

MARKETING WILLS

Michael R. McCunney

Alyssa A. DiRusso

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.

Michael R. McCunney holds his B.S. in Marketing from the University of Hartford and his M.B.A. from Boston College.

Alyssa A. DiRusso is an Assistant Professor of Law at Samford University's Cumberland School of Law, and holds her J.D. from the University of Texas School of Law and her B.S. in Psychology from Carnegie Mellon University.

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I. Introduction

Despite the relative certainty of mortality, most people die without having executed a valid will.¹ 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

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.²

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,³ fear of death,⁴ procrastination,⁵ laziness,⁶ and the belief that a will is unnecessary for an individual based on assets or family situation⁷ 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.⁸

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.⁹ 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.¹⁰ 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.”¹¹ 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-

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.¹² 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.¹³ 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.¹⁴ What are the features of the product or service, and what are the benefits it provides to the end user?¹⁵ 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?¹⁶ 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.¹⁷ Another organization might utilize pricing strategy to relay competitive

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.*