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COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE

The Downside of Disruption: The Risks Associated with Transformational Change in the Delivery of Legal Services

Raymond H. Brescia¹

Change is coming to the legal profession. New forms of communicating, researching, advertising, finding clients, serving clients, and preparing documents are transforming the way legal services are delivered in the 21st century.² The advent of new technologies, like the internet, machine learning, and mobile communications have put the legal profession on the cusp of what business theorist Clayton Christensen calls “disruptive innovation”: transformative shifts in a market for a product or service that threaten the business models, and even the very existence, of incumbent actors within that market.³ In the legal profession, these technology-enabled changes are streamlining all aspects of the delivery of legal services. They are changing the ways that lawyers identify, market to, and secure clients; conduct legal research; prepare court documents; compile and review discovery; collaborate with other lawyers, clients and experts; and prepare contracts, patent applications and other legal documents. In short, the evolution of the legal profession in the United States is entering a phase where we will see greater digitization, commoditization, and atomization of legal services that will result in a streamlining of such services in ways that make it more efficient and less costly. This streamlining holds out the promise that all aspects of the lawyer’s role can be made easier and more affordable to more consumers. But it is not without its risks.

For some lawyers and law firms, the disruption of the current model of legal services delivery means that they will be forced to change the way they provide services or risk the loss of customers and income. For others, those who adapt to the new legal landscape, they will likely thrive, only if they are able to utilize technology to change the way they do business, lower the costs of the services they provide, and find new clients to make up for the loss of revenue that will likely accompany new methods of service provision. Richard Susskind has discussed the fate of the legal profession in its current form and declared the still evolving disruption in the legal profession as the “End of Lawyers.”⁴ Others are not so sure.⁵ Even Susskind plots out what he anticipates to be the new roles that lawyers will assume in a newly-enhanced, digitally-enabled legal landscape, and still finds a range of functions lawyers can fill in this new landscape, even if they are different from those they fill today.⁶

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² For an overview of some of these changes, see Raymond H. Brescia *et al.*, *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553 (2015) (hereinafter “Embracing Disruption”).

³ CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997).

⁴ RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

⁵ Susskind is not without his detractors. See, e.g., Paul F. Kirgis, *The Knowledge Guild: The Legal Profession in an Age of Technological Change*, 11 NEV. L. J. 184 (Fall 2010) (arguing that technological change in the delivery of legal services that makes it easier to access and less expensive, coupled with increased complexity and heterogeneity in society, may increase the demand for legal services generally not reduce it).

⁶ RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

Disruption and the “Low” End of the Legal Services Market

Most will agree that while the changes to incumbent firms in the legal services market as we currently know it may be dramatic, the potential benefits to the consumer and prospective consumer of legal services are also significant. Indeed, the streamlining of services likely means that significant cost savings can be passed on to the consumer. In a legal market where eighty percent of the legal needs of low-income Americans and half of the legal needs of middle-income Americans remain unaddressed,⁷ mostly because those with such needs cannot afford an attorney, any disruption to the cost of legal services will likely inure to the benefit of those who cannot otherwise afford an attorney, as streamlined—and less expensive—services will be closer to the reach to a broader segment of society.

But this disruption, what Schumpeter called “creative destruction”—is both creative and destructive.⁸ It will not be without its costs. The costs to the legal profession could be significant. While some may argue that the technology-enabled innovations in the provision of legal services could mean there will be less of a need for lawyers, I believe the significant “justice gap” – the fact that a significant number of Americans face their legal problems without a lawyer simply because they cannot afford one -- means there is plenty of work to go around, provided the price is right. Once the cost of services, scope of services, need for services, and ability of prospective clients to pay for services all meet on a particular price point, there could be a significant increase in customer demand for legal services, and a greater demand for lawyers to meet that need.

For many lamenting the advent of disruption in the legal services field, they turn to the impact of new technological innovations, and the social innovations they spur (like the ability to outsource document review), on large, incumbent law firms, instead of turning to where true disruptive innovation tends to appear. According to Christensen, true disruption in a market occurs at the lower ends of that market, where incumbent goods and services are both out of reach of that end of the market, but where those goods and services have features that exceed the need.⁹ Indeed, few consumers of legal services would choose to pay tens of thousands of dollars to defend themselves in a traffic violation action, yet if they were paying a high-end lawyer his or her hourly rate to represent the client, that is what the services would cost.

