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Luz E. Herrera

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ENCOURAGING THE DEVELOPMENT OF “LOW BONO” LAW PRACTICES

Luz E. Herrera*

INTRODUCTION

For decades, the discussion about access to justice has primarily focused on the ability of low-income individuals to obtain free representation by lawyers. Lawyer representation is the “gold star” of the legal profession and advocates of legal services for the poor have fought difficult battles to ensure the most disadvantaged in our country have access to these professionals. As a result, legal aid programs and pro bono services that assist the most economically disadvantaged in our country are now common in our legal service delivery system.

Despite those important efforts, only 50% of those eligible for free legal services actually receive them.¹ Traditional access to justice platforms, while critical for offering legal assistance to a segment of the poor, have not been funded at levels that allow them to serve all those who need and qualify for their services. In lieu of lawyers, members of the legal profession have created self-help tools and substitutes for attorneys in the form of general advice hotlines, online document automation programs, and self-help law centers. If the profession correlates justice with lawyer representation, then the majority of average income Americans and a significant segment of the poor, are without it. In 2011 the United States ranked 50th out of 66

* Luz E. Herrera is Assistant Dean for Clinical Education, Experiential Learning and Public Service at UCLA School of Law. She wishes to acknowledge the following students, staff and faculty at Thomas Jefferson School of Law that offered assistance or feedback to this article: Deven Desai, Lilys McCoy, Eric Mitnick and Edith Polanco. A special recognition is also in order for Robert Cowen, C.P.A., Beth Kransberger, and volunteer attorneys at Community Lawyers, Inc. for their input on the financial aspects of this piece.

¹ LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–2 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. [hereinafter DOCUMENTING THE JUSTICE GAP].

developed nations in providing accessibility to its civil justice system to its citizens.²

In order to address the unmet legal needs of individuals in our country, the legal profession must advance an affordable legal services agenda that includes lawyers who provide competent legal services at reduced or “low bono” rates. Increased funding to help the poor and efforts to provide greater accessibility through the use of technology are efforts that can help bridge our justice gap. However, such efforts are limited in their scope. To make additional gains into providing more access to law, we need to devote attention to a segment of our society that currently receives no support and can potentially also benefit the near poor who go in and out of poverty.³ According to the research of an expert on U.S. poverty, “nearly 40 percent of Americans between the ages of 25 and 60 will experience at least one year below the official poverty line during that period and 54 percent will spend a year in poverty or near poverty (below 150 percent of the poverty line).”⁴ These figures reveal that a larger segment of the population requires a legal system that understands the fluidity of poverty and their financial instability. A lower-cost legal service delivery system must exist for those priced out of free services who need lawyers to get them back into a more stable financial reality.

Law practices that offer services at low bono rates offer a lawyer alternative to the more than 81.4 million households that earned less than the median income of \$51,017 in 2012.⁵ Many of these individuals make less than \$25 per hour but make too much to qualify for free legal services.⁶ Like the poor, Americans of average

² MARK DAVID AGRAS ET AL., THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 21, 103 (2011).

³ Mark R. Rank, *Poverty in America is Mainstream*, N.Y. TIMES, (Nov. 2, 2013), http://opinionator.blogs.nytimes.com/2013/11/02/poverty-in-america-is-mainstream/?_php=true&_type=blogs&_r=0. (“The typical pattern is for an individual to experience poverty for a year or two, get above the poverty line for an extended period of time, and perhaps encounter another spell at some later point.”).

⁴ *Id.*

⁵ See U.S. CENSUS, TABLE H-8, MEDIAN HOUSEHOLD INCOME BY STATE: 1984 TO 2012 (2013) (stating that an annual median income of \$50,000 averages to about \$24 per hour based on a 50 week, 40 hour per week. In 2012, 81,435,000 million households earned less than the median income of \$51,017).

⁶ See Charlotte Lait, *TCR Talks: Filling the Justice Gap*, THE CHICAGO REPORTER (Feb. 18, 2014), www.chicagoreporter.com/tcr-talks-filling-the-justice-

means need lawyers to advise them about legal issues that arise in their everyday lives but many of them cannot afford lawyers who charge hourly rates that exceed \$300 per hour. This chapter explores the need to build the framework that encourages the development of low bono law practices.

Part I helps us understand low bono and why it is a necessary component of a broader legal service delivery system. Part II discusses the challenges that lawyers face in building and maintaining low bono practices. It addresses the financial challenges of running low bono practices and identifies the necessary components for developing viable low bono business plans. Part III outlines the framework the legal profession can and should build to support low bono law practices. It addresses the assumption that an affordable legal fee necessitates a lower quality service. It calls law schools, bar associations and courts to devote resources to build the necessary infrastructure for the delivery of legal services to average means Americans. The chapter concludes with a brief reflection of why lawyers may choose to build a career as a low bono lawyer.

I. UNDERSTANDING LOW BONO

Low bono is a term that many bar leaders, law faculty and new graduates have heard but may not fully understand. A definition of low bono is not yet included in *Black's Law Dictionary* but the frequency of its use is increasing in the legal profession. Low bono is used synonymously with the practices of offering reduced legal fees.

Low bono fee arrangements embrace the idea that lawyers should make legal services affordable for those who cannot afford market rates. It is a system of billing that takes into account the financial constraints and the legal needs of average means Americans. In a low bono fee arrangement a lawyer agrees to charge her client a lower rate for her services, not a discount for work performed. Still, what constitutes a low bono fee varies based on the market rate of the particular geographic region where the lawyer practices. In a community where it is common to find hourly attorney rates of \$300, a low bono rate can be as high as \$150 and still be considered affordable. Generally, a low bono rate is 40–50% lower than the

prevailing market rate.⁷

It is not clear who coined the term “low bono” but it first appears in the literature late in the 21st century.⁸ The first reference to it is related to a report on the Greater Access and Assistant Project (GAAP) of the American Bar Association’s Young Lawyers Division.⁹ GAAP was a national effort that sought to address the needs of individuals who did not make enough money to hire a lawyer but who made too much to qualify for free legal assistance from federally funded legal aid organizations (this population is described for the remainder of the chapter as the “Gap Population” and is meant to describe Americans with incomes at or below the median who do not qualify for free legal services).¹⁰ The article explains that some of these GAAP programs adopted “a low bono approach charging under-market hourly and flat-fee rates.” In January 1995, the reference to offering low bono services appeared in the Oregon State Bar Bulletin in a report of a Modest Means Program of the state’s lawyer referral program.¹¹ It describes low bono as a reduced fee offered by attorneys in private practice “...who simply cannot afford to donate services, or who perhaps disagree with the concept of free legal services on a philosophical basis”¹² These attorneys charged Gap Clients a low hourly rate for consultations on criminal and family law cases.¹³ The article discusses the development of a Pro Se Assistance Panel that included attorneys who helped self-represented litigants complete legal documents for “divorces, name changes, bankruptcies and step-parent adoptions” in exchange for low bono fees.¹⁴

The next discussion of low bono appears in the context of the Law School Consortium Project (LSCP).¹⁵ The LSCP was a project

⁷ See Stephanie Francis Ward, *Luz Herrera: ‘Low Bono’ Pioneer*, LEGAL REBELS (Oct. 14, 2009, 1:55 pm), www.abajournal.com/legalrebels/article/luz_herrera.

⁸ Joseph Wharton, *Legal Help for the Working Poor: Young Lawyers Division Spearheads Nationwide Effort*, 80 A.B.A. J. 108 (Dec. 1994).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Wharton, *supra* note 8.

¹⁵ Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for low and Moderate Income Individuals*

funded by the Open Society Institute in 1997 to help law schools develop the infrastructure to support solo and small-firm lawyers provide quality low bono legal services.¹⁶ Low bono services are again discussed as a way for private lawyers in solo and small firm law offices to offer legal services to Gap Clients.¹⁷ More recent references to low bono continue to mean reduced fees. Low bono fees are charged primarily by private lawyers who are starting their law practices through attorney incubator programs sponsored primarily by law schools, or serving on modest means panels organized by state and local bar associations. These programs encourage the provision of reduced rate fees by facilitating relationships with clients that can pay lower rates and helping attorneys reduce the cost of providing those services. To support their alumni in solo and small firm practice, some law schools subcontract with attorneys to provide reduced rates for underserved populations.¹⁸ A small number of legal services programs also pay private attorneys reduced fees to take on some of their cases.

Although the term low bono may be new, the practice of offering reduced legal fees is not. The concept of low bono is memorialized in ABA Model Rule of Professional Conduct 6.1(b)(2). This particular subsection states that in addition to aspiring to provide 50 hours of free legal services each year, lawyers should also “provide any additional services through . . . delivery of legal services at a substantially reduced fee to persons of limited means.”¹⁹ Comment 7 of ABA Model Rule 6.1 explains that lawyers who offer “a modest fee for furnishing legal services to persons of limited means” comply with the spirit of the rule despite the stated preference for pro bono services.²⁰ The idea that lawyers should reduce their fees as a way to

and Consumers, 29 FORDHAM URB. L.J. 1245, 1245 (2001).

¹⁶ *Id.* at 1245 n.1 The original law schools involved included the City University of New York School of Law, University of Maryland School of Law, Northeastern University School of Law, and St. Mary's University School of Law.

¹⁷ *Id.* at 1245 n.2.

¹⁸ See *Access to Justice Institute; For the Alumni Community*, SEATTLE UNIV. SCH. OF LAW, www.law.seattleu.edu/centers-and-institutes/access-to-justice-institute/for-the-alumni-community (last visited April 18, 2014). See also *Modest Means Program*, EL PASO COUNTY BAR ASSOC., www.elpasocountrybar.org/legal-resources/modestmeans (last visited April 18, 2014).

¹⁹ MODEL RULES OF PROF'L CONDUCT R. 6.1(b)(2) (Revised 2002).

²⁰ ABA Comm. on Prof'l Conduct 6.1(b)(2), Formal Op. 7 (2002). See also Leslie C. Levin, *Pro Bono Publico In a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 706 (2009) (discussing various

comply with their professional responsibility was cemented in 1983 with the adoption of the Model Rules of Professional Conduct.²¹ Today, most states recognize the spirit of ABA Model Rule 6.1(b)(2) and recognize reduced fees, or low bono, as an alternate expression of a lawyer's public service commitment. However, programs to support the promulgation of low bono services are far and few between.

Despite the existence of policies that advocate reduced fees, there are several critiques of low bono services. The first critique of low bono is that offering reduced fees is unfair to the lawyers who reduce their rates.²² Language in the ABA Model Code of Professional Responsibility ("Model Code"), the ethical canons for the legal profession from 1969 to 1983, offers insight into the quandary perceived by the profession by offering low bono rates. The Model Code reminded lawyers to accommodate individuals unable to pay all or a portion of a reasonable legal fee.²³ It also stressed the need for lawyers to be compensated for their work.²⁴ Ethical Canon 2-17 stated, "adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession."²⁵ Central in this expression of the difficult balance between profit making and public service is the idea that clients must adequately pay a lawyer in order to ensure quality service.

The suggestion that offering legal services at low bono rates necessitates delivering lower quality services that ultimately hurts the profession is inherent in another critique of the practice. A 1961 ABA ethics opinion states:

When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the

states' views on pro bono work and the adoption of Model Rule 6.1).

²¹ MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

²² See Claude R. (Chip) Bowles, Jr., et al, *Panel 1: Lawyers in a Fee Quandary: Must the Billable Hour Die?*, 6 DEPAUL BUS. & COM. L.J. 487, 501 (2008) (noting that "[t]he clients frequently are able to access legal services, but the problem is that the economic benefit is on the backs of the lawyers.").

²³ See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-16 (1980).

