

PRO BONO PUBLICO IN A PARALLEL UNIVERSE: THE MEANING OF PRO BONO IN SOLO AND SMALL LAW FIRMS

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I. INTRODUCTION

The organized bar is increasingly providing pro bono legal assistance to the more than fifty million people of limited means in the United States.¹ In 2008, the 200 highest grossing law firms in the United States contributed a record 5.57 million hours of pro bono service to individuals and organizations that could not afford to hire lawyers.² These large firms now have well-organized pro bono programs that enjoy considerable administrative support. But the lawyers in large firms (over 100 lawyers) comprise only about 16% of the lawyers in private practice.³ Solo and small firm (two to five) lawyers, who comprise 63% of private practitioners,⁴ contribute more time and in greater numbers to the pro bono legal representation of persons of limited means than any other group of lawyers.⁵

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1. More than fifty million people are eligible to receive civil legal services from programs that are funded by the Legal Services Corporation (“LSC”). Most live at or below 125% of the federal poverty guidelines, which in 2009 was \$27,563 for a family of four. *See* Financial Eligibility, 45 C.F.R. § 1611 app. A (2009). These numbers do not include undocumented immigrants living in the United States who may fall below the federal poverty guidelines but are not eligible for assistance from LSC-funded programs.

2. David Bario, *Recession-Proof?*, *AM. LAW.*, July 2009, at 53, 54.

3. *AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 2* (2009), <http://www.abanet.org/legalservices/probono/report2.pdf> [hereinafter *SUPPORTING JUSTICE II*].

4. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000*, at 8-9 (2004) (reporting that in 2000, there were 672,901 lawyers in private practice, with 324,903 lawyers in solo practice and 99,235 lawyers in firms of two to five attorneys).

5. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 131* (2005); PAUL RUGGIERE & MARIELENA CARPANZANO, *STATE BAR OF TEXAS SURVEY OF 2007 PRO BONO 10, 13* (2008); *see also* *SUPPORTING JUSTICE II*, *supra* note 3, at 12 (reporting that a higher percentage of solo and small firm lawyers perform free legal services to persons of limited means than is provided by any other practitioners); ADMIN. OFFICE OF THE COURTS, *FINAL REPORT: CURRENT STATUS OF PRO BONO SERVICE AMONG MARYLAND LAWYERS, YEAR 2007*, at 21 (2008) (reporting that a higher percentage of solo and small firm lawyers perform some pro bono than any other group of lawyers).

The pro bono efforts of these lawyers have not received focused attention, even though their experiences are different in many respects than the pro bono experiences of other lawyers. Indeed, the ways in which pro bono work is found and performed, the motivations and incentives for performing it, the types of work performed, and the supports available for this work are often significantly different in solo and small firms than they are in large firm settings.⁶ The differences in the pro bono experience in these two practice settings are so great that the lawyers seemingly operate in parallel universes.

Just a few examples of the differences suffice to make this point. In large law firms, pro bono has been thoroughly institutionalized.⁷ A lawyer or administrator runs the law firm's pro bono program. Matters are often selected that can be appropriately handled by junior attorneys and that will not create conflicts with corporate clients.⁸ Pro bono work performed by large firms is typically performed entirely for free and is supplied to entirely different clients than those ordinarily serviced by the firm. Firm lawyers may be given time off to work exclusively on pro bono matters while still receiving full compensation. They may devote enormous resources to helping a single individual.⁹ Large law firms view their pro bono programs as critically important to recruitment of new associates and firm marketing.¹⁰ Consequently, some large firm lawyers feel direct pressure from their colleagues or their clients to perform pro bono work.¹¹

6. This is not a new insight. As Robert Granfield has observed, "pro bono work means something different to lawyers across different organizational sectors within the hierarchy of the legal profession." Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW & SOC'Y REV. 113, 141 (2007).

7. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6 (2004).

8. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 87 (2007); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1430 (1998). I am using the term "conflicts" in the broadest sense and not only as used in the conflict of interest rules under lawyers' professional codes. Not only do firms wish to avoid ethical conflicts with existing clients, but they often seek to pursue matters that will not create conflicts with the perceived interests of their clients. Thus, large firms often become involved in matters involving children or international human rights to avoid conflicts with their corporate clients. If they become involved in matters with which their clients philosophically disagree, they have been known to withdraw. See, e.g., William Glaberson, *New York Loses Major Legal Ally in Suit Over Guns: Illegal Traffic at Issue*, N.Y. TIMES, Apr. 17, 2004, at A1.

9. See, e.g., Brian Baxter, *From Death Row to Dolphins: Am Law 200 Firms Have Embraced a Rich Palette of Cases*, AM. LAW., July 2007, at 101 (describing a partner and associate who devoted 500 hours to obtaining benefits for a single veteran).

