

## MARKETING WILLS

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*Disappointingly high rates of intestacy may result from a business failure as much as a legal failure. In this interdisciplinary Article, the authors investigate whether widespread intestacy may be attributable in part to the inability of the legal industry to market wills effectively. Although attorneys can market within the boundaries of the Model Rules of Professional Conduct, the majority do not take full advantage of the range of permissible marketing strategies. This Article suggests that attorneys learn the basics of marketing strategy and rely on guidance from marketing experts in order to structure effective programs to educate the public on will-drafting services. By integrating both law and business, estate-planning lawyers can better serve current and future clients.*

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### I. Introduction

Despite the relative certainty of mortality, most people die without having executed a valid will.<sup>1</sup> Although we cannot opt out of death, we can opt out of intestacy. Every competent American adult is empowered by state law to execute a will overriding default rules of intestacy and disposing of property at

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1. See JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS: CASES AND MATERIALS* 62 (2d ed. 2003) (“Most Americans die without wills.”); see also LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 35 (2002) (“most people who die prematurely die intestate”).

death according to the pattern the decedent-to-be prefers. Given what should be the substantial demand for will-drafting services, the rates of intestacy in our country are startling.<sup>2</sup>

Why do so few people choose to control the disposition of their own estates? Many factors contribute to the choice—or failure—to execute a will. Past theories have pinpointed cost,<sup>3</sup> fear of death,<sup>4</sup> procrastination,<sup>5</sup> laziness,<sup>6</sup> and the belief that a will is unnecessary for an individual based on assets or family situation<sup>7</sup> as reasons people give for remaining intestate. Research in this area, however, has depended heavily upon self-reports. Self-reports are limiting because people may be unaware of the reasons behind the decisions they make and are therefore unable to disclose those reasons accurately. It remains possible that substantial factors contributing to intestacy remain unreported.

We posit that one reason for the disappointing number of individuals who execute wills is a wholesale failure of the legal industry to effectively market them. Well-designed marketing plans can guide consumers to purchase products and services that meet their needs. Perhaps because of a lack of sophisticated analysis of the intestate market, modern attempts at matching clients to providers of wills have been half-hearted and largely ineffective. A more strategic approach to marketing would increase the percentage of Americans who determine the disposition of their property—and increase profits for the providers of those services.<sup>8</sup>

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2. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 337 (indicating overall testacy rates of 45%); see DOBRIS ET AL., *supra* note 1, at 62.

3. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 60 (7th ed. 2005).

4. See *id.* at 59 (“Most people cannot accept and plan for their own deaths.”).

5. See Monica K. Johnson & Jennifer Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 489 (1998) (citing Sheldon F. Kurtz, *A Comparison of Iowans’ Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978)) (noting that having “not yet gotten around to writing one” was a primary reason given for intestacy).

6. In one study, 245 of 385 subjects (63.6%) cited laziness as the primary reason they did not have a will. See Fellows et al., *supra* note 2, at 339.

7. *Id.*

8. But see Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 250–51 (1963) (noting that although the majority of Americans may die intestate, the majority of wealth is still passed by will or nonprobate substitutes because a disproportionate number of the intestate are poor). The author notes:

The majority of Americans have not executed a will.<sup>9</sup> To put it another way, the majority of Americans have not *purchased* a will. What guides a person to make a purchase—or refrain from one—is studied by scholars of marketing. Although the many factors that contribute to a decision to make a purchase may not be obvious, the science of marketing has revealed mechanisms for predicting and influencing the behavior of consumers.<sup>10</sup> Future entrepreneurs earning advanced degrees in business administration routinely study how to market—what actions can increase the likelihood customers will purchase a good or service. It is high time lawyers did the same.

In this Article, we provide an introduction to the fundamentals of marketing for trusts and estates attorneys. We then analyze the current marketing activities by the majority of attorneys and explain how these approaches are falling short. The modest restrictions on marketing imposed by the *Model Rules of Professional Conduct* are acknowledged, and we explain how marketing strategies can be accomplished within the range of permissible activities. Finally, we provide guidance for going forward, and explain how trusts and estates attorneys can improve the marketing of their services.

## II. How to Market: A Business-School-Style Overview

What is marketing? Professors Louis Boone and David Kurtz define marketing as “the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, services, organizations, and events to create and maintain relationships that will satisfy individual and organizational objectives.”<sup>11</sup> Put more simply, marketing is the internal and external actions a business takes to gain new customers, retain current customers, and increase profitability. By understanding the basics of marketing and making strate-

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it is questionable whether any substantial “return” would accrue from intensifying efforts to induce people to plan their estates. At least if an objective of the public relations campaign is to aid the economic status of the Bar, it is questionable whether an important increase in legal business would result from having 100 per cent of the decedents die with wills.

*Id.* at 251. We believe that not only are there still profits to be made, but more importantly, there are critical services to be provided.

9. Fellows et al., *supra* note 2, at 337.

10. See MICHAEL PORTER, *COMPETITIVE STRATEGY* 4 (1998).

11. LOUIS E. BOONE & DAVID L. KURTZ, *CONTEMPORARY MARKETING: WIRED* 9 (9th ed. 1998).

gic choices in the operation of a legal practice, attorneys can provide a valuable service to a wider range of clients. Simple changes may produce substantial results.

#### A. Marketing Basics: Product, Price, Place, and Promotion

The first step in creating an effective marketing strategy is to understand marketing basics. One way to examine a current marketing strategy is to break things down into the “Four P’s”: Product, Price, Place, and Promotion.<sup>12</sup> The Four P’s can be thought of both as temperature checks to assess the current status of a business and as active strategies for operating a business.<sup>13</sup> Knowing and understanding what an organization is doing in these four areas is a good start to help guide its strategic marketing direction.

Product (or service), the first “P”, is concerned with the actual characteristics the product or service possesses, and how one’s business offering differs from others.<sup>14</sup> What are the features of the product or service, and what are the benefits it provides to the end user?<sup>15</sup> What utility does it produce? What is special about the product or service the business is selling, and what makes it unique from other competitive and substitute goods or services?

Price, the second “P”, is fairly straightforward. What is the amount at which something is offered for sale?<sup>16</sup> While conceptually the most quantifiable of the Four P’s, pricing strategy is undoubtedly the most complex and is as close to an art as it is a science. Pricing strategy can be used in many ways. For example, a competitor might use a low-price-leader market entry strategy and offer the lowest price, and thus take the low-cost leader position in the market.<sup>17</sup> Another organization might utilize pricing strategy to relay competitive

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12. E. JEROME MCCARTHY & WILLIAM D. PERREAULT, JR., *BASIC MARKETING: A MANAGERIAL APPROACH* 37 (9th ed. 1987).

13. *Id.*

14. See BOONE & KURTZ, *supra* note 11, at 24.

15. A feature is “an attribute that represents a product’s ability to perform the task for which it is was designed,” and a benefit is “the value a customer places on a function or the feeling the product produces through its features.” DAVID PARMERLEE, *AUDITING MARKETS, PRODUCTS, AND MARKETING PLANS* 70 (2000). Think of the feature as the “what,” or the characteristic of a product or service, and the benefit as the “so what,” or what the feature means to the end user.

16. See BOONE & KURTZ, *supra* note 11, at 688.

17. See *id.* at 721. Low-price leader simply means pricing your good or service offering at the lowest price to the purchaser. *Id.*

signaling to rival organizations as to the firm's pricing and strategic intent.<sup>18</sup>

Place, the third "P", refers to whom and where products are delivered, or in other words, distribution channels.<sup>19</sup> Place is really a forced P in the service industry context as it truly makes sense only in a retail goods market.<sup>20</sup> In today's marketing world, place can be interpreted to mean not just physical distribution of a product, but also the paths new customers take to obtain services.<sup>21</sup> Place can also be interpreted to mean the physical boundaries most service firms face.<sup>22</sup>

Promotion, the final "P", is also known as advertising and is the "P" most people commonly associate with marketing. Promotion involves how an organization conveys a marketing message and how the target audience interprets it.<sup>23</sup> However, equally important is how the organization is trying to position itself by these advertisements.<sup>24</sup> How is the firm trying to be seen in the eyes of its customers, potential customers, and competing firms? How is it trying to position itself in regard to competitive and substitute goods and services?

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18. See John G. Riley, *Competitive Signaling*, 10 J. ECON. THEORY 174, 174-86 (1975). Competitive signaling in this context means pricing a product line or service so as to specifically send a message to a competitor. *Id.* For example, an established electronics company may drop its price on laptops to an unprofitable level to signal to new entrants that this industry will not be profitable for them.

19. A distribution channel is a way or means that a product or service reaches its intended audience. In products, there can be (and often are) multiple distributors, while it is rare in services due to the human element. As Professors Boone and Kurtz note:

[a] distribution channel can be defined as an organized system of marketing institutions and their interrelationships that promote the physical good and service, along with the title that confers ownership, from producers to consumer or business user. Distribution channels provide ultimate users with convenient ways to obtain the goods and services they desire.

BOONE & KURTZ, *supra* note 11, at 465.

20. See *id.* at 444-67.

21. Distribution of a service could mean the path through which aligned service companies present their products. For example, a distributor of an estate-planning product could be a life insurance salesman that offers free references back to the firm.

22. The vast majority of service-based businesses are constrained by geographic boundaries, due to the human element of the service provided (for example, a homemaker in Omaha, Nebraska, is unlikely to use a dry cleaner in Boston, Massachusetts).

23. See BOONE & KURTZ, *supra* note 11, at 565-67. Messages in a marketing context are primarily thought of as the information being communicated through advertisements, but they can also be as subtle as how the sign on the front of your building is seen. *Id.*

24. See AL REIS & JACK TROUT, *POSITIONING: THE BATTLE FOR YOUR MIND* 5-9 (1981).

What the Four P's create is positioning. Positioning simply describes how consumers view a product or service offering.<sup>25</sup> This is something every service firm does, regardless of marketing efforts or lack thereof.

In the most basic concept of a service firm, there is a buyer, a seller, an end-user (often the buyer), and a service provider (often the seller).<sup>26</sup> The buyers are often the customers, who derive and pay for professional services from the company, and choose whether to return for repeat business in the future.<sup>27</sup> Overly pleased customers may spread the word of good service and act as a "hero" helping to generate new business.<sup>28</sup> Highly dissatisfied customers, on the other hand, may act as a "bad apple"<sup>29</sup> and hurt the business by telling ugly war stories; thereby dissuading others from patronizing a company or using a specific product.