²⁴ *Id.*

²⁵ MODEL CODE OF PROF'L RESPONSIBILITY EC 2-17 (1980).

welfare of the profession injured and the administration of justice made less efficient.²⁶

The language of this ethical canon encapsulates the concerns about offering low bono fees. First, it establishes the belief that lawyers are inadequately compensated if they provide a fee that is lower than a market rate. Second, the language also communicates that lawyers must be induced to provide such services and that such inducement into inadequate compensation may translate into a lower quality service. Finally, the language of this ethical canon reveals that there is a perception that such arrangements are harmful to the profession and the administration of justice. Addressing these biases are important for advancing low bono alternatives for average income clients.

The notion that a lawyer is not adequately compensated if they do not earn market rates does not distinguish the existing income disparities of legal services consumers. The adequacy of a lawyer's compensation is relative to what their client base can afford to pay. Lawyers who represent elite interests can justify charging their clients a higher legal fee than lawyers who represent average income Americans.²⁷ An individual or corporation that earns millions each year can afford to pay their lawyers a high hourly rate because it has sufficient assets to do so. However, a client whose hourly wage averages \$10–\$15 an hour cannot pay his lawyer a rate that is twenty times his own salary. Even when average-income Americans value the expertise and unique skill set of a lawyer, they must often decide between paying a lawyer and making their rent or mortgage payment. The adequacy of compensation is therefore dependent on the attorney's client base.

The concept of inducing lawyers to provide reduced fees may be true but such inducement does not necessitate lower quality. Any attorney who offers legal services at low bono rates makes a choice to deliver such service. Until now, the bar has not mandated that

²⁶ See ABA Comm. on Prof'l Ethics, Formal Op. 302 (1961); cf. ABA Comm. on Prof'l Ethics, Formal Op. 307 (1962).

²⁷ Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 961 (2000) (discussing the high average cost of legal services in the commercial setting).

attorneys provide free services or reduced fees.²⁸ Lawyers may need to be lured or persuaded to offer low bono rates but once they agree to offer their services on a low bono basis, a lawyer that charges \$500 an hour has the same duty of competence and diligence to their clients as a lawyer charging \$150 an hour.²⁹ It is true that the amount spent on a legal matter may allow a lawyer to contract third party services such as experts, court reporters, and translators that can have a positive impact on the outcome. Still; most of the legal matters affecting average income Americans present similar fact patterns and procedural obstacles regardless of what lawyers charge their clients. Charging a fee of \$150 or \$300 is simply a reflection of a lawyer's overhead (is the office in Beverly Hills or Compton?) and lifestyle (how costly is the lawyer's car?).

Regardless, in our society there is a common perception that paying an attorney more money to solve a problem will yield a better solution. The belief that more money means a better product exists throughout all sectors of our economy. Because lawyers self-regulate and control the provision of legal services, consumers lack access to information and therefore legal services consumers use price as a proxy for quality.³⁰ The legal profession has prevented the development of an affordable legal services agenda because it is not perceived to be in in their best financial interest. High pricing works

²⁸ However, New York and California are revising their bar admissions policies to include a pro bono requirement. See N.Y. CT. APP. RULES FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS § 520.16(A), *available at* <http://www.courts.state.ny.us/ctapps/520rules10.htm#B16> (requiring completion of 50 hours of pro bono service for applicants admitted to the New York State Bar after January 1, 2015) and STATE BAR OF CAL. TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 25 (June 24, 2013), *available at* [http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_\(FINAL_AS_APPROVED_6_11_13\)_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf) (requiring 50 hours of pro bono or modest means service to be completed before or within the first year of admission).

²⁹ See MODEL RULES OF PROF'L RESPONSIBILITY R. 1.1 (establishing attorneys' duty to provide competent representation); see also *id.* R. 1.3 (establishing attorneys' duty to act with reasonable diligence and promptness).

³⁰ See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, QUARTERLY J. OF ECON. 488 (1970) (describing the problem associated with consumers' tainted perception regarding used cars, and how such a perception hinders the development of a viable used car market).

so long as there are consumers willing to pay for the product or service at market rates. The recent economic recession has transformed many prospective clients for lawyers into actual consumers of online legal document automation programs and alternative legal services providers. When the economy causes the demand for traditional legal services dwindle, alternatives such as low bono must be considered.

Charging reduced fees advances the administration of justice. However, established lawyers with exiting clients that pay market rates may not welcome low bono rates. Novice lawyers are counseled against becoming known as the “cheap lawyer” by offering reduced fees. In a profession where reputation is everything, perception by senior and peer attorneys goes a long way in influencing what the legal marketplace offers. The implication is that a less expensive lawyer delivers a substandard service. This concern should be acknowledged and addressed but we must remember that the obligation to provide quality legal work is not dependent on the fee a client pays. When price serves as a proxy for measuring the quality of the legal services delivered, good lawyers are discouraged from reducing their rates.

The practice of lawyers offering “low bono” rates is also not fully embraced by all who support offering more affordable legal services. Some object to describing the practice of reduced rates as low bono because the word “low” communicates an inferior priority that can discredit the practice. Others caution that the problem with low bono “is that the economic benefit is on the backs of the lawyers” who are usually not always in the strongest economic position to subsidize legal fees. Those who understand the plight of solo and small firm lawyers, therefore focus on advancing an agenda for affordable legal services primarily through limited scope representation at market hourly rates.

The concept of limiting the scope of an attorney’s representation is not new. Attorneys have used engagement letters to define the nature of their obligations to clients by limiting the scope of the representation.³¹ Until about ten years ago, the default model of attorney representation included a full representation model that

³¹ See generally Duke N. Stern, *Avoiding Legal Malpractice Claims: Defining the Relationship*, J. MO. B. 471 (1992) (discussing the importance of an engagement letter).

usually concluded at the final disposition of the matter but before any appeal. Attorneys who made an appearance on a case were bound to continue representation until conclusion of a matter, unless a client consented to or a court authorized withdrawal. As legal services consumers experienced more financial constraints and attorneys attempted to limit their services to those a client could pay, the practice of limiting the scope of representation to a particular transaction became more popular. Proponents of unbundled services explain that such relationships do not alter an attorney's liability to the client for the work contracted, it merely allows the legal service consumer with limited means to be more strategic about when she hires an attorney into the lifeline of a legal problem. A relationship with an attorney using a traditional model of unbundling results in a more affordable legal services bill because the attorney limits her involvement to particularly agreed upon tasks that are something other than full representation. Many attorneys unbundle their services and offer them at low bono rates, but the practice of limiting the scope of representation is not synonymous to low bono. While the practices of low bono and unbundling are great tools in making lawyers more accessible to modest means clients, limiting the scope of representation does not necessarily reduce a lawyer's hourly rate. However, lawyers who offer low bono rates often do so by unbundling their services and offering flat fee options for average-income Americans, or "Gap Clients."³²

Gap Clients constitute a large and growing segment of the U.S. population. They are store clerks, security officers, bank tellers, single parents, married couples, family members, and immigrants we interact with on a daily basis. Some even have professional degrees but live paycheck to paycheck. Long periods of unemployment, new jobs at lower wages and financial ruin based on underwater mortgages, have all contributed to an increasing need to consult with lawyers but a decreased ability to hire them. The legal problems of average income Americans include asset distribution at divorce, bankruptcy advice when they experience financial ruin, child custody issues and estate matters when family members die. The frequency of personal legal services make their resolution more routine but when they go

³² For more information on the intersection of low bono and unbundled legal services, see Kathryn Alfisi, *Above the Guidelines: Low Bono Widens Path to Access to Justice*, WASHINGTON LAWYER, Sept. 2013, at 24–30.

unattended simple problems can become mired in procedural technicalities that only lawyers are equipped to untangle. Past studies and recent trends reveal that individuals need lawyers to help them navigate legal issues that involve contract breaches, consumer matters, housing issues, workplace problems, government benefits, domestic relations, immigrant status concerns and legal considerations of self-employment, among others. While we do not have sufficient information to make valid generalizations about how average means clients navigate the legal system, we know there is a significant market for self-help tools, unbundled legal services at flat fees and lay legal service providers.

In order for lawyers to provide a low bono alternative for legal services consumers that need to hire them, the profession must develop and strengthen programs to support the provision of low bono services. Before discussing how law schools, bar associations and courts can encourage lawyers to offer low bono practices, leaders of the profession need to understand the economic challenges of low bono to the lawyer provider.

II. THE ECONOMIC CHALLENGES OF LOW BONO

Starting and maintaining a low bono law practice can be personally rewarding but also poses a number of financial challenges for a lawyer.³³ A lawyer who builds an entire law practice offering low bono fees or who simply wishes to offer low bono fees to a segment of his client base must engage in an analysis of his personal and economic goals. Taking stock of personal motivations and assessing what lawyers need to sustain a business are difficult to do. Writing a business plan requires that a lawyer confront his biases and expectations about who he thinks he is and what he wants to become in the legal profession. Before starting a low bono law practice, a lawyer must be honest with himself about what he needs to be happy. Lawyers whose motivation to go to law school is primarily financial gain may not be suited to weather the low bono law practice start-up period.

For a lawyer to develop a successful low bono law practice,

³³ *Id.*

she must begin by establishing a budget that helps her live within her means. Each attorney's necessities will vary according to family size, geography and the existence of subsidies from spouses and family members. Unless the lawyer is subsidized by a trust fund, a spouse, a family member or is independently wealthy, starting a low bono law practice will require that the lawyer opt out of superfluous spending. Lawyers starting low bono law practices may not be able to make payments on expensive cars or live in the wealthiest part of town. Cable television, shopping sprees, and morning lattes at the local coffee shop are some of the extras that may need to be eliminated at least in the start-up period. Although the idea of living a frugal lifestyle is not popular in an era where extravagant living is promoted on television, it is a reality for many lawyers particularly in their first few years of practice.

Lawyers must think of themselves as social entrepreneurs to develop a successful low bono business plan. For many law students and new lawyers, the thought of running a business seems particularly daunting. While the largest practice sector of lawyers is that of those who are self-employed, lawyers have a difficult time thinking of themselves as entrepreneurs. The reluctance to think of ourselves as business owners is in part due to our training that largely encourages lawyers to be risk adverse. While more law schools are considering the intersection of law and entrepreneurship, few law schools incorporate business planning in the curriculum. Conversations about the business of law are primarily reserved for law practice management courses that are rarely promoted and undervalued.

Despite the lack of discussion about the business of law in lawyer training, law and justice have price tags. This Great Recession showed us that reduced government funding meant lay offs at legal aid and district attorney offices. Lower student enrollment has significantly altered the financial reality of many law schools. Without paying clients a private law firm cannot survive. Lawyers who offer low bono fees must formulate roadmaps that will allow them to do good and make a living. Business plans require that a lawyer articulate his mission in starting his practice, identify his strengths, and define roles for himself and other personnel that leverage strengths in pursuit of the mission. They also require an articulation of the law firm's client base and marketing strategies. This exercise helps lawyers

understand that they are creating an organization that must be understood as a business. These business plans are living instruments that will require constant revision as the law firm grows.

Starting a low bono law practice requires that an attorney identify a market niche for her services. Low bono practices must be informed by the needs of the community, but defined by the personal attributes of the lawyer. While a good website and a marketing plan are important elements to developing a client base, nothing replaces one-on-one networking, development of personal relationships and word of mouth referrals³⁴. Lawyers must know themselves enough to understand what type of client or type of legal issue they are most drawn to and what the characteristics are of those who will be drawn to them. Experience doing pro bono work often helps an attorney identify her market niche. The key is for lawyers to understand what they bring to the legal profession and highlight the particular characteristics that make them the right fit for their particular client base. Some of the most successful attorneys identify a couple of market niches that could greatly benefit from their expertise. While many lawyers can easily define their target client or articulate why they are starting a law practice, many find it difficult to tackle the financial aspects of the business.

To properly articulate the financial portion of a business plan for a low bono law practice, a lawyer first needs to understand what he needs to earn to cover his living expenses. Shelter, transportation, health care, food, utilities and miscellaneous expenses must be calculated. Two examples of conservative but realistic budgets for an attorney living in a large metropolitan area is approximately \$3,200 per month or \$38,400 per year for a single attorney and \$4,200 per month or \$50,400 annually for a lawyer with two dependents.³⁵ These

³⁴ See Stephen Daniels and Joanne Martin, *It's Darwinism – Survival of the Fittest: How Markets and Reputations Shape the Ways in Which Plaintiff's Lawyers Obtain Clients*, 21 LAW & POL'Y 381, 383 – 84 (1999) (discussing the importance of word of mouth networking and client referrals).

