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What Can Technology Do to Increase Access to Justice?

VANESSA BUTNICK DAVIS*

Hi everybody, my name is Vanessa Butnick Davis and I am the Vice President of Legal and Managing Product Counsel at LegalZoom.com. I am here today to talk about what technology can do to increase access to justice. First things first, I have a little bit of a confession: a long time ago, I was an English major, which means I do a lot of navel-gazing about words. I see “Access to Justice” and I try to parse what that means. I think that a lot of what we talk about when we talk about “Access to Justice” are the things my co-panelists are talking about: things like domestic violence, immigration rights, things that people in troubled situations need to access.

But, what I am going to be talking about today is lowercase “a” access, and lowercase “j” justice. That is, things that might not affect the fifteen percent (15%) of people below the poverty line, but do affect most of our friends and family and ninety-nine percent (99%) of small businesses. These things can have real impacts on people’s lives. For example, one of the top five reasons people go bankrupt is divorce.¹ Things like personal injury (“PI”) and divorce have meaningful, long-lasting effects on people's lives.² I am also going

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¹ *Top 10 Reasons People Go Bankrupt*, HUFFPOST (Mar. 24, 2015, 4:23 PM), https://www.huffingtonpost.com/simple-thrifty-living/top-10-reasons-people-go-b_6887642.html.

² See, e.g., Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1274–75, 1277–78 (2000); J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of Posttraumatic Stress*

to rework “access to justice” a little bit so I can answer the question I want to ask: what is “access to legal services?” Justice is one of those abstract concepts. People picture courthouses. They picture lawyers. There are a lot of things people picture when they think about justice, so I am going to talk about access to legal services—something a bit more concrete.

I. MY EXPERIENCE AS A LEGAL CONSUMER

To figure out where we want to go, we have to ask, “Where are we now?” I am going to tell a story about what happened to me recently and, more accurately, to my family. It is about my experience as a legal consumer. My wife was in a car accident a couple years back. It was very traumatic and very challenging, so we hired a lawyer. It was my first experience personally hiring a lawyer, and I have to say, it was weird. It is a weird thing to hire a lawyer. It is a really uncomfortable situation. I am going to relay some of my experience with the lawyer and explain where I think we can go with technology to improve this overall experience.

A. *I Guess I Need a Lawyer . . . and I Guess It's You.*

When my wife was in the car accident, I was at work and gathering all my things. I was really confused. I didn't know what to do. I was thinking about insurance. I was thinking about the car, which was almost brand new—that's a separate thing, but still a little bit daunting! There were only 5,000 miles on the car. I am never going to let that go. Anyway, on my way out the door, after gathering all these papers, a colleague of mine handed me a business card. It was her husband's, who is a PI lawyer. For me, that was it. I didn't do any comparison shopping. I didn't think about alternatives to lawyers, even though part of my job is to think about stuff like that. I was honestly so happy to have something taken off my plate that it seemed like a pretty good deal. Right?

This is pretty common. Fifty-five percent (55%) of people contact a lawyer before doing research online or before doing anything

Disorder After a Motor Vehicle Collision: Empirical Findings and Clinical Observations, 38 PROF. PSYCHOL. RES. & PR. 629, 629–30 (2007).

else,³ and seven out of ten people talk only to one lawyer.⁴ That is to say, they hire the first person they talk to.⁵ They don't do a lot of investigation. People don't like doing that. Nobody likes talking to lawyers.

B. *Am I Being Ripped Off?*

My second thought was, "Am I being ripped off?" This was a PI case. It was a contingency fee case. So technically, it was free representation.⁶ But, I had this feeling that I didn't really know what he was working on. I thought, "Maybe I am not making the right decisions. Maybe he is not making the right decisions, and we are losing money on this whole case."

C. *I Have No Idea What Is Going On.*

I was not helped by the fact that I had no idea what was going on. It was impossible to talk to this guy, who I just sort of knew socially. He would not answer the phone when I called. I'm a lawyer, but I'm not a PI lawyer. I don't know how many discovery requests are supposed to go back and forth. I don't know the timeline. I don't know if we are supposed to appear at depositions. It was like I wasn't a lawyer in this situation because I was out of my practice area. This bad communication is pretty common. In the United States, according to some American Bar Association ("ABA") studies, about thirteen percent (13%) of attorney malpractice cases are based on poor communication.⁷ In Ontario, Canada, that number is about thirty-five percent (35%).⁸ Thirty-five percent! Canada is our

³ FINDLAW, THOMSON REUTERS CORP., 2014 U.S. CONSUMER LEGAL NEEDS REPORT: UNDERSTANDING TODAY'S LEGAL CONSUMER (2014), <https://www.lawyermarketing.com/studies/findlaw-2014-us-consumer-legal-needs-survey/>.