10. See, e.g., Cummings, *supra* note 7, at 39-40, 73, 109-10.

11. Andrew Boon & Avis Whyte, "Charity and Beating Begins at Home": *The Aetiology of the New Culture of Pro Bono Publico*, 2 LEGAL ETHICS 169, 187-88 (1999); Nate Raymond, *A*

In contrast, lawyers in solo and small firms do not have the support staff or associates to help them with pro bono work that are available to large firm lawyers.¹² Although some of the pro bono work performed by solo and small firm practitioners is received from referrals by organized pro bono programs,¹³ more often it comes through friends, family, and existing clients.¹⁴ In most cases, no one vets these cases for them before they take them on. Since their compensation is very directly tied to what they earn on an hourly or flat fee basis, every hour they spend performing pro bono work directly affects their monthly take-home income. Many consider themselves to be doing pro bono when they perform “low bono” work, which involves the provision of legal services at reduced rates to individuals, including regular clients, who cannot otherwise pay.¹⁵ Indeed, the recipients of pro bono services from solo and small firm lawyers are more likely to be their regular clients, who simply can no longer afford the bill. Thus, the very meaning of pro bono in the solo and small firm context is different than it is in the large firm setting. Moreover, the firm cultures within which solo and small firm lawyers work, and their motivations for taking pro bono cases, are often very different than in large firm practices. Pro bono is rarely important for small firm recruiting and may actually be discouraged by firm partners due to economic concerns.¹⁶

It would be a mistake, however, to think of solo and small firm lawyers as a monolithic group, even in the context of pro bono. While many are attracted to the small firm setting because of their desire to help others,¹⁷ they vary considerably in the types of clients they represent, their level of administrative support, and in their economic success.¹⁸ Some are essentially cause lawyers who deliberately choose to

Silver Lining: Rather Than Diminishing The Am Law 200's Pro Bono Commitment, Will the Economic Downturn End Up Enhancing It?, AM. LAW., July 2008, at 100, 102-03.

12. Elizabeth Stull, *Many Solo, Small Firm Attorneys Lack Time, Resources for Pro Bono*, N.Y. L.J., Dec. 13, 2004, at 1.

13. AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 14 (2005) (reporting that 37% of pro bono work came to firms of one to nine lawyers in this way).

14. *Id.* (reporting that private practice attorneys in large firms were more likely to receive referrals through organized programs than from friends and family, whereas the reverse was true for lawyers in solo and small firms of one to nine attorneys); *see also* LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 155 (2001).

15. *See* Stull, *supra* note 12.

16. *See* MATHER ET AL., *supra* note 14, at 151-53.

17. CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS 5-6 (1996).

18. *Id.* at 76; Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 858 (2001).

represent underserved populations.¹⁹ Other lawyers build practices serving middle-class and wealthier clients in personal plight areas such as family, landlord-tenant, or criminal law, which are areas in which underserved populations also need legal assistance. Still others represent organizations, and work in the same practice areas found in large law firms.²⁰ Solo and small firm lawyers do, however, share common concerns about bringing in new business and being able to service their clients' matters diligently and competently.²¹ Cash flow is also a constant concern,²² and can make it difficult for these lawyers to hire as much administrative support as they need.²³ These factors can raise special challenges when they contemplate taking on pro bono work.

This Article examines pro bono in the solo and small firm context. It will consider the political and marketing environment in which the organized bar's pro bono rule has evolved and the ways in which the rule is viewed by solo and small firm practitioners. The Article will also look at data that provide some insight into the meaning and practice of pro bono in solo and small law firms—including as a professional value, as part of running a business, and even as a revenue source. It will also explore the tension between the messages that these lawyers receive about good bill collection practices and doing reduced fee work for persons who cannot afford to pay for a lawyer. The tension reveals the need to consider whether the American Bar Association's ("ABA") Model Rules definition of "pro bono" should be expanded to encompass more of the free and reduced fee work that solo and small firm lawyers actually perform for individuals who cannot afford to pay a lawyer. Finally, this Article will consider how the obligation to perform pro bono may be inculcated in this group and will provide some suggestions for how pro bono might be conceptualized, encouraged, and organized so it is easier for these practitioners to perform.

II. THE HISTORY, POLITICS, AND MARKETING OF PRO BONO IN PRIVATE PRACTICE: DUAL PERSPECTIVES

While U.S. lawyers have reportedly always provided some free legal services to clients who were unable to pay,²⁴ the bar has not shared

19. MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 167 (1994); *see also infra* Part IV.C.

20. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 325 (2004).

21. *Id.* at 323-24.

