Making the Case for Civil Legal Assistance in the United States[1]

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Abstract
A perennial theme of public policy discussion is the "business case." In the legal aid context, business case research and advocacy advance instrumental arguments for public and, often, philanthropic spending. In arguing for investment in not-for-profit activities, business case arguments seek to show that investment in some activity creates welcome revenue or desired savings in other activities. Drawing on interviews with civil justice service providers, consumer and funders who are stakeholders in two innovative service delivery projects, I explore differences in people's judgements about what factors count as benefits and what are treated as costs when they consider the implementation of novel programs to provide civil legal assistance. Four broad categories of value emerge that are relevant to the business case: guild protectionism, leverage, efficacy, and inefficacy. Among stakeholders to a given project, these values may conflict. Sometimes these conflicts are reconcilable in terms of value common to those who disagree; sometimes, they are not.

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Introduction

A perennial theme in debates about public policies is the so-called business case. Business case arguments "refe[r] to the bottom-line financial and other reasons" for pursuing some activity (Carroll and Shabana 2010: 85). When considering the activities of for-profit businesses, a business case examines benefits that accrue to the firm that engages in the activity – for example, reducing legal risks or the threat of external regulation, increasing legitimacy or improving reputation – that may be linked to short or longer term profitability (Carroll and Shabana 2010: 92-94). When considering the activities of not-for-profit, government, or "third sector" entities, a business case often takes the form of an analysis of "social return on investment," or an attempt to measure and quantify the "social, environmental and economic outcomes" created by an activity (Nicholls *et al.* 2009: 8). Whether precisely quantified or used essentially as a metaphor, a business case is a form of instrumental argument – if we do X, some desirable Y will result. Ideally, the values of X and Y can be quantified and expressed in a common currency. The business case formula is distinct from a normative argument, which holds that we ought to do X because it is the right thing to do, or because someone deserves it. It is distinct as well from what we might call a consummatory argument, when we regard X as a good in and of itself.

In times of austerity and support for "smaller" government, business case research and advocacy offer economically rational arguments for public and, often, philanthropic support of specific activities and programs. A familiar form of this is the economic benefits approach, which seeks to show that investment in some activity creates

welcome revenue or desired savings in other activities. Sometimes the economic benefits are precisely quantified, while in other cases they are implied. In the legal aid context, we see examples of business case-style arguments in studies of the anti-poverty impacts of legal aid (Houseman and Minoff 2014), reductions in health care expenditures achieved by treating legal problems (Pleasence *et al.* 2007; Teufel *et al.* 2012), and money that flows into U.S. states from the federal government as a result of providing legal aid services (Abel and Vignola 2010).

Business case arguments are meant to persuade stakeholders to support an activity by showing that the activity achieves outcomes that produce value recognized those stakeholders, making an argument that the value gained is worth the cost of producing it. Business case arguments make the question of value in to an empirical one in the sense that costs and benefits of an activity must be identified and measured empirically (e.g., Nicholls *et al.* 2009; Prescott 2009). The present paper makes the question of value into an empirical question in a different way, by asking what factors count as business case values to key stakeholders whose support is necessary for the implementation and expansion of innovations in providing civil legal assistance. Accounts of value come from a study of two actual innovations, one market-based and the other a service fully subsidized by a combination of public and philanthropic funding.

Drawing on interviews with traditional and alternative providers of civil legal assistance services, court staff, and service funders, I identify four themes. Each theme reflects a different understanding of what counts as value. *Guild protectionism* values a continued

monopoly on a specific activity. Arguments about *leverage* value expansion of existing activity. Accounts that focus on *efficacy* value specific impacts of the activity. Accounts that focus on *inefficacy* involve stakeholder expressions of support for an activity contingent on the activity explicitly *not having* specific impacts. These themes of value are common to both the market-based and the nonprofit innovation.

Identifying substantive values held by stakeholders to legal aid innovation is instructive both intellectually and practically. Eliciting arguments for and against innovation in civil legal services informs us about the current state of understanding by key stakeholders in that activity, revealing insights about what empirical changes and ideas of change animate their reactions and participation, support, or obstruction. Second, the themes highlight rhetorical and evidentiary challenges that those wishing to use business case arguments could address in order to increase stakeholder support, or at least reduce effective opposition. In some instances, stakeholders' conceptions of value are in conflict. Some of these conflicting conceptions are reconcilable, while others may not be.

