A and Firm B both charge \$300 per hour. Firm A bills in one-minute increments; Firm B bills in rounded-up 6 minute increments. A 2 minute email will cost Firm A's clients \$10, it will cost Firm B's clients \$30. so that sending a 2 minute email costs the client only 1/30th of the lawyer's hourly rate) is a process that (so that that email costs the client 1/10th of the lawyer's hourly rate).

¹⁹¹ Paterson, *Professional Competence in Legal Services*, above note 15.

¹⁹² Canadian Bar Association, 2015, above note 58.

¹⁹³ Semple, *Hitting the Sweet Spot*, above note 49 at 115-6.

¹⁹⁴ Cohen, online: "attorney retention"

¹⁹⁵ "Behavior is a product of the person and the environment," (Hamilton and Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law," *supra* note at 142)

¹⁹⁶ Amy Salyzyn, "What If We Didn't Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices" (2013) 92 Canadian Bar Review 507 at 508; Ted Schneyer, "A Tale of Four Systems: Reflections on How Law Influences the 'Ethical Infrastructure' of Law Firms" (1998) 39 South Texas Law Review 245; Christine Parker, Tahlia Gordon and Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 Journal of Law and Society 466.

plausibly lead to higher fees for clients of that firm, for two reasons. First, an extreme workload, combined with the unverifiability of dockets, creates incentives to pad dockets.¹⁹⁷ Second, even if the associates are honest, they may be overworked and therefore inefficient. They may have to work and bill more hours to accomplish tasks than less overworked associates would.

The proportion of staff members at different pay grades could also be scrutinized. A firm that is "top-heavy" (too many senior staff) may be prone to low affordability value, because it cannot delegate simpler tasks down the pay scale.¹⁹⁸ A "bottom-heavy" firm (not enough senior staff) may be prone to low effectiveness value, if junior staff are "in over their heads" and not sufficiently supervised. For a certain legal service, it might be possible to identify ideal approximate ratios of partners to associates to clerical staff. Firms that are within the appropriate ranges might be expected to produce better legal service value.

4.2.3 Methodological Challenges for Internal Metrics

Unlike output data, the necessary information for internal metrics resides within the four walls, or on the servers, of a law firm. This creates a methodological challenge. Self-reporting by law firms is one option. For example, firms could affirm that they have adopted a series of best practices, in order to earn a certification or badge.¹⁹⁹ If there were sufficient evidence that these processes reliably generate good service value, then the certification would provide helpful information to consumers.

Peer file review is another way to examine firms' processes.²⁰⁰ Some legal aid programs require firms to open their files to confidential review by outside lawyers.²⁰¹ The file may reveal whether conflict checks have been performed, a written retainer has been provided to the client, and appropriate research has been performed. Some aspects of high-quality communication, such as empathy and active listening, may be invisible on paper. Thus, peer observation of client intake interviews may use audio or video recording.²⁰² Peer review has traditionally been used to detect and correct quality problems,²⁰³ but it could also be used for value quantification and comparison.²⁰⁴

Regulators and legal aid funders can audit firms, inspecting their processes and structures.²⁰⁵ Results from these audits could help inform consumers, for example by identifying

¹⁹⁷ <https://www.glassdoor.ca/Reviews/Wilson-Elser-billable-hours-Reviews-EI-IE3445.0,12-KH13,27.htm>

¹⁹⁸ Semple, *Hitting the Sweet Spot*, above note 49 at Chapter 5 (Vertical Division of Labour).

¹⁹⁹ Regarding the temptation for measured parties to omit or distort data, or to fabricate it outright, see Muller, *The Tyranny of Metrics*, *supra* note at location 369 and location 372.

²⁰⁰ Zemans and Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment," *supra* note; Donald M. Crawford, "Professional Peer Review: Can the Legal Profession Learn from the Medical Profession's Experience" (1989) 20 *University of Toledo Law Review* 473.

²⁰¹ England & Wales has a particularly comprehensive approach in this regard : ntd https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf ; Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 145.