⁴ *See id.*

⁵ *See id.*

⁶ *See When You Need a Lawyer: Legal Fees and Expenses*, A.B.A. (Mar. 18, 2013), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.

⁷ *See* STANDING COMM. ON LAWYERS' PROF'L LIAB., AM. BAR ASS'N, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2012–2015, at 18 (2016).

⁸ LAWPRO, *Is Anyone Listening? Preventing Communications Claims*, PRACTICEPRO (Sept. 1, 2011), <https://www.practicepro.ca/2011/09/is-anyone->

friendly neighbor to the north, and even they are having problems with communication. There is clearly a lot of work to be done to improve this problem.

D. *Are You Any Good at This?*

I had no idea if he was doing a good job. I knew that I was looking at briefs because he was forwarding them to me, because I insisted that he forward them to me. There were some things that I would change because I am a little pedantic, but I didn't know if the briefs were bad. Maybe they were good. I didn't have a sense. Eventually, we had a settlement. I don't know if it was a good settlement. The lawyer had a lot of papers at the end of the case to show that there were comparable settlements in similar cases. We didn't get those at the beginning of the case, so I don't know if he had a stack of them ready to go for whatever the settlement offer was. Ultimately, it was hard to feel like I was satisfied with the whole thing.

E. *You Are Not That Nice.*

Finally, he just honestly was not that nice. And again, this is someone I knew socially. If you were in a car accident or someone you knew were in a car accident, what is something you might say to them? "Are you okay?" "Oh my God, that must have been so scary." You might not say something like, "Do you have shooting pains or stabbing pains? And honestly, it's better for us if you have shooting pains," which is something he actually said to us. This accords pretty well with most people's impressions of lawyers. In fact, Princeton did a study in 2014 that ranks various professions on an axis of competence versus warmth.⁹ Lawyers, although they did very well in the competence scale, did very poorly in warmth.¹⁰

In summary, a product I did not want or research, and of which I did not know the price, substance, or quality, was delivered

listening-preventing-communications-claims/. More recent data shows that only twenty-eight percent (28%) of legal malpractice claims are based on communications issues. LAWPRO, *E&O Program: Claims Report*, PRACTICEPRO (May 1, 2017), <https://www.practicepro.ca/2017/05/eo-program-claims-report/>.

⁹ Susan T. Fiske & Cydney Dupree, *Gaining Trust as Well as Respect in Communicating to Motivated Audiences About Science Topics*, 111 PROCEEDING NAT'L ACAD. SCI. U.S. 13,593 (2014).

¹⁰ *Id.* at 13,595.

unpleasantly. I would not accept this from any other product in the world. There are stores in my neighborhood that are very convenient that I do not go into because someone looked at me a little bit off. This is crazy. It is crazy that this is the product that people are delivering. So, what can we do to improve it? What can technology do?

II. UN-WEIRDING LEGAL SERVICES

I have to pause, as an English major, and think about technology and how some of the panelists earlier talked about technology. I think, particularly in a place like this, what we are talking about is stuff like artificial intelligence (“AI”) and blockchain and smart contracts, which I just want to call general bleep blorp. The other panels talk about technology as the “new, new thing.” It’s a very twenty-first century lens on what technology is. A saw was a great technology back in the day. A wheel was innovative technology back in the day—not to say anything about the incredible things our cell phones can do that everyone was discussing this morning.

However, technology is much broader than what we are talking about. Technology is anything that changes the way we do what we do. Whether or not we consider it a new or innovative technology completely depends on our perspective. So let’s talk about using technology in whatever form to un-weird legal services.

A. *Options*

One of the things the rest of the panel and I talked about on the phone before the Symposium was how people think about lawyers when they think about justice. That is still the case. LegalZoom has done a lot of work and is pushing the envelope on what people think they need a lawyer to do. You can debate whether or not that is good or bad. But ultimately, LegalZoom is only nudging the envelope. It is not really pushing the envelope because there are still a host of things that people would never consider doing on their own. We need to offer more lawyer-free options, but there is a reason that there are not more of these options. That reason is UPL laws—unauthorized practice of law. Unauthorized practice of law regulations make it really impossible to innovate right now.