Research Context: Innovations in US Legal Services Delivery

In the United States, legal professions are regulated at the level of states. Throughout the country, private individuals hold a right of self-representation, or the legal capacity to transact legal business and appear in courts and other hearing fora without legal counsel of any kind. In the U.S. states, lawyers maintain a strong monopoly on legal services, holding powers to give legal advice, provide legal representation and enact

many kinds of legal documents. Once licensed, attorneys in the US are formally omnicompetent: they may practice in any area of law. Nonetheless, despite this strong monopoly, the provision of civil legal services in the United States has for many years involved more than attorneys and those staff working under their direct supervision. Authorized nonlawyer models of service provision have long included autonomous nonlawyer advocates practicing within a limited scope and permitted in certain kinds of courts and tribunals (Kritzer 1998; Sandefur 2015). In some states, paraprofessions exist that are permitted to engage in the preparation of specific legal documents. As well, nonlawyer staff serve in "self-help" programs for unrepresented litigants that are located in courthouses in some parts of the country. Though these self-help program staff may be formally supervised by an attorney, sometimes they are not. Among those who are, the degree of actual oversight varies widely, from careful review by attorneys of each piece of work product to no actual supervision at all. Computer programs that assist people in creating legal documents, such as A2J Author, have been available for many years (A2J Author n.d.), and such capacities are expanding into the market through providers such as LegalZoom and RocketLawyer.

More recently, new experiments have been launched to provide legal services through means other than traditional, fully qualified attorneys. Some of these models use technology, some use new kinds of service staff, and some combine new human roles and new technologies. New experiments involving new kinds of personnel pare off some of the powers of a fully qualified attorney and combine them in novel ways to create new legal roles with new constellations of powers. Like the older experiments,

these new “roles beyond lawyers” nibble at the US legal profession’s monopoly on the practice of law (Sandefur and Clarke 2016).

One way to conceptualize these human nonlawyer roles is as forms of “unbundled” or “limited scope” legal practice (Mosten 1994). Figure 1 depicts the work jurisdiction of contemporary US attorneys and some of the ways specific tasks have been combined for new roles. A fully qualified attorney is formally omnicompetent, empowered to perform all of the tasks in any field of substantive law. Fully qualified attorneys may engage in any or all of: representing clients in and out of court; advising clients about their legal options; taking legal actions on clients’ behalf; holding communications with clients in strict confidence; and, informing clients about the law. In U.S. states where attorneys are permitted to engage in limited scope practice (most states), with client consent lawyers may perform only some of those tasks on a given legal matter (American Bar Association Standing Committee on the Delivery of Legal Services 2014). New (and old) roles for nonlawyers limit the scope of practice in both legal substance and legal powers. These roles may practice in only some areas of substantive law, and only some parts of those areas, and are restricted to only certain tasks historically within lawyers’ jurisdiction. The most common roles for nonlawyers in the US context encompass only one power of fully qualified attorneys: providing legal information[2], because this the single power on which US attorneys have not held any

[2] The fine line between legal advice and legal information can be difficult to identify in practice. Typically, the distinction is between general information about legal principles, laws or professional practice that does not pertain to any specific set of facts or circumstances and the application of legal principles, laws or professional experience to

monopoly. A few expand to permit the preparation of legal documents on a clients' behalf. The most expansive limit the substantive scope of nonlawyer professional activities, even when they permit representation.

[Figure 1 about here]

The present paper explores stakeholders' views of two new nonlawyer roles. Both of the programs studied here involve the use of people who are not fully legally qualified to provide to individual members of the public services that were historically available only from licensed attorneys. Both were launched as intended solutions to the problem of unrepresented litigants involved in formal court processes, specifically in the areas of divorce and child custody, debt collection, and eviction. One program empowers staff to provide only information, moral support, and accompaniment throughout a legal process; at the same time, this program also sends the new personnel into court rooms to accompany litigants who have no lawyer representation. These new personnel cannot represent clients there or anywhere, but they can answer factual questions addressed to them by judicial staff. The services of this program are free to clients at the point of service and fully subsidized. In Figure 1 and throughout the paper, I refer to this program as the "Process Helpers." The other program creates an occupation empowered to practice law independently within a limited scope, providing legal advice, provider-client privilege, and legal document preparation services within a specific substantive area of law, but restricts the new occupation's activities to those that fall

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specific facts or circumstances (see, e.g., Center for Public Legal Education Alberta 2015).

short of any kind of representation. The services of this new occupation are market-based, paid for by clients. In Figure 1 and throughout the paper, I refer to this program as the “Attorneys-Lite.”