Sommerlad, "Legally Aided Clients and their Solicitors" above note 15

²⁰² Paterson, "Peer Review and Quality Assurance," *supra* note at 767. See Sherr, "The Value of Experience in Legal Competence," above note 15 at 105 for a checklist of important client intake interview questions.

²⁰³ Zemans and Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment," *supra* note

²⁰⁴ Client consent and the right to opt-out is required for ethical reasons.: Zemans and Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment," *supra* note at 720-1.

²⁰⁵ E.g. ntd <https://www.lsuc.on.ca/spotaudit/> ; <http://www.legalaid.on.ca/en/about/qualityservice.asp>

the firms with the best ethical infrastructure. Structural attributes could also be measured using anonymous surveys of a firm's employees.²⁰⁶ Employees can also help measure different firms' success regarding diversity-related third party value, e.g. removing career barriers to racialized legal professionals.²⁰⁷

4.3 Input Metrics

Input metrics focus on the people who provide a legal service.²⁰⁸ If output metrics consider what *comes out* of the firm, and internal metrics consider what happens *within* the firm, then input metrics look at who *walks in* to the firm at the start of each workday. How many years of experience does the lead lawyer have?²⁰⁹ How many practice hours, or relevant continuing legal education hours have the lawyers and staff accumulated? Where law schools did the lawyers attend, what were their grades, and what were their bar exam scores?²¹⁰ These numerical metrics are relatively easy to record and compare, although in some cases their relevance to legal service value is questionable.²¹¹

Another potential source of input value metrics is literature based on surveys that ask lawyers to identify the knowledge,²¹² skills,²¹³ attributes,²¹⁴ that are most important for other lawyers to possess. For example, one recent major effort from the Institute for the Advancement of the American Legal System found that "treat[ing] others with courtesy and respect" is immediately necessary for all lawyers, according to 91.9% of survey respondents. "Assertiveness" has that level of importance according to only 31.9% of respondents, and this characteristic is either "not relevant" or merely "advantageous" according to over 20% of lawyer respondents.²¹⁵ One input-based approach to quantifying legal service value would be to test individual legal practitioners for the extent to which they possess the knowledge, skills, and

²⁰⁶ Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap (Slaw, December 13th 2016)," *supra* note

²⁰⁷ Law Society of Upper Canada Challenges Faced by Racialized Licensees Working Group, "Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions," *supra* note at 15: "encourage legal workplaces to conduct inclusion surveys."

²⁰⁸ As Carlson puts the point, input measures focus on the "resources entering the system." Carlson, above note 13 at 295.

²⁰⁹ See Valorem Law Group, "Metrics," *supra* note regarding the "average team seniority" metric. See Paterson, *Professional Competence in Legal Services*, above note 15 at 19, re checking whether supervising lawyers have at least three years' experience .

²¹⁰ Paterson, *Professional Competence in Legal Services*, above note 15 at 9.

²¹¹ Sherr et al, "Assessing the Quality of Legal Work," above note 15 at 142; Carlson, above note 13 at 309. "Input measures are the easiest to apply, and probably have the least to offer." Paterson, *Professional Competence in Legal Services*, above note 15 at 9. Expressing skepticism about input metrics generally, see Muller, *The Tyranny of Metrics*, *supra* note at location 354 and Michael Barber, *How to Run a Government: So That Citizens Benefit and Taxpayers Don't Go Crazy* (London, UK: Penguin, 2015) at location 4467.

²¹² Federation of Law Societies of Canada, *National Entry to Practice Competency Profile for Lawyers and Quebec Notaries* (Ottawa: FLSC, 2012) <

²¹³ Stephen Chitwood, Anita Gottlieb and Evelyn Gaye Mara, *A Business Skills Curriculum for Law Firm Associates* (Chicago: Association of Legal Administrators, 2005); Stuckey, "Best Practices for Legal Education: A Vision and a Road Map," *supra* note (with regard to the competence of new graduates as a goal for law school).