“But what about startups? There are so many startups, right?” Well, sort of. I track legal startups as part of my work at LegalZoom, and there are about 2,000 on my radar right now. However, of those, maybe fifteen to twenty percent (15–20%) are focused on solving *consumer* problems. Startups are mostly focused on solving *lawyer* problems. That is, things like e-discovery and practice management—things that make a lawyer’s job more efficient. That’s good, but it doesn’t really affect consumers, except on a trickle-down basis.

B. *Clear Fees and Alternative Fee Arrangements*

I did not say *cheap* fees, which I think people are thinking. I said *clear* fees. I do not think anybody should undervalue their work, but I also do not think they should be coy about what their prices are. LegalZoom offers a lot of flat fee products,¹¹ and some of them are not cheap. One of the products we offer is the Utility Patent product, which we use an attorney to fulfill.¹² It is not cheap.¹³ Maybe for some people it is cheap, but it is not cheap to me. The point is, people are grateful that they know exactly what they are going to pay before they pay it, regardless of the price.¹⁴

What about alternative fee arrangements?¹⁵ It is only partly true that everybody is using these arrangements now. Altman Weil does a study every year about law firms in “transition,” and they mostly

¹¹ *Why Us*, LEGALZOOM, <https://www.legalzoom.com/why-us/> (last visited Jan. 4, 2019).

¹² See *Utility Patent Pricing*, LEGALZOOM, <https://www.legalzoom.com/business/intellectual-property/utility-patent-pricing.html> (last visited Jan. 4, 2019).

¹³ Step One of filing a patent at LegalZoom costs \$699.00 and Step Two costs \$2,400.00 plus federal filing fees. *Id.*

¹⁴ See *Win-Win Alternative Fee Arrangements*, A.B.A. (Oct. 23, 2012), https://www.americanbar.org/publications/law_practice_magazine/2012/july-august/win-win-alternative-fee-arrangements/.

¹⁵ Alternative fee arrangements are methods of calculating fees that are not the billable hour, including fixed or flat fees, fixed fees with success fees, capped fees, contingency fees, and task-based billing. See Amy Larson, *Alternative Fee Arrangements: Why and When?*, ABOVE L. (Dec. 15, 2017, 12:39 PM), <https://abovethelaw.com/small-firm-center/2017/12/alternative-fee-arrangements-why-and-when/>.

survey large law firms.¹⁶ Of the firms surveyed, ninety-three percent (93%) use alternative fee arrangements.¹⁷ That's good. Except, seventy-four percent (74%) of firms use alternative fee arrangements only reactively¹⁸—that is, in response to client demands.¹⁹ So, we are seeing some of the biggest companies in the world demanding discounts from some of the biggest law firms in the world. That doesn't really relate to most people. In fact, Clio compiled a report, and found that most of the bills tracked through Clio's systems still use the billable hour.²⁰ In the very same survey, however, forty-seven percent (47%) of consumers reported that one factor they considered when choosing an attorney was whether the attorney charged flat fees.²¹ Thus, there is a disconnect between how lawyers are billing and what customers really want.

C. Communication

Communication is a really big issue for me. I hate the phone, for the record. I do not want to talk to my lawyer on the phone. I don't even want to text him. I don't want to email him. I think there should be a better way for lawyers to communicate to their clients where they are in each client's case. I am kind of obsessed with the Domino's Pizza Tracker.²² It is amazing. I don't know if people use Domino's, but I kind of order from them just for this. Their app shows you exactly where in the pizza process you are.²³ There's a quality control element—I don't know what it is, but we know exactly when the pizza is going to be coming to our house. But, that's easy, right? It's pizza, not law.

¹⁶ THOMAS S. CLAY & ERIC A. SEEGER, LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY, at i (2017), http://www.altmanweil.com/dir_docs/resource/90D6291D-AB28-4DFD-AC15-DBDEA6C31BE9_document.pdf.

¹⁷ *See id.* at 67 (noting that 92.9% of firms use non-hourly based billing).

¹⁸ *Id.* at 68.

¹⁹ *Id.*

²⁰ CLIO, LEGAL TRENDS REPORT 27 (2017), <https://www.clio.com/resources/legal-trends/2017-report/>.

²¹ *Id.* at 17.

²² *Tracker*, DOMINO'S, <https://www.dominos.com/en/pages/tracker/#!/track/order/> (last visited Jan. 19, 2019).