³⁵ The listed figures are based on pricing of housing options and transportation options in San Diego, California, which was rated the ninth most expensive city to live in. See KIPLINGER, <http://www.kiplinger.com/slideshow/real-estate/T006-S001-1-new-york/index.html> (last visited April 21, 2014). The median income in San Diego from 2008 through 2012 was \$63,857. See U.S. CENSUS, STATE & COUNTY QUICKFACTS, SAN DIEGO COUNTY, CA (2012),

budgets contemplate the following monthly expenses:

	<u>Lawyer Only</u>	<u>Lawyer+ 1dependent</u>
Housing	\$1,500	\$2,000
Automobile	\$300	\$300
Auto. Insurance	\$250	\$250
Health Insurance	\$250	\$500
Food	\$400	\$600
Utilities	\$100	\$150
Cell Phone	\$100	\$100
Entertainment	<u>\$300</u>	<u>\$300</u>
TOTAL	\$3,200	\$4,200

The specific needs and priorities of each lawyer will require an adjustment to these figures. These figures will vary depending on the geography and the spending habits of lawyers. They do not take into account student or consumer debt, nor does it account for any savings. These matters will be discussed separately. The most important part of this illustration is not so much the actual figures but the model for lawyers to develop a basic personal budget. A lawyer with an understanding of how much he needs to earn to make his monthly expenses, will have a clearer vision of how much his law firm will need to produce to sustain himself and his family.

In addition to determining personal budgets, developing a business plan requires a clear articulation of the cost of doing business. Today's lawyers can build viable practices by leveraging technology to reduce the cost of providing quality legal services. While a physical space to meet clients is important for establishing a presence in a community, most client communications are now done telephonically or through cloud-based case management programs. A number of attorneys now operate virtual law practices from the comfort of their homes. The Internet has revolutionized law practice so much that legal research, client billing and even court filing can all be done from an attorney's laptop.³⁶ By using cloud based law office management

<http://www.quickfacts.census.gov/qfd/states/06/06073.html>. (last visited Apr. 21, 2014).

³⁶ Lawyers starting their law practices today need to establish secure servers and Internet connections to maintain client confidentiality. See generally Stephanie L. Kimbro, *The Law Office of the Near Future: Practical and Ethical Considerations for Virtual Practice*, N.Y. ST. B. J., Sept. 2011, at 28–29 (discussing the ethical implications of having a virtual law office).

software, and developing a functional website that draws a client base and automates routine transactions, lawyers have more tools to compete with their counterparts at larger firms. Instead of investing a substantial sum of money into law office space, lawyers dedicate a larger portion of their business budgets to client development and pay for office space on Main Street as needed. Although new technology introduces new variables that constitute ethical violations when not properly implemented, it also provides a great opportunity to improve communication with clients and run a more efficient business.

Aside from a stable office location, a good computer, a scanner and a printer, attorneys starting low bono law practices need malpractice insurance, mentors and access to legal research platforms. In exchange for an annual fee, most bar associations offer their members group discounts on law office management tools, malpractice insurance, marketing programs, continuing legal education and networking events. Law school alumni associations and post-graduate programs can play a significant role in helping new attorneys forge relationships with good mentors. In addition, law schools and law libraries are usually available to members of the bar for free or for a nominal fee. As a result of all the available resources, a realistic virtual law practice budget in a large U.S. city includes the following approximate expenses of \$1,700 per month or \$21,000 per year:

<u>Expense</u>	<u>Monthly Cost</u>	<u>Annual Cost</u>
Office Space ³⁷	\$500	\$6,000
Malpractice Insurance	\$300	\$3,600
Marketing/Client Develop.	\$250	\$3,000
Subscriptions & Dues	\$200	\$2,400
Health Care	\$200	\$2,400
Phone, Internet, Utilities	\$150	\$1,800
Office Supplies	\$100	\$1,200
Case Management Software	<u>\$ 50</u>	<u>\$600</u>
	\$1,700	\$21,000

These expenses are approximate and will change based on the location of the low bono law practice. The estimate for office space is based on shared office suite arrangements or renting an empty office space in an existing law firm with extra space. Lawyers in underserved communities may pay less for office space but they often make up the

³⁷ *Id.* at 28. Many virtual offices operate completely online. However, many lawyers rent office space for in-person client meetings and therefore the allocation.

cost by having to travel further to access law libraries. The cost of malpractice insurance varies depending on the substantive area of practice and the number of years the attorney has been practicing. In California a new lawyer can obtain malpractice insurance that includes unlimited hours of continuing legal education training for about \$500.³⁸

Another consideration in starting a law practice, but perhaps one of the most crucial for business development, is establishing the attorney's brand. An attorney setting up her own practice must be clear about her motivations and interests in becoming a lawyer. If a lawyer is tentative about her ability to be diligent and offer competent services through preparation and study, she will translate such uncertainty to prospective clients. The process of branding a law firm's services is therefore important not only for marketing purposes but for solidifying the lawyer's intention about the role she plays in the legal profession. Designing an effective logo, letterhead and website requires that a lawyer define herself in the law and communicate to her prospective clients that she is the lawyer best suited to represent them. A professional headshot and a biography that discusses not just the lawyer's training but her personal narrative is absolutely necessary in today's reality-show driven culture.³⁹ Many graphic designers, photographers and web developer are willing to work with lawyers to finance the cost of their services.⁴⁰ However, lawyers may also consider contracting local technical schools that have students looking for projects to add to their work portfolios. The above budget incorporates a realistic marketing line item for such services.

This budget does not account for the initial investment needed to purchase professional attire, furniture and equipment (computer, printer, and scanner). Starting a low bono law practice is not

³⁸ See, e.g., *Strong Start Program*, LMIC.COM, http://www.lmic.com/policies_offered/strong_start_program (last visited Apr. 21, 2014) (describing a new type of malpractice insurance for licensed lawyers going into solo practice).

³⁹ See Michael Heatherly, *From Yellow Pages to Web Pages: Legal Marketing Meets Technology*, WASH. ST. BAR NEWS, Apr. 2010, at 23., available at http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Bar-News/~media/Files/News_Events/Publications/Bar%20News/2010%20Full%20Issues/201004AprilBarNews.ashx

⁴⁰ *Id.* at 22–23.

inexpensive, but it also does not require a huge investment. Lawyers starting their law practices can find reasonably maintained office furnishings and equipment through a variety of sources. With a budget of \$2,500–\$5,000 an attorney can furnish an office space, buy a handful of suits and office equipment. Many shared office arrangements already come with furnishing and access to copy machines. Many lawyers set up eFax accounts and Internet-based phone systems that are less expensive than traditional phone lines. Online case management tools that facilitate client billing, record keeping and client communication are also available for about \$50 per month. New technology is allowing lawyers to keep their costs down but they must ensure that their communications mechanisms are arranged in a way that does not run afoul of the professional obligation to keep client confidences. For guidance on how to incorporate technology into law practices, attorneys must consult their state bar associations for an articulation of the best ethical approaches.

The personal and business overhead budgets provided here do not consider that lawyers developing low-bono practices will drive luxury cars, live in expensive penthouses or establish law offices in the most expensive zip codes in their area. Lawyers who establish low-bono law practices must be honest with themselves about whether they are doing so based out of necessity or personal preference. The financial commitment and personal goals of each lawyer will determine how much and for how long low bono will be a part of their law practice model. Some lawyers will offer low bono rates only until they build a client base that is able to pay higher rates. Other lawyers will find it difficult to charge market rates based on their location or client base. There are also a group of lawyers who will primarily maintain low-bono law practices for social justice considerations. Low bono can play a role in each scenario but ultimately every lawyer needs to determine what works for them, their family and the community of clients they serve.

Now that the lawyer understands his personal and business expenses, he must determine how much he needs to make to become a viable low bono law firm. Understanding how to price legal services for a targeted group of consumers is instrumental in developing such law practices. In the examples offered here, the lawyer has a monthly budget of \$3,200 for living expenses and \$1,700 for business

expenses. Based on these budgets, let us assume a total budget for monthly expenses of \$5,000 for an attorney with no dependents and \$6,000 for an attorney with one dependent who does not contribute additional income.

Assuming the going rate for legal services in a particular market is \$300, a low bono rate would range between \$75–\$180. If a lawyer wanted to only work 40 hours per week, he would at most bill 20 hours per week. Lawyers who work in law offices with little or no administrative support should expect to spend 40–50% of their time on administrative tasks related to managing their caseload and their business. Assuming the attorney works and collects payment for each of those 20 hours, her income based on a low bono hourly rate would be:

	<u>Weekly</u>	<u>Monthly</u>	<u>Annual</u> ⁴¹
\$50 x 20 hours	\$1,000	\$4,000	\$48,000
\$75 x 20 hours	\$1,500	\$6,000	\$75,000
\$100 x 20 hours	\$2,000	\$8,000	\$100,000
\$125 x 20 hours	\$2,500	\$10,000	\$125,000
\$150 x 20 hours	\$3,000	\$12,000	\$150,000

These gross figures may sound great to lawyers with starting salaries of \$45,000–\$65,000 or who are doing contract work at rates of \$50–\$75. However, after deducting taxes, the costs of doing business and personal expenses, we understand that lawyers rates cannot go too low before they begin to impact their long-term viability.

There are three areas that will impact the low bono rate an attorney can offer: tax liability, educational debt and consumer debt. Tax professionals and financial advisors can provide lawyers with a better understanding of their tax liability and the best debt management strategies. For purposes of this example, assume that after deducting business expenses, tax liability for a self-employed lawyer is about 35%.⁴² Based on 20 billable hours per week on a 50–

⁴¹ The annual income listed is based on a 50 hour per week year.

⁴² The tax rate provided here is based on an estimate for a lawyer who pays federal and California state tax. State tax rates vary. Only after all business expenses and self-employment taxes are calculated can a lawyer understand her true tax burden. Other tax considerations include the number of dependents, the taxpayer's filing

week year, the following are examples of what it would cost to maintain a low bono law firm:

Gross Income	\$75,000	\$100,000	\$125,000	\$150,000
Taxes (@35%)	-\$26,250	-\$35,000	-\$43,750	-\$52,500
Personal	-\$38,400	-\$38,400	-\$50,400	-\$50,400
Business	-\$21,000	-\$21,000	-\$21,000	-\$21,000
Disposable Income:	\$10,650	\$ 5,600	\$9,850	\$26,100

These rough net figures reveal that after considering tax liability, personal and business expenses, lawyers have little or no disposable income. The table above reveals that a lawyer with the personal and business budget set above cannot offer rates of \$75 and only bill 20 hours. An attorney with a client base that can only pay \$75 an hour will have to bill more hours, reduce her living or business expenses or offer low bono services at a higher rate. Lawyers who have significant student or consumer debt will have to determine if there is a loan repayment plan that works them.⁴³

Individual debt burdens vary but national figures help us understand the financial challenges to building low bono law practices. In 2013, the nation's average credit card debt was \$15,279. This figure is minimal when we consider that the average educational debt for law students in 2012 was \$84,600 for public schools and \$122,158 for private schools.⁴⁴ Newer lawyers have a variety of student loan repayment programs available to help them handle the burden of educational debt.⁴⁵ The specifics of these loan repayment programs are beyond the scope of this chapter but they still require loan payments

status and other deductions such as interest paid on mortgages or student loans.

⁴³Before enrolling in a loan repayment program, lawyers must educate themselves about which repayment programs their loans qualify for, the conditions of such programs, how these programs could affect their credit score, whether the program capitalizes unpaid interest and the tax consequences of any debt forgiven.