In the above simplistic generalization of a service firm, one important detail was left out: marketing. How did those customers arrive to the business in the first place? Some customers are repeat customers or referrals. But what about the rest? Did the Ouija Board direct them? Did chance, luck, or fate deliver them to the doorstep of the business? The obvious answer is no. Consumers make a decision whether and from whom to purchase a service based on the information they have already obtained. Rarely does a customer make the effort to obtain information aggressively by researching a service company, checking on prices, and otherwise educating himself.<sup>30</sup> More often, a customer will obtain information passively by receiving a post card in the mail, seeing a commercial on television, glancing at an advertisement in the local paper, hearing an ad on the radio, driving by

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25. See *id.* at 2. Customers assess businesses on several fronts such as value, quality, and value added. BOONE & KURTZ, *supra* note 11, at 47.

26. See generally J. PAUL PETER & JAMES H. DONNELLY, JR., *MARKETING MANAGEMENT: KNOWLEDGE AND SKILLS* 206 (7th ed. 2004) (describing the components of a service firm and the service industry). There are two types of businesses: those that sell a physical product and those that sell a service. *Id.* at 176-77. Many companies do both. *Id.* at 175-80.

27. See, e.g., JILL GRIFFIN, *CUSTOMER LOYALTY* 115-16 (1995) (describing the process that a customer goes through when determining whether to become a repeat buyer).

28. See MICHAEL PHILLIPS & SALLI RASBERRY, *MARKETING WITHOUT ADVERTISING* 2/6-2/8 (5th ed. 2005).

29. See *id.*

30. A customer who goes out and tries to educate herself by actively finding information is aggressively learning, as opposed to passive learning, which happens by receiving a message an organization or peer has sent unsolicited.

the store and seeing signs displayed, or encountering other means of marketing promotion intended to convey a message. While some might consider these ads to be an annoyance and believe they have disregarded the message, the message was sent, it was interpreted by the end user, and she was informed. The importance of the customer hearing the message is as meaningful as it is simple: it has removed part of the unknown from a potential sale.<sup>31</sup>

Business scholars have determined that the information a consumer has about a product or service affects not just whether she will make a purchase, but whether she will change service providers.<sup>32</sup> When a customer lacks information about a product or service, she must expend “learning costs” by using her time and resources to educate herself about the possible purchase.<sup>33</sup> Customers dislike these learning costs and often attempt to avoid them.<sup>34</sup> One way to do this is not to make the purchase.<sup>35</sup> Another way is to remain with the original service provider regardless of how happy or dissatisfied they are, so as to avoid researching new providers.<sup>36</sup>

With some service providers, making a leap of faith is easy. Perhaps a man has a fairly simple haircut and believes that most barbers can cut his hair with acceptable results. In this case, the simple marketing strategy of advertising in the yellow pages or on the Internet might be enough. But what about a bigger unknown purchase, such as one that would lead to varied legal consequences? That leap of faith is tougher to make without additional information. An integral part of marketing is the education of the target market to enable a comfortable purchase.

When an industry is created, MP3 players for example, much of the early marketing is undertaken to inform consumers what the product is; sellers need to educate consumers on the product or service itself before they can convince them one brand is better than an-

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31. See Thomas A. Burnham et al., *Consumer Switching Costs: A Typology, Antecedents, and Consequences*, 31 J. ACAD. MARKETING SCI. 109, 110 (2003). If a seller is able to remove some of the unknown from the purchase decision, the amount of learning cost the customer must spend decreases. *Id.*

32. See *id.* at 110–17.

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.* In the context of changing providers, learning costs related to choosing a new provider are referred to as “switching costs.” *Id.*



other.<sup>37</sup> If a consumer does not understand what an MP3 player is, she does not know what sort of utility she can derive from it and, therefore, has no idea what a good price would be. A customer is not going to purchase a product or service if she has no idea what it does or what it is. It is unknown. Companies must spend resources to educate and inform the public as to what their products do and what the features and benefits are.<sup>38</sup>

Only after the public has a base level of knowledge on what the product or service is can the business progress to differentiating itself, positioning its brand, and offering a buying proposition as to why a customer should choose its service over another's.<sup>39</sup> This can be done by positioning a product as having the best value through advertisements and promotional material, communicating that a product or service has the most beneficial features for the specific target audience, or any other means of separating the product or service from its direct and indirect competition.<sup>40</sup> Differentiation is an essential element of marketing a product because it allows customers the ability to contrast the product with other competitive or substitute goods in the marketplace.<sup>41</sup> If no marketing is performed, positioning of the product is done by the customer's guesswork and assumptions.<sup>42</sup>

There are several active marketing strategies sellers can use to increase sales of their product or service. Perhaps the most obvious strategy is marketing through advertising and promotions. Aggressive marketing through multiple mediums (often referred to as the "marketing mix" or "promotional mix") in tandem with heavy promotional activity aimed at generating new leads on prospective clients can increase sales.<sup>43</sup> Most advertising is done with the intention of "pulling" the customer to purchase or inquire about services through information or ideas that spur him to make a phone call, go to a store, or actively pursue usage of a service or ownership of a product.<sup>44</sup> A

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37. See BOONE & KURTZ, *supra* note 11, at 608.

38. See *id.*

39. See *id.* at 251, 399–404.

40. Price is only one metric on which products and services can be differentiated. See Linda Westphal, *Don't Compete with Price: There Is a Better Way*, DIRECT MARKETING, Aug. 1999, at 17, 17 (arguing that without sufficiently convincing information customers will choose price as a default differentiator).

41. BOONE & KURTZ, *supra* note 11, at 251–53.

42. *Id.*

43. MARK STEVENS, YOUR MARKETING SUCKS 121–42 (2003).

44. See BOONE & KURTZ, *supra* note 11, at 584.

“push” strategy, on the other hand, could mean providing incentives to the distributor to position a product favorably through in-store layouts or salesperson incentives.<sup>45</sup> Many companies use both push and pull strategies.<sup>46</sup>

When sellers do not take an active role in marketing their product or service, they must rely on more passive forms of marketing and the willingness of the prospective customer to expend time and money—leading to increased learning expenses. If an industry spends insufficient resources informing prospective target markets, a potential purchaser will likely solicit input from personal and professional relationships as to where to procure the service.<sup>47</sup> In most industries, there are clientele that have positioned themselves within the community as “thought leaders” that influence a significant amount of consumers.<sup>48</sup>

Consider the MP3 player example. Most people know someone who is often on the cutting edge of consumer electronics. If someone were interested in purchasing an MP3 player and did not know much about them, there is an excellent chance that someone would have many questions. How do they work? Are they difficult to use? What is the best brand? Should I buy now or wait? These are all very powerful questions that a thought leader or early adapter would be able to answer. Thus, the thought leader or early adapter has an immense influence on the purchasing habits of an uneducated consumer. Generally, businesses are not best served allowing thought leaders or early adapters to speak for them. Active marketing allows a business to have more control over the message prospective clients receive than passive marketing. Word-of-mouth advertising can be great, but what if the thought leaders are recommending a competitor’s product? Communicating to the target audience is essential if a company is to be in control of its own positioning.

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45. *Id.* at 584–85.

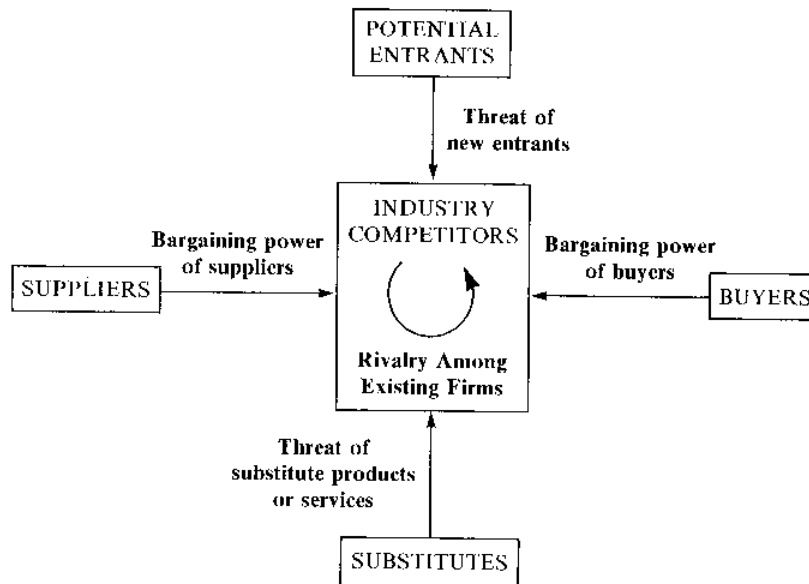
46. *Id.*

47. Early adopters are those users who are the first to use a product or service, and are usually willing to do so despite a premium (high) price. See EVERETT ROGERS, *DIFFUSIONS OF INNOVATIONS* 264 (4th ed. 1995).

48. Thought leaders are users that are seen by peers to be experts in a certain genre of product or service use. See Francis A. Buttle, *Word of Mouth: Understanding and Managing Referral Marketing*, 6 J. STRATEGIC MARKETING 241, 254 (1998).

## B. The Porter Matrix and the Competitive Environment

The Four P's are a good framework from which to examine the current state of a firm and the strategic choices it can make with respect to positioning and marketing, but that's only part of the puzzle. A firm must also consider its competitive environment. Professor Michael Porter provides the classic competitive environment matrix (Porter's Five Forces) that allows us to examine the current environment of an organization.<sup>49</sup>



In Porter's Five Forces, "potential entrants" are organizations that could enter the same market in which an organization currently competes.<sup>50</sup> These are companies already directly competing with an organization or those not yet competing at all.<sup>51</sup> Understanding who these competitors are and what positions they might take helps define

49. See PORTER, *supra* note 10, at 49–50.

50. See *id.*

51. See *id.* An example is an electronics manufacturer who currently produces televisions, VCRs, and DVD players, such as Sony. A potential threat for Sony in the DVD industry could be a fellow electronics producer who is not currently competing in the DVD industry, but has already been competing in a similar industry such as televisions or other consumer electronics. Conversely, a potential threat could also be a DVD manufacturer currently in the industry competing in a foreign economy that could potentially enter the U.S. market.

a current strategy. It is also important to know what barriers to entry exist to potential new competitors, and how to use them to an organization's advantage.<sup>52</sup>

"The bargaining power of buyers" refers to the power a buyer commands in the marketplace for a product or service.<sup>53</sup> For example, if there is limited differentiation between products, there might be no reason for a consumer to select one product or service over another. Thus her bargaining power is increased, higher price competition ensues, and lower prices result.<sup>54</sup> Sellers will be forced to either decrease price or offer ancillary services to compensate. Another factor in the bargaining power of buyers is the purchase's prevalence.<sup>55</sup> Is this a purchase that is made a hundred thousand times a day all over the country by a hundred thousand different customers, or is this an organization that creates one sale a week? Rare sales work in the consumer's favor.<sup>56</sup> It is also critical to understand how knowledgeable the consumer is about the product or service.<sup>57</sup> The greater the ability to understand all the features, benefits, prices, availability, promotions, and other factors, the better decisions buyers make, and the greater influence buyers have to ensure they get the most favorable prices.<sup>58</sup>

When an organization thinks about "substitutes," it is examining the other nondirect competition it may be facing, such as the threat of substitute goods or services.<sup>59</sup> This is important because these nondirect (and less obvious) competitors could start taking market share.<sup>60</sup> If there is a change in the industry or economy, they could become direct competition as well. Furthermore, how a company positions itself against a direct competitor in the direct competitive environment

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52. See PETER & DONNELLY, *supra* note 26, at 191–93. Barriers to entry are obstacles that a new competitor must overcome to compete in the market place. *Id.* at 208. They could be as straightforward as obtaining a right to import goods into the country, or as complex as being forced to create a new distribution channel. *Id.* at 191–93.