²¹⁴ Gerkman and Cornett, "Foundations for Practice," *supra* note at 9; Shultz and Zedeck, "Identification, Development, and Validation of Predictors for Successful Lawyering," *supra* note .

²¹⁵ Gerkman and Cornett, "Foundations for Practice," *supra* note at 16.

attributes that help create high value services within a certain niche.²¹⁶ Individuals could be tested for their knowledge of substantive and procedural law,²¹⁷ and legal-ethical obligations such as the duty of confidentiality.²¹⁸

It is worth reiterating that appropriate input metrics, like other metrics, differ depending on the context and nature of the service. For example, studying community legal clinics, Marsden and Buhler asked clients, lawyers, and staff at two Canadian clinics about essential lawyer competencies in that context. They argue that "relationality, critical reflection, and deep attention to context" are as important as "mainstream" and technical competencies in that context.²¹⁹

For regulators, identifying practitioners who did especially *well* on input metrics is a "light touch" and hopefully uncontroversial way to give consumers some information about value. An input metric of third party value, recently endorsed by the Law Society of Ontario, is the proportion of large firms' lawyers who are members of racialized or equity-seeking groups.²²⁰ Leaders in this regard will be identified. If a family lawyer scored in the top 10% of all candidates on the family law section of the bar exam, clients should be able to see this objective quality information on the lawyer's webpage and law society directory entry. The relationship between bar exam performance and effectiveness has not been empirically demonstrated, but offering this objective information would at least offer a consumer one data point to use in choosing a firm.

5 A Steep Path Worth Climbing

5.1 Why the Path is Steep

Quantifying legal service value is no small challenge, and certainly not one that this article has fully accomplished. The value of a legal service is a complex aggregate of its effectiveness, affordability, client experience, and third party effects.²²¹ Measuring it accurately requires gathering data from multiple sources, using a variety of methodologies. Some possible metrics discussed above are expensive to administer.²²² Other metrics require cooperation from firms.²²³ Voluntary cooperation is unlikely if firms see value-measurement as endangering something that they already have (e.g. a reputation or a stream of files). Voluntary cooperation is more likely if value-measurement gives them access to something they don't have already, such as a "gold standard" quality mark or certification.

²¹⁶ Schultz and Zedeck identified personality tests that are plausibly correlated to the "effectiveness factors" most commonly identified as important by lawyer respondents: Shultz and Zedeck, "Identification, Development, and Validation of Predictors for Successful Lawyering," *supra* note .

²¹⁷ Allstate, online: "How would you rate the firm [in] Knowledge of laws and regulations that relate to your matters?"

²¹⁸ Canadian Bar Association, 2015, above note 58 at 2, 4.

²¹⁹ Buhler and Marsden, "Lawyer Competencies for Access to Justice: Two Empirical Studies," *supra* note

²²⁰ Law Society of Upper Canada Challenges Faced by Racialized Licensees Working Group, "Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions," *supra* note

²²¹ Part 2, above

²²² Paterson, "Peer Review and Quality Assurance," *supra* note.

²²³ Regarding the resistance and skepticism encountered among criminal defence lawyers subject to peer review in an Ontario experiment, see Zemans and Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment," *supra* note.

Legal service valuation should be either done properly, or not done at all. Jerry Muller warns of a "tyranny of metrics" taking hold in schools, hospitals, businesses, and other contexts. This involves metrics that are misleading, disproportionately expensive, or liable to divert effort away from things that matter.²²⁴ However Muller also acknowledges that, "used judiciously... measurement of the previously unmeasured can provide real benefits."²²⁵ Legal services are already subject to measurement (e.g. peer rankings and the Litigator Awards), but these systems are often incomplete or misleading. This article seeks to improve existing legal service valuation, as well as to carefully extend it.