22. MATHER ET AL., *supra* note 14, at 141; SERON, *supra* note 17, at 13-14.

23. Levin, *supra* note 20, at 323-24, 343-45.

24. RICHARD L. ABEL, *AMERICAN LAWYERS* 129 (1989); Cummings, *supra* note 7, at 10.

a common understanding of the term “pro bono publico.”²⁵ The term was understood to mean free legal work or work performed at reduced rates, but it also included work for the community that was nonlegal in nature.²⁶ Large law firm lawyers often gave their time to endeavors such as sitting on symphony boards and other civic activities that might lead to new corporate business.²⁷ For solo and small firm lawyers, pro bono publico often meant working for clients who were simply unable to pay.²⁸ It has only been relatively recently that the lawyer’s obligation to perform pro bono work for individuals of limited means has come to be taken seriously by large segments of the legal profession.²⁹

A. History and Bar Politics

It was not until the late 1960s that efforts began in earnest to encourage lawyers to view pro bono work for persons of limited means as a professional value.³⁰ By the early 1980s, the organized bar began to embrace this type of pro bono as a professional value at a time when funding for the Legal Services Corporation was being cut.³¹ This can be seen most clearly in the ABA’s adoption in 1983 of Model Rule 6.1, which articulated the official view that providing pro bono service to persons of limited means is a professional value.³² Since then, large firms increasingly have “provided the resources and prestige to promote pro bono as a central professional goal.”³³

25. F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 8 (1972).

26. *Id.*

27. *Id.* at 129-30; *see also id.* at 8, 10; DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* 14 (2005).

28. *See* ABEL, *supra* note 24, at 129.

29. *Id.* at 129-30; MARKS ET AL., *supra* note 25, at 15-16; RHODE, *supra* note 27, at 12-13.

30. MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 161-62 (1988); Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 95 (2002); *see also* Thomas Ehrlich, *Charles H. Miller Lecture—Lawyers and Their Public Responsibilities*, 46 TENN. L. REV. 713, 725-26 (1979) (urging the bar to recognize its responsibility to provide legal assistance to the poor).

31. The reasons for this are complex, and detailed explanations have been offered elsewhere. *See* Cummings, *supra* note 7, at 19-33; Maute, *supra* note 30, at 126-27, 129-36.

32. Prior to that time, the ABA’s Model Code had addressed this concept in an aspirational Ethical Consideration, rather than in a Disciplinary Rule. It stated that “[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.” MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1980). Beyond that language, there was little recognition of the duty of all lawyers to represent the poor. MARKS ET AL., *supra* note 25, at 15-16; Maute, *supra* note 30, at 123-24.

33. Cummings, *supra* note 7, at 33.

The elite bar's efforts to elevate the provision of pro bono service from a professional goal to an actual obligation highlight some of the differences between pro bono as practiced in large law firms and in solo and small firms. Large firms, which have more resources to devote to pro bono, have been more open to mandatory pro bono proposals, including minimum hour requirements, while solo and small firm lawyers have generally opposed them.³⁴ Thus, in 1979, the ABA's Kutak Commission considered a mandatory pro bono rule, which was vigorously opposed by a number of groups, including solo and small firm lawyers. The latter were concerned about their ability to meet mandatory minimums and resented the efforts by large firm lawyers to impose requirements on them that they may not be able to meet or "buy out."³⁵ This same dynamic was played out in the New York bar at around the same time,³⁶ and again in the early 1990s, when the elite Association of the Bar of the City of New York supported a mandatory pro bono rule, but it was opposed by the New York State Bar Association due to the reactions of solo and small firm attorneys.³⁷ Interviews with solo and small firm (under fifteen) lawyers revealed that they strongly opposed a mandatory pro bono rule and saw it as something that the elite bar was attempting to foist upon them.³⁸ This feeling was no doubt exacerbated by the fact that New York Lawyer's Code of Professional Responsibility defined "pro bono" as free legal services to individuals of limited means, but the definition did not

34. This is not intended to suggest that elite lawyers are, in fact, more concerned about helping underserved populations. Rather, as Michael Powell had noted, the insertion of pro bono requirements in ethical codes is part of the professional project and has "symbolic significance in demonstrating the profession's concern about moral standards," wholly apart from the reality. POWELL, *supra* note 30, at 173.

35. The Kutak Commission's first tentative pro bono draft rule, which appeared in 1979, proposed forty hours per year of mandatory pro bono, or its dollar equivalent, to improve the justice system or provide legal services to the poor. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 701 (1989). After much debate, an aspirational pro bono rule was adopted with no reporting requirement. Maute, *supra* note 30, at 134.

36. In 1979, a similar mandatory pro bono proposal emanated from the elite Association of the Bar of the City of New York, and it, too, was met by opposition by solo and small firm lawyers who saw it as an elite reform that they could ill afford. See POWELL, *supra* note 30, at 162-64.