Innovations in service delivery provide an instructive case for understanding stakeholders’ views of value because these developments confront stakeholders with a new activity that must be made sense of and accepted, rejected, or tolerated. Key stakeholders for such innovations include three principal groups of people (Sandefur and Clarke 2016):

1) current participants in the work process into which the innovation will enter. In the civil legal context, these may include judges, court staff, law office staff, and legal services providers on both sides of the legal issues at hand. That these stakeholders at least tolerate the innovation is a requirement of its survival – if they actively oppose it, it has slim prospects for successful implementation and sustainability;
2) participants in the production of the new services. These may include not only providers of the new service themselves, but also those who train, supervise and, sometimes, regulate them;
3) funders and potential funders of the service. In the US civil legal context, these may include government and philanthropic funders as well as clients served.

Data and Methods

The data for this study come from interviews with key informants about the implementation, conduct, and impact of two new services programs, the court-based Process Helpers and the market-based Attorneys-Lite. These categories of stakeholders and the specific roles and individuals who comprised them were identified through a process of "context mapping" (Sandefur and Clarke 2016): identifying the people, roles and organizations who would be directly involved in the implementation of the innovation or whose work would be affected by it. Informants included judges, court clerks and other court staff, legal aid and private practice attorneys, other service providers, current and potential funders of services, including clients, and people who themselves were providing the new services. The interviews were conducted in 2015 and 2016. Some interviews were conducted by two members of the research team together; others were conducted only by the author, who participated in all interviews.

Perceptions of value were elicited by a range of questions, including questions about how the roll-out of the innovation was proceeding, the informants' personal experience of the new workers and the work, how the new service delivery model and its staff were perceived by others involved in the work, and what evidence of outcomes or impact would lead the informant to support the continuation or expansion of the new program. When possible, the interviews were recorded. When it was not possible to record the interview, I took detailed notes. In total, I spoke with 43 people. All were promised anonymity in reports from the research; below, individual informants are indicated by codes describing their role, e.g., "ATTY A" for an attorney.

The process of uncovering understandings of value was systematic, inductive, and issue-focused (Weiss 1994; Lofland and Lofland 1995). My aim was to identify the principal themes of value that stakeholders used when discussing the new programs, recognizing than any given person might draw upon more than one in his or her understanding of a program. To identify informants' understandings of value, I first went through the documentation for each interview and identified all expressions of value and evaluative statements about the programs in general or their specific activities. I then coded the substance of each expression, focusing on what informants described as the goods that should be preserved or enhanced or were threatened by the implementation of the new program. The focus of the present paper is on values relevant to making a business case, or instrumental arguments for and against the innovations.

Findings

Stakeholders' views of the new programs revealed a range of perceptions of value. Some stakeholders evaluated programs largely based upon the perceived impact on their own activities, while others compared their perceptions of a program's performance to independent standards of different kinds. Stakeholders used a variety of evaluative logics, some of which were instrumental and consistent with business case logic, others of which drew upon beliefs about ultimate goods. From stakeholders' discussions of their views on the programs, four broad categories of business case values emerged. Though one program was market-based and the other was fully

subsidized, all four emerged in the discussions of both programs. These values were: guild protectionism, leverage, efficacy, and inefficacy.

Guild Protectionism

In guild protectionism evaluations, new activities that are perceived to threaten to take paying work or substantive jurisdiction away from the stakeholder in question and people in similar roles are *per se* undesirable: the good to be served is the revenue stream or the exclusivity of work jurisdiction, or both. Both innovations involved nonlawyer personnel engaging in tasks historically performed only by fully qualified attorneys. Given the long history of guild protectionism on the part of lawyers in the US and elsewhere (Abbott 1988; Abel 1989; Larson 1977), it is unsurprising that attorneys working in the areas of law where the innovations were launched perceived that their turf was being invaded. Expressions of guild protectionism came from both private practice lawyers and salaried legal aid attorneys whose clients' use of their services is entirely subsidized by third parties. Such expressions also came from court staff, who were sometimes ambivalent about sharing their role as providers of legal information with the new personnel.