If we take this view of the legal profession, and look at the low end of the market to identify opportunities for true disruptive innovation, it is in the provision of services to low- and moderate-income communities where this type of innovation will unfold. As Christensen and his co-authors recently reiterated in an article for the Harvard Business Review, the theory of disruptive innovation looks for change first in the lower ends of a given market, not in the wealthier and more expensive corner of the market.¹⁰

If this is the case—that true disruptive innovation will occur where legal services are crafted to meet the needs of low- and moderate-income Americans, what are the prospective benefits that can accrue to such communities by the provision of streamlined, efficient, and less costly services? Perhaps equally important, what are the potential downsides of such innovation?

⁷ Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

⁸ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 83 (3d ed. 1962).

⁹ CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* 16 (2011 ed.) (noting that disruptive innovation begins at the lower end of a given market and slowly works its way into the mainstream, displacing incumbents).

¹⁰ Clayton Christensen *et al.*, *What is Disruptive Innovation?*, HARV. BUS. REV. 44 (December 2015).

The Upside of Disruption

It goes without saying that the potential benefits of expanded access to justice for low- and moderate-income Americans are too many to mention. Should new forms of legal services delivery truly expand access to justice, families who receive representation in housing court will have assistance avoiding homelessness. Individuals seeking Veterans Administration benefits will obtain health care, educational assistance, and counseling. Families fleeing intimate partner violence will find safety, housing, and assistance with any immigration issues they may face as a result of the violence they face. Workers will have assistance obtaining unemployment or workers compensation benefits. Families will avoid mortgage foreclosure. The benefits are legion. But in addition to the concrete and real benefits that will accrue to these individuals and families, a society that prides itself on the notion of “Equal Justice Under Law,” will be able to come closer to meeting that promise by ensuring that no one will have to face their legal problems without adequate legal representation.

The practical and societal benefits of greater access to justice that might come about should legal services become affordable for those who pay for their own services, or more accessible for those who still cannot, because the providers of free legal services to the indigent can meet more of the need for such services because the funding dollars go farther, are significant. However, what are the risks associated with this technology-enabled approach to the provision of legal services? The remainder of this essay attempts to identify those risks and assess their import, and whether they stand as barriers to a new access to justice paradigm made possible by disruptive innovation in the delivery of legal services.

The Downside of Disruption

Putting aside the fact that technology-enabled changes to the legal profession could mean significant disruption (for lack of a better term) of the incomes, job prospects, and plans of lawyers currently serving in incumbent firms, those in law school today, and those who still wish to attend law school in the near future, this essay will focus on some of the downside risk of disruptive innovation in the provision of legal services as it might impact low- and moderate-income consumers (and potential consumers) of legal services.

Will disruption really bring about greater access to justice on the lower end of the legal services market?

It is quite possible that Christensen’s model of disruptive innovation—where true disruption occurs at the lower end of the market and works its way up, eventually taking significant market share from incumbents until they completely displace those incumbents—will not happen in the legal services market. At present, while there are outliers, groups like Pro Bono Net, the national LawHelp network, CrowdDefend, and others that are looking to technology to help close the justice gap,¹¹ most of the innovations in the delivery of legal services are targeted towards a wealthier clientele, or are being marketed directly to lawyers, not clients. While some websites are offering matchmaking services like LawDingo and Avvo, which make finding a lawyer easier, a group like LegalZoom appears to be the closest thing to a provider of legal services that is trying

¹¹ Naree Chan, *Can Technology Help the Middle Class Close the Justice Gap?*, JURIST, Dec. 12, 2015, <http://jurist.org/professional/2015/12/naree-chan-justice-gap.php>.

to offer an affordable alternative to the lower end and middle of the market for legal services. But the services they offer are limited in nature. The LegalZoom interface is using what some might call a “one-size-fits-all” approach with much of the services it provides, and when one looks at the types of issues LegalZoom handles, it is hard to find assistance—let alone representation—in the types of cases that are most pressing for low- and moderate-income individuals and families, like evictions and foreclosures or veterans’ benefits.¹² While there are certainly low- and moderate-income individuals who need a provisional patent, one of the services offered through LegalZoom, such a need is not high on many low-income individuals’ hierarchy of legal needs. If providers of disruptive legal services do not focus on the legal needs of low- and moderate-income individuals and families, such disruption will have little effect on closing the justice gap and improving access to justice in the fields where it is most needed.

Are disruptive services truly competent and effective legal services?