37. Memorandum from S. Todd Crider, Partner, Simpson Thatcher & Bartlett, LLP, Regarding Aspirational Statements Governing the Conduct of New York Lawyers in Pro Bono Matters to the N.Y. City Bar 9-10 (May 2004), available at http://www.nycbar.org/VanceCenter/PDF/probono/Todd%20Crider_Eng.pdf; Leon I. Behar, Letter to the Editor, *What's Good for the Goose*, N.Y. L.J., Nov. 25, 1992, at 2; Benjamin Greshin, *Large/Small Firm Split in State Bar*, N.Y. L.J., Nov. 8, 1989, at 2.

38. SERON, *supra* note 17, at 129-30, 134-35.

include reduced fee services of the sort solo and small firm practitioners often provide to their clients who are unable to pay.³⁹

Today the provision of pro bono services to persons of limited means is an aspiration of the legal profession, but is still not a true bar norm,⁴⁰ as evidenced by the fact that more than 40% of all lawyers perform no pro bono work for these individuals.⁴¹ The bar's reluctance to embrace pro bono as a core value is reflected in ABA Model Rule 6.1, which states that a "lawyer should aspire to render at least" fifty hours of pro bono services per year, but does not require it.⁴² It is telling that no state has adopted a requirement that lawyers perform pro bono, and several states have diluted ABA Model Rule 6.1 by removing annual target hours or the emphasis on serving individuals of limited means.⁴³ Seven states attempt to encourage pro bono work by requiring annual reporting by lawyers of hours devoted to pro bono service, although these requirements were often opposed by segments of the bar.⁴⁴

39. The New York State Bar Association voted to expand the definition of pro bono in 2005 to include the provision of legal services at reduced fees to individuals of limited means. John Caher, *Bar Group Expands Pro Bono Definition*, N.Y.L.J., Apr. 5, 2005, at 2. This change was ultimately incorporated into the New York Lawyers' Code of Professional Responsibility. *See* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 2-25 (2008).

40. Jerome Carlin described bar norms as those that are generally accepted by the bar as a whole. In contrast, elite norms are ethical standards that are accepted by most large firm lawyers, but by a much smaller proportion of small firm lawyers. JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 49 (1966).

41. The exact percentage is difficult to calculate, but I found only one state survey indicating that as many as 58% of their lawyers perform pro bono for persons of limited means or organizations that serve the poor. *See infra* notes 67-69 and accompanying text.

42. The Comment to the Rule stresses that the pro bono responsibility "is not intended to be enforced through disciplinary process." MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 12 (2008).

43. *See, e.g.*, CONN. RULES OF PROF'L CONDUCT R. 6.1 (2009); KAN. RULES OF PROF'L CONDUCT R. 6.1 (2007); MICH. RULES OF PROF'L CONDUCT R. 6.1 (2009) (including no minimum hour recommendation and no preference for serving persons of limited means). Ohio and Texas have no Rule 6.1, and only reference pro bono work in the Preamble. OHIO RULES OF PROF'L CONDUCT (2007); TEX. GOV'T CODE ANN. art. X, § 9 pmb1. 5-6 (Vernon 2005); *see also* NORTH CAROLINA RULES OF PROF'L CONDUCT (2008) (containing no Rule 6.1).

44. *See* American Bar Association Standing Committee on Pro Bono & Public Service, *Reporting Policies*, <http://www.abanet.org/legalservices/probono/reporting/pbreporting.cfm> (last visited July 25, 2009) (indicating that Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico have mandatory pro bono reporting for lawyers). These requirements were typically controversial. For example, in 1993 the Florida Supreme Court adopted a rule that required lawyers to report their pro bono hours. The Florida Bar sought to eliminate the requirement, but the Florida Supreme Court rebuffed this effort. *See* Amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar—Pro Bono Public Service, 696 So. 2d 734, 734-35 (Fla. 1997) (*per curiam*); *see also* Joe Surkiewicz, *After Three Years and a Few Compromises, New Pro Bono Rules Take Effect in Maryland*, DAILY REC. (Balt., Md.), Feb. 9, 2002, at 1B [hereinafter Surkiewicz, *After Three Years*] (reporting that "[n]early all the bar associations sent off letters to the Court of Appeals opposing the changes" requiring reporting of pro bono); Joe Surkiewicz, *Dissent Stirs Debate on Pro Bono Rule Change*, DAILY REC. (Balt., Md.), May 15, 2002, available at http://findarticles.com/p/articles/mi_qn4183/is_20020515/ai_n10050475.