AMER. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR., AVERAGE AMOUNT BORROWED 2001–2012 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf. Although these are the official ABA figures, numerous recent law graduates report debt loads that exceed the national average mortgage debt of \$154,365 (as of Apr. 2014). *American Household Credit Card Debt Statistics: 2014*, NERDWALLET.COM, <http://www.nerdwallet.com/blog/credit-card-data/average-credit-card-debt-household> (last visited Apr. 11, 2014).

⁴⁵For a range of loan forgiveness programs, see *Take Control of Your Future: A Guide to Managing Your Student Debt*, EQUAL JUSTICE WORKS (Oct. 17, 2012), <http://www.equaljusticeworks.org/ed-debt/ebook>. [hereinafter TAKE CONTROL].

based on gross income that do not necessarily account for expenses associated with self-employment. For lawyers who are not able to cover their debt burden with disposable income of \$9,850–\$26,100 per year, building a low bono law practice may be difficult, if not impossible.

Offering reduced rates requires lawyers to set forth a business plan for their law practices. A business plan helps define the law firm's mission, client base and marketing strategies as well as financial projections. Low bono services may be collected through the traditional hourly rate model, as flat fees for unbundled services, or delivered through other flexible fee structures such as extended payment plans. Lawyers may also offer a mix of low bono and market rates. To determine the appropriate fee structure, attorneys must consider their personal and business expenses in addition to the client's ability to pay. These business roadmaps must include realistic financial projections that allow these lawyers to pay their living expenses, sustain their businesses and tackle their debt.

Starting a low bono law practice is not for everyone and it may also not be forever. Lawyers drawn to the profession by social justice goals may find developing a low bono practice extremely rewarding. Lawyers who search for public interest employment and do not find it are more likely to sustain a low bono practice for the life of their careers. Low bono practices may also appeal to an unemployed or underemployed attorney who is sustaining himself by working for other attorneys at hourly wages of \$30–\$50 an hour. Often these attorneys see low bono cases as an opportunity to obtain more experience and develop a client base that will yield clients that can pay higher fees in the future. Finally, attorneys transitioning into a new field of law may also incorporate low bono work to develop greater expertise in the area and establish a reputation within a new client community. For these lawyers, low bono may be a temporary experiment that includes unbundled legal services or establishing flexible payment plans.

Ultimately, what determines whether a lawyer establishes a low bono law practice depends on the particular economic realities of each lawyer. Economic obligations to family, student and consumer debt, in addition to the cost of maintaining an office, are all relevant

factors in assessing the viability of establishing a low bono law practice and determining the length of time a lawyer will offer reduced rates. The financial discipline that sustaining a low bono law practice requires may feel like a sacrifice for some. For others, such plans will be welcomed as helpful tools to do the work, or to work with the client base, they love.

III. DEVELOPING THE LOW BONO FRAMEWORK

As a profession, we are well aware of the economic reality of most average income earners today, but we have failed to develop an infrastructure that encourages lawyers to offer affordable legal services. At the same time, a record number of attorneys are reporting unemployment, underemployment and the inability to earn a salary as a lawyer. Lawyers who offer low bono services can increase access to justice to Gap Clients and make a living. Individuals tracking the growth of venture capital in legal services estimate that there is a latent market for legal services that is worth \$20 billion.⁴⁶ Encouraging the development of a low bono framework requires a paradigm shift. This shift requires that re-imagines law schools, bar associations, courts, and even legal services organizations, re-think the legal service delivery paradigm that facilitates the practice of significantly reducing legal fees to address the needs of modest income clients. Such support will be critical in encouraging the development of low bono law practices.

A. Law Schools

Law schools are the most instrumental in forming lawyers' preferences. Students arrive to law school from a variety of economic and political backgrounds but they are uniformly taught to think like lawyers. In addition to learning how to craft legal documents, law students are also conditioned to become professionals. Law schools can do more to promote low bono services by providing greater career counseling in this area, integrating more law practice management

⁴⁶ Richard S. Granat, *Online Legal Services: The Future of the Legal Profession*, AMER. BAR ASS'N. COMM'N ON ETHICS 20/20 INVITED SPEAKER & PUBLIC HEARING SCHEDULE 3-4 (Feb. 5, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/feb_hearing_speakers_submissions.authcheckdam.pdf.

courses that incorporate delivery of legal services discussions, and developing post-graduate programs, including attorney incubators that encourage low bono rates.

1. Career Counseling

Professional training has primarily centered on inspiring speeches at orientation, courses in professional responsibility and a variety of programming by career services. Law school panel discussions on the importance of civility in the profession, the do's and don'ts of networking, and even professional dress etiquette, are quite common. Less common are conversations that expose students to low bono work. Classes and career programming that focus on access to justice primarily focus on legal aid models, government services and lawyer involvement in pro bono. Even more absent are conversations about the business of law and what is necessary for lawyers to create their own living.

Faculty and career services staff must know enough about the various career opportunities and challenges facing graduates in order to advise their students about what to expect after law school. Each law school has a unique set of considerations to take into account depending on its geography, its status in the law school hierarchy, and the specific characteristics of its student body. If a law school has a significant number of its graduates in solo and small firm practice, it should have personnel available to help students and alumni think through the practical and financial considerations of providing low-bono services. Attorneys in solo and small firm practices are more likely to offer personal legal services that average income Americans need. This practice setting also constitutes the largest segment of the 1.2 million lawyers in our country. Almost two-thirds of private practitioners work in law offices of five attorneys or less, with 49% as solo practitioners.⁴⁷ The recent lawsuits against law schools that have

⁴⁷ 75% of all lawyers work in private practice. Of those, 49% identified as solo practitioners and another 14% as working in offices of 2–5 lawyers. In contrast, only 1% of lawyers work in public defender or legal aid offices, 1% work in private associations, 8% work as government lawyers and 20% work in law firms of more than 50 lawyers. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf.

historically graduated lawyers who become self-employed demonstrate a great misunderstanding from these graduates about where lawyers have traditionally worked.⁴⁸ Law schools should communicate that starting their own offices is a common experience for many lawyers.

Career counseling must engage the financial costs and benefits of a lawyer's career. Every lawyer has a unique financial situation and a different threshold for risk. Not every lawyer will be able to offer low bono services and make a living. However, for those who went to law school to serve the low and average income population, financial advising about living modestly and planning for a future low bono law practice are important. Law schools should offer comprehensive financial advising to students not just when they exit law school but each time they sign a new loan document and receive a check disbursement while in school. Students must understand the consequences of rising student debt as they make decisions about whether to take work-study funds, whether to enroll in school full-time or work part-time and even decisions about their summer plans. While borrowing the least amount of money in the first two years of law school is preferred, students must also understand that they may need to borrow more in their last year in order to finance that four- to six-month period between graduation and bar admission. A better understanding about how to minimize and plan for legal education costs will help students make more informed financial decisions that can make a low bono practice possible.⁴⁹

2. Strengthen Curriculum

Despite the central role of economics in facilitating law practice, the majority of law schools and lawyer training programs do not offer great insight or education on the economics of being a lawyer. The American Bar Association does not require law schools to offer courses on the business of law or on the delivery of legal services as part of a lawyer's training. Instruction on how lawyers can make a

⁴⁸ Despite this preference, statistics on the profession reveal that lawyer self-employment is not a new phenomenon. The percentage of lawyers who are self-employed has remained constant for the past four decades.

⁴⁹ See TAKING CONTROL, *supra* note 46. Cf. Graham Hill, *Living With Less. A Lot Less.*, N.Y. TIMES (March 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/living-with-less-a-lot-less.html?pagewanted=all>.

living by serving a large underserved market can help dispel the notion that lawyers are only for the elite.

Law office management, access to legal services, and the business of law should be integrated into the curriculum. These courses help students understand how legal services are delivered and the cost of providing such services, opening their eyes to a greater range of available roles for them in the profession. Such curriculum can be easily integrated into courses on professional responsibility and clinical education but may also have a role in other parts of the curriculum particularly as a small component of lawyering skills courses. Classes that delve into the business of law inevitably lead to a discussion on who can pay for lawyers at market rates. These conversations require that students and their instructors explore the market for legal services and alternatives that exist to address the need of Gap Clients. The discussions that these topics raise can encourage students to develop plans to assess their unique contributions as well as help them think more strategically about building networks, identifying a client base, and fulfilling their professional obligation to ensuring access to law for low and average income Americans.

The post–Great Recession reality for successful law firms includes the integration of technology to produce greater value for clients.⁵⁰ To offer affordable legal services at a competitive price, attorneys must maximize tools such as automated document assembly, workflow and case management software, and the Internet for marketing. Organizing law practices using new delivery mechanisms requires an understanding of new technologies work and how to employ them. Technology allows attorneys to minimize costs and leverage their time but it imposes additional requirements for ethical conduct.⁵¹ Law practice management courses therefore require in depth conversations of how technology–based corporations facilitate

⁵⁰ See, e.g., Stephanie Francis Ward, *How Law Firms Can Use Technology To Save Money*, ABA J.PODCAST (Dec. 2, 2013, 9:45am CDT), http://www.abajournal.com/news/article/podcast_monthly_episode_45. (last visited Apr. 21, 2014).

⁵¹ See, e.g., *Ethics Opinions Related to Technology*, STATE BAR OF CAL., <http://ethics.calbar.ca.gov/Ethics/EthicsTechnologyResources/EthicsOpinionsRelatedtoTechnology> (last visited Apr. 21, 2014).

access to law. Some of these companies are producing significant income streams by charging affordable rates for routine legal services. As lawyers point fingers at each other for the profession's market failures, the business community has capitalized on the untapped need. Lawyers need to understand how to build and replicate these models in order to expand access to more affordable legal services.

3. Post Graduate Support

Most law students do not see themselves as entrepreneurs or anticipate becoming small business owners. When they become lawyers, they generally lack a roadmap on how to use their professional training to generate their own salaries. In addition to helping law students think about creating viable business plans, law schools can offer post-graduate programs to support new lawyers who launch their law practices and incentivize the offering of low bono rates.

For decades, law school alumni offices have offered continuing legal education programming and organized alumni networking events for their graduates. These programs help their alumni develop greater expertise and establish new contacts that help with business development. The first effort to support solo and small firm lawyers providing low bono rates for Gap Clients was launched in 1997 as the Law School Consortium Project (LSCP).⁵² The LSCP was formed by several law schools through a grant from the Open Society Institute to address the needs of Gap Clients and self-employed public-minded law graduates.⁵³ The most enduring projects to result from the LSCP program were Civil Justice at University of Maryland Francis King Carey School of Law (Maryland Carey Law) and the Community

⁵² For a history of the Law School Consortium Project, see Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and Communities*, 29 FORDHAM URB. L. J. 1245, 1245–47 (2002); see also Kristin Booth Glen, *To Carry It On: A Decade of Dealing After Haywood Burns*, 10 N.Y. CITY L. REV. 7, 19–23 (2006) (describing how the Open Society Institute was used at CUNY School of Law).

⁵³ *Id.* The LSCP schools included City University of New York (CUNY) School of Law, University of Maryland Francis King Carey School of Law (Maryland School of Law), Northeastern University School of Law, and St. Mary's University School of Law.

Legal Resource Network at City University of New York (CUNY) School of Law.

Maryland Carey Law faculty developed Civil Justice, an independent nonprofit entity that operates a referral service connecting a network of solo and small firm lawyers committed to increasing access to low- and moderate-income individuals.⁵⁴ Through its staff, Civil Justice facilitates mentoring and networking opportunities for solo and small firm lawyers by offering informal counseling by law school faculty and co-counseling arrangements with more experienced attorneys.⁵⁵ It also offers attorney members assistance in managing their law practices to help them comply with ethical obligations.⁵⁶ Civil Justice refers prospective clients to the solo and small firm bar who offer reduced rates. Maryland Carey Law supports Civil Justice by integrating into their curriculum instruction on the skill set needed to operate small law firms.⁵⁷

CUNY School of Law also developed an active alumni support network and an incubator for self-employed graduates. The Community Legal Resource Network (CLRN), an attorney listserv that connects more than 300 attorneys who are otherwise isolated in solo and small firms, is based at CUNY School of Law.⁵⁸ The community allows alumni to support and mentor each other while CUNY staff facilitates continuing legal education, discounts on law office management software and products, and opportunities for low

⁵⁴ Professors Michael Millemann and E. Clinton Bamberger worked with five alumni to create the concept of Civil Justice, Inc. *History*, CIVIL JUSTICE, INC., <http://www.civiljusticenetwork.org/About/Historymission.aspx> (last visited Apr. 18, 2014).with five alumni to create the concept of Civil Justice. *History*, CIVIL JUSTICE, INC., <http://www.civiljusticenetwork.org/About/Historymission.aspx> (last visited Apr.18, 2014).

⁵⁵ *Member Benefits*, CIVIL JUSTICE, INC., <http://www.civiljusticenetwork.org/ForAttorneys/Memberbenefits.aspx> (last visited Apr. 18, 2014).

⁵⁶ *Id.* See also Howard, *supra* note 53, at 1249 (explaining that Civil Justice, Inc. offers its members “mentoring; networking and peer technical assistance; practice management assistance; substantive law training; access to a listserv; legal products and services at a reduced rate; a client referral service; marketing services and opportunities; and mediation training.”).

⁵⁷ Michael Millemann, *The Symposium on the Profession and the Academy: Concluding Thoughts*, 70 MD. L. REV. 513, 524 (2011).

⁵⁸ *Id.*

bono work.⁵⁹

The work of CLRN led CUNY to develop its Incubator for Justice—a post-graduate program that houses self-employed graduates as they start their law practices and encourages low bono fees. CUNY’s Incubator, established in 2007, trains CLRN members in general law office management issues such as “billing, record-keeping, technology, bookkeeping and taxes while, at the same time, facilitating Incubator participants’ involvement in larger justice initiatives and in subject-based training.”⁶⁰ The CUNY Incubator supports up to twelve attorneys who are starting their law firms.⁶¹ The attorneys operate independently from their law firms but CUNY supports them by providing office space at an affordable rate for up to eighteen months. CUNY alumni pay \$500 in rent for office space in downtown Manhattan, which is shared with an adjunct faculty member and alumna, Laura Gentile, who teaches law office management and is available to answer questions about law office procedures.⁶² Participants in CUNY’s Incubator receive training to launch solo

⁵⁹ Although St. Mary’s University School of Law withdrew from the LSCP in 2000, the following law schools also became members and offered some support for their alumni offering affordable legal services: University of Michigan School of Law, University of New Mexico School of Law, New York Law School, Rutgers University, Syracuse University School of Law, University of Tennessee College of Law, Thomas Cooley School of Law, and Touro Law Center. The University of California Berkeley School of Law, The University of California Davis School of Law, Golden Gate University School of Law, University of the Pacific McGeorge School of Law, University of San Francisco School of Law and Santa Clara University School of Law joined forces to form the Northern California Collaborative. *Law School Consortium Project*, UNIV. OF CALIFORNIA, BERKELEY LAW, <http://www.law.berkeley.edu/1103.htm> (last visited Apr. 18, 2014). The LSCP is no longer active. *Id.*

⁶⁰ *Community Legal Resource Network*, CUNY SCHOOL OF LAW, <http://www.law.cuny.edu/clinics/JusticeInitiatives/Community.html> (last visited Apr. 18, 2014).

⁶¹ Jonathan D. Glater, *Lawyers Learn How to Be Businesslike*, N.Y. TIMES (Jan. 9, 2008), <http://www.nytimes.com/2008/01/09/nyregion/09law.html>.

⁶² Richard Zorza, *NewsMaker Interview— Fred Rooney on the CUNY Incubator*, RICHARD ZORZA’S ACCESS TO JUSTICE BLOG (Sept. 22, 2011), <http://accesstojustice.net/2011/09/22/newsmaker-interview-fred-rooney-on-the-cuny-incubator/> (last visited Apr. 18, 2014); see also Emily Sachar, *CUNY to Train Start-Up Lawyers in Business Basics to Enhance Justice*, CUNY LAW: A COMMUNITY OF JUSTICE at 6 (2007), available at <http://www.law.cuny.edu/magazine/archive/07-fall-cunylaw.pdf>.

practices in underserved New York City communities.⁶³ CLRN and the CUNY Incubator use their network to provide low-cost legal services to individuals in New York that would not otherwise have access to lawyers. CUNY's Incubator has served as a model for other law schools seeking to support their graduates' entrepreneurial development and the provision of affordable legal services.⁶⁴

Today, the American Bar Association's Standing Committee for the Delivery of Legal Services (ABA Delivery Committee) lists ten law schools that have some post-graduate program whose mutual goals are to train new lawyers and provide more affordable legal services.⁶⁵ There are others in development or which are operating but not yet listed on the website. Most of the post-graduate programs listed are incubators that follow a similar model to CUNY's Incubator for Justice.⁶⁶ The attorney incubator models are borrowed from the business community's practice of providing support services for new businesses to increase the likelihood of success.⁶⁷ The information compiled by the ABA Delivery Committee reveals that these

⁶³ *Id.*

⁶⁴ Fred Rooney & Justin Steele, *Exporting the Legal Incubator: A Conversation with Fred Rooney*, 9 U. MASS. L. REV. 108(forthcoming 2014) (documenting conversation with CUNY's former Incubator for Justice director, Fred Rooney, regarding his experience helping other law schools establish legal incubator programs).

⁶⁵ The schools include California Western School of Law, CUNY School of Law, Cleveland-Marshall College of Law, Florida International University College of Law, ITT Chicago-Kent College of Law, PACE Thomas Jefferson School of Law, University of Missouri, Kansas City, and University of Utah's S.J. Quinney College of Law. See Incubator/Residency Programs Directory, AM. BAR ASS'N, http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_directory.html (last visited Apr. 18, 2014). See also Ed Finkel, *INCubator-Style Programs Growing Among Law Schools*, 42 STUDENT LAWYER 2, 28-31 (discussing various post-graduate training programs including one at Rutgers University School of Law).

⁶⁶ See generally *Rutgers Law Associates Fellowship Program*, RUTGERS SCHOOL OF LAW—NEWARK, <http://law.newark.rutgers.edu/rutgers-law-associates-fellowship-program> (last visited Apr. 11, 2014). See also *Law School Public Interest Programs – Post-Graduate Fellowships and Awards*, AM. BAR ASS'N, (last visited Apr. 11, 2014) https://apps.americanbar.org/legalservices/probono/lawschools/pi_postgrad_fellowships.html.

⁶⁷ See generally *What is Business Incubation?*, NAT'L BUSINESS INCUBATION ASSOCIATION, http://www.nbia.org/resource_library/what_is/ (last visited Apr. 11, 2014).

incubators offer lawyers the following start-up support:

- In-house Mentoring
- Organized Networking Opportunities
- Law Practice Management Training
- Client Development Skills & Tools
- Office Space
- Opportunities to Engage in Pro Bono & Low Bono

The programs vary in terms of how much or if they charge lawyers for office space costs but generally the law schools foot the bill for an in-house director who helps organize the training and mentoring of the lawyers in the program. This director facilitates the development of the law practice skills and connects new lawyers with experienced lawyers who can help them develop greater expertise in substantive areas of law. The program director is not co-counsel on cases nor is there any fee-sharing arrangement. However, in some of these programs the director is charged with helping the program participants find opportunities for low bono work.

In addition to the solo and small firm incubators, Pace University School of Law and Arizona State University Sandra Day O'Connor College of Law list post-graduate residency programs.⁶⁸ The difference between post-graduate residency programs and the attorney incubators is that residency programs pay their attorney participants alumni a stipend or salary for engaging in low bono work. Residency programs have experienced attorneys supervise the work of residents and focus more on substantive training than client development. Both types of programs are concerned with sustainability but the incubator programs are more focused on imparting entrepreneurial skills needed for them to become self-sustaining solo and small firm lawyers.⁶⁹ As a result, residency

⁶⁸ See *Pace Community Law Practice*, PACE LAW, <http://www.law.pace.edu/pace-community-law-practice> (last visited Apr. 11, 2014). See also *A Residency Program for Lawyers*, INSIDE HIGHER ED., <http://www.insidehighered.com/news/2012/06/26/arizona-state-plans-create-law-firm-hire-and-train-recent-graduates#sthash.IXKvOzjy.dpbs> (last visited Apr. 11, 2014).

⁶⁹ Katie Dilks, *Law School Incubator Programs: Models and Best Practices*, October 2013 NALP Bulletin. –need login info, librarian does not have access

programs are more costly than incubators.⁷⁰

In exchange for supporting the training on the tools needed to becoming self-sustaining, incubator programs require that their participants offer free and reduced fee legal services to underserved population. For example, the mission of the Center for Solo Practitioners at Thomas Jefferson School of Law is “to help alumni develop law practices committed to the representation of people who are not eligible for free legal services but have difficulty paying high hourly rates.”⁷¹ The program goals are to:

- (1) provide reasonably-priced legal services to low and middle-income individuals;
- (2) help bridge the “justice gap” in our community;
- (3) engender a career-long passion for serving and improving under-served communities; and
- (4) provide lawyers with the skills necessary to run successful law firms, while instilling a deep commitment to ethics and professionalism.”

These programs make setting up a law office less daunting for lawyers without much experience in running their own businesses. At the same time, they help address the growing need for affordable legal services. A lawyer who is building a client base understands that a handful of clients at \$100 an hour is better than no clients at \$300. Getting paid a contract hourly wage of \$25–\$50 is helpful for new lawyers to get experience but many soon realize they can keep more money in their pockets by taking on their own clients at \$75–\$150 an hour. Ultimately, lawyers who establish low bono law practices respond to a community need by generating their own paychecks.

Lawyers in incubator programs must learn to balance their professional call to engage in public service and their need to charge

⁷⁰ See James R. Silkenat, *Legal Access Job Corps*, *The Judge's Journal*, 53 AM. BAR ASS'N 1 (2014); *Law School Solo Practice Incubator and Legal Residency Programs*, HANOVER RESEARCH (Law School Administration Practice, Washington, DC), 2012, at 17.

⁷¹ *The Center for Solo Practitioners*, THOMAS JEFFERSON SCH. OF LAW, <http://www.tjssl.edu/sites/default/files/publications/solo-practitioners-brochure-872013.pdf> (last visited Apr. 12, 2014).

accessible fees that allow them to build law practices. These post-graduate programs are relatively new and little data is available on their effectiveness. Longitudinal studies of solo and small firm lawyers who offer low bono services are required. Until then, greater interest in participating in these programs will require the use of technology to scale these programs not just near law schools, but in underserved communities throughout the country.

B. Bar Associations

Bar associations are perhaps in the best position to integrate low bono by supporting modest-means panels, encouraging attorney incubator programs, and coordinating other resources to facilitate the provision of affordable legal services.

Some bar associations promote low bono rates by offering modest means panels through their lawyer referral and information services. Attorneys who volunteer for these panels have the opportunity to be exposed to clients that they may not otherwise attract. Bar associations screen prospective clients to determine whether they qualify as modest means. Individuals seeking assistance from modest means panels must usually demonstrate proof of income before the bar association's administrative team refers the matter to an attorney on the panel. These programs have established income guidelines that go up to 300% of the federal poverty guidelines. These programs educate legal services consumers about the limited scope representation that lawyer provide for reduced rates. They also make it easier for the lawyer to engage in this work by limiting the subject matter of the modest means panel. Attorneys are vetted to participate on the panel and must carry malpractice insurance. The requirements for attorneys to participate in the panel vary but all require a level of minimum competency which is achieved through experience, training or mentoring by more experienced lawyers.