Apples should not be compared to oranges. Any set of metrics devised under this model will generally only be useful for comparing firms that offer the same service in the same context. For example, ranking all of a jurisdiction's criminal defence lawyers, without distinguishing public defenders with hundreds of cases per year from client-paid lawyers with a few dozen, would be quite misleading.²²⁶ In terms of client experience value, it would be problematic to compare firms whose services tend to leave clients happy (e.g. transactional real estate services) against legal services which tend to leave clients less happy regardless of the quality of the service (e.g. family law services). If valuation metrics are made public, contextualizing data appropriately is important. For example, if tallies of client complaints are presented on a firm-by-firm basis, then the size of the firm and number of cases it has handled are important sources of context.²²⁷

Each individual metric discussed in this paper offers only very partial information about the value of a service. An approach which measures some elements of value while ignoring others can do more harm than good, especially if it is widely relied upon by consumers to choose firms. As Steven B. Levy puts the point, "you get what you measure."²²⁸ Those who are subject to high-stakes measurement are encouraged to concentrate on aspects of value that are being measured and ignore those aspects that are not. If a regulator gathers and publicizes price (affordability) information from firms, but provides no information about the other three elements of value, then it might promote a dangerous price war in which quality suffers. Conversely, a single-minded focus on the quality dimensions of value, which disregards price, encourages an "all-Cadillac" legal service marketplace and exacerbates the access to justice problem.²²⁹ Thus, this paper has emphasized the need for a broad-spectrum, inclusive, context-attentive approach to defining and measuring legal service value.

5.2 Why the Path is Worth Climbing

Why is the steep path to legal service valuation worth ascending? Why is it important to find better ways to measure and quantify legal service value? The benefits include improved

²²⁴ Muller, *The Tyranny of Metrics*, *supra* note at location 111. See also location 313: "'Campbell's Law,' named for the American social psychologist Donald T. Campbell, holds that '[t]he more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.'"

²²⁵ *Ibid* at location 169.

²²⁶ Paterson, *Professional Competence in Legal Services*, above note 15 at 4.

²²⁷ Legal Services Consumer Panel (UK), "Opening up Data in Legal Services," *supra* note at 18

²²⁸ Steven B. Levy, "This Little Measure,"; Barton *et al.*, "Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence," *supra* note at 1.

²²⁹ Garth, above note 13 at 649.

legal professionalism, rationalized legal service regulation, and more informed and empowered consumers.

5.2.1 Improving Professionalism

The lack of reliable value information hobbles the legal profession's aspiration to provide strong, and ever-increasing value to clients and society. If there were better methods available to measure legal service value, then professionals would be able to identify and then adopt the processes and structures that consistently generate value.²³⁰ This approach to improvement can occur one client or one firm at a time. For example, the DuPont corporation created a series of metrics to evaluate the performance of its external counsel. These metrics

disclosed some unique lessons about how initial discovery efforts should be focused in employee benefit litigation... after comparing and contrasting the handling of this litigation in various cases. Through this analysis, the best practice identified resulted in fewer depositions and costs... [and] models of how staffing in certain types of cases should be structured.²³¹

However better value measurement also leads to better professionalism through better competition. If it becomes easier for consumers to know which law firms offer the best value, then firms will experience stronger market incentives to improve the value that they offer those consumers.²³² As the UK's Legal Services Consumer Panel puts this point, "consumers have a role to play in driving up quality standards but they cannot play this role if they ... are unable to make informed choices and gauge the value of a service."²³³

Advertising, membership in privileged racial or social groups, and other spurious attributes might fade as determinants of success in the legal industry, to be replaced with a better meritocracy. Currently, perception of "law firm quality is tied to parochialism and brand."²³⁴ As one industry observer puts it, "if you work at a high prestige brand-name law firm, many assume the quality of your work is better than if you work at a firm with a less prestigious brand."²³⁵ Compare this status quo to a field such as professional sports. The best players and teams are

²³⁰ Regarding "legal process improvement," see Furlong, *Law is a Buyer's Market*, above note 2 at 716; see also Moorhead, "Judging on Results?" above note 15 at 195 and Kenneth Grady, "The Elephant in the Room: Measuring Service Quality (Part 1) (Seytlines, September 30, 2014)" (2014) .

²³¹ Decarli & Schaeffer, above note 8 at 58.