53. See PORTER, *supra* note 10, at 24.

54. See *id.* at 24–26.

55. See MARTIN CHRISTOPHER ET AL., RELATIONSHIP MARKETING 43–44 (1991).

56. See *id.* (noting that a buyer will be more powerful if it constitutes a larger proportion of a seller's sales).

57. PORTER, *supra* note 10, at 26.

58. See *id.* A simple example is a buyer possessing the knowledge of the cost of an automobile to the distributor (car dealership).

59. See PETER & DONNELLY, *supra* note 26, at 208.

60. See *id.* at 207–08.

could be quite different from how it attempts to combat a substitute good.<sup>61</sup>

Next, we look at the “power of suppliers.” Much like place in the Four P’s is heavily geared toward a physical retail product environment, so too is the “power of suppliers.”<sup>62</sup> A manufacturer that assembles parts from many suppliers obviously needs to pay more attention to this element than most professional service firms. In the context of a professional service industry, law firms are supplied by the intellectual capacity and knowledge of the professionals servicing the clients of the firm.

The external competitive environment certainly affects marketing strategy. But what about *direct* competition? To understand where a company needs to strategically market its products and services, finding the areas targeted by the direct competition is necessary. Perhaps the competition is only direct mailing a certain geographic portion of the local population, using advanced marketing research to target only a certain socioeconomic group. Or perhaps the competition is not conducting any promotional activities at all. There is an endless amount of possible strategies. However, if a company can determine where the competition has positioned itself and its offerings, the company can best target the most profitable market niche.

### C. Marketing Research and Marketing Strategies

Marketing research concerns the customers of a business: past, present, and future.<sup>63</sup> It allows a business to find out why current customers use a business, how they perceive the business and its products, and other types of purchasing behavior.<sup>64</sup> Effective marketing research should guide a business like a blueprint, telling the company where it is currently positioned and helping show where it wants to go.<sup>65</sup> Marketing research can be as simple and effortless as purchasing a Dun and Bradstreet datasheet,<sup>66</sup> or as involved as first-person inter-

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61. *See id.*

62. *See* PORTER, *supra* note 10, at 27–28.

63. *See* D.V.L. SMITH & J.H. FLETCHER, *THE ART AND SCIENCE OF INTERPRETING MARKET RESEARCH EVIDENCE* (2004); BRUCE WREN ET AL., *MARKETING RESEARCH: TEXT AND CASES* (2002).

64. *See* WREN ET AL., *supra* note 63, at 1–3.

65. *See id.*

66. For information on Dun and Bradstreet datasheets, see Dun and Bradstreet-Global Risk, Credit, Sales, Marketing, and Supplier Management Solutions, <http://dnb.com/us> (last visited Mar. 7, 2008).

views, focus groups, and test marketing. All of these tools are designed for one thing: to determine how customers view product and service offerings.

By effectively using marketing research and strategy, a business is able to take a group of like-minded individuals and market directly to them with a specific message. This process is known as market segmentation<sup>67</sup> and is one of the keys to effective marketing. Not every message a company utilizes is relevant to all parties, and specific messages are more effective when they address specific wants and needs of customers. A general message might not be as eye-catching or as likely to influence a specific type of customer, and, likewise, a specific message may not be appropriate for the masses. Market segmentation helps a business understand where its customer base is coming from, which is of critical importance.<sup>68</sup>

There has been a movement in the business community over the past decade toward a return to core competencies.<sup>69</sup> Core competencies essentially means “doing what you are good at.” For instance, does Dunkin’ Donuts do all of their own marketing? No, of course not.<sup>70</sup> Why? Because their business is making and selling food products.<sup>71</sup> The most successful businesses in the country do what they are good at and outsource the rest to other firms. Outsource firms do what other companies cannot and do it better and more cost effectively. If a business cannot effectively market itself, the choice is to outsource and thrive or miss out on the increased profitability good marketing can generate.

In addition to the theory of core competencies, Customer Relationship Management (CRM) has also been utilized by several differ-

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67. See BOONE & KURTZ, *supra* note 11, at 231. Market segmentation is defined as the “division of the total market into smaller, relatively homogeneous groups.” *Id.*

68. See Sally Dibb, *Criteria Guiding Segmentation Implementation: Reviewing the Evidence*, 7 J. STRATEGIC MARKETING 107, 107–08 (1999).

69. See generally C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, HARV. BUS. REV., May–Jun. 1990, at 1, 1. The core competency movement started in the 1990s building on the work of Hamel and Prahalad. See also HUGH DAVIDSON ET AL., OFFENSIVE MARKETING: AN ACTION GUIDE TO GAINING COMPETITIVE ADVANTAGE 48 (2004).

70. See Hill Holiday, <http://www.hhcc.com> (last visited Mar. 7, 2008) (listing Dunkin’ Donuts as a client, as of March 2008).

71. See Dunkin’ Donuts, <http://www.dunkindonuts.com> (last visited Mar. 7, 2008).

ent industries for the better half of the last decade.<sup>72</sup> CRM theory dedicates a business to customer service; meaning a business will create individual relationships with customers rather than treating them as random people.<sup>73</sup> By paying attention to the lifetime value of the purchasing power of a client, a business is able to understand more fully what that customer means to the firm over the duration of the relationship.<sup>74</sup> Customer Lifetime Value (CLV) theory is the attempt to reduce this impact to calculus.<sup>75</sup> Using marketing research and segmentation, a business can adequately calculate a client's CLV.<sup>76</sup> This information can also help guide the business in many strategic areas, including pricing, advertising, and other marketing elements. Specifically, when talking about CLV and CRM, it is important to understand the prevailing base justification: obtaining new customers can be quite expensive, and keeping them is not only less expensive, but also offers opportunities for repeat purchasing and cross-selling.<sup>77</sup> If a business is able to determine the long-term impact of a customer, including all of the cross-selling opportunities inherent in services industries, the business is guided as to just how much it should be investing to create these new relationships, and, moreover, how it should be doing everything within its means to keep them.<sup>78</sup> Optimally, a service firm will want to be engaged in both new customer acquisition and old customer retention in order for the business to grow market share, market size, and profitability.<sup>79</sup>

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72. See ADRIAN PAYNE, HANDBOOK OF CRM: ACHIEVING EXCELLENCE IN CUSTOMER MANAGEMENT 4-6 (2006). The term CRM was originally coined by META Group in 1990. META Group has since been acquired by Gartner. See Press Release, Gartner, Inc., Gartner to Acquire META Group for \$162 Million (Dec. 27, 2004), available at [http://www.gartner.com/press\\_releases/asset\\_116494\\_11.html](http://www.gartner.com/press_releases/asset_116494_11.html).

73. See PAYNE, *supra* note 72, at 4-6.

74. See J. NICHOLAS DEBONIS ET AL., VALUE-BASED MARKETING FOR BOTTOM-LINE SUCCESS: 5 STEPS TO CREATING CUSTOMER VALUE 58 (2003).

75. See Paul D. Berger & Nada I. Nasr, "Customer Lifetime Values" *Marketing Models and Applications*, 12 J. INTERACTIVE MARKETING 17, 18 (2001). "Supplier value ( $v^s$ ), is equal to CLV over the sum of your acquisition, maintenance, and retention costs of  $v^s = CLV / \Sigma (\text{Acquisition} + \text{Maintenance} + \text{Retention})$ ." DEBONIS ET AL., *supra* note 74.

76. Berger & Nasr, *supra* note 75, at 17.

77. See Amoy X. Yang, *Using Lifetime Value to Gain Long-Term Profitability*, 12 J. DATABASE MARKETING & CUSTOMER STRATEGY MGMT. 142, 142 (2005).

78. See *id.* at 151.

79. See *id.*

CRM lends itself to the service industry well because the service industry has many cross-selling opportunities.<sup>80</sup> By maintaining a client over the long-run, the service firm is getting to know as much about the client as possible. Therefore, the service firm is better able to serve and fulfill their clients' current and future needs. This more personal approach also creates a benefit to the service provider in the form of a relational-switching cost.<sup>81</sup>

Advanced marketing is a learned skill and is not intuitive. While some basic marketing concepts do seem straightforward, there is a reason why there are marketing and advertising firms all over the world specializing in growing businesses and positioning organizations. Not all lawyers need to be experts in marketing, but those with solo practices, along with those responsible for the business growth of a law firm, truly should have good, basic business knowledge in order to perform their business and marketing duties well. Those without this expertise should consult with those that do.

### **III. How Wills Are Marketed: Poor Performance, Rotten Results**

The study of marketing indicates that thoughtful and strategic choices in product, pricing, place, and promotion can increase sales and enhance the profitability of providing a good or service. We will now examine how effectively wills have been marketed by law firms and competing estate-planning document providers.

#### **A. Industry Analysis: The State of the State**

To critique the marketing techniques of an industry, it is helpful to assess the "state of the state"—to describe how things are. To do this, we will examine both how law firms are currently positioning themselves and the state of the generic competitive environment. Additionally, we will look at what tactics and strategies are currently being used and which are likely not. We will start by focusing on the estate-planning industry as a whole to discover the current state of the market. In the realm of providing wills, there are two different clus-

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80. A cross-selling opportunity in the legal industry might be talking to a client about how her litigation turned out and asking questions about her intentions to execute an estate plan.

81. See Burnham et al., *supra* note 31, at 110.



ters of competition: attorneys and retail will providers, although they perhaps seldom compete over the same clientele.