Attorneys participate in these panels when they are building a client base or to fulfill their public service commitment. In difficult economic times, attorneys are more willing to participate than when they are busy with clients who pay full rates. In today's legal market, those without any or much experience can rarely justify a top dollar fee for their work. Bar associations who run modest means panels may

want to consider recruiting and integrating newly self-employed lawyers on these panels.⁷² Recruiting for modest means is easier when bar associations offer lawyers training, mentors and other resources to facilitate a reduced fee. A 2008 Survey of Modest Means Panels by the ABA LRIS Committee revealed that moderate means panels rates range from \$40 to \$125 per hour.⁷³ Some require clients to deposit retainer fees that can be as high as \$1,000.⁷⁴ While these modest means panels facilitate the provision of low bono work, many programs do not have enough attorneys who participate to address the need.⁷⁵

In addition to modest means panels, state bar led access to justice entities are also engaged in promoting greater option for average-income Americans. The Colorado Access to Justice Commission developed a Modest Means Task Force in 2012. After months of research across the United States, the task force released a report that recommends that its bar associations encourage more attorneys to take on modest means clients by:

- offering a tool kit that helps lawyers establish modest means practices;
- distributing business planning software to help lawyers determine how to bill and setup viable law firms serving modest income clients;
- developing a mentoring program for lawyers who represent modest means clients;

⁷²See *Lawyer Referral Service*, SANTA CLARA COUNTY BAR ASS'N, <http://www.sccba.com/displaycommon.cfm?an=1&subarticlenbr=188> (last visited Apr. 12, 2014) (describing a modest means panel where experienced attorneys mentor new attorneys to provide reduced rates for work in bankruptcy, criminal, family, guardianship, immigration, juvenile and landlord/tenant).

⁷³ *Modest Means Survey* AM. BAR ASS'N STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE at 27(2008), http://www.americanbar.org/content/dam/aba/migrated/legalservices/lris/clearinghouse/downloads/2008_modest_means_survey.authcheckdam.pdf.

⁷⁴ *Id.*

⁷⁵ Although modest means panels are helpful in connecting average income Americans to lawyers, some have requirements that are too restrictive. Bar associations that do not have sufficient lawyers on their modest means panels should evaluate their requirements to ensure they are not unduly burdensome and are consistent with current trends in the profession.

- establishing a program to train lawyers how to provide modest means representation;
- developing a lawyer information database for coordinators of self-represented litigation programs; and
- building a listserv to connect attorneys offering reduced rates to modest-means clients.

A number of state bar associations already offer some of the resources Colorado's Access to Justice Commission recommends but few have proposed such a comprehensive blueprint to encourage the sustainability of attorneys who offer low bono fees.⁷⁶

California is also in the process of exploring its involvement with programs to address the unmet needs of average income individuals. In its final report of its first phase on admissions regulation reform, the Task Force on Admissions Regulation Reform stated its belief that an infrastructure to support modest means legal service delivery required the bar's encouragement.⁷⁷ In its final Phase I report, the California Task Force on Admissions Regulations Reform acknowledges that modest means legal services are "a vastly underdeveloped part of the legal economy,"⁷⁸ and as a result recommended 50 hours of pro bono or low bono services become a

⁷⁶ The Iowa State Bar Association supports its members by offering an affordable library of legal documents called IowaDocs. See *IowaDocs*, IOWA DOCS, <http://www.iowadocs.net> (last visited Apr. 14, 2014). The Iowa State Bar Association owns the copyright to the legal documents which it automates using HotDocs. See *Rate Table for 2014 IowaDocs Subscription*, IOWA DOCS, <http://www.iowadocs.net/rates.cfm> (last visited Apr. 14, 2014). Also, state bar organizations such as the Maryland State Bar Association (MSBA) already organize annual conferences for new lawyers and individuals starting their own practices. The 14th annual MSBA Solo and Small Firm Conference program in 2014 included presentations on legal technology, billing, web marketing, client development and other ethical considerations of law practice management. *14th Solo and Small Firm Conference*, MD. STATE BAR ASS'N, <http://www.msbasoloconference.org/events/soloconference/preview.asp> (last visited Apr. 14, 2014).

⁷⁷ Jon B. Streeter, et al., CAL. BAR ASS'N, TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT (June 24, 2013) at 8, 10, *available at* [http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_\(FINAL_AS_APPROVED_6_11_13\)_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf).

⁷⁸ *Id.* at 14.

new requirement for admission to the California bar.⁷⁹ In addition, the California Access to Justice Commission's Modest Means/Incubator Task Force has indicated its plans to develop a regional and statewide infrastructure that supports the development of incubators and other modest means programs.⁸⁰

More bar associations are promoting new attorney incubator programs that incorporate reduced fee services. The Kansas City Metropolitan Bar Association and the Missouri Bar Association were the first bar associations to develop relationships with a law school to launch an incubator program. In November 2010, the University of Missouri Kansas City School of Law (UMKC) announced the launch of its attorney incubator program.⁸¹ The program was a natural development that was supported by the bar association's efforts to support solo and small firm lawyers through an annual conference and also UMKC's commitment to supporting the development of lawyer entrepreneurship amongst their graduates.⁸² The annual conference is a two-day gathering that is family friendly and includes a range of programs on law practice management, ethics, and substantive legal issues.⁸³ The Missouri State Bar hosts a listserv that connects solo and small firm lawyers that was started at the first Solo and Small Firm Conference in 1996.⁸⁴ UMKC developed the Solo and Small Firm Institute in 2004 that offers workshops and classes to students and attorneys that focus on business planning, founding and operating a law firm.⁸⁵ The Solo and Small Firm Institute curriculum is taught by

⁷⁹ The California State Bar Task Force on Admissions Regulation Reform is in the process of developing the rules and regulations, and implementation. The changes are expected to take place no earlier than 2015. *Id.* at 25.

⁸⁰ Meeting Materials for December 10, 2013 California Commission on Access to Justice. Materials on file with Author.

⁸¹ Steve Vockrodt, *UMKC Incubator Preps Lawyers for Small, Solo Practices*, KAN. CITY BUS. J. (Nov. 12, 2010), <http://www.bizjournals.com/kansascity/print-edition/2010/11/12/umkc-incubator-preps-solo-lawyers.html?s=print>.

⁸² Comments from Dean Ellen Suni on January 3, 2014 at AALS Conference, New York, NY. —contact author

⁸³ *Id.* contact author

⁸⁴ *What you need to know about SFIG: Solo and Small Firm Committee Listserv*, MO. BAR, <http://www.mobar.org/weblinks/sfig-new-subscribers.pdf> (last visited Apr. 15, 2014).

⁸⁵ *UMKC School of Law Launches Solo and Small Firm Incubator*, UNIV. OF MO.—KANSAS CITY (Oct. 29, 2010), <https://www.umkc.edu/news/news-release.asp?id=959>.

UMKC faculty and faculty from the Henry W. Bloch School of Business and Public Administration. The curriculum helps prepare lawyers to understand the importance of marketing and business planning that permits the delivery of low bono services.⁸⁶ Applicants to the incubator are selected in part by their statement of a commitment to offer free and low bono services to the local community.⁸⁷ In addition to helping identify mentors, continuing legal education instructors and to refer clients to participants of UMKC's incubator, the Kansas City Metropolitan Bar Association and the Missouri Bar Association were also involved in facilitating in-kind donations and money to support the incubator.⁸⁸

The Columbus Bar Association developed Columbus Bar inc as a pilot incubator program in April 2011 as part of their professional development center.⁸⁹ The "inc" in the program name is short for incubator and intends "to offer new lawyers valuable experience and ongoing education to help build their professional career, develop sound business management skills, and engender high ethical standards."⁹⁰ Columbus Bar inc selected recent law graduates from local law schools to participate in a one-year program to help them launch solo practices.⁹¹ The incubator offers office space in the same building as the Columbus Bar Association and through its attorney network offers participants mentoring on "client intake, billing practices, law office management, marketing, case management, discovery, and other practice-related topics."⁹² Incubator participants pay rent for furnished and equipped office space but the bar association helps subsidize their costs by sending participants referrals from the bar's lawyer referral service.⁹³ In exchange for the support

⁸⁶ The UMKC incubator also provides support in law office management and mentoring to start law practices. *Id.*

⁸⁷ *Application Process*, UMKC SCH. OF LAW, <http://law.umkc.edu/careers-cle/solo-and-small-firm-application-process.asp> (last visited Apr. 15, 2014).

⁸⁸ *Application Process*, UMKC SCH. OF LAW, <http://law.umkc.edu/careers-cle/solo-and-small-firm-application-process.asp> (last visited Apr. 15, 2014).

⁸⁹ *Columbus Bar Announces New Incubator Program*, COLUMBUS B. FOUND. (Jan. 21, 2011), <http://www.columbusbarfoundation.org/newsawards/index.php?y=2011&i=1631>. [hereinafter COLUMBUS BAR ANNOUNCES NEW INCUBATOR].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* The Columbus Bar Association also offers sponsorship opportunities and

and mentoring, participants agree to take on at least one pro bono case from the Columbus Bar Association's Lawyers for Justice program.⁹⁴ The Columbus Bar Association also developed Columbus Bar inc Limited, a program that offers similar mentoring, networking and training opportunities without the office expense.⁹⁵ Both programs are run through the Columbus Bar inc Professional Development Center.

The Chicago Bar Foundation provided seed funding to start the Justice Entrepreneurs Project (JEP) in June 2013. JEP's goal "is to develop market-based solutions to serve the unmet needs of moderate income individuals for affordable legal services." JEP offers similar opportunities for mentorship, training and networking as other incubators but organizes its program into three periods of six months each and admits up to 10 new attorneys into its program each month.⁹⁶ The Chicago Bar Foundation, through various resources including law school stipends, subsidizes the cost of office space for the first six months in exchange for participation in pro bono work. In the second six months of the program attorney participants pay \$300 per month for their office space and \$500 per month in each of the last six months in the program.⁹⁷ While JEP represents that its attorneys do not offer discounted or low bono rates, its program focuses on leveraging technology to unbundle services at below market rates.⁹⁸ The Chicago Bar Foundation leverages its existing relationships to provide JEP participants with malpractice insurance, supervised training on pro bono cases, and mentoring that encourages their participants to think

accepts in-kind donations for individuals wishing to subsidize start-up costs for lawyers. *Columbus Bar Inc. Professional Development Center*, COLUMBUS B. ASS'N, http://www.cbalaw.org/cba_prod/Main/Resources/Legal-Professionals/inc/Sponsor.aspx (last visited Apr. 17, 2014). [hereinafter COLUMBUS BAR INC.] They have sponsorship packages at \$2,000, \$5,000 and \$10,000 levels. *Id.* In exchange, sponsors receive recognition in bar publications and promotional materials. *Id.*

⁹⁴ COLUMBUS BAR ANNOUNCES NEW INCUBATOR, *supra* note 90.

⁹⁵ COLUMBUS BAR INC., *supra* note 94.

⁹⁶ *Justice Entrepreneurs Project*, CHI. B. FOUND.,

<http://chicagobarfoundation.org/wpcontent/uploads/2013/12/overview.pdf> (last visited Apr. 17, 2014).

⁹⁷ *Id.*

⁹⁸ Roy Strom, *Bridging the 'Justice Gap'*, CHI. DAILY L. BULL., Nov. 13, 2013, available at http://chicagobarfoundation.org/news_item/bridging-the-justice-gap/ (reporting that one of its attorneys standardizes his practice to charge his clients \$125 for child support petitions and \$75 for a child support response).

not just about their own viability but about reinventing the way legal services are delivered.

Alone or in collaboration with law schools, bar associations can do a great deal to encourage more lawyers to provide affordable legal services to underserved communities. By encouraging lawyers to address the legal needs of average income Americans, bar associations send the important message that there is a need for affordable and quality legal services provided by lawyers for average income Americans. This type of messaging begins to remove the stigma of being the “cheap lawyer” and can encourage more lawyers to consider developing low bono law practices. Messages sent by bar leaders about the profession’s values are critical to defining the expectations of prospective lawyers.

C. Courts

As the principal lawyer regulator, the judicial branch should also be instrumental in developing an affordable legal services agenda that incorporates low bono work by lawyers. Courts are one of the most interactive bodies of government and are the most frequent representation of our democratic principles. In order to remain relevant to average-income Americans, courts must evaluate their policies to ensure lawyers are equally accessible to all. While maintaining their neutrality, courts can encourage an affordable legal services infrastructure by allocating resources to develop it, and by revisiting rules and policies about who is authorized to practice law.

1. Resource Allocation

In the last few years, courts across the country have experienced unprecedented budget cuts that have significantly threatened their operations. Despite these cuts, most state judicial branches have substantial access to monetary and non-monetary resources to support a modest income infrastructure.

The Unified Judicial System in South Dakota offers one example of how courts can support a modest means delivery system through a monetary contribution. In March 2013, South Dakota passed a law to launch a pilot program that subsidizes lawyers to work and

live in rural areas for a minimum of five years.⁹⁹ The Recruitment Assistance Pilot Program aims to draw attorneys to small and rural communities in South Dakota with populations of 10,000 or less.¹⁰⁰ Although a fifth of the U.S. population lives in rural communities, only 2% of small law firms are located in those communities.¹⁰¹ The program accommodates up to 16 participants who receive an annual \$12,000 stipend each of the five years they maintain a law practice and live in the rural community.¹⁰² While the stipend may not seem like a large amount for lawyers who graduate with large debt loads, each payment equals 90% of tuition and fees at the University of South Dakota School of Law.¹⁰³ The program is financed through a partnership between the State Bar of South Dakota, which contributes 15% of the stipend, each county that hosts a lawyer pays 35% of the lawyer's stipend, and the Unified Judicial System which is responsible for 50% of the stipend.¹⁰⁴ The judicial branch has committed to allocating \$96,000 per year to pilot this program.¹⁰⁵

The New York Unified Court System, led by Judge Fern Fisher, has set up a court program that promote the provision of unbundled legal services by recent law graduates to help modest-income Americans in housing court.¹⁰⁶ Efforts in the New York

⁹⁹ Debra Cassens Weiss, *South Dakota Lures Lawyers to Rural Areas with Annual Subsidies*, A.B.A. J., Apr. 9, 2013, http://www.abajournal.com/news/article/south_dakota_lures_lawyers_to_rural_areas_with_annual_subsidies/. See S.B. 218, 2013 Leg., 88th Sess. (S.D. 2013); H.B. 1096, 2013 Leg., 88th Sess. (S.D. 2013).

¹⁰⁰ *Rural Attorney Recruitment Program*, S.D. UNIFIED JUDICIAL SYS., <http://uj.s.sd.gov/Information/rarprogram.aspx> (last visited Apr. 17, 2014).

¹⁰¹ Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers to Pay*, N.Y. TIMES, Apr. 9, 2013, at A1.

¹⁰² *Id.*

¹⁰³ Contract/Letter of Agreement for the Recruitment Assistance Pilot Program, between the S.D. Unified Judicial Sys. and the State Bar of S.D. (on file with author).

¹⁰⁴ *Id.*

¹⁰⁵ The court will contribute \$6,000 per year for each lawyer after the county and the state bar make their contributions. *Id.* This program mirrors a federal medical program that offers medical professionals as much as \$50,000 for two years of service in underserved communities. See *Loan Repayment Programs*, NAT'L HEALTH SERVICE CORPS, <https://nhsc.hrsa.gov/loanrepayment/index.html> (last visited Apr. 18, 2014).

¹⁰⁶ See generally *New York State Courts Access to Justice Program*, N.Y. STATE

Courts, led by Judge Fisher include the development of a housing court apprenticeship program. The New York Housing court has an existing Volunteer Lawyer for a Day program where experienced attorneys volunteer to represent tenants in housing court on nonpayment proceedings.¹⁰⁷ Through collaboration with CUNY School of Law, these volunteer attorneys are now providing mentorship and supervision to recent law graduates waiting for bar results. The program, called the LaunchPad for Justice, teams up CUNY law graduates with a volunteer lawyer to provide representation in court to an otherwise self-represented litigant. While they wait for bar results, recent graduates are trained in the law and procedure necessary to represent individuals in housing court.¹⁰⁸ In order to implement this model, the Supreme Court amended the student practice rules to allow for recent graduates to practice while waiting for bar results. In addition, some seed funding was available through public sources to provide recent graduates with modest stipends for their work. The partnership requires development, training and coordination by court personnel but through the LaunchPad for Justice, many average-income self-represented litigants obtain representation they would otherwise forgo.¹⁰⁹ The program also introduces future lawyers to the need for affordable legal services and the opportunity to offer discrete task representation.

Judicial bodies are sometimes tasked with the authority to administer grants that expand access to legal services. When the opportunity arises, courts need to consider programs that will facilitate the provision of legal services to average-income individuals. Most courts already provide resources for self-represented litigants. The Civil Justice Infrastructure Mapping Project of the American Bar Foundation found that every state in the U.S. has information online to help self-represented litigants and ninety-eight percent of states have

COURTS, <https://www.nycourts.gov/ip/nya2j> (last visited Apr. 12, 2014).

¹⁰⁷ Hon. Fern Fisher, *Best Practices for the Administration of Court-Sponsored Volunteer Lawyer for the Day Programs*, (N.Y. State Courts: Access to Justice), Jan. 2010, at 2, available at

www.nycourts.gov/ip/nya2j/pdfs/NYSA2J_BestPracticesVLFD.pdf.

¹⁰⁸ Natalie Gomez-Velez, *Structured Discrete Task Representation to Bridge the Justice Gap: CUNY Law School's LaunchPad for Justice in Partnership with Courts and Communities*, 16 CUNY L. REV. 21, 38 (Winter 2012).

¹⁰⁹ *Id.* at 38–40.

a selection of legal forms on those websites.¹¹⁰ Additionally, more than seventy percent of states have at least one court-based self-help center that offers members of the public information and assistance to help them represent themselves.¹¹¹ The growing resources for legal services consumers provide options that are less costly than lawyers to sophisticated legal services consumers. Yet, these self-help resources are not always sufficient for individuals who face language barriers, suffer through emotional trauma or quite simply are not sophisticated enough to overcome confusing procedural issues.¹¹² When they face these obstacles, courts should offer these individuals referrals to lawyers and others who offer reduced rate services.

By not advocating a low bono lawyer infrastructure that sits between pro bono and market rate, the judiciary is not offering access to courts to Gap Clients nor adequately supporting those who it admits to practice law. Average-income Americans have the same legal rights and responsibilities as the wealth and the poor. They also deserve and need accessible lawyers. The need for an affordable legal service alternative is currently only addressed by non-lawyers that are generating millions of dollars by selling self-help materials and legal documents. These efforts, previously regarded as peripheral, are becoming part of the “new normal” for average income Americans. As they do, lawyers and courts are seen as obstacles rather than

¹¹⁰ Rebecca L. Sandefur & Aaron C. Smyth, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, (The Am.Bar Found.), Oct. 7, 2011, at 11 available at www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

¹¹¹ *Id.* Additionally, 59 percent of states have courthouses with computer terminals to assist self-represented litigants. These computers use software to that explains how to respond to a claim. *Id.*

¹¹² See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Per Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1554–58 (2005) (discussing the limitations of the resources for self-represented litigants). See also Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, SEATTLE J. FOR SOC. JUST. 51, 62–71 (2010) (summarizing studies showing that individuals represented by lawyers are more likely to win than those who represent themselves). See also D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

facilitators of justice.

2. Unauthorized Practice of Law

Developing a modest means agenda that benefits average-income Americans requires the judiciary to reconsider and clarify what work is solely in the jurisdiction of lawyers. As the gatekeeper for the provision of legal services, the judicial branch determines what constitutes the practice of law and who can practice it. Participation in our democracy requires access to courts and to lawyers. The inability of the judicial branch to offer affordable legal services to average-income Americans, jeopardizes the integrity of our courts.

In an effort to address the growing legal need, judicial branches and bar associations are authorizing the issuing limited licenses to practice law to a new class of legal practitioners. In 2012, the Washington Supreme Court approved a court rule that allows individuals to provide limited legal advice on domestic relations.¹¹³ To become a Limited License Legal Technician, an applicant must have an associate level degree, 45 credits of core classes in legal studies at an ABA approved law school or paralegal program and have completed courses in the area of law the applicant intends to practice.¹¹⁴ However, to encourage individuals with substantial experience in the area of practice to become legal technicians, paralegals with more than 10 years of experience who are certified or registered and who have passed a designated competency exam may apply for a waiver of the educational requirement.¹¹⁵ Licensing is anticipated to begin by the Washington State Bar Association by the

¹¹³ *Supreme Court Adopts Rule Authorizing Non-Lawyers to Assist in Certain Civil Legal Matters*, WASHINGTON COURTS (June 15, 2012), <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=2136> (last visited Apr. 12, 2014).

¹¹⁴ *See Amendments to APR 28 Education Requirements*, LIMITED LICENSE TECHNICIAN BOARD, www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Technician-Board (last visited Apr. 12, 2014). [hereinafter LIMITED LICENSE TECHNICIAN BOARD].

¹¹⁵ *Regulations of the APR 28 Limited License Technician Board R. 4*, LIMITED LICENSE TECHNICIAN BOARD, available at <http://www.wsba.org/~media/Files/WSBA-wide%20Documents/LLLT/Rules%20and%20Regulations/Regulation%204%20Limited%20Time%20Waivers.ashx> (last visited Apr. 18, 2014).

end of 2014.¹¹⁶ The bar's sanction of these Limited License Legal Technicians in Washington promises to provide more affordable options that help address the needs of legal services consumers that cannot pay lawyers market rates.¹¹⁷ Washington's Limited License Legal Technicians will be required to provide proof of financial responsibility and be subject to discipline if they violate attorney ethical standards.¹¹⁸ They will also pay an annual fee to the Washington State Bar for the right to such license.¹¹⁹ The initial focus of these technicians is to provide assistance in family law matters but there are plans to extend these licenses to other practice areas where there is great legal need.¹²⁰ The idea of limited license legal professionals seems to be catching on. The California State Bar created a subcommittee that has begun to explore and take testimony from interested individuals.¹²¹ The New York City Bar has also recommended creating legal technicians or courtroom aides.¹²² The American Bar Association's Task Force on the Future of Legal Education also issued a report recommending a "new system of training and licensing limited practice officers."¹²³ While having more

¹¹⁶ *Id.*

¹¹⁷ Limited License Legal Technicians are expected to have educational and exam requirements, ethical obligations, and disciplinary procedures. *See* LIMITED LICENSE TECHNICIAN BOARD, *supra* note 115.

¹¹⁸ *Regulations of the APR 28 Limited License Technician Board R. 28*, LIMITED LICENSE TECHNICIAN BOARD, <http://www.wsba.org/~media/Files/WSBA-wide%20Documents/LLLT/Rules%20and%20Regulations/Regulation%204%20Limited%20Time%20Waivers.ashx> (last visited Apr. 18, 2014).

¹¹⁹ *Id.*

¹²⁰ WASH. ST. BAR ASSOC., Limited License Legal Technician Board Meeting Minutes, Nov. 21. 2013, http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/LLLT%20Board/Minutes/20131121%20Meeting%20Minutes.ashx (last visited Apr. 18, 2014). *Id.*

¹²¹ *Limited License Working Group*, ST. BAR OF C.A., <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/LimitedLicenseWorkingGroup.aspx> (last visited Apr. 18, 2014).

¹²² *Committee On Professional Responsibility, Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners*, N.Y. CITY B.A., available at <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

¹²³ Draft Report and Recommendations, *Task Force on the Future of Legal Education*, Am. Bar Ass'n (Sept. 20, 2013) available at http://www.americanbar.org/content/dam/aba/images/news/PDF/draft_report_of_aba_task_force_september_2013.pdf.

affordable options is good news for legal services consumers, lawyers stand to lose a large market share.