²³² Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 40. Regarding lack of information as a demand-side impediment to competition in personal legal services markets, see Noel Semple, "Mystery Shopping: Demand-Side Phenomena in Markets for Personal Pliant Legal Services (Working Paper)," .

²³³ Legal Services Consumer Panel (UK), "Opening up Data in Legal Services," *supra* note at 26. See also Mark Armstrong, John Vickers and Jidong Zhou, "Consumer Protection and the Incentive to Become Informed" (2009) 7 *Journal of the European Economic Association* 399: "the more that consumers know about deals in the market, the greater is the competitive pressure on firms to offer good deals. Thus there is a positive externality between consumers in that each consumer benefits when others possess better market information."

²³⁴ Cohen, online: "A disproportionately high percentage of large firm lawyers graduate elite law schools. They are presumed to be superior lawyers even when their academic excellence and pedigree do not mirror practice achievement."

²³⁵ Grady, "Debunking the Legal Service Quality Myth (Seytlines, April 2, 2015)," *supra* note.

much more likely to be recognized and rewarded regardless of race, creed, or socioeconomic origin, because there are clear and accepted methods to identify the value they offer.

5.2.2 Rationalizing Regulation

Measuring legal service value would also help us rationalize legal service regulation. Regulators would be able to identify and deal with the lowest-value service providers, without waiting for anyone to complain about them.²³⁶ On the other end of the value spectrum, regulators would also be better able to choose recipients of recognitions that suggest high quality to consumers – such as designation as a certified specialist or Queen's Counsel.²³⁷

A plethora of hurdles and obligations are imposed on those who want to offer legal services. These include educational requirements both before and after licensure, apprenticeship obligations, and the exclusion of outside investment.²³⁸ These increase service price, but are assumed to improve quality. Techniques to measure legal service quality would set the table for experiments indicating whether and to what extent different regulatory requirements actually increase legal service quality.^{239 240}

5.2.3 Informing and Empowering Consumers

This is perhaps the most important reason why we need to better quantify legal service value. Legal services are often essential for people who want to pursue or protect things that are important to them, such as liberty, money, and security.²⁴¹ Individuals, corporations and states spend over US\$600 billion on legal services each year around the world.²⁴² These consumers deserve to better understand and maximize the value that they receive for their money.

"Repeat players" in the legal services marketplaces (i.e. corporate and state consumers) would benefit from better information about legal service value. With such information, legal aid authorities would be able to maximize value-for-money by choosing the right firms to empanel, and making rational decisions about, for example, when to use lawyers as opposed to paralegals.

²³⁶ Regarding deficiencies of complaint-based legal services regulation, see Lesjak & Lesjak, above note 31 at 1205 and ntd *Justitia*

²³⁷ See <http://mrc.lsuc.on.ca/jsp/csp/index.jsp> and <https://justice.alberta.ca/initiatives/Initiatives%20Library/queenscounsel.aspx>

²³⁸ Trebilcock on input reg

²³⁹ Carlson, above note 13 at 300-1. For example, Kritzer studied the value offered by lawyers and non-lawyers in a series of tribunals, was able to conclude that "the presence or absence of formal legal training is less important than substantial experience with the setting." (ntd Herbert Kritzer, *Legal Advocacy : Lawyers and Nonlawyers at Work* (Ann Arbor: University of Michigan Press, 1998))

²⁴⁰ Hadfield 2016 at 244: "in 2011... the UK conducted the secret-shopper study of will-writing that I mentioned earlier." Ntd 25% failed to meet standard AND the wills produced by licensed solicitors no better than those produced by others. This led to regulatory rationalization: removal of licensing requirement

²⁴¹ Ntd Hadfield: law-bound

²⁴² Ntd <https://www.usitc.gov/publications/332/pub4682.pdf> at 105

²⁴³ In the corporate legal services market, "value-based billing" is often demanded by clients.²⁴⁴ Still, most fee arrangements labelled in this way (with the exception of the pure contingency fee) do not actually produce a fee proportionate to the value actually delivered by the firm. This is because the value delivered cannot yet be properly quantified in most cases.