While the advent of technology-enabled services seems to serve as a harbinger of radical change in the provision of legal services, a question remains: are such services truly competent and effective? Indeed, are they legal services at all? A quick review of the LegalZoom website offers a disclaimer (one that has been litigated over in many states), that says quite clearly that the information provided over the LegalZoom website, which offers a range of services, from brief advice and information to model forms one can fill out, are not, in fact, legal services.¹³ Closing the justice gap can only come about by the provision of legal services. And it is only the provision of legal services that is subject to the types of quality control that comes about through adherence to the ethical rules that govern attorney behavior and the ethics machinery—from bar associations to judicial panels on ethics and the courts—that oversees it. While some may argue that the availability of technology-enabled services, where the alternative is no services whatsoever because of a lack of access to justice, could be better than nothing, that is not the case when the services rendered are so bad that a client-customer is worse off than she would have been without the assistance.

The first thing to ensure that the services rendered meet the standards of competence and zeal required of lawyers under their ethical obligations to their clients is to monitor the provision of these new, technology-enabled services for their compliance with such ethical obligations. And for that to start these technology-enabled services will have to make it clear to their customers whether they are holding themselves out as lawyers or not. If they are, they must comply with their ethical obligations as attorneys. If they are not, they should make it clear to their customers the role they are filling, and what, if any, consumer protections are available to the customer. Again, a customer of such services could be made worse off by misguided, uninformed and incompetent advice that places his or her legal rights in jeopardy. If one wins the trust of a customer and that customer places that trust in the service provider, that provider should be trustworthy and competent in the services he or she is rendering.

¹² www.legalzoom.com (website offers a wide array of legal services for consumers to utilize).

¹³ The LegalZoom disclaimer provides as follows:

Disclaimer: Communications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege or as work product. LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies. Your access to the website is subject to our Terms of Use.

Disclaimer, LEGALZOOM, <http://www.legalzoom.com> (last visited May 15, 2016). For an overview of the litigation regarding LegalZoom with respect to whether the business is engaged in the unauthorized practice of law, see *Embracing Disruption*, *supra* note 2, at 583-585.

Will technology-enabled services miss those without access to technology?

In a digitized legal profession, some consumers will first seek information from the on-line and mobile portals that might offer them legal insights and guidance and they will then end their search for answers instead of seeking out further assistance of an attorney; they will then turn to their legal problems armed with the information and guidance they obtained in their search. Others will fill out an on-line questionnaire and perhaps obtain a pre-packaged form or pleading that they will use to attempt to address their legal dispute on their own. Still others will seek brief advice and assistance, perhaps speaking to an attorney or legal “navigator” who will provide some level of guidance. Finally, some will rely on direct, so-called “bespoke” services or individually tailored legal services, paying a premium for the privilege.

The extent to which the consumer feels she can address the presenting legal problem through the level of service she accesses will, to a certain degree, drive the selection of the approach the consumer takes. What is more likely, however, is that the consumer’s ability to afford a particular level of service will likely drive the decision to select among the particular options available. In other words, resources, not need, will still dictate the consumer’s decision, just as they do today. Does that mean the promise of access to justice will still come down to resources and income?

Apart from the direct impact of resources on access to justice, even when legal services are more affordable, other resource barriers to the availability of legal services, even ones that are technology enabled, will still exist. While concerns over the so-called “digital divide” have diminished over recent years, and more and more low- and moderate-income consumers have access to the internet and mobile technology in the form of smart phones, if technology is going to be the new avenue through which the justice gap is to be addressed, one cannot overlook the fact that there are still parts of the country and communities where access to broadband and cellular services is either non-existent or unreliable.¹⁴ Technology-enabled services are only an effective means of meeting the promise of access to *justice* if individuals and families of low- and moderate-income communities have access to the *technology* that makes such access to justice possible. Expanding access to justice through technology will thus require a concomitant increase in access to technology. Since the Great Recession, the federal government has taken steps to address the digital divide and to support state and local government efforts to do so as well. In early 2009, as part of the federal stimulus package, Congress adopted measures designed to expand digital access.¹⁵ As a part of that effort, the Federal Communications Commission issued a report, in 2010, outlining specific steps for doing so.¹⁶ While a discussion of the specific strategies for closing the digital divide are beyond the scope of this essay, any expansion of the use of technology to promote access to justice will necessarily require concomitant actions that also expand access to that technology.

¹⁴ For a description of the present state of digital access, see THE WHITE HOUSE, COUNCIL ON ECONOMIC ADVISORS ISSUE BRIEF, MAPPING THE DIGITAL DIVIDE (July 2015), https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.

¹⁵ American Recovery and Reinvestment Act of 2009, 47 U.S.C. § 1305 (describing goals and purposes of the Broadband Technology Opportunities Program).

¹⁶ FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN xi (2010), available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

Will technology-enabled “triage” of clients miss important legal issues?

Part of the promise of technology-enabled services is the triage function that internet and mobile interfaces can serve. Such services can help to screen cases that are appropriate for a one-size-fits-all approach and direct them to the appropriate level of service within the legal services institution. This sort of triage occurs in legal services offices and for-profit firms every day. But such services can be labor intensive, and must be managed by someone versed in the range of issues the office handles so he or she can appropriately direct the client to the right place within the organization, or make a referral outside the organization. Technology holds out the promise that this sort of triaging can be done without the intervention of a live person, through virtual interviews, questionnaires, surveys and other means. But a virtual “interview” conducted via a questionnaire or survey can be filled out wrong by the consumer, or the interface can ask the wrong questions and can miss important issues affecting the client. Whether it is a misstep of the client in navigating a triage portal, a poorly framed question, or a survey that does not anticipate every possible permutation of every possible case, it is possible that critical facts will be missed and the triage service will go awry, missing important points or directing a customer to information or services that are not helpful, or, worse, harmful. Under the lawyer’s ethical obligations to the client, the failure to flag important legal issues, or to fail to advise the client on legal issues beyond the scope of the representation about which the client should be made aware, can be cause for a finding of malpractice and/or breach of fiduciary duty.¹⁷ While it is certainly possible for a technology-enabled interface to anticipate every potential minefield and pitfall a customer may face, time will tell whether triage is an area where machines can function at least as well as, if not better than, humans.

Will disruptively innovative, yet digitized, commoditized and atomized services allow for systemic change or undercut opportunities for collective action?

Returning to the potential service delivery landscape—where clients access services along a continuum, from accessing services from a website to full representation—it is likely that many prospective customers will find themselves treated in a vacuum, so to speak, where they cannot connect to other individuals facing similar problems. This atomization may have profound effects on the ability of consumers to collaborate together to advance social change. In fact, the availability of digitized services, which can be accessed by the click of a mouse or through a swipe on a smart phone, could lead to a weakening of the possibility of collective action. If a consumer can find some degree of assistance, no matter how shallow, will it lead her to forego opportunities to work together with other consumers in collective action or to engage in broader mobilization? This is, of course, the classic tension between political organizing and the provision of direct services that has arisen in debates around the right approach to the delivery of legal services.¹⁸ Will a digitized, atomized approach to the provision of legal services tilt the balance, placing opportunities for mass mobilization beyond the reach of legal services providers?

Perhaps, but it does not have to be that way. With the possibilities unlocked by the tools of Big Data, providers of legal services—even in their digitized, atomized form—can use information gleaned from consumer complaints and the issues that arise in communications with prospective

¹⁷ See, e.g., *Nichols v. Keller*, 15 Cal.App.4th 1672 (5th Dist. Cal. 1993) (finding failure to advise on potential third-party claims in workers compensation representation constitutes malpractice). In the criminal context, see *Padilla v. Kentucky*, 559 U.S. 356 (2009) (finding failure to advise client on the immigration effects of criminal convictions constitutes ineffective assistance of counsel).

¹⁸ See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS & THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 33-34 (1993) (describing some of the early tensions over service delivery as opposed to law reform or political mobilizations).

clients to seek out patterns of legal issues and identify opportunities for mass mobilization and broader legal action. Such an approach can use data analytics that seek to identify and then address common problems that call out for common solutions. Indeed, this is one of the potential promises of commoditization: that as patterns of legal issues begin to come into focus, astute, alert, and agile providers of legal services can mobilize a response that is efficient and effective. By having the ability to reach more consumers and have “antennae” seeking out patterns, it is possible that new modes of legal services delivery will identify more opportunities for collective legal responses, simply because more patterns will emerge from more communications with more consumers, made possible by a digital and easy-to-access customer interface.

By no means is such an outcome foregone, or even likely, but, legal services providers in a new era of legal services delivery should seek opportunities to apply new models of marketing, data collection, analysis and service delivery in ways that identify common problems. In turn, such common problems may call for a commoditized response, one that is more efficient than representing individual clients to address their individual—yet shared—problems. Indeed, if the commoditization of the delivery of legal services holds out any significant promise, particularly for access to justice, it is that the more often a problem presents itself, the more likely a legal services provider will develop expertise to address that problem and construct a method of responding to it that is more efficient, more effective, and less costly than alternative approaches.