The first cluster contains organizations of attorneys, either in groups or in solo practice, that provide the service of creating estate-planning documents. Attorneys create the documents by applying their professional knowledge of the law, as well as a personal understanding of the client-desired outcome. The service is not merely providing legal documents, but also providing the understanding and lawful manipulation of these documents to present the client with the most desirable outcome. This service relationship culminates in one or more physical legal documents.

The second cluster consists of manufacturers, developers, and distributors that offer software to create legal documents for sale at retail or online locations (hereinafter “will-kits”). This physical product is put into the hands of end-users who use a paint-by-number-like set of instructions to guide the user in completing sufficient estate-planning documents. This product also culminates in one or more physical legal documents.

The will-drafting industry is unique for several reasons. While both clusters are competing in the same space, one cluster does so by providing a higher-cost service transaction, in which an attorney creates an individualized document for the client, perhaps working from a model template.<sup>82</sup> The other cluster does so by providing a low-cost, retail-transaction product that provides the consumer with a bare-bones estate-planning document.<sup>83</sup> The service provided by the first cluster is the luxury of having an attorney who knows and understands the law create a “legal” will that has a high probability of holding up in court and accurately carries out the testator’s dispositive plan. In the end, it is the input of the client combined with the expertise of the lawyer that produces the final document that is then the finished product. Quite literally, the competition between lawyers and

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82. Although many practicing attorneys draft model forms, a growing number use drafting software. *See, e.g.*, Hot Docs, <http://hotdocs.com> (last visited Mar. 7, 2008) (selling model document template program).

83. The truly interesting part about these two clusters is that they are marketing themselves to polar opposite priced clientele and have separated themselves via one metric only: price.

will-kits is a product versus a service in the same field, which is most unusual.<sup>84</sup>

## B. Marketing of Wills by Legal Professionals

The first cluster of competitors in the will market consists of estate-planning attorneys. Attorneys may practice alone or in firms of a few or many attorneys. They may specialize in estate planning exclusively, specialize in a particular facet of estate planning, or may only occasionally perform estate-planning work. Attorneys who provide will-drafting services generally charge by the hour, but some firms may offer flat-fee costs.<sup>85</sup>

### 1. THE FOUR P'S

Earlier we established that a basic marketing overview for a firm should focus on understanding the Four P's: Product, Price, Place, and Promotion.<sup>86</sup> Applying this basic framework to the legal industry's marketing of wills and interpreting the competitive environment, it is clear that there are several marketing shortcomings. The product (or service) is not sufficiently differentiated from its alternatives.<sup>87</sup> The pricing strategy is essentially lacking direction or purpose. Place is largely disregarded, due to lack of attention to the demographic profiles of existing consumers and prospects. The most prominent shortcoming of all is the lack of promotion and advertising throughout the industry compared to other service industries.<sup>88</sup>

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84. See Brenda Rindge, *Drawing Up a Will: Legal Document Helps Make Sure Your Wishes Are Carried Out*, POST & COURIER (Charleston, S.C.), Feb. 22, 2001, at E1.

85. One of the authors (Michael McCunney) undertook substantial research, looking at private practices and legal firms. First-person interviews were conducted with lawyers currently practicing law in the following cities: Atlanta, Boston, Cincinnati, and Tallahassee. Extensive research was conducted to find advertising mediums in this field, including direct mail, television advertisements, print advertisements, internet promotional activity, and in-house promotional material. Michael R. McCunney, Marketing Research Interview Notes (on file with the author).

86. See MCCARTHY & PERREAULT, *supra* note 12, at 38; see also *supra* Part II.A.

87. There are marketing kits that offer to be the firm's or lawyer's marketing arm, by having every firm using the kit cut and paste its header into prefab materials. See SCHUMACHER PUBLISHING INC., PRODUCT SAMPLES 1-256 (2008), [http://www.estateplanning.com/pdf/schumacher\\_samples.pdf](http://www.estateplanning.com/pdf/schumacher_samples.pdf).

88. See SIAA, FIFTH ANNUAL SERVICE INDUSTRY ADVERTISING AWARDS WINNERS LIST 1-20 (2008), <http://www.siaawards.com/SIAAWinnersList2008.pdf>. The site shows awards for outstanding marketing in other fields. Lawyers almost never win.

*a. Promotion* The most troublesome P for the legal sector is promotion. Most trusts and estates lawyers engage in little advertising and promotion activity.<sup>89</sup> By and large, these firms and professionals rely heavily on word-of-mouth advertising by current and former clients, networking through professional organizations, and referrals through other noncompeting financial professionals, such as Certified Public Accountants and Certified Financial Planners.<sup>90</sup> While most state bar ethics rules strictly forbid the transaction of money for business leads,<sup>91</sup> some estate-planning lawyers will engage in bartering and discount future services with insurance- and financial-services professionals.<sup>92</sup> An insurance salesperson may refer business to a law firm, and in exchange that law firm may do work at a discounted rate for that group.<sup>93</sup> In a less explicit quid pro quo, a financial-services institution may refer business to an attorney (or use his services itself) with the hope that the attorney will name the financial institution in a fiduciary role in the estate-planning documents he drafts.<sup>94</sup> In large part due to the nature of the services, these business referrals are done without any effort of the law firm aside from previous performance. As a result, many estate-planning attorneys are acting as a “Venus fly-trap,” patiently waiting for their next customers to come to them.

Cross-selling existing clientele is another way some law firms achieve estate-planning business.<sup>95</sup> A client has already used the law firm for other services, such as litigation or corporate work, and this prior relationship positions the client to solicit the creation of a will (or other legal services) from the same provider.<sup>96</sup> Because the estate-planning industry does not aggressively market, and therefore inform prospective clients, a will is an unknown purchase for many. Once a client has established a relationship with a firm, there is an excellent

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89. See McCunney, *supra* note 85.

90. See American Institute of Certified Public Accountants, <http://aicpa.org> (last visited Mar. 7, 2008); Certified Financial Planner Board of Standards, <http://www.cfp.net> (last visited Mar. 7, 2008). Referral in this sense means a non-commissioned business lead offered in good faith for the benefit of the client.

91. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2004).

92. See McCunney, *supra* note 85.

93. See *id.*

94. In the personal experience of one of the authors (Alyssa DiRusso) as in-house counsel for a major national bank, these informal business generation cycles were common.

95. See McCunney, *supra* note 85.

96. See generally Burnham et al., *supra* note 31, at 119 (describing how satisfaction with the incumbent service provider leads the consumer to stay with that service provider).

chance the client will return to the same firm for future legal needs—unless the firm’s performance was so displeasing as to force the consumer to restart the arduous process of reinvestigating the unknown and resoliciting advice from peers and others.<sup>97</sup>

There appear to be two main reasons why most attorneys do not aggressively market or promote their services: fear of discipline and personal-injury lawyer advertising. The first and most influential reason is fear of state bar discipline.<sup>98</sup> Although advertising and marketing—alone or in cooperation with nonlawyers—is not prohibited, it is regulated.<sup>99</sup> Lawyers not familiar with the boundaries of what is permissible may not be comfortable coming anywhere near those boundaries. The *Model Rules of Professional Conduct* provide enumerated guidance on permissible activities.<sup>100</sup> Although some marketing activities are prevented by these rules, many are not. Most attorneys could be marketing more aggressively than they are now and still operate well within the standards of professional conduct.

The second reason for paltry marketing efforts is that many attorneys do not like to be seen in the same light as personal-injury lawyers, a segment of the legal community that does aggressively advertise.<sup>101</sup> The thought of aggressively advertising a firm’s services is met with some trepidation as that firm could be associated with these other professionals. Like it or not, some self-imposed stigma is attached to advertising in the legal profession.<sup>102</sup> The general sentiment from the legal industry appears to be that there is no need to advertise; the product or service will speak for itself.

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97. *See id.* at 120–21.

98. Lawyers who want to avoid bar discipline for their advertising behavior “have an incentive to advertise only in the most conservative fashion.” Whitney Their, Comment, *In a Dignified Manner: The Bar, the Court, and Lawyer Advertising*, 66 TUL. L. REV. 527, 546 (1991).

99. *See* MODEL RULES OF PROF’L CONDUCT R. 7.2 (2004).

100. *See id.* R. 7.1–7.3.

101. Plaintiff’s lawyers have a reputation for advertising more aggressively than lawyers in many other practices. Some evidence suggests that plaintiff’s lawyers have increased their advertising efforts in recent years. *See* Stephen Daniels & Joanne Martin, *Texas Plaintiffs’ Practice in the Age of Tort Reform: Survival of the Fittest—It’s Even More True Now*, 51 N.Y.L. SCH. L. REV. 285, 307 (2007) (noting that in a 2006 survey, only 15% of plaintiff’s lawyers reported not advertising).

102. Some attorneys have asserted that to advertise is “undignified.” *See* Their, *supra* note 98, at 527. The author notes that this view is held by some, but does not espouse the view herself. *Id.*

Unfortunately, the legal community is not speaking at all to many prospective consumers.<sup>103</sup> If lawyers are not actively marketing, no information is being passively received by the target market, and the service becomes an unknown purchase unless the customer attempts to research a wholly unknown. As discussed earlier, unknown purchases make customers uncomfortable and discourage sales.<sup>104</sup> Thus, a prospective customer will either decide to purchase based on extremely limited information, purchase a competing product, or worse still, not purchase at all.

Word-of-mouth marketing is largely passive and between consumer peers.<sup>105</sup> In the case of estate planning, those peers are likely to be family members, friends, or acquaintances with higher economic status (as there appears to be a common perception that the purchase is a luxury item). Again, this is completely out of the hands of the law firm. All the firm can do is provide the best services possible and hope prior satisfied customers will refer others to the firm. By relying only on referrals among peers or other professionals, attorneys may be neglecting key demographics and untapped markets.

*b. Pricing* The legal industry's strategic direction with one P, promotion, has lead to issues with another P, pricing. If the value proposition is not clear to the customer, pricing strategy becomes virtually powerless.<sup>106</sup> The current pricing strategy, generally speaking, seems to be based on benchmarks set up by competition. It does not seem as if many professional estate planners have a reference for what they charge. While there are many different pricing strategies to consider for the array of businesses in existence, this is a key differentiating metric that is being widely ignored by this industry.

If there is no marketing to convey the value of the product, consumers are forced to guess what the features and benefits are. When deciding whether to make a purchase, a customer must weigh those

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103. See McCunney *supra* note 85.

104. See *supra* note 31 and accompanying text.

105. See Alan Mitchell, *It's Nil by Mouth for Marketers as Consumers Hold the Power*, *MARKETING WK.*, Oct. 18, 2007, at 24–25. Word-of-mouth marketing has many forms, but generally consists of consumer-to-consumer communication.