However, empowerment is particularly pressing challenge for "one-shotter" and individual consumers of legal services. Individuals seeking legal help confront high search costs,²⁴⁵ it is often difficult for them to compare service-providers and make intelligent consumption choices among them.²⁴⁶ This is not only problematic in of itself, but also the source of larger problems. The difficulty of comparing and choosing confidently causes some people to exit the market, leaving legal needs unmet or trying (and often struggling) to meet them without professional assistance.²⁴⁷ If Bal (introduced at the outset of this article), who needs a will, cannot reach any firm conclusions about the level of value offered by the various will-drafting alternatives, he may simply go without a will. He might also simply pick the cheapest option, losing out on important quality attributes that he cannot detect, in today's information-poor marketplace.²⁴⁸

5.2.4 The Role of Regulators

There is unmet consumer demand for better information about legal service value. Directories such as Lexpert and referral shops such as Avvo.com might better meet this unmet demand by using the value metrics described in this paper.²⁴⁹ Private sector accreditations, including law-specific marks as generalist ones like ISO 9001, allow firms to send reliable quality signals to consumers.²⁵⁰ However, private sector ventures cannot compel firms to participate or to divulge data. Moreover, they depend on law firms for revenue, casting doubt on their capacity to measure value neutrally.

Thus, legal services regulators have a key role in measuring legal service value, not only to improve regulation of firms but also to inform consumers. It is by now a cliché to say that

²⁴³ Moorhead, "Judging on Results?" above note 15 applied quality criteria to legal aid ; Sandefur, "Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact," *supra* note at 924; ntd Kritzer 1998. Regarding "franchising" as a way for legal aid authorities to formally prefer law firms that demonstrate strong value, see Giddings, 1996 #6386} at 68; Paterson, *Professional Competence in Legal Services*, above note 15 at 8.

²⁴⁴ Ani Krikorian, "Billing Outside the Box" (2014) 27 *Geo. J. Legal Ethics* 655 at 665-6; Brooke MacKenzie, "Better Value: Problems with the Billable Hour and the Viability of Value-Based Billing" (2011) 90 *Can. B. Rev.* 675.

²⁴⁵ Semple, online: .

²⁴⁶ Useful quality information helps consumers evaluate the extent to which different options available in a market would support their heterogeneous interests: Joseph Alba *et al.*, "Interactive Home Shopping: Consumer, Retailer, and Manufacturer Incentives to Participate in Electronic Marketplaces" (1997) 61 *Journal of Marketing* 38 at 43.

²⁴⁷ See Malcolm Mercer, "Access to Justice and Market Failure (Slaw.Ca, Nov. 1 2016)" (2016) : "What is interesting is the possibility that the access to justice gap may be, if only in part, explained by market failure arising from continuing information asymmetry despite minimum standards."

²⁴⁸ Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap (Slaw, December 13th 2016)," *supra* note: " if the public feels that it can't accurately assess the quality of legal services, there is a risk that people won't retain lawyers or, at the very least, people may feel compelled to hire those practitioners who charge lower rates even if they provide inferior services."

²⁴⁹ See note 11 and accompanying text, above.

²⁵⁰ Salyzyn, "Transparency Can Be Tricky: Questions About Solving the Lawyer Quality Information Gap (Slaw, December 13th 2016)," *supra* note; Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note at 70.

regulators must pursue the public interest, as opposed to the interests of legal services providers.²⁵¹ The consumer interest is the largest part of the public interest. Most consumers do not receive state-funded legal services; they must rely on the market to meet their needs. It follows that regulators cannot discharge their public interest mandate unless they attend to the health of the legal service market.²⁵²

The North American legal service market for individuals with "personal plight" (dispute-related) legal needs is afflicted by high search costs and information scarcity.²⁵³ It is difficult and time-consuming to identify an acceptable firm willing to take one's case. Those who do undertake this search find a dearth of the price and quality information necessary to make a well-informed consumer decision.²⁵⁴

Better measurement of legal service value is a response to both of these problems, and regulators have the impartiality and the authority to climb this steep path. They are also uniquely positioned to communicate this value data to consumers. In England & Wales, the Solicitors' Regulation Authority, spurred on by the Competition & Markets Authority,²⁵⁵ is moving toward compelling much broader disclosure of information from law firms about price and quality.²⁵⁶ The Law Society in that jurisdiction has invested in Lexcel, a voluntary standard based on internal metrics to identify firms which adhere to best practices.²⁵⁷

In a consumers' paradise, regulators would ensure the same easy access to comprehensive and accurate price and quality information about legal services that is currently available about goods or packaged vacations online. This vision may never be completely realized, due to the complexities and challenges of legal service valuation identified in this article. Self-regulators such as Canada's law societies and the USA's bar associations may find it politically impossible to subject their constituents to this level of scrutiny and increased competition.

Nevertheless, there are several concrete steps that North American regulators can take to improve legal service valuation by applying this article's framework. Many regulators already certify some firms or practitioners as superior, through designations such as Certified Specialist or Queen's Counsel.²⁵⁸ Selection processes for these honours should take into account all four dimensions of value (including affordability and client experience), and should consult clients in doing so. Non-profit referral services operated or supported by regulators may impose selection criteria to ensure that only high-value firms are included.²⁵⁹ Regulators could require legal

²⁵¹ Semple, *Justitia's Legions*, above note 3 at 18-21.

²⁵² Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2014) 38 *International Review of Law and Economics* 43 at 243-5; Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective" in Trevor Farrow & Les Jacobs eds., *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, forthcoming 2018) <https://ssrn.com/abstract=2959477> (last accessed: 3 June 2016).

²⁵³ Semple, online: .

²⁵⁴ *Ibid.*

²⁵⁵ Competition & Markets Authority (UK), "Legal Services Market Study: Final Report," *supra* note .

²⁵⁶ Solicitors Regulation Authority (England and Wales), "Greater Price Transparency Would Help People Make Better Choices About Legal Services (25 January 2018),".

²⁵⁷ Note 178, above, and accompanying text.

²⁵⁸ See e.g. Justice and Solicitor General (Alberta), "Queen's Counsel Appointments,".

²⁵⁹ New York's Lawyer Referral Service is a good example. In order to be included in this directory, a firm must submit an application. Applications are reviewed by legally-trained staff, background research is conducted, and applicants are interviewed. In order to be referred some types of cases, a practitioner must demonstrate that he or she meets pre-defined experience and education thresholds. Information is also sought from clients of the applicant

professionals who bill by the hour to disclose their hourly rates on firm websites,²⁶⁰ or even make such information available in regulators' public directories and as downloadable data files.²⁶¹

5.3 Conclusion

This article has sought to lay a theoretical and methodological foundation for measuring legal service value. In this model, value has four distinct elements: effectiveness, affordability, client experience, and third party effects. For data about how much value a given firm provides in each of these domains, one must attend to both client and non-client sources. An array of metrics should be used, with the composition of the array depending on the legal niche in question. Value metrics can be classified according to methodology. Output metrics are ideal in principle but often methodologically fraught. Internal metrics and input metrics are also available. Measuring legal service value is difficult, and even dangerous. Nevertheless, this steep path is worth climbing. A better understanding of legal service value will give us legal services that are more successful and better regulated, and services that better fulfill their essential role in our society and economy.

firms. See Allen Charne, "New York's Lawyer Referral Service" in Samuel Estreicher & Joy Radice eds., *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) and ntd <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=70680>

²⁶⁰ A recent report from a Law Society of Upper Canada committee proposed requiring contingency firms to do so. CHECK Law Society of Upper Canada Advertising & Fee Arrangements Issues Working Group, *Fifth Report* (Toronto: LSUC, 2017) < 184: re requiring disclosure of standard rates on licensee websites.

²⁶¹ Solicitors Regulation Authority (England and Wales), "Information Proposals Should Benefit Public and Law Firms (27 September 2017),".