To date, social justice advocates have not used data mining and “Big Data” analytics to advance social causes. The closest thing to such an approach is the way that these techniques have found their way into electoral campaigns.¹⁹ The delivery of legal services through a commoditized, high-volume approach will likely help generate data on trends, common problems, and legal and geographic “hot spots,” much the way large cities like New York City are relying on data from citizen complaints to isolate and address problem issues and areas.²⁰ Advocates can harness the information gleaned from contacts with clients to identify areas for systemic change; as similar patterns surface, targeted strategies can be deployed to address them. And with such problems coming in at such a high volume, advocates can deploy different tactics to try to solve them, see which ones are the most effective, and take them to scale.

Will devoting resources to technology-enabled and commoditized services divert funds from traditional legal services providers or call into question the need for the services they provide?

The last concern I will address here in terms of the potential downsides of disruption in the legal services industry is the possibility that devoting attention, and resources, to expanding access to justice through disruptive, digital, commoditized, and technology-enabled services will not just result in a decrease in funding for traditional legal services programs that presently help close the justice gap, but will generate calls to defund such programs because new models provide “just enough” justice. These are, of course, legitimate concerns. By providing some degree of services to low-income consumers (we will put aside moderate-income consumers because there is virtually no governmental or philanthropic support for such efforts at present), will this end up undermining efforts to provide full funding, or even funding at present levels, for traditional legal

¹⁹ On the evolving use of data analytics in political campaigns, see David Nickerson and Todd Rodgers, *Political Campaigns and Big Data*, 28 J. ECON. PERSPECTIVES 51 (Spring 2014).

²⁰ For a description of how New York City government is using big data to identify and address problems requiring city attention, see Alexander Howard, *How New York City Is Using Big Data to Serve Its Residents*, HUFFINGTON POST (Nov. 13, 2015), http://www.huffingtonpost.com/entry/how-new-york-city-is-using-big-data-to-serve-its-residents_56461423e4b08cda34887f1a.

services providers? Given the political forces historically aligned against funding for legal services for poor and marginalized communities, it is likely that they would look for any argument, and any opportunity, to reduce the resources available to such providers.

Yet, at present, low- and moderate-income consumers face their legal problems without the benefit of legal assistance at an alarming rate. It is hard to tell them they should continue to go without some legal assistance, regardless of the form, because some other, potential beneficiaries of legal services might lose the assistance they might receive if services are expanded and broadened to reach a larger segment of the population. This is the classic ethical conundrum. Should many go without so that some can continue to receive a higher degree of service? Assuming that it is indeed a risk that attention to providing a lower “level” of service, provided in a digitized, commoditized form, to many will undercut the more traditional services that some receive, it is appropriate to debate the likely effect such attention will have, and to grapple with the best outcome: some for many or more for a few. Such a debate is worth having, but it should not get in the way of some degree of experimentation, i.e., efforts that can help assess whether new modes of legal services delivery can help close the justice gap in meaningful ways, ways that might help meet the broader goal of access to justice.

Conclusion

The evolution of the American legal profession is likely about to embark on a new phase, one that will see new modes of service delivery that are technology-enabled, digitized, commoditized and atomized. This evolution holds out the promise that it might make legal services more affordable for moderate-income individuals and families and more obtainable for those of low income. The potential downsides, some of which are addressed here, are real, but they are also worth exploring, anticipating, discussing, and addressing. No fundamental shift in an industry and a profession is not without its risks. It is also possible that theorists like Christensen and Susskind are wrong: that disruptive innovation is not coming to the legal profession, and that the theory of disruption itself is not an accurate way to think about or look at sectoral change.²¹ Regardless of one’s views of Christensen’s theory of the ways in which disruptive innovation impacts markets, it is hard to argue with the idea that technology has transformed and is transforming the practice of law. What is more, those who can navigate these technological advances to make legal services more affordable will make great strides toward closing the justice gap.

The fundamental transformation of American journalism made possible by the internet and mobile technologies means both that the grip of traditional media has been weakened, while there has never been more access to information. Many can debate the benefits of this shift and whether it is better for the consumer of information and society in general. So, too, with the coming transformation of the legal profession. There are many risks, but there are also many potential benefits, like the possibility of improving access to justice in meaningful ways. Those interested in reducing the justice gap can manage change, or change can just happen, with unforeseen, and perhaps undesirable consequences. The more we discuss the risks associated with the change, the more we can address them, and this essay, and the essays in this volume, help to unleash, identify, explore, and assess appropriate ways to manage and harness change in beneficial ways that can improve and enhance access to justice for all Americans. •

²¹ For a critique of Christensen’s theories of disruptive innovation, see Jill Lepore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, THE NEW YORKER, June 23, 2014, <http://www.newyorker.com/magazine/2014/06/23/the-disruption-machine>.