²³ *Id.*

It's true—law is more complicated. But, let me tell you about one of the things that LegalZoom has done. We own a law firm in the United Kingdom that does primarily conveyance work, which is real estate transfers.²⁴ One of the things that we have managed to do there is develop an app.²⁵ In the app, we tell people when their legal work is going to be done. We offer them a checklist so they know exactly what is going on and we offer some statements of things we need from them. People are reacting really well to knowing exactly where they are in their case. It makes people feel like they have control and it has also increased our customer satisfaction rating.

D. *Quality and Customer Service*

Quality is one of those things that, in law, people are hesitant to measure. You cannot really know if something is good or not. Part of the problem is that, historically, we have measured quality from the perspective of the lawyer and not from the customer.²⁶ Customer surveys, even though they are not high-tech, are a really good way for people to communicate how they feel about the product.²⁷

Lawyers don't really think of themselves as being in the service industry, but they are. They are delivering services to a customer—to a client. One of the things that we have done with the lawyers in our network—they do not work for LegalZoom, but they are associated with us—is provide them with a checklist. We have offered them a checklist of things that they should remember when they are

²⁴ *LegalZoom UK to Acquire Law Firm*, BUS. WIRE (Dec. 7, 2015, 9:00 AM), <https://www.businesswire.com/news/home/20151207005117/en/LegalZoom-UK-Acquire-Law-Firm>.

²⁵ See *LegalZoom Estate Planning*, GOOGLE PLAY, https://play.google.com/store/apps/details?id=com.legalzoom.estateplan&hl=en_US (last visited Jan. 4, 2019); Neil Rose, *LegalZoom Launches 'Digital Will' in First UK Product Roll-out*, LEGALFUTURES (Nov. 28, 2016), <https://www.legalfutures.co.uk/latest-news/legalzoom-launches-digital-will-first-uk-product-roll-out>.

²⁶ See Mark A. Cohen, *New Business Models – Not Technology – Will Transform the Legal Industry*, FORBES (Nov. 8, 2018, 7:14 AM), <https://www.forbes.com/sites/markcohen1/2018/11/08/new-business-models-not-technology-will-transform-the-legal-industry/#4bdbe1e718cc>.

²⁷ See Lynn Luong, *Law Firm Client Relations: How to Get Client Feedback That You Can Use*, ABOVE L. (Nov. 9, 2016, 8:00 AM), <https://abovethe-law.com/small-firm-center/2016/11/law-firm-client-relations-how-to-get-client-feedback-that-you-can-use/>.

talking to customers.²⁸ These shouldn't be surprising to anybody. This is basic etiquette, which is itself a technology. This is stuff that people need to remember when they are talking to clients. It doesn't seem like it should be that complicated, but it is. People are focused on details of the *product* they are providing and not on the *service* they are providing.

III. HELLO. MY NAME IS ELIZA.

One last thing. I know somebody earlier today mentioned Eliza and I don't know if everyone knows what Eliza is. She was one of the first AI chatbots developed at MIT in the 1960s.²⁹ One of her scripts was called "Doctor" and Doctor was meant to be a parody of the non-directional psychotherapy that was popular in the 1960s.³⁰ It is the stuff you probably remember from the movies—like the "Oh, I see" and then, "How did that make you feel when your mother said that?" Eliza was meant to parody. She was meant to show that nobody gets any value out of that type of therapy. However, Eliza was actually very popular.³¹ In fact, she was very popular among some of the people that developed her.³² So people wanted to spend time with Eliza.³³ They felt like she really listened to them and heard their problems.³⁴

So the experiment, I guess, was a failure. However, I think it shows us a couple of different things. First, it does not take that much to create a human connection. It takes a simple kind of reciprocal communication for people to feel understood. Second, humans and machines can work together to create an authentically human experience. We spend a lot of time talking about machines in the law and automation of processes. This is ironic, because the future is going to be both more automated and more personalized than ever.

²⁸ It includes things like (1) introduce yourself, (2) listen, (3) use plain language, (4) do what you promise, (5) send a follow-up email, (6) call on time, (7) be prepared, (8) be friendly, empathetic, and interested, and (9) don't rush.

²⁹ Brian Christian, *The Samantha Test*, NEW YORKER (Dec. 30, 2013), <https://www.newyorker.com/culture/culture-desk/the-samantha-test>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

We spend time talking about the automation part, and I think we really need to talk about the personalization part and how we can use machines to help deliver a product that has heart.

Thank you.