The judiciary will ultimately determine which legal issues and procedures benefit most from assistance by limited license practitioners, attorneys and self-represented litigants. Existing policy and budget priorities indicate support for the self-represented but not for lawyers who offer reduced rates. While not all legal problems require the assistance of lawyers, having low bono services offered by attorney is essential part of an affordable legal services agenda. To advance a low bono agenda, courts must clarify what constitutes the practice of law and who gets to do it.¹²⁴ Whether offered by attorneys in private practice or through nonprofit organizations, low bono law practices recognize that there is a role for lawyers to play in delivering legal services for modest-income Americans. It reflects an understanding that given the complexity of family relationships, the difficulties raised by limited resources and the increasingly interconnected world we live in, simple legal issues sometimes are complicated enough to require the expertise of lawyers. Embracing low bono models demonstrates a commitment by the judiciary to have lawyers represent average-income Americans.

D. Legal Aid

Courts, bar associations and law schools may be the most instrumental players in advancing policy that supports low bono law practices, but legal aid organizations are instrumental partners in creating a culture that embraces a modest-income agenda as a necessary component of our justice system. Legal aid organizations should embrace an affordable legal services agenda because doing so creates more lawyer resources for low-income individuals and

¹²⁴ In *Frye v. Tenderloin Housing Clinic, Inc.*, the Supreme Court of California indicated that nonprofits that hire lawyers to represent individuals may collect court-awarded fees for delivering legal services. 129 P.3d 408, 424 (Cal. 2006). However, the court did not clarify whether nonprofits receiving fees directly from consumers for personal legal services work is acceptable or if nonprofits have to become law corporations to develop such a revenue model. There are also tax considerations for tax-exempt organizations that hinder the development of a low bono agenda within nonprofit entities. These questions of law and policy require clarification in order to permit new models that offer affordable legal services by lawyers to emerge.

facilitates stronger relationships with Main Street lawyers.¹²⁵

1. More Lawyer Resources

Legal aid organizations have effectively communicated that low-income individuals require the expertise of lawyers and that more resources are necessary to address that need. However, budget cuts, downsizing at private law firms, and lower earnings on state IOLTA accounts have reduced the number of lawyer resources available to low-income individuals. Restrictions on federally funded legal aid programs have created barriers for many low-income individuals to obtain assistance. Even when such a person is income eligible for free legal services, the Legal Services Corporation (LSC) reports that only 1 in 2 legal aid eligible individuals who seek legal services subsidized by the federal government actually obtain them.¹²⁶ Legal aid and pro bono programs funded by non-LSC sources are more lenient in their eligibility guidelines but still struggle to find the resources to help everyone.¹²⁷

Low-income individuals who do not obtain free legal services already hire private lawyers so an affordable alternative would benefit them as well as middle-income Americans. The last national survey on civil legal needs found that 75% of the low-income individuals who were assisted by an attorney used a private lawyer.¹²⁸ Only 25% used a legal services attorney to handle their legal issue.¹²⁹ Only 32% of those who used a private lawyer reported not paying a fee or paying a fee through a contingency agreement.¹³⁰ The data demonstrates that 68% of low-income individuals who hired a lawyer paid an attorney to resolve their legal needs.¹³¹ When asked about the fee arrangement

¹²⁵ “Main Street lawyers” refers to solo and small firm practitioners for whom low and moderate income clients represent a sizeable part of their practices.

¹²⁶ DOCUMENTING THE JUSTICE GAP, *supra* note 1, at 1.

¹²⁷ Some legal aid programs go beyond the federal poverty guidelines and help individuals at 200% of those guidelines. Classes of individuals such as seniors, veterans and others, also have higher income thresholds.

¹²⁸ *The American Bar Association Legal Needs Study*, ALGODONES ASSOCIATES, http://www.algodonesassociates.com/legal_services/assessing_needs/abalegal.htm.orig (last visited Apr. 12, 2014).

¹²⁹ *Id.* at 7–8.

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

with those private lawyers, 39 percent of low-income households said they paid the usual fee, and 8 percent reported a reduced-fee arrangement.¹³² If low-income clients who are not served by legal aid organizations are already paying lawyers to handle their legal matters, then our efforts should focus on developing an agenda that promotes affordable fees that make legal services accessible to the millions of poor and near poor who need lawyers but do not seek them due to concerns about cost.¹³³

Licensing individuals to perform routine legal services will be important to address the unmet legal needs of many low- and middle income Americans but some of their legal problems require lawyer intervention. As legal aid lawyers know, personal legal services problems are not always so simple or routine. When Gap Clients have complicated legal issues that require more expertise than what document preparers, court advocates and limited license legal technicians are permitted to perform, they should have the option to hire a lawyer who offers low bono rates. By supporting an affordable legal services agenda that includes low bono services by lawyers, legal aid organizations contribute to expanding their own access to justice agenda. Legal aid organizations can develop their own income-generating models or developing stronger relationships with the solo and small firm bar.¹³⁴

2. Stronger Relationships

There are a number of legal aid organizations that already support low bono work by private lawyers. These legal aid entities use a portion of their budget to pay the private bar to take on cases for legal-aid eligible clients that they cannot take on due to conflicts or the capacity of their staff.¹³⁵ These programs, which exist primarily in

¹³² *Id.* Another 8% indicated they were not sure if they paid the reduced or non-reduced rate for the attorney's services. *Id.*

¹³³ Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005) (citing research reporting that only about a third of individuals who do not use lawyers do so because of cost concerns).

¹³⁴ Legal aid's ability to develop low bono models will be largely determined by funder restrictions, changes in tax law, and ethics rules.

¹³⁵ Legal aid organizations that receive funding from the Legal Services Corporation are required to spend 12.5% of their budgets on involving the private bar. 45 C.F.R. § 1614.1 (2008). For a discussion of the genesis of the private attorney involvement

rural communities, identify private lawyers who understand legal aid's client base and can provide competent representation for a fraction of the market rate. Legal aid usually contracts with attorneys to perform a range of services with a set low bono fee payment schedule. Legal aid screens the client, connects them with the attorney and then pays for the services rendered after the lawyer submits proof of completion of the work.

Legal aid organizations are also supporting the development of low bono law practices by referring cases they cannot take on to local incubator programs. For example, the Memphis Area Legal Services (MALS) has partnered with Memphis Bar Association (MBA), the University of Memphis Cecil C. Humphreys School of Law, and the Service Corps of Retired Executives (SCORE) to create Esq.Build – The Memphis Bar Association Sole Practitioner Incubator.¹³⁶ Participants pay a \$50–\$100 monthly fee to MALS in exchange for office space. Participants provide their own office equipment and are required to perform ten hours of pro bono work per month for MALS.¹³⁷ Like most other incubator programs, participants must submit an application to participate in the Esq.Build.¹³⁸ Once in the program, lawyers attend training programs, develop a marketing strategy and obtain preference in securing court appointed cases.¹³⁹ Since these lawyers are renting space in MALS's offices, legal aid lawyers can greatly influence their training. By engaging in the training of the private bar, legal aid organizations are able to vet future Main Street lawyers, leverage their resources, and gain new supporters.

requirement, see Luz E. Herrera, *Rethinking Private Attorney Involvement through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 25–28 (2009).

¹³⁶ *About ESQ.BUILD- The Memphis Bar Association Sole Practitioner Incubator*, MEMPHIS.EDU, http://www.memphis.edu/law/esq_build_app.pdf (last visited Apr. 12, 2014).

¹³⁷ *Id.*

¹³⁸ To be considered for ESQ.BUILD, lawyers or individuals waiting for bar results must have graduated from the University of Memphis Cecil C. Humphreys School of Law, admitted to practice in Tennessee within the last three years, be a member of the MBA and carry professional liability insurance. *Id.* See also *Cecil C. Humphreys School of Law Career Services*, Univ. of Mem., www.memphis.edu/law/career/esqbuild.php (last updated Dec. 2, 2013).

¹³⁹ *Cecil C. Humphreys School of Law Career Services*, Univ. of Memphis., www.memphis.edu/law/career/esqbuild.php (last updated Dec. 2, 2013).

The Legal Aid Society of Orange County (LASOC) has maximized its opportunities to collaborate with the private bar and encourage the development of low bono law practices. In addition to using some of its budget to pay private lawyers low bono rates, it runs a lawyer referral program and helps fund its legal aid program by collecting referral fees from private attorneys. LASOC also recently developed the Bar Waiter Program and the Lawyer Entrepreneur Assistance Program (LEAP) to engage recent law graduates in pro bono work. The Bar Waiter Program helps recent law graduates waiting for bar results “to develop their lawyering skills and build their legal resumes.”¹⁴⁰ Program participants volunteer with LASOC by working pro bono on routine legal aid cases in the areas of domestic relations, tenant rights, and consumer issues. In exchange these recent law graduates obtain training, access to LASOC’s brief bank, and relationships with the local bar. They also have the opportunity to see how their work makes a difference in the community.

Similarly, the Lawyer Entrepreneur Assistance Program (LEAP) connects new solo lawyers to LASOC’s training, network and lawyer referral service in exchange for pro bono work. Lawyers are trained to do intake by working LASOC’s hotline, they are taught to put together a client file, and work alongside legal aid lawyers in LASOC’s family, bankruptcy and tenant law clinics.¹⁴¹ Many of the lawyers represent LASOC clients in court under the supervision of a legal aid lawyer. As a result of these programs, LASOC reports that 32 LEAP attorneys made 143 appearances for 103 low-income litigants in a ten-month period.¹⁴² Participants in both programs were responsible for closing 298 LASOC cases in family law, housing, bankruptcy, wage claims, guardianships, civil harassments and conservatorships.¹⁴³ LASOC is working with the local bar association and law schools to provide law office management training for these

¹⁴⁰ Letter from William T. Tanner, Directing Attorney, Legal Aid Society of Orange County, to author (Aug. 30, 2013) (on file with author).

¹⁴¹ LASOC reports hosting more than 20 continuing legal education events on substantive areas of law for these volunteers from the period of February to November 2013. Email from William T. Tanner, Directing Attorney, Legal Aid Society of Orange County, to author (Dec. 2013) (on file with author).

¹⁴² LASOC also reported that there were 26 appearances for 10 recent admittees scheduled in December 2013. *Id.*

¹⁴³ *Id.*

lawyers. All of these efforts to engage the private bar in pro bono and low bono work helps LASOC obtain support and funding that would otherwise be absent.

If low-income clients not served by legal aid are already paying lawyers to handle their legal matters and online non-lawyer businesses are generating millions of dollars on automating legal forms, then there is an opportunity to develop an affordable legal services agenda that includes low bono services by attorneys. Lawyers who operate low bono law practices may not make as much money as their Wall Street counterparts but with the right planning and marketing many lawyers can make a living and serve unaddressed legal needs. Legal aid organizations and their clients have much to gain from such collaborations.

IV. CONCLUSION

Bar associations, law schools, courts and legal aid organizations should embrace low bono as a solution for meeting the unmet legal needs of average income Americans. Without their collective support, there is little incentive for lawyers to develop consumer-responsive law practices. Efforts to commoditize routine legal services and to license a new group of legal services providers may be the most effective ways to adequately address the needs of Gap Clients. However, lawyers who are barely making ends meet express concerns that licensing a new group of service providers to perform legal work will continue to depress lawyer salaries. While the concern is valid, the legal profession's inability or unwillingness to develop a legal service delivery system that includes lawyers for average means Americans has created an opportunity for non-lawyer businesses to create systems and networks that address the need. If the legal profession wants to remain relevant to average-income Americans, it must understand that a lawyer alternative between free and \$350 an hour is necessary.

Through lower-than-market legal fees, unbundled legal services at full rates, flat-fee pricing and other flexible-fee structures, attorneys can attract clients who otherwise will forgo legal representation or resort to more affordable non-attorney options. The concept of a low bono practice must come to mean a business

enterprise that allows lawyers to charge reasonable rates for the demographic they serve. Ultimately more legal services at lower fees have a positive impact on both lawyers and legal services consumers.