The current ABA Model Rule 6.1(a) reflects the large firm view of pro bono. It places the greatest emphasis on rendering the “substantial majority” of legal services “without fee or expectation of fee” to persons of limited means⁴⁵ or to organizations in matters that are designed to address the needs of persons of limited means. Although ABA Model Rule 6.1(b)(2) states that lawyers should provide “any additional services” through the “delivery of legal services at a substantially reduced fee to persons of limited means,” the Rule conveys that this is a less valued and desirable method of rendering pro bono service.⁴⁶ A few states, such as Florida and Illinois, equate “pro bono” work exclusively with free legal services or with a monetary contribution to a legal services organization.⁴⁷ In some states, lawyers can discharge their pro bono obligations “collectively,” which in larger firms allows for one or more lawyers to work on pro bono matters that can be counted toward discharging the pro bono obligations of other lawyers in the firm.⁴⁸

45. Model Rule of Professional Conduct 6.1(a) provides:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
- (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means

MODEL RULES OF PROF'L CONDUCT R. 6.1(a) (2008).

46. Model Rule of Professional Conduct 6.1(b) provides that the lawyer should “provide any additional services through”:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
- (2) delivery of legal services at a substantially reduced fee to persons of limited means;
- or
- (3) participation in activities for improving the law, the legal system or the legal profession.

Id. at R. 6.1(b). “In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.” *Id.*

47. RULES REGULATING THE FLA. BAR R. 4-6.1 (2008); ILL. COMP. STAT. ANN. 756(f)(1)-(3) (West Supp. 2008). In Nevada, the preference for free legal services is reflected in the rule that a lawyer may discharge the responsibility to render pro bono legal services by providing a minimum of twenty free hours of legal services or sixty hours of reduced fee services. NEVADA RULES OF PROF'L CONDUCT R. 6.1(a) (2008).

48. *See, e.g.*, ARIZ. RULES OF PROF'L CONDUCT R. 6.1(c) (2008); RULES REGULATING THE FLA. BAR R. 4-6.1(c) (2008); MISS. RULES OF PROF'L CONDUCT R. 6.1(c) (2008); VA. RULES OF PROF'L CONDUCT R. 6.1(b) (2008).

The precise definition of pro bono is especially important in states where there is mandatory reporting of pro bono work. For example, in Maryland, the definition of “pro bono” was highly controversial within the Rules Committee that considered the proposed changes to Rule 6.1.⁴⁹ The final version of Maryland Rule 6.1, which requires reporting of pro bono activity, adopts a broad definition of “pro bono” that places free or reduced fee legal services to charitable, religious, community, governmental, or educational organizations on the same footing as legal work for individuals of limited means.⁵⁰ Apparently due to intense opposition from bar groups, a provision was removed that would have set a minimum amount of \$350 for lawyers who wanted to discharge their pro bono obligations through financial contributions. This provision had been viewed as particularly unfair to younger lawyers and to some solo and small firm lawyers, who argued that large firm lawyers who could readily afford it would “buy out” their pro bono obligations, leaving the performance of real pro bono work for other lawyers.⁵¹

B. *Pro Bono and the Market*

As previously noted, pro bono in the solo and small firm context often arises from the everyday work of these lawyers, when a person who needs help walks in the door or a client is no longer able to pay. The majority of solo and small firm lawyers do not deliberately seek out this type of work. Although they may accept the work because it will allow them to improve their skills, or because they hope it will later help them build their client base,⁵² or because even a reduced fee will help them with their cash flow, they do not necessarily view it in a positive light. It is not viewed by most of these lawyers as helpful for recruiting other lawyers or for marketing themselves or their firms.

In contrast, the opportunity to perform pro bono work in large law firms was of some importance in recruiting new associates by the late 1960s,⁵³ and pro bono work became institutionalized in some large firms

49. Joe Surkiewicz, *Law Notes*, DAILY REC. (Balt., Md.), Jan. 17, 2001, at 1C.

50. Surkiewicz, *After Three Years*, *supra* note 44; *see also* MD. LAWYERS' RULES OF PROF'L CONDUCT R. 6.1(b)(1)(D) (2008).

51. Surkiewicz, *After Three Years*, *supra* note 44.

52. Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431, 460 (1975).

53. Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 31, 52 (Robert L. Nelson et al. eds., 1992); Cummings, *supra* note 7, at 35.

during the 1970s.⁵⁴ Although many of the largest law firms performed some pro bono work during the 1980s, the commitment to pro bono work remained relatively modest, with a few notable exceptions.⁵⁵ This commitment grew in the 1990s, and in 1993, in order to promote pro bono activity among large law firms, the ABA instituted the *Law Firm Pro Bono Challenge*, which called upon firms of over fifty lawyers to devote 3% to 5% of their total billable hours annually to providing legal assistance to persons of limited means.⁵⁶ After a period of retrenchment from pro bono initiatives by large firms due to rising salary costs,⁵⁷ in 2002, the *American Lawyer* started to calculate its “A-List” of large law firms based, in part, on pro bono performance. The pro bono calculation was based on the average number of hours per attorney devoted to pro bono work, and the percentage of lawyers who performed more than twenty hours of pro bono per year. Once large firms started being evaluated in this fashion by the *American Lawyer*, pro bono participation shot up. Stories abound of large firm efforts to increase pro bono participation due, at least in part, to the *American Lawyer* rankings, and in some law firms, firm-wide participation is mandated.⁵⁸ For large law firms, pro bono work is important for associate hiring, retention of lawyers, training, improved client relationships, and business development.⁵⁹ For these reasons, pro bono efforts are now prominently advertised on firm websites, in firm newsletters, and in press releases.

54. MARKS ET AL., *supra* note 25, at 85-92. Some organized pro bono activities reportedly occurred in a few large firms during the 1960s. *Id.* at 98-99; JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 45 (1978).

55. See ABEL, *supra* note 24, at 130. Even as late as 1989, a large law firm could create a “stir” by appointing a partner to lead a newly formed public interest section in the firm. Bruce Vielmetti, *Firm Creates Stir with Commitment to Public Service Work*, ST. PETERSBURG TIMES (Fla.), Sept. 18, 1989, at 1.

56. William J. Dean, *The ABA’s Challenge to Law Firms*, N.Y. L.J. May 24, 1993, at 3.

57. Cummings, *supra* note 7, at 38-39; see Raymond, *supra* note 11, at 100.

58. Raymond, *supra* note 11, at 102-03 (noting that some firms have instituted firm-wide pro bono requirements and warned that noncompliance would be factored into compensation reviews). See also Ben Hallman, *Pro Bono Starts at the Top*, LAW.COM, July 2, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005556042> (noting that Morgan Lewis, Hogan & Hartson, and LeBoeuf Lamb “acknowledge that their recent ascension to the upper tier of pro bono contributors is due to big initiatives they have undertaken”); Brenda Sandburg, *The High Ground: Hogan & Hartson Charts a Course onto the A-List by Renewing its Commitment to Pro Bono Work*, AM. LAW., July 2006, at 86, 87. As the *American Lawyer* noted when it released its 2006 rankings, “[r]evenues are critical, but ignoring pro bono is a sure way to miss the cut.” *The A-List*, AM. LAW., July 2006, at 84, 84.

59. ESTHER F. LARDENT, PRO BONO INST., *MAKING THE BUSINESS CASE FOR PRO BONO* 4-11 (2000), <http://www.probonoinst.org/pdfs/businesscase.pdf>; Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365, 366-72 (2003).

The definition of pro bono work remains contested even within the elite bar, and the reasons appear to be more related to marketing than to moral philosophy. The precise definition of pro bono is a high-stakes issue for large firms that often care a great deal about their *American Lawyer* rankings. Controversies have arisen, for example, over whether Winston & Strawn's work on former Illinois Governor George Ryan's criminal case, to which the firm devoted a twenty-person legal team, could properly "count" as pro bono under the *American Lawyer* definition.⁶⁰ Likewise, questions were raised about whether free legal work performed for New York City's Lincoln Center (with net assets at that time of close to \$300 million) could properly be considered pro bono.⁶¹ After discovering "a few examples of overreaching," the *American Lawyer* spent a year devising a common definition of "pro bono."⁶² The definition "refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice," including (but not limited to) "the delivery of legal services to persons of limited means"⁶³

III. PRO BONO PARTICIPATION AND ATTITUDES

There have been increasing efforts since the 1970s to study pro bono participation by the legal profession and to determine who performs pro bono and why—or why not—it is performed. Most of the data come from the ABA, the *American Lawyer*, and state bar surveys that are based on self-reports of pro bono participation. Scholars have also conducted a few studies of solo and small firm lawyers that included questions about their pro bono work. Some of the data are summarized in this section.

Before proceeding, however, it is important to note that the survey data concerning pro bono participation must be viewed with caution.

60. Carlyn Kolker, *The Good Fight*, AM. LAW., July 2006, at 105, available at <http://www.law.com/jsp/article.jsp?id=1152263126628>. As the writer of the article noted, Ryan received an annual pension of \$195,000 and was not "poor." *Id.* While he could not have afforded to pay Winston & Strawn's rates, he could have afforded competent counsel. *Id.*

61. *Id.*

62. Aric Press, *Pro Bono 2007: Drawing the Line*, AM. LAW., July 2007, at 119, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005556047>.