Lawyers' expressions of guild protectionism took different forms. One form was a wish to have the profession initiate and control any change through designing and regulating the new roles. People taking this view believed that the "bar needs to keep control of it," and that is was especially important to "avoid having a legislative solution" – a situation where state government stepped in and redefined the practice of law for the bar [LEGAL

EDUCATOR A]. Another form of guild protectionism focused on lost revenue or funding. Private practice lawyers had concerns about Attorneys-Lite "undercutting their prices" and "taking away business" [ATTY A]. In response to the argument that people buying Attorney-Lite services could not afford the services of full-service attorneys, one lawyer observed that "sometimes clients" who initially do not believe they have enough money to hire an attorney "will find the money after they meet with you" [ATTY A]. When the program was subsidized rather than market-based, as in the case of the Process Helpers, lawyers expressed guild protectionism in terms of competition for government and charitable funding. As one legal aid attorney observed,

> the economics of all this are super-challenging. When this whole conversation [about Process Helpers and other nonlawyer providers of legal services] got going in earnest in recent years, one of the first things that occurred to me… would be the push to drive down costs. Having funders push us to hire people who can work more cheaply [than lawyers] would be the natural outcome of this kind of initiative if it really builds [ATTY B].

There is of course more than one guild whose work is being disrupted. For example, court staff such as clerks currently provide a range of information services to members of the public who come to court without lawyer representation. One member of a court clerk's office described himself as "the face," the main point of contact and information for people visiting the courthouse. In recounting his experiences with the Process

Helpers, he commented dryly that “some people want to do other people’s jobs for them,” and went on to observe further that in doing so Process Helpers sometimes made troublesome mistakes [COURT STAFF A]. His implication was that the Process Helpers should stay out of his part of the business of the courts.

Leverage

In leverage accounts, stakeholders described how the innovation permitted the generation of more value, specifically in the form of more work and, sometimes, more revenue. Leverage accounts valued expansion of existing activity. Like guild protectionism, leverage accounts emerged in both the market and the non-market contexts. In the non-market context, leverage accounts were about doing more with less. As one funder of civil legal assistance observed,

> We’ll never have enough lawyers to meet the full demand. [Process Helpers are] one way to potentially to start to meet more of the demand in a more cost effective way. [FUNDER A].

In a market context, for attorneys leverage could be about more business for lawyers or – as in the non-market context -- about expanded capacity for existing providers, law firms. One attorney, whose practice employed an Attorney-Lite, observed that having the Attorney-Lite on staff “benefits the firm” because the firm gets “the extra hourly clients, even at a lower rate.” It is also “good to have another person [in the] practice who people refer to, [it] gets everyone’s name out there” [ATTY C]. Attorneys who

worked with Attorneys-Lite described them as sources of new business and new revenue: because Attorneys-Lite could not represent clients in court, court appearances could be unbundled and referred as paying work to attorneys in the firms who employed Attorneys-Lite. Leverage could also mean empowering the actual client to do more than she could have without the innovatino. As one client of an Attorney-Lite described, she appreciated

> Being able to independently take care of it…. [Attorneys-Lite are] a good spot between no support and having a lawyer take it over for you [CLIENT A]

Efficacy

In efficacy accounts, stakeholders described the achievement of a particular outcome as a justification for supporting the new activity. The good was a specific desired impact. Efficacy accounts identified a range of possible desired effects of the new programs. Some stakeholders wished specifically for a legal impact: if these new roles did not change the legal outcomes of individual cases, they were not worth the trouble necessary to design, supervise and fund them. As one stakeholder of the Process Helpers observed, his support for the continuation and expansion of the program would,

> really boil down to evictions being prevented. No matter what anybody tells you about 'they were happy with the results of their case, they got $10,000 to move,'… if they get evicted in this city they're not going to have alternatives that work the way they should. [ATTY B]

Efficacy accounts could also highlight the value of being able to manage the tasks at hand in dealing with a legal matter – that is, the good was getting people help with their problems. For example, an Attorney-Lite's client who was pursuing divorce described how pleased and grateful she was that the Attorney-Lite had

> really helped me to see the real-world scenario of it, so that I didn't have too lofty or too lenient expectations when it came to dividing things up and really pursuing that [CLIENT A].

Sometimes efficacy accounts were about easing the stakeholder's burdens. A judge described how the Process Helpers "could be helpful, in that [they] relieved some of the responsibility of the court staff because… people felt that there was someone else that they could ask questions of" [COURT STAFF E].

Some stakeholders explicitly referenced expanded access to justice desired outcome of a new program. One attorney in the market where the Attorneys-Lite were working believed that Attorneys-Lite expanded access to justice, because they could assist "moderate means clients who couldn't afford a full attorney" [ATTY C]. As another observed of the Process Helpers, there will "always be room for ancillary services for those not getting what they need" [ATTY B].

Inefficacy

Surprisingly, some accounts explicitly cited inefficacy as a value: if an innovation was found to have certain impacts, those impacts were *per se* evidence of its failure to deliver an important value. Inefficacy was sometimes valued in a principled way, when it was seen as essential to the achievement of another value. Inefficacy was also valued in what appeared to be an unprincipled way, when efficacy seemed to be opposed largely because it was inconvenient.

Principled inefficacy was expressed by those who felt that other important values were preserved when the innovation failed to have certain effects. One variety of principled inefficacy reflected a particular understanding of the practice of law: this view held that the practice of law involved any and all activities that might change the legal outcome of a case. If the innovation truly did not infringe on the practice of law, its services should accordingly have no effect on legal outcomes. In the case of the Process Helpers, one stakeholder in a group interview observed that "in no way, shape or form" do Process Helpers "practice law." Therefore, when the Process Helpers are successful in their work, litigants not only did not achieve different legal outcomes, but those litigants also "aren't as concerned with the outcome anymore, because somebody listened to them" [COURT STAFF B]. Another variety of principled inefficacy reflected a perception that the court, which supported the Process Helpers, should never be involved in an activity that changed the outcome of a case, as the court is a neutral hearing site rather than an advocate for either party to any case. If Process Helpers actually changed legal outcomes, they violated this principle of neutrality.

Other accounts that valued inefficacy in a principled way reflected concerns about consumer protection. These stakeholders believed that power should be restricted to those that the new roles could competently perform. Asked if the Attorneys-Lite should be given powers of representation, one attorney believed there was too little information about how the program worked to be sure that the Attorneys-Lite would do a good job in court. The program, she believed, was

> So new. I don't think they should appear in court and represent people. [It's] so new. [ATTY A].

As another observed, the background of the Attorneys-Lite might not be appropriate for such an active, independent role, as their

> experience is narrow, focused, and does not translate well into being a standalone professional without supervision. [EDUCATOR A].

What I have termed unprincipled inefficacy reflected, essentially, grumbling about an innovation because it created inconvenience by upsetting standard operating procedures. These arguments also hinged on a definition of the practice of law. For example, when the Process Helpers first began working consumer debt cases, some debt collectors' attorneys complained to the court about Process Helpers "being seen as that person's advocate [because] now people are prompting the litigant not to clam up" about her side of the dispute. As this informant observed, consumer debt "plaintiffs' attorneys work per diem, so [dealing with the Process Helpers] is another hurdle they

have to jump before they get their settlements" [Court Staff C]. Once the plaintiffs' attorneys got used to the presence of the Process Helpers, the complaints stopped.

Analysis: Reconcilable and Irreconcilable Differences

The logic of a business case argument is that costs and benefits can be assessed in a common metric and compared, that values are commensurable and accounts can be reconciled. For some of the instrumental values expressed by stakeholders to the two innovations, accounts could be reconciled, by presenting empirical evidence in the common terms on which stakeholders agreed. For other values, however, accounts appear to be irreconcilable.

An instance of reconcilable accounts of value is represented in the juxtaposition of guild protectionism and leverage. Guild protectionism reflects perceptions of jurisdictional or economic threat: these new personnel will take away part of my client base, my funding stream, my job. A business case engaging with this value could draw on empirical evidence of leverage to defuse the threat. For example, if lawyers turn out to get more business because of Attorneys-Lite activity, the guild is protected and the market expands. Similarly, if Process Helpers turn out increase the capacity of legal services providers without affecting the funding levels of legal services providers – for example, by having the Process Helpers be comprised largely of volunteer staff, as they currently are – this would similarly assuage concerns. However, just because the debate could be carried on in a commensurable currency of values did not mean that all concerns could be easily refuted. The economic threat with the strongest empirical basis was

probably that expressed by the legal aid attorneys vis-à-vis the Process Helpers: funding for civil legal assistance in the United States is scarce, and dollars put behind a new project are indeed sometimes those withdrawn from support for other services.

An instance of irreconcilable accounts of value appears in the evaluations of the Process Helpers. Among stakeholders to the same innovation, there are competing and irreconcilable ideas about the good. Specifically, some stakeholders will support the Process Helpers only if their activity changes the legal outcome of cases, while others will support them only if it does not. There is little space for agreement here, until one side or the other changes what it values.

Conclusion: Whose Business Is the Business Case?

Business cases tend to draw upon the presumed perspectives of the funders of services, whether these be clients themselves, or government entities, or philanthropies. However, funders are not the only stakeholders whose business is affected by innovations. For these new activities to be successful, the many professionals and other workers whose ordinary routines and jurisdictional boundaries are disrupted by the new personnel need to cooperate in their implementation, or at least not engage in active opposition.

Business case arguments come out of a world of for-profit organizations and market provision. Because of this origin, the logic of these arguments employs the assumption that values are commensurable. This project has explored the instrumental expressions

of value employed by stakeholders of two innovations in the delivery of legal services, asking what might count as values for these stakeholders if they were considering a business case for the innovations. In so doing, the research reveals a range of perceptions of value, some of which are reconcilable and some of which are not. The terms of one person's business case are not always the same as the terms of another's.

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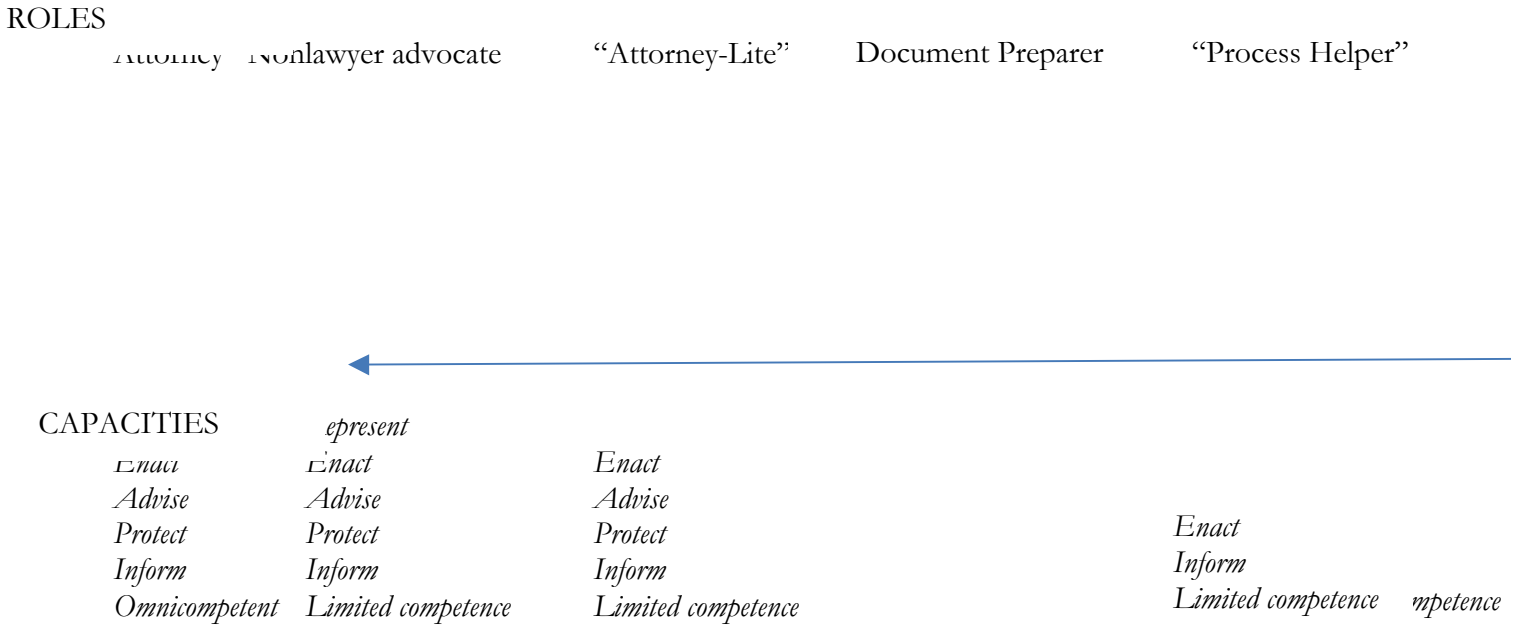
Figure 1. Capacities for Legal Action of Selected Legal Roles



Capacities for Legal Action

Represent clients in and out of court
Enact legal processes on client's behalf
Advise client on legal options
Protect confidentiality of provider-client communication (**privilege)**
Inform client about the law
Omni versus **Limited** Competence in Substantive Law