106. Value proposition is the bid any good or service makes to a customer asking them to make a purchase. See PETER & DONNELLY, *supra* note 26, at 81. Quite simply, it's the value of all the features that benefit the end-user in relation to the price.

features that benefit him against a cost scale to determine the value.<sup>107</sup> If that value is high enough, accompanied by a want or need, a purchase is made. The legal industry is difficult for consumers because it asks them to find the relationship themselves between features and benefits and price, and thus value.<sup>108</sup> This approach does not put the customer first.

Generally speaking, other than personal-injury firms, the legal industry does not market aggressively.<sup>109</sup> And when there are promotional materials involved, price seems to be the last thing mentioned. Perhaps there is a perceived fear that a client will find the price too expensive, or that the product will be viewed as being of inferior quality if the service price is stated when other firms are not disclosing price. Counterintuitive as it might seem, this lack of information is hurting firms more than any sticker shock possibly could.<sup>110</sup> Even with luxury automobiles or high-end homes, prices are listed—despite the fact they are a purchase many would consider a large-ticket item. Consumers have found the value in these large-ticket purchases even though they might initially receive sticker shock.<sup>111</sup> Price might not be the most attractive attribute of the service, but communicating to the consumer is important. Removing unknowns from a purchase will help consumers more accurately understand the value proposition of a service and thus allow the consumer to buy more often.

In value-based pricing strategies, the price is to some extent a function of value. However, estate-planning documents can be difficult to value; their value is not attributable solely to the document itself, but also to the level of legal expertise that the client has received. Top-tier firms can command a premium price because elite clientele are willing to pay more, believing they have purchased the best way to handle their finances.<sup>112</sup> In essence, the primary benefit to the client

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107. See DAVIDSON ET AL., *supra* note 69, at 347–70.

108. Compare the approach of will-kits, discussed in Part III.C *infra*, which tend to be quite affordable and reveal their price to the consumer upfront. See, e.g., Family Will Forms Kit, <http://www.living-trusts.net/will-kit.html> (last visited Mar. 7, 2008).

109. See McCunney *supra* note 85.

110. See HARRY J. HAYNESWORTH, *MARKETING AND LEGAL ETHICS: THE RULES AND THE RISKS* 21 (1990).

111. See DAVIDSON ET AL., *supra* note 69, at 347–70.

112. This generalization is true throughout the majority of goods and services industries. This is called getting a “premium” on the transaction—the company has positioned its service and differentiated it far enough away from the standard

at the time of the transaction is the peace of mind rendered by leveraging the brand equity of the firm or the lawyer drafting the will.<sup>113</sup>

*c. Product* Related to the legal industry's shortcomings in pricing strategy is its inattentiveness to distinguishing its service offerings. To make a selection between attorneys, clients need to know what distinguishes one from another. Is it even clear to clients what distinguishes attorneys from their will-kit competitors? It would be difficult to assert as much, given the lack of advertising and promotion undertaken by the professional legal services industry. Advertising and promotion are necessary to understand the features and benefits offered by a service company, and how the individual product features benefit current and future consumers.<sup>114</sup> Understanding what differentiates a law firm's estate-planning services from a will-kit might seem obvious to the firm, but it must be made clear to prospective customers.

*d. Place* As we have addressed and taken stock of the other classic Four P's, we will briefly address place. Again, place speaks to distribution channels and is much more applicable to retail goods than it is to services. In the legal industry, distribution of services is limited to how a firm acquires its customers. In most cases, geography imposes restrictions since most attorneys are not licensed to practice in all states. Also, as the firm could be construed as being its own distributor, it is restrained by how far clients are willing to travel to the lawyer's place of business.

## 2. PORTER'S FIVE FORCES

Using the Four P's, we have an idea of the estate-planning product and how its features and benefits are positioned, the current pricing strategy, how firms currently obtain clients, and the advertising and promotional activities firms currently undertake. The next

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offering to command this monetary increase. *See generally* MCCARTHY & PERREAULT, *supra* note 12, at 225 (providing a general discussion of pricing for specialty products).

113. Brand equity refers to "the added value that a certain brand name gives to a product in the marketplace." BOONE & KURTZ, *supra* note 11, at 402.

114. *See supra* notes 24–25 and accompanying text.

step is taking this information and going a step further using Porter's Five Forces to better understand the competitive environment.

First, we'll start with the bargaining power of buyers. There is not much differentiation taking place by most firms,<sup>115</sup> which increases the purchasing power of potential clients.<sup>116</sup> The general lack of information provided by the industry to customers negates some of that power. Wills are not purchased very often, and therefore firms are probably going to (or should) make an effort to gain new business. Part of this effort is likely to include adding benefits or lowering price. Oddly enough, many firms that could gain customers and market share by behaving in this manner are not. They are ignoring the consumer's buying power by offering a relatively undifferentiated service.<sup>117</sup> By positioning themselves as valuing the client and aggressively pursuing the client's needs through offering incentives, firms that take initiative to actively market could have a first-mover advantage within the existing local competitive environment over firms that are comfortable with the status quo.<sup>118</sup>

Now we will look at the power of the suppliers and how that affects the competitive environment of the legal industry. Law firms, as a service industry, sell knowledge and acquired expertise. The true suppliers unique to this industry are the lawyers themselves. Real power struggles exist only when firms attempt to court the same legal talent. Additionally, the staple forces of leasing space, computer, software, and other costs are all firm-specific.<sup>119</sup>

Another issue is the threat of new entrants into the legal market. How easy or difficult is it for a new competitor to compete for the same business as current estate-planning lawyers? The barriers to en-

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115. See McCunney, *supra* note 85.

116. See PORTER, *supra* note 10, at 27.

117. See *supra* Part III.B.1.c.

118. "First-mover advantage" is defined as: "[a] sometimes insurmountable advantage gained by the first significant company to move into a new market," but also translates into the first organization to change the way they do business, such as offering free shipping or a complimentary oil change. Marketing-Terms.com, First Mover Advantage definition, [http://www.marketingterms.com/dictionary/first\\_mover\\_advantage](http://www.marketingterms.com/dictionary/first_mover_advantage) (last visited Mar. 7, 2008).

119. It is worthwhile to investigate these factors and to understand their value and costs to the firm. Is it necessary to have a firm located in the heart of a downtown financial district? Is it part of the marketing of the firm to position itself in a certain light compared to other firms? Should the firm invest in purchasing land or office space instead of leasing? There are a multitude of questions that can be posed in a basic cost/benefit analysis that are important to understand when looking at the bottom line.



try and exit are minimal at best; the only real hurdles a new firm must overcome are basic service-industry related hurdles, aside from the acquisition of legal talent and ensuring they are able to practice in the firm's state.<sup>120</sup> The lack of differentiation of services would make it extremely easy for a brand new firm to compete head-to-head for the same business with a firm that has existed for a hundred years. Aside from a new firm's limited brand equity, there are few obstacles beyond whether there is any business to be had. Realistically, unless a firm is in a saturated market with a relatively small potential customer base and is thus battling a heavy amount of competition, the threat of new entrants is exceedingly high.<sup>121</sup>

The threat of substitute goods is the force that is of the utmost interest to law firms. With the advent of will-kits, the options available to consumers have changed; there now are very real alternatives. These alternatives became viable because of two factors: lack of differentiation and the emergence of disruptive technologies. The legal market's inability to differentiate itself from will-kits on the features and benefits of professional will-drafting services is a real threat.<sup>122</sup> There is no active case being made as to why a consumer should not use a will-kit, and that has helped open the door to the marketing of will-kits to consumers.

Secondly, the emergence of two disruptive technologies has allowed will-kits to become viable. These technologies are personal computers and the Internet.<sup>123</sup> The ability to comfortably operate a personal computer allows many prospective clients to feel as if they can successfully create their own estate plan by utilizing the software available in will-kits. The Internet allows prospective clients to not only find information on the different will-kits available for direct sale, but also allows them to compare the features and benefits, including price—a value proposition opportunity. Customers can search for favorably reviewed will-kits, price bargains, or those positioned as premium offerings. This is of crucial importance to the pro-

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120. Professional conduct rules, of course, prohibit the unauthorized practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.5. (2004).

121. If the market is saturated as a result of a large number of firms competing in a certain geographic area for a perceived client base, additional competitors should be reluctant to enter.

122. See McCunney, *supra* note 85.

123. Disruptive technologies are those that require a complete rethinking of a business model, and the Internet is one such disruptive technology. See Marydee Ojala, *Disruptive? Who You Calling Disruptive?*, ONLINE, July–Aug. 2004, at 5.

professional legal services industry because the will-kit industry is taking two blatantly obvious strategic marketing steps: aggressively offering information through marketing and aggressive pricing.<sup>124</sup> These kits promote the ability of customers to create legal documents without the aid of a lawyer and carry a price tag that is heavily discounted compared to the perceived prices of professional legal services. To many potential customers of professional legal services firms, will-kits are a true substitute good. This understanding has to be included in the direction taken by the strategic marketing of any firm in this industry.

The last of Porter's Five Forces is the competition that firms have with one another. Most firms operate in a specific geographic area; a firm that offers estate planning in Boston, Massachusetts, is not going to be competing directly with a firm that offers similar services in Memphis, Tennessee. This is true not only because these are two separate state bars, but also because a client would not be willing to travel a great distance for a service that is locally available.<sup>125</sup> Similarly, an attorney licensed to practice in the whole state may be geographically far enough away to not be in direct competition with another in-state firm. Based on the population and demographics of a certain geographic area, there is bound to be a litany of various competitive situations. In a smaller town there might be only one other local competing firm, while in a major city there may be hundreds. It is important for each firm to understand what its specific competitive environment looks like and how its competitors are positioned in the marketplace. This can only be effectively done on a per geographic market basis, but is among the most important factors in understanding how to create a successful marketing strategy.

### C. Marketing of Estate-Planning Software

#### 1. THE FOUR P'S

While in the same basic market as attorneys providing estate-planning services, will-kits are sold through completely different channels than traditional wills. In fact, the estate-planning software

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124. See McCunney, *supra* note 85.

125. The ultra-high-end clientele (perhaps the top 1% of the market) is likely to be less geographically constrained and may, in fact, be open to competition on a more national level. However, for purposes of this Article, we will concentrate on the vast majority who are geographically constrained.

industry more closely mirrors the marketing of most tangible products and has more in common with other consumer software products than with professional legal services. There is promotional activity at the point-of-sale at retail locations, such as Staples and Office Depot, and Web sites for the direct download and online purchase of products.<sup>126</sup>

Will-kit products are geared toward price-conscious consumers.<sup>127</sup> For the price of a sit-down, chain-restaurant dinner for two, a customer can print out what he believes to be adequate legal documents to ensure his final wishes are carried out.<sup>128</sup> To this target clientele, the value of a lawyer is not realized. These consumers believe (or believe at the point of purchase) that they are able to draft the estate-planning document at an acceptable loss level compared to that of a hired attorney.