63. *Id.* Unlike ABA Model Rule 6.1(a), the *American Lawyer*'s definition does not primarily emphasize work for persons of limited means, but also includes the provision of legal assistance to protect civil liberties or public rights and the provision of legal assistance to charitable, religious, community, and other organizations, "where the payment of standard legal fees would significantly deplete the organization's economic resources" *Id.* The definition excludes pro bono activities for well-endowed non-profit organizations, such as cultural institutions, or work on the boards of non-profit organizations. *Id.*

The terminology used in some of the surveys is vague and comparisons are difficult because the studies are measuring somewhat different activities and differently situated lawyers. For example, some studies of pro bono participation do not include reduced fee services provided by lawyers, while other studies do. Some studies do not ask specifically about pro bono work that benefits persons of limited means, but instead ask a single question that encompasses all types of pro bono. Some studies distinguish between active and inactive lawyers, or full-time and part-time lawyers, while others do not. Lawyers in different states are also differently situated with respect to the urgency and the obviousness of the unmet need.⁶⁴

It is also likely that there is some response bias, because those who participate in pro bono activities are more likely to respond to surveys on the topic than those who do not.⁶⁵ State reports based on mandated pro bono reporting may be more accurate because of the high response rate, although cognitive biases may still produce an overstatement of pro bono work actually performed. The pro bono participation in the jurisdictions with mandatory reporting may also not be representative of pro bono participation throughout the United States, because reporting requirements may increase actual pro bono participation or at least *reports* of participation. Nevertheless, the studies do provide some insight into the relative levels of pro bono participation, the bar's views toward pro bono work, and the ways in which it is performed in solo and small firm practice.

64. For example, natural and man-made disasters may account for unusual levels of pro bono activity in certain jurisdictions during some time periods. Thus, in 2001-02, there was an outpouring of offers of pro bono assistance in New York City for victims and their families who were affected by the events of September 11, 2001. ASS'N OF THE BAR OF THE CITY OF N.Y. FUND ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11, 2001, at 10, 12 (2004), <http://www.abcny.org/pdf/PSTC1.pdf>. In 2006, 13% of those who provided legal services in civil matters in Texas did work related to Hurricanes Katrina or Rita. PAUL RUGGIERE, STATE BAR OF TEXAS SURVEY OF 2006 PRO BONO 24 (2007).

65. Persons who are interested in a survey topic are more likely to participate than those who are not. Robert M. Groves et al., *The Role of Topic Interest in Survey Participation Decisions*, 68 PUB. OPINION Q. 2, 25 (2004); Thomas A. Heberlein & Robert Baumgartner, *Factors Affecting Response Rates to Mailed Questionnaires: A Quantitative Analysis of the Published Literature*, 43 AM. SOC. REV. 447, 458 (1978); Charles L. Martin, *The Impact of Topic Interest on Mail Survey Response Behaviour*, 36 J. MARKET RES. SOC'Y 327, 333 (1994). Thus, lawyers who value or perform pro bono are more likely to respond to surveys on the topic than those who do not. The exception might be in studies where substantial follow-up efforts are made to obtain participation and high response rates are achieved. None of the studies of pro bono participation that I located reported this sort of follow-up.

A. General Trends

The most recent nationwide survey of pro bono participation by lawyers, which was conducted by the ABA in 2008, reported that in the preceding twelve months, 73% of respondents provided free legal services to persons of limited means or to organizations that serve the poor.⁶⁶ This number, which was based on a telephone survey of 1100 lawyers, appears to be high.⁶⁷ Other state studies and reports during roughly comparable time periods indicate that the percentage of lawyers who provide free legal assistance, directly or indirectly,⁶⁸ to benefit underserved populations ranges from less than 33% to 58%.⁶⁹ A smaller

66. SUPPORTING JUSTICE II, *supra* note 3, at 10. It is not clear whether the respondents' definition of "persons of limited means" was precisely the same as the definition in Rule 6.1. When the survey was conducted, the term "persons of limited means" was not defined for the survey respondents. E-mail from Jamie Hochman Herz, Assistant Comm. Counsel, ABA Standing Comm. on Pro Bono & Public Serv., to Leslie Levin, Professor of Law, University of Connecticut School of Law (May 5, 2009) (on file with the Hofstra Law Review).

67. Approximately half of the lawyers initially screened for participation in the ABA survey declined to participate. E-mail from Jamie Hochman Herz, Assistant Comm. Counsel, ABA Standing Comm. on Pro Bono & Public Serv., to Leslie Levin, Professor of Law, University of Connecticut School of Law (May 8, 2009) (on file the Hofstra Law Review). It is possible that many of those who declined to participate had not performed pro bono, which would help explain the disparity between the ABA's Report and the data from other states. For example, in Maryland, which requires all lawyers to report their pro bono activities, including reduced fee work and work that does not benefit indigent clients, the percentage of full-time lawyers admitted in Maryland who performed *any* pro bono work in 2007 was 55%. *See* ADMIN. OFFICE OF THE COURTS, *supra* note 5, at i. In Florida, which requires all lawyers to report their free legal assistance to the poor, 52% provided such assistance to persons of limited means or organizations serving the poor during 2006. KELLY CARMODY & ASSOCS., PRO BONO: LOOKING BACK, MOVING FORWARD 9 (2008), http://www.floridasupremecourt.org/pub_info/documents/2008_Pro_Bono_Report.pdf.

68. "Indirect services" refers to the provision of legal services to civic, religious or other organizations in matters designed primarily to address the needs of persons of limited means.

69. *See supra* note 67; ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, 2008 ANNUAL REPORT 2008, at 6-7 (2009) (indicating that 35% of Illinois lawyers who were eligible to perform pro bono had provided free direct or indirect legal services for the poor); RUGGIERE & CARPANZANO, *supra* note 5, at 9 (noting that 58% of Texas survey respondents reported providing free direct or indirect legal services to the poor); STATE BAR OF WIS., 2007 PRO BONO CONTRIBUTIONS OF WISCONSIN LAWYERS 3 (2008) (stating that 57% of survey respondents reported that they provided some free legal services to low income individuals); *see also* ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 9, 14-15 (indicating that 33.3% of Maryland lawyers with offices in the state provided some type of direct or indirect pro bono legal services to the poor); Len Horton, *Supreme Court's Legal Needs Study: Changing Georgia's Civil Justice System*, GA. B. J., Aug. 2008, at 56, 58 (stating that about 40% of Georgia lawyers reported that they provide pro bono legal services); E-mail from Kristina Marzec, Director, Access to Justice Commission, State Bar of Nevada, to Leslie Levin, Professor of Law, University of Connecticut School of Law (May 4, 2009, 01:52 EST) (referencing attached document entitled "2007 Pro Bono Reporting," which indicates that approximately 38% of Nevada lawyers reported performing some type of pro bono legal services); E-mail from Lyn Flanigan, Executive Director, Hawaii State Bar Association, to Lee Sims, Head of Reference Services, University of Connecticut School of Law Library (May 4, 2009, 16:03 EST) (on file with the Hofstra Law Review) (referencing attached document entitled "2008

but still significant percentage of lawyers report doing pro bono in the form of reduced fee work for underserved populations.⁷⁰ In some jurisdictions, almost as many hours of reduced fee services were provided to persons of limited means as hours of free legal services.⁷¹

The studies show that lawyers in private practice are much more likely than in-house lawyers or government attorneys to perform pro bono work.⁷² Lawyers in solo and small firms and those in the largest firms were more likely to do pro bono work than those in firms of six to fifty lawyers.⁷³ Older lawyers are more likely to perform free pro bono work than younger attorneys.⁷⁴ Middle-age (over forty-five) and older attorneys may perform more hours, on average, of legal services at substantially reduced rates than other lawyers.⁷⁵

HSBA Pro Bono Hours,” indicating that 68% of Hawaii’s active lawyers reported performing some pro bono).

70. MONTANA VOLUNTARY PRO BONO REPORTING SURVEY 2002-03 (36%); RUGGIERE & CARPANZANO, *supra* note 5, at 13 (29.7%); STATE BAR OF WIS., *supra* note 69, at 17 (38%); CASEY & CO., INTERIM REPORT ON 2002 BAR SURVEY 11 (2002) (reporting that in Missouri, 48% of respondents provide “a lot” or “some” legal help at a reduced fee to indigent persons); *see also* SUPPORTING JUSTICE II, *supra* note 3, at 4 (reporting that 33% of responding attorneys performed some substantially reduced fee pro bono work).

71. *See, e.g.*, STATE BAR OF WIS., *supra* note 69, at 10, 17 (indicating that survey respondents reported providing 37,213 hours of free legal services to persons of limited means and 37,894 hours of substantially reduced fee services).

72. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 24 (indicating that 63.3% of private firm lawyers provided some pro bono service as compared to 31.3% in corporations and 19.1% in government offices); SUPPORTING JUSTICE II, *supra* note 3, at 10-11 (noting that 81% of those in private practice directly or indirectly provided free legal services to the poor, as compared to 43% of lawyers in corporations and 30% of lawyers in government); *see also* CASEY & CO., *supra* note 70, at 29; HEINZ ET AL., *supra* note 5, at 131; Horton, *supra* note 69, at 58; Jennifer Modell, Addressing Unmet Legal Need in Rhode Island: Barