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Abstract: Much of the American conversation about access to justice focuses on regulatory barriers to new forms of service delivery and treats regulatory resistance as the primary problem to be solved. Meanwhile, obstacles to consumer awareness and engagement have received less attention. This essay reverses the order of analysis and considers strategies for expanding access first from a marketing perspective. What models of legal assistance have been most successful in building consumer awareness and trust? To what extent can successful marketing help to sidestep or overcome regulatory resistance? And what are the implications for reformers interested in expanding access to justice?

The legal market in the United States is increasingly tilted toward large, corporate clients and away from individuals. Data from the U.S. Census Bureau's 2017 Economic Census show a 10 percent drop from 2007 to 2012 in law firm receipts from individual clients – the so-called PeopleLaw sector – even as total law firm receipts increased.¹ Since the late 1980s, consumer spending on legal services has declined significantly relative to consumer spending on other goods and services, including other professional services.² Currently, most people go it alone in handling civil legal problems and disputes.³

Within the legal profession, the conversation about access to justice often focuses on regulatory barriers to new forms of service delivery, in particular lawyers' monopoly over the practice of law and the profession's continued resistance to non-lawyer ownership and investment in legal services. While other Anglo-American jurisdictions, such as Australia and the United Kingdom, have opened their legal markets to nonlawyer providers and investors, the United States remains bound to a state-based, court-centered system of professional self-regulation in which new models for service delivery have met sustained and, historically,

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successful resistance from the organized bar. State bar associations, backed by state courts, have used unauthorized practice of law (UPL) statutes and other anticompetitive regulation to challenge the activities of paraprofessionals, self-help legal software publishers, and other nonlawyer providers of legal information and services, as well as lawyers' own efforts to market their services through online networks and platforms.

Yet while regulatory resistance has been persistent and important in structuring the U.S. legal market, focusing on anticompetitive regulation and other supply-side barriers to access emphasizes supply-side strategies for reform: for instance, civil right-to-counsel and pro bono initiatives to increase access to lawyers; state licensing and local regulatory initiatives to increase access to paraprofessionals and limited scope legal services; and technology initiatives to increase online and mobile access to legal information and services. These efforts undoubtedly have improved access to some types of legal assistance in some contexts, but supply-side initiatives can go only so far in addressing information failure and consumer habits in the use – and nonuse – of legal resources.

Consider Washington State's limited licensing initiative. In 2012, the Washington State Supreme Court authorized the licensing of a new category of independent paraprofessionals, limited license legal technicians (LLLTs), to provide limited-scope legal assistance to individuals in family court, such as information about court procedures and help filling out forms. The initiative was the product of a hard-fought, twelve-year campaign to amend state court rules to allow paralegals to provide limited legal advice without lawyer supervision, with the aim of lowering the cost of legal assistance, initially in family law matters.

The economic viability of the model was a concern from the start, since many of the barriers to low-cost assistance from lawyers are also present for paraprofessionals. The proponents' goal, however, was to "get a rule through."⁴ By winning the profession's approval for limited advising in the family law context, they hoped that the model could be expanded gradually to include additional services in additional areas, and perhaps additional business models through further regulatory change. Proponents also envisioned a training partnership with American Bar Association–approved law schools, which could be a mechanism for scaling the program and spreading the LLLT model to other states.

Yet the LLLT initiative appears to be foundering. The initial cohorts of LLLT candidates were smaller than expected, making specialized training costly to provide. Two of the state's three law schools have declined to offer training, citing financial constraints, and the third is offering training at a loss, which is unsustainable. The regulatory costs for the LLLT board and the Washington State Bar Association also have been substantial, with a breakeven point five to seven years away. Meanwhile, LLLTs are struggling to develop viable family law practices. Only a handful of LLLTs work full-time as independent practitioners; instead, most practice part time out of law firms, while also working as traditional paralegals. Many report difficulties in standardizing and pricing their services, and thus fall back on hourly rates around or above those of paralegals. Most are unable to attract enough clients to run a viable business even though "the evidence for a sufficient pool of potential clients is strong."⁵

Regulatory barriers undeniably are part of the problem. Though Washington

amended its rules to allow for limited licensing, it continues to ban nonlawyer investment in legal services, which could benefit LLLTs as well as lawyers aiming to provide limited scope legal services. If such barriers fall, the LLLT model could be scaled up considerably. In addition, however, LLLTs have a marketing problem. The LLLT model is not well known or understood by the public; it is difficult for potential clients to discover what “LLLTs” are or when it might make sense to use them. Even clients who use LLLTs report confusion about what services they offer and the boundaries of the LLLT role. A preliminary evaluation of the LLLT program concludes that “effective marketing is perhaps the critical link for business success at this point.”⁶

Effective marketing is the critical issue for many forms of legal assistance, even in the absence of regulatory barriers. Many people with civil justice problems do not recognize their problems as “legal,” even when those problems raise clear legal issues and have legal remedies.⁷ Most people with civil legal problems never consider using a lawyer, but rather rely on their own understanding and support networks to deal with the problem, or do nothing, even when the potential stakes are high.⁸ Many people forgo available legal assistance even when it is free.⁹

People’s lack of awareness and engagement with potential legal resources is compounded by the enormous variety of small-scale models for legal assistance in different locations. A 2017 review of civil legal aid in the United States describes one pilot project after another, but few mechanisms for national coordination or branding.¹⁰ Even national and federal initiatives might be rebranded at the state or local level. Many of the resources available to people who face common legal problems are not determined by the nature of the problem but rather by “where

they happen to live,”¹¹ and are not easy to discover.

Online, too, there is a “crucial disconnect between the resources available for accessing the justice system and their use by the public.”¹² Although there is no shortage of designers and marketers promising to drive traffic to law firm websites, most people are not interested in law firm websites. Studies show that even young people who have used the Internet all their lives have trouble finding usable legal information online.¹³ And while mobile technology has enormous potential to increase access to legal assistance, efforts to market access-to-justice apps are underdeveloped, leaving many potentially valuable apps all dressed up with nowhere to go. Of twenty access-to-justice apps featured in a 2015 article, nearly half are currently unavailable on the App Store or Google Play, or have had no downloads over the past year.¹⁴ Supplying resources is, at best, half the battle.

Rather than fighting the bar to open the market to new suppliers, reformers should focus on attracting and mobilizing consumers to win over the bar. Demand creation has been an essential component of successful entry into both corporate and consumer legal markets. In the consumer sector, companies such as LegalZoom and Avvo have gone to market without asking permission and have successfully fought state bar resistance, or maneuvered around it.

LegalZoom began in 2001 as an online provider of legal documents, fighting and settling state-by-state unauthorized practice of law challenges along the way. In 2010, it expanded its business model to include subscription-based legal service plans, drawing on a branded network of independent lawyers who use LegalZoom as a marketing platform. In 2014, LegalZoom joined the Federal Trade

Commission in calling for increased antitrust scrutiny of professional licensing boards, resulting in a Supreme Court antitrust ruling that effectively quieted UPL challenges to LegalZoom's business model at the national level.¹⁵ By 2015, LegalZoom was among the most widely recognized legal brands in the United States, despite continuing regulatory restrictions on its ability to deliver legal services directly. In the words of one observer, "With respect to LegalZoom, the train has left the station. . . . They've got a couple million satisfied customers and it's going to be really hard for anyone to shut them down."¹⁶

Likewise, Avvo began in 2007 as an online lawyer directory and ratings platform, scraping data from public sources to generate profiles of lawyers; it then invited lawyers to claim and enhance their profiles as a marketing tool. State bar associations blustered and took steps to regulate lawyers' participation, and Avvo faced several early lawsuits from lawyers objecting to their ratings, but Avvo successfully defended their ratings platform on First Amendment grounds. In January 2018, Avvo entered a deal to be acquired by Internet Brands, the parent company of WebMD and the Martindale-Nolo Legal Marketing Network. "Scale . . . is really everything," explained Marc Britton, then-CEO of Avvo.¹⁷ Avvo is competing with Google to be the go-to site for people who are searching for lawyers.

Access to capital helps fuel these innovations. Because they do not deliver legal services directly, LegalZoom and Avvo are not subject to professional restrictions on nonlawyer investment, and they have benefited from venture capital funding that is unavailable to traditional law firms. This money means that they can finance state-by-state litigation and national marketing campaigns. LegalZoom and Avvo each spent more

than \$10 million on television advertising in 2015.

Yet even within current professional rules, there are opportunities for traditional law firms to improve marketing and outreach for their own benefit as well as for consumers'. And the external regulatory environment is changing, owing in part to pushback from alternative providers such as LegalZoom. The regulatory battle is a red herring. Marketing matters whatever the contours of professional regulation. The dog is about to catch the car. Time to focus on what comes next.

Providers should market targeted solutions to problems as understood by consumers, rather than selling themselves as providers of generalized "legal" services. Marketing "solutions" for corporations' problems is all the rage in the corporate legal market. But problem-focused marketing is also proving effective, and scalable, in the consumer market. For instance, mobile apps and websites providing a convenient response to parking tickets and traffic citations are gaining traction. Fixed was a California startup founded in 2013 that allowed users to dispute parking tickets simply by uploading a photo of the ticket. The cost to the consumer was twenty-five percent of the ticket if the dispute was successful; otherwise, the user paid nothing. The app generated so much demand that city agencies fought to shut it down, ultimately commissioning a technical block to prevent Fixed from accessing city parking ticket websites. Fixed responded by altering its business model to focus on moving violations and, in 2016, was acquired by Lawgix, a multistate law firm that uses Fixed as a front-end interface to "onboard new clients."¹⁸ Off the Record, a Seattle startup operating in eighteen states, uses a similar interface as a referral platform for ticket defense lawyers and advertises a 97 percent success rate.

The private bar resists the commoditization of legal services, which leads to price competition and arguably drives down quality. Off the Record's fees for San Francisco lawyers ranged from \$195 to \$1,100 when the company started in 2015 but, by 2017, had dropped to an average of \$200 to \$250. Among lawyers, mass marketing originally was the project of consumer "legal clinics" that, in 1977, sued for the right to advertise fixed-price legal services such as wills, name changes, and uncontested divorce.¹⁹ By most accounts, the clinics were successful in stimulating consumer demand, but, by the early 1990s, most firms had abandoned the clinic model, hampered by low profits and increasing price competition. Since then, direct legal marketing has been overwhelmingly dominated by personal injury lawyers, who spend an estimated \$1.5 billion per year on highly targeted advertising, and have proven resistant to price competition in the contingent fee context.²⁰ Most ads focus on differentiating firms from their rivals based on quality ("MAXIMUM RECOVERY!") rather than stimulating demand.²¹ Like LegalZoom and Avvo, the biggest advertisers are nationally branded, highly capitalized firms, such as Sokolove Law, that serve as marketing platforms for local providers. Many of the original legal clinics, such as Jacoby and Meyers, have rebranded as personal injury firms.

Notwithstanding the bar's resistance, however, increasing commoditization is coming to the consumer legal market. TIKD, a Florida startup that fights traffic tickets, is engaged in a likely groundbreaking battle with the Florida Bar, which is seeking an injunction against TIKD for the unauthorized practice of law. TIKD has countered with an \$11.5 million antitrust lawsuit that looks like a clear winner under the Supreme Court's recent antitrust ruling. Notably, the De-

partment of Justice has filed a statement of interest on TIKD's behalf, stating that disruption to "business models entrenched for decades . . . almost invariably" benefits consumers.²²

The challenge for the bar will be to expand beyond defining new categories of service, such as limited licensing and limited scope representation, which do not correlate with specific tasks and are difficult for consumers to understand. Lawyers must design standardized products and services targeted to consumers' discrete legal needs. They will need to invest in research on individual legal needs, identifying areas in which consumers currently forgo potentially valuable legal action. They will need to design service menus based on research about price sensitivity, as well as demographic and other sources of market segmentation. Lawyers will need to identify where provider quality is marketable to consumers, and where it should be regulated to protect them. For the private bar, the long game in both market and regulatory battles depends on credible quality claims. The bar has enormous incentives to invest in quality assessment research.

To mobilize public demand, lawyers must make a business case to consumers and to related service providers, such as health care providers, state and local governments, and court administrators. Cost-benefit arguments for legal assistance are proving successful in the non-profit sector. For instance, medical-legal partnerships integrate civil legal assistance into health care teams to address underlying, health-harming legal needs, such as poor housing, consumer debt, and barriers to eligibility for public benefits. The National Center for Medical Legal Partnerships promotes the medical-legal partnership model in part by emphasizing the economic returns to providers,

such as the benefits to hospitals from the resolution of denied benefit claims. As of 2018, medical-legal partnerships have been established in 373 health organizations in forty-seven states. In September 2011, the Department of Veterans Affairs (VA) issued a directive encouraging VA Medical Centers to make space available for legal service providers, and research analyzing the impact of VA medical-legal partnerships is ongoing. Proponents note that “Congress would only need to appropriate half of one percent (.5%) of the VA’s healthcare spending to exceed federal funding of the Legal Services Corporation.”²³

Another project, Justice in Government, promotes the inclusion of legal assistance in state government programs to “ensure maximum benefit from dollars spent on low- and moderate-income people and communities.”²⁴ Legal assistance can be shown to provide a positive return on investment in areas such as eviction defense, criminal record-clearing for job-seekers, and legal intervention on behalf of domestic violence victims. This evidence-based, economic pitch for “good government” is distinct from the normative pitch for “access to justice,” and can help drive policy change. In 2017, New York City passed a law guaranteeing a right to counsel for every tenant facing eviction, after proponents commissioned a cost-benefit analysis showing that the costs of providing counsel were lower than the costs of homelessness and its consequences, such as job loss and juvenile justice costs.

Marketing legal assistance requires a political strategy and efforts to improve and coordinate political messaging. The American legal profession is facing profound – some would say existential – challenges regarding the value of lawyers’ services and the justifications for anti-

competitive regulation.²⁵ Corporate clients are voting with their feet, making increasing use of alternative providers for work previously performed by large law firms. Individual clients are scarce on the ground and many solo and small law firms are struggling. Public funding for legal assistance and court administration is low. Law school enrollment is at its lowest point in more than forty years.

These challenges require lawyers to rethink their marketing in the broadest sense of the term. This project will require bar leadership, planning, and attention to public messaging. Bar associations must free themselves from capture by incumbents focused on their own short-term revenues and look for sustainable ways to improve the value of legal services for clients and consumers. They must build their capacity for industry research, and engage with scholarly research, to promote new forms of assistance without sacrificing consumer protection. Lawyers must educate themselves, their legislatures, and the public about the economic and normative value of civil legal assistance and its importance for the rule of law in civil society. These efforts are in the profession’s self-interest and they are an integral part of its duty to the public.

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