The pricing of will-kits is positioned closely to other consumer software at retail locations; costing between thirty and fifty dollars.<sup>129</sup> Undoubtedly, a customer should hold the expertise obtained in the will-kit to be of a lesser quality than that of a professional attorney. When a price tag of thirty to fifty dollars is available, it forces the customer to examine the value proposition. Will a consultation with a legal professional be better, and if so, how much better? Because the price of professional legal services is widely unknown, assumptions are likely varied. Would it cost a hundred dollars to sit with a lawyer? Three hundred? A thousand? Five thousand? Ten thousand? These ratios are quickly calculated in a consumer's head, and the value proposition is evaluated. The customer asks, "Is this will-kit half as valuable as sitting with a lawyer? A third? A tenth?" Again, the unknown of the exact benefits and associated costs of having an

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126. *E.g.*, Last Will & Testament Will Kits—Do It Yourself Legal Forms, <http://www.lastwillshop.com> (last visited Mar. 7, 2008) [hereinafter Last Will & Testament Will Kits—Do It Yourself Legal Forms]; Suze Orman—The Suze Shop, Will & Trust Kit, <http://www.suzeorman.com> (follow "Will & Trust Kit" hyperlink under "Suze's Books & Kits") (last visited Mar. 7, 2008).

127. *See* McCunney, *supra* note 85 (research generated no attorneys who could undercut \$49.99 for drafting a will).

128. *E.g.*, Last Will & Testament Will Kits—Do It Yourself Legal Forms, *supra* note 126; Will & Trust Kit: Ultimate Protection Portfolio Help, <http://www.suzeorman.com> (follow "Will & Trust Kit" hyperlink under "Suze's Books & Kits," then follow "Buy Now" hyperlink) (last visited Mar. 7, 2008).

129. *See, e.g.*, Family Will Forms Kit—Making a Legal Living Will and Testament Document, <http://www.living-trusts.net/will-kit.html> (last visited Mar. 7, 2008).

attorney complete estate-planning documents compared to will-kits forces many consumers to make assumptions that often favor will-kits. While there is certainly intent to stress price differentiation versus the perceived high costs of a professional legal services firm, a will-kit's main differentiation is that the consumer can perform the service by themselves. This saves the consumer time, learning costs, and, in the case of online purchases or direct downloads, travel time.

Place, or distribution, for will-kits is completely different than that of professional legal services firms. In addition to the multitude of offerings available online through both software manufacturers and software distributors, many will-kits are available for retail purchase at local retail stores.<sup>130</sup> Estate-planning software follows a more traditional push market<sup>131</sup> through retail channels where rewards are given to distributors of the programs, either directly to the retail locations or their distributors. This classic product distribution system is where the manufacturer either directly ships the product to the retail location, or has another distributor purchase the products from the manufacturer only to turn around and ship or deliver the purchased products (along with other manufacturers' products) to retail locations.<sup>132</sup> We can see that this is very different from the approach taken by the professional legal services field.

The estate-planning software market is also more active than attorneys at product promotion. This is not surprising given the general lack of promotion by attorneys, as well as their lack of marketing education. Promotion for will-kits closely mirrors many other consumer software offerings. Detailed information on the specifics of these kits, such as price, cost to deliver (direct download or shipping costs), product usage specifications, and documents included, is available on the Internet.<sup>133</sup> At the retail location, price incentives are offered to retailers to "move" (or sell) the product. This could be a price break that

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130. See Amazon.com, <http://amazon.com> (search "Joy Chambers the easy will and living will kit") (last visited Mar. 7, 2008); Will Kit, <https://www.qualitybooks.com/will.htm> (last visited Mar. 7, 2008).

131. See *supra* note 47 and accompanying text.

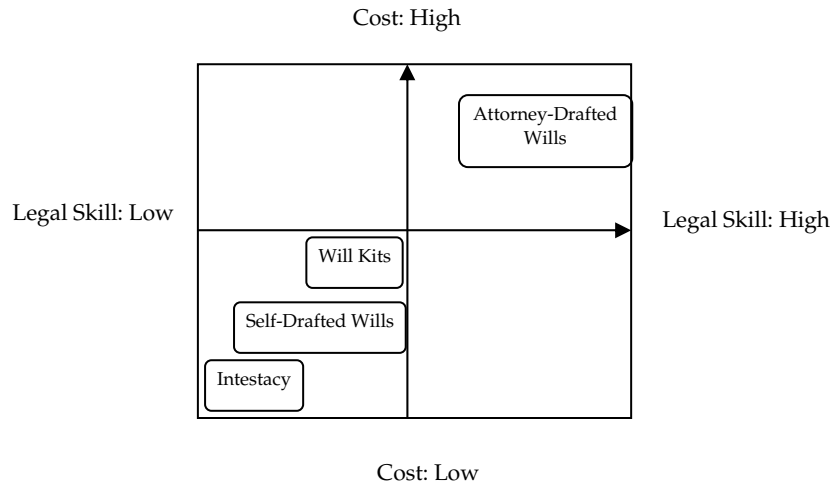
132. See generally Anna Bilden Parker, Note, *The Soft Drink Act: Soft on Vertical Restraints?*, 2 PACE L. REV. 249, 254-57 (1982) (discussing manufacturers' options for product distribution systems).

133. See, e.g., Ginger Applegarth, 12 Easy Steps to Preparing Your Estate Plan, <http://articles.moneycentral.msn.com/retirementandwills/planyourestate/12easyestepstopreparingyourestateplan.aspx> (last visited Mar. 7, 2008); Estate Planning, Wills and Living Trust Software, <http://www.lawfirmssoftware.com/software/estate.htm> (last visited Mar. 7, 2008).

is passed on to the consumer, split with the retailer, or completely realized by the retailer.<sup>134</sup> There does not appear to be much active promotion on radio or television by competitors in the will industry, but rather these services are promoted online and in some print advertising.<sup>135</sup>

## 2. PORTER'S FIVE FORCES

Lawyers should understand their positioning with respect to competitors. Will-drafting services provided by an attorney are distinguished from other options, including will-kits, on metrics of price and legal skill. The following positioning chart demonstrates this dynamic.



Briefly examining the will-kit industry utilizing Porter's Five Forces, we see that the set of forces are completely different than those facing the professional legal services market.

The bargaining power of buyers is not exceedingly high because there is not a free flow of information as the consumer is passively receiving the product. However, the learning costs are substantially lower because it does not require much effort for a consumer to enter a retail market place, such as a retail store or Web site, and browse product specifications and prices. Thus, consumers easily construct a

134. See BOONE & KURTZ, *supra* note 11, at 584.

135. See McCunney, *supra* note 85.

personal value proposition. Constructing the value proposition could take even less time using the Internet. Using the Internet increases the knowledge of the product offering faster and leaves the customer in a position to be more educated about the different product choices, thereby increasing her buying power.

Supplier power is also different for the will-kit industry than for legal firms. While attorneys presumably help program the software to comply with relevant law, they are not needed on an ongoing basis by the testator himself. Suppliers of the will-kit market are again more traditional, be it outsourced manufacturing facilities, boxing and packaging companies, or simply the required raw materials. Generally speaking, the power of suppliers offering fairly generic services is very low.<sup>136</sup>

The threat of substitute goods is an interesting question as it raises issues as to how the will-kit providers should choose to position themselves. Do they see themselves as competitors in the estate-planning field or as solely competing with other will-kit providers? Undoubtedly, the producers see themselves from both of these viewpoints. For our purposes, we will assume that competitively speaking, they view professional legal marketing services as substitute goods, albeit a much higher quality and higher priced offering. What other competitive substitute products or services are out there? With the advent of more software-on-demand, it is foreseeable that some will-kit competitors, professional legal services, or other competitors could create and market a similar one-time use product.

The threat to new entrants in this market is also very similar to other consumer software markets. If high, sustainable profits are realized by current online companies, new entrants to the market will be induced. As the market is still fairly new and growing, this is the probable outcome. Online barriers to entry mirror standard product marketing barriers, with the additional cost of obtaining professional legal expertise and software engineers required to program the software.<sup>137</sup> Capital costs that would be required to enter the field are not minute, however, they would not be prohibitive to most companies already engaged in consumer software markets as the infrastructure is largely already in place. Lastly, market competitors attempt to differentiate their products based on price, benefits of the software, and dis-

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136. See PORTER, *supra* note 10, at 25.

137. See *id.*

tribution channels—again much like most consumer software product offerings.

As we have illustrated, the landscape has changed. We have a product (will-kits) competing with a service provider (attorneys). The will market is increasing because a greater number of competitors are now in the marketplace than only several years ago. It is possible that these two competitive clusters are going after mutually exclusive clientele, but it is foolish and shortsighted to assume there is no overlap. The professional legal services industry needs to recognize this new competitive substitute and incorporate it as they shape their marketing strategies in the future.<sup>138</sup>

Lawyers, however, face standards of professional ethics that other entrepreneurs do not. Although ethical standards regulating the way attorneys can market have evolved throughout the past several decades, professional ethics still impact how an attorney must structure any marketing plan. Effective marketing can, and should, operate within the rules governing attorney behavior. Before we suggest a plan for improving marketing, we must examine the strictures to which lawyers selling wills must adhere.

#### **IV. Professional Responsibility Rules as Boundaries on Marketing**

Attorneys who wish to market estate-planning services will be cognizant of the professional rules of conduct governing their communications. Although rules of professional conduct vary somewhat state-by-state, many are based on the American Bar Association *Model Rules of Professional Conduct (Model Rules)*.<sup>139</sup> While some marketing activity is permitted under the *Model Rules*, not all actions are accept-

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138. Although one focus of this Article is how attorneys should focus their marketing efforts to compete more effectively with will-kits, we do not believe there is no place for will-kits in serving the legal needs of Americans. To the contrary, we believe will-kits often provide a valuable resource to individuals who would otherwise face intestacy. Nonetheless, some clients will be better served by an attorney than a will-kit and this is one message marketing by attorneys should convey.

139. MODEL RULES OF PROF'L CONDUCT (2004). This Article does not attempt to cover the wide range of variations on the *Model Rules* adopted by different states. For some background on this matter, see William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 272 (2005).

able. An attorney should market as aggressively as the rules permit, but not exceed the boundaries established by professional ethics.

**A. The Boundaries Established by the *Model Rules of Professional Conduct***

The *Model Rules* govern the way an attorney can market her services. The *Model Rules* prohibit a lawyer from making “a false or misleading communication about the lawyer or the lawyer’s services.”<sup>140</sup> Within this overall guideline, the *Model Rules* also provide detailed guidance on what advertising is appropriate for attorneys and legal services.

Lawyer advertising is ethical so long as it conforms to the standards of professional conduct. Rule 7.2 governs advertising and provides that “a lawyer may advertise services through written, recorded or electronic communication, including public media.”<sup>141</sup> It is appropriate for a lawyer to pay a reasonable fee for these advertisements,<sup>142</sup> and advertisement communications must refer the reader to the lawyer responsible for the content of the material.<sup>143</sup>

Lawyers may also market their services through referrals within certain guidelines.<sup>144</sup> Lawyers may use a “qualified lawyer referral service” and pay the service’s usual charges for directing clients.<sup>145</sup> It is also appropriate for a lawyer to establish nonexclusive referral agreements with other lawyers or nonlawyers, as long as clients are informed of the agreements.<sup>146</sup> Referral networks often serve as profitable and ethical sources of business development for attorneys.<sup>147</sup>

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140. MODEL RULES OF PROF'L CONDUCT R. 7.1. “A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” *Id.*

141. *Id.* R. 7.2(a).

142. *See id.* R. 7.2(b)(1).

143. *See id.* R. 7.2(c) (“Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.”).

144. *See id.* R. 7.2(b).

145. *Id.* The Rule provides in relevant part: “[a] lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may . . . (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.” *Id.*

146. *See id.* The Rule provides in relevant part:

[a] lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may . . . (4) refer



The official commentary to the *Model Rules* is largely supportive of advertising efforts and elaborates on the kind of information an attorney might appropriately promote through advertising. Appropriate promotion includes information such as how fees are calculated (“including prices for specific services and payment and credit arrangements”), references and representative clients, the lawyer’s name and contact information, the kinds of services performed by the lawyer, foreign language fluency, and “other information that might invite the attention of those seeking legal assistance.”<sup>148</sup> The comments promote liberalizing advertising rules and criticize state efforts restricting them, largely due to a recognition of the public’s need for information.<sup>149</sup> The comments note that

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clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.

*Id.*

The official commentary to the rule provides additional guidance on referral arrangements:

[a] lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

*Id.* R. 7.2 cmt. 8.

147. See Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiff’s Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 251–52 (2007).

148. See MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 2; see also Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 617 (1986). Careful practitioners should note, however, that some state courts and state ethics committees have considered certain “promotional advertising” to fail to provide useful information and to be “misleading and undignified.” *Id.* at 640.

149. See MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 3.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified”

[t]o assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition . . . .<sup>150</sup>

The *Model Rules* also provide guidance on solicitation of clients and restrict certain kinds of direct contact with potential customers. An attorney is forbidden from soliciting legal business through "in-person, live telephone or real-time electronic contact" unless the person contacted already has a professional relationship with the lawyer, is a family member, is another lawyer, or has a close personal relationship with the lawyer.<sup>151</sup> Lawyers are further restricted from contacting people who have made it clear they do not wish to be contacted.<sup>152</sup> Lawyers also must not initiate contact that constitutes

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advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.

*Id.*

150. *Id.* R. 7.2 cmt. 1.

151. *See id.* R. 7.3(a) (noting that this contact is disallowed where "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"). The *Model Rules* do not forbid direct contact by certain legal service plans.

Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

*Id.* R. 7.3(d).

152. *Id.* R. 7.3(b)(1).

A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer.

*Id.*

“coercion, duress or harassment.”<sup>153</sup> The commentary to Model Rule 7.3 recommends advertising as an alternative to direct contact.<sup>154</sup>

Outside of these restrictions some solicitation is permitted. If a lawyer solicits business from a prospective client “known to be in need of legal services in a particular matter,” all electronic, recorded, or written information must include the words “Advertising Material” at the beginning and end of the communication, or on the outside of the envelope.<sup>155</sup> This requirement does not apply to communications responding to requests of potential clients.<sup>156</sup>

Professional responsibility concerns are also central when an attorney partners with someone outside the legal profession, such as a marketing expert.<sup>157</sup> Professional conduct rules are designed to ensure that an attorney partnering with a nonlawyer retains his or her independent legal judgment,<sup>158</sup> and fee-sharing arrangements are strictly

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153. *Id.* R. 7.3(b)(2).

154. *Id.* R. 7.3 cmt. 2.

Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client’s judgment.

*Id.* “The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely.” *Id.* R. 7.3 cmt 3.

155. *Id.* R. 7.3(c). A lawyer does not need to note that a communication is “Advertising Material” if the person she is contacting already has a professional relationship with the lawyer, is a family member, is another lawyer, or has a close personal relationship with the lawyer. *Id.*

156. *Id.* R. 7.3 cmt. 7.

157. Attorneys clearly are permitted to outsource marketing and pay for it, notwithstanding the restrictions on paying others for “channeling professional work.” See *id.* R. 7.2 cmt. 5. The commentary notes that

[l]awyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

*Id.*

158. “A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” *Id.* R. 5.4(b). The *Model Rules* also provide that “[a] lawyer shall not permit a person who recommends,

regulated.<sup>159</sup> The *Model Rules* also make attorneys responsible for some actions of their agents, employees, and other subordinates.<sup>160</sup> Thus, a lawyer cannot employ a third person to perform acts prohibited by the professional rules.<sup>161</sup> When a lawyer retains or employs a nonlawyer agent, the lawyer remains responsible for monitoring the nonlawyer's conduct.<sup>162</sup>

Also relevant to the ability of professional will providers to compete with will-kits and other providers for clients are the professional conduct restrictions on the unauthorized practice of law. The *Model Rules* provide that a lawyer is prohibited from "assist[ing] a

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employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.* R. 5.4(c). The *Model Rules* prohibit a lawyer from practicing as a for-profit legal association or professional corporation if "(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer." *Id.* R. 5.4(d).

159. The *Model Rules* provide that

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; [and] (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

*Id.* R. 5.3.

160. *See id.*

161. *See Moss, supra* note 148, at 648 ("A lawyer should not be allowed to have another do what she cannot do herself.").

162. MODEL RULES OF PROF'L CONDUCT R. 5.1. The *Model Rules* provide that

(a) [a] partner in a law firm . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner . . . in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Id.*

person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”<sup>163</sup> This rule affects how a lawyer will interact with a nonlawyer when they work together.

Furthermore, lawyer advertising is an aspect of free speech protected by the First Amendment.<sup>164</sup> In *Bates v. State Bar of Arizona*, the Supreme Court held that a lawyer’s right to advertise his services, including information on cost, was protected speech.<sup>165</sup> Other cases have likewise supported the right of an attorney to advertise.<sup>166</sup> First Amendment protection of lawyer advertising, though, is perhaps not as strong as it should be.<sup>167</sup> Skittishness relating to the ability to advertise has persisted despite the attorney’s victory in *Bates*.<sup>168</sup>

### B. Criticism of the *Model Rules*: Should the Boundaries Be Expanded?

Attorneys and scholars have criticized the *Model Rules* as being too strict and inefficient.<sup>169</sup> Critics have long suggested that restrictive rules on advertising “interfere with the optimal function of the market.”<sup>170</sup> More recently, scholars have noted that the ethical rule re-

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163. *Id.* R. 5.5. Rule 5.5(a) provides that a lawyer shall not “practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” *Id.* This Rule can make it difficult for lawyers to cooperate effectively with non-attorney providers of will drafting software. See Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 130, 136–37 (2000).

164. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

165. *Id.*

166. See, e.g., *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 479–80 (1988) (holding a state must not prohibit attorneys from sending direct mail solicitations to people known to need legal services).

167. See Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 580–81 (1998). But see Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 66 (1999) (describing some advertising that is incontrovertibly brazen).

168. See Sullivan, *supra* note 167, at 580–81.

169. See Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 510 (1999) (noting that Justice Kennedy has observed that “[t]here is no justification for banning useful methods of transmitting information ‘vital to the recipients’ right to petition the courts for redress of grievances.”); see also Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?*, 15 LOY. L.A. ENT. L. REV. 1, 31 (1994). Note that some criticism was of earlier versions of the rules.

170. Geoffrey C. Hazard et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1108 (1983). The authors

straining advertising is “plainly aimed at decreasing competition,” and eliminating the bar “likely would increase market competition and lower prices.”<sup>171</sup>

Restrictive rules on advertising are also thought to create a disincentive for providing “standardizable services,” like will drafting, at discount prices.<sup>172</sup> When an attorney can provide services that are standardizable—forms that are generally quite similar from one client to another with minor personalized alterations made for each client—attorneys can reduce the costs required to create these documents.<sup>173</sup> Restrictions on advertising may inflate the price of these services—attorneys are able to reduce costs through standardizable services, but charge higher prices due to the lack of market competition.<sup>174</sup> More flexible advertising regulations might create more incentives to standardize services and lower prices.<sup>175</sup>

Others have argued that despite the appearance of a strict rule on lawyer advertising, the level of activity that is actually tolerated is quite high.<sup>176</sup> Professor Zacharias notes that the rule on lawyer advertising in California was routinely not enforced.<sup>177</sup> He suggests that disciplinary authorities have likely made a conscious decision not to take action on violations of the rules on advertising and that attorneys may therefore violate them with little fear of repercussion.<sup>178</sup>

The tension between those who favor advertising leniency and those who condemn it can be summed up as a conflict between public

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argue that “[b]oth proponents and opponents of advertising have failed to recognize fully that legal services are a market commodity.” *Id.* at 1089.

171. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1233–34 (2003). Professor Barton notes that “[t]he ABA has a long and checkered history of utilizing ethical rules to suppress competition and control the more entrepreneurial elements in the bar. The most glaring example is lawyer advertising.” *Id.* at 1283 n.248; see also Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 429–90 (2001).

172. See Hazard et al., *supra* note 170, at 1090.

173. *Id.*

174. *Id.*

175. See Busa & Sussman, *supra* note 169, at 508 (“Firms providing standardizable services can use advertising to increase their recognition in the community, generate more business, and lower prices.”).

176. Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 988 (2003).

177. *Id.* at 984–87.

178. *Id.* at 996.

access and professionalism.<sup>179</sup> Advertising may increase business, but some attorneys fear the public image of the profession will suffer if attorneys appear commercial.<sup>180</sup> Advertising, however, is thought to be more necessary to support a practice serving poorer individual clients than a practice serving wealthier corporate clients because of the low fees, quick case turnover, and lack of repeat business associated with a low-income client practice.<sup>181</sup>

Clearly, more lenient rules of professional conduct would allow more aggressive, and probably more effective, marketing. To the extent that rules are less restrictive in some states, savvy attorneys should market to the extent permitted by their local confines.<sup>182</sup>

### C. Playing by the Rules: Winning with the Hand You've Been Dealt

Although criticisms of the *Model Rules* may be fair, the fact remains that the majority of trusts and estate attorneys are not pressing up against the boundaries set by the *Model Rules*; in fact, they are not even near them. Lawyers can advertise services “through written, recorded or electronic communication, including public media,”<sup>183</sup> and pay a reasonable fee for these advertisements.<sup>184</sup> They can market their services through referrals, within certain guidelines,<sup>185</sup> and can directly solicit business through personal contact in some cases.<sup>186</sup> Lawyers can employ marketing consultants and even outsource their marketing operations.<sup>187</sup> And nothing in the *Model Rules* prohibits a

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179. See Hornsby, *supra* note 139, at 272; see also Delchin & Costello, *supra* note 167, at 101–05 (describing the two camps as the “profession paradigm” and the “business paradigm”).

180. See Hornsby, *supra* note 139, at 272.

181. See *id.* at 292.

182. Most states have standards with respect to advertising that are consistent with the *Model Rules of Professional Conduct*. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 7.2 (2008); ALASKA RULES OF PROF'L CONDUCT R. 7.2 (2008); HAW. RULES OF PROF'L CONDUCT R. 7.2 (2005); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 7.2 (2007); N.M. RULES OF PROF'L CONDUCT R. 16-702 (2003). For a list of the professional responsibility rules on attorney advertising in each state, see THOMPSON WEST, WESTLAW 50 STATE SURVEYS, BUSINESS ORGANIZATIONS—CONSUMER PROTECTION: ADVERTISING ATTORNEY SERVICES (2007).

183. MODEL RULES OF PROF'L CONDUCT R. 7.2(a) (2004).

184. See *id.* R. 7.2(b)(1).

185. See *id.* R. 7.2(b).

186. See *id.* R. 7.3(a).

187. See *id.* R. 7.2 cmt. 5 (“A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services,

law firm from conducting marketing research, creating pricing strategies, differentiating their product, or assessing and redefining a firm's position.

Overall, the *Model Rules* do place some limitations on one P—promotion. However, promotion is just one aspect of marketing, and many more remain unaddressed and unencumbered. Much promotion can be done within the confines of the *Model Rules*, and less is being done than is permitted. Perhaps the *Model Rules* will be expanded to allow even more aggressive solicitation techniques, but many attorneys are not even taking advantage of the opportunities already available.

In the context of trusts and estates practice, arguing for the elimination of the professional responsibility boundaries on marketing is rather like arguing that the ceiling is too low when you are lying prone on the floor. The *Model Rules* may, in fact, be too restrictive. However, much more activity may be safely carried out within the system as it currently exists. Rather than assume that the *Model Rules* prohibit the execution of any marketing plan, attorneys would be better served by creating a tailored marketing plan that complies with the rules as they stand today.

## V. Marketing Wills: Looking Forward

Although current marketing techniques used by most estate-planning attorneys do not pass business school muster, opportunities for improvement abound. Lawyers should educate themselves as to their positioning and take active steps to change if necessary. In assessing their positioning, lawyers should take notice of the Four P's: product, place, pricing, and promotion. They should also be acutely aware of their competitive environment. Lawyers can also improve their business by allowing the theories of customer lifetime value and core competencies to impact their practice's marketing strategy.

Attorneys will be more successful at marketing wills if they take stock of the positioning of their firms and themselves. Professional legal services firms that have not already done their homework and executed an up-to-date marketing plan need to start examining their current environment—both internally and externally—immediately.

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such as publicists, public-relations personnel, business-development staff and website designers.”).



At the most basic level, it is time to understand where their business is coming from, and that requires executing some internal marketing research. Who are the customers? From what distances are they traveling to patronize a firm? Why did they go with a firm in the first place, and will they come back? Are they genuinely satisfied with the services provided?

A firm should also assess how it is positioned in relation to the local direct competition. Unless the firm obtained recent marketing research, its position is probably not clear, and therefore it is advisable that this be determined as soon as possible. It is critical to understand where a firm is before any active positioning is performed. It is rather like playing the game of Battleship™ versus looking at an opponent's map. You may get lucky with a shot here or there, but it makes a lot more sense to understand where you should be targeting. Be forewarned that good marketing research is not always cheap, but it is also almost always worth it—as long as the information revealed is acted upon. Once a firm has obtained as much internal and external information as possible, it should write out a marketing plan based on where the firm is on the competitive landscape and what direction is going to be the most profitable in the future. Making active, strategic choices about positioning allows a firm not just to maximize profits, but to also select the kind of clients it wishes to serve.

It is crucial for legal firms to take stock of their product offerings and how those offerings compare to their competition. Is there a difference at all? What can be done to create a difference? Looking beyond industry competition (other law firms) what about substitute goods? How is a firm's offering different than that of a will-kit? What steps has a firm taken to send those differentiation messages thereby positioning the firm's service offerings to current and prospective clients?

In taking stock of a firm's positioning, lawyers must analyze the status of their service product. To be successful, a product must be sufficiently differentiated from its competitors. If a firm cannot say with confidence why someone in its community (local economy) should use it over another competing firm, it is imperative to find out how the firm can differentiate its offering. If the firm is not sufficiently differentiated yet, it is not too late to change! Once there is one or more effective differentiators, the firm should communicate that message.

Attorneys can also improve their marketing with increased awareness of place. Understanding how the distribution stream works, or rather, how the service comes to reach the client, can inform marketing strategy. Marketing research may reveal that certain demographic or geographic groups are oversaturated or underserved. Attorneys can use this information to assess whether their current distribution path is ideal or whether to improve it.

Wills can be marketed more efficiently if attorneys make better strategic choices about pricing. The most profitable pricing strategy may not be to price high and court ultra-high-income clients. While the market for low- or middle-income clients may or may not be smaller, if there are five firms in the area competing over the very high-end clients and no one attacking middle- and lower-end clients, this lower-end focus could be a more profitable target market for a firm. This is not to say that one cannot attack both, but being negligent of an untapped market is leaving dollars on the table, and in the case of wills, demographics drastically underserved. Thus, there may be opportunities for lawyers who are willing to price lower and increase practice volume.

Pricing strategy is not just a matter of pricing low, however. Attorneys may gain a competitive advantage over their peers merely by *disclosing* their prices. To the extent that attorney fees are kept secret, customers lack the information they need to construct a proper value proposition and determine whether the service is worth the price. With full information, some clients will decline professional will-drafting services, but others will accept them. Without full information, many clients are incapable of making an informed decision and will therefore opt out of a purchase they might otherwise have made.

Perhaps the most delicate topic to address is promotion. Many estate-planning attorneys are apprehensive about their ability to advertise and promote in light of state standards of professional conduct. While attorneys are to be praised for their sensitivity to ethical issues, many promotional and marketing activities are perfectly acceptable under modern standards. Attorneys should assess the boundaries of the professional responsibility rules in their home state and promote their services as fully as the rules permit.

Estate-planning lawyers must increase their awareness of the competitive environment as well. For years, the American automotive industry ignored Japanese competition. While the Japanese were

newly focused on Arthur Deming's high-quality approach to building automobiles, the dominant domestic forces of Ford, General Motors, and Chrysler pushed ahead with larger models that were fancier, sexier, and had more horsepower. After all, that is what the marketplace had always wanted, and the Japanese were no direct threat. Certainly fuel economy and reliability were not that important, so why bother acknowledging a competitor that was clearly inferior?

While by no means a perfect corollary, perhaps the professional legal services industry should heed the lessons taught by this monumental blunder. It is imperative to understand that the competitive landscape can change, and a competitor who may not seem to be a direct threat today could one day be your worst nightmare. "Business as usual" is often a quicker way to the grave than to the top of the mountain. When shaping a legal firm's marketing strategy, one must understand what about the firm's offering differentiates it not only from the direct local competition of other professional legal services firms, but also from substitute products such as will-kits. It may seem obvious to an attorney why the client should use a lawyer to execute a will, but it is not obvious to the consumer. The will-kit market keeps on growing and to ignore it as an idle threat as its market size grows is self-defeating. This indirect competition needs to be addressed.

It is time for the professional legal services industry to realize that it is no longer the only option for legal services. Further, just because a firm has been around for years is by no means an indicator that it will be around forever. The competitive landscape has changed. Professional legal services firms must stop running their businesses like lawyers and start running them as businesses competing in a very challenging environment. More and more service firms have realized that they need to take care of their customers to best understand and serve their needs, and law firms are no different.

In creating a marketing strategy, savvy attorneys will pay attention to the long-term value a relationship with a client can bring the firm. By noting the CLV of individual clients, attorneys can be more attuned to ensuring that their current clients stay content and their future clients are appropriately informed about the potential relationship the attorney can provide.

Estate-planning attorneys can also learn from the theory of core competencies. Presumably, what lawyers do best is practice law. More time should be allocated to practice and less to administrative

tasks that could be delegated to support staff. Should no one in a firm have expertise in crafting a marketing plan, it would be best to out-source to a marketing entity in the area.

## VI. Conclusion

Attorneys have not effectively marketed wills to the general public. Marketing strategies have been unsuccessful for several reasons. The industry is characterized by poor differentiation, counter-productive pricing strategies, and lackluster promotion. Although attorneys can market within the boundaries of the *Model Rules*, the majority of will-drafting attorneys are not taking full advantage of the range of permissible marketing strategies. Attorneys have also not sufficiently relied upon guidance of marketing experts to create sophisticated marketing strategies—instead they have practiced with makeshift business development plans limited by their lack of marketing knowledge.

These marketing failures are not entirely unavoidable. By taking simple steps to understand the basics of marketing strategy and seeking additional guidance as needed, attorneys can structure effective programs to educate the public on products and services for will preparation. In removing part of the unknown from the transaction costs of obtaining a will, attorneys can provide greater incentive to the public to execute estate-planning documents. By promoting their services more widely, attorneys can reach underserved demographics.

As more attorneys market efficiently, business development strategies will become more effective. By targeting niche demographics, testacy can spread throughout local communities. Marketing can encourage people to create a will and take active involvement in the final transfer of their property, rather than letting a state statute control disposition. By integrating interdisciplinary skills of law and business, the field of trusts and estates can develop to better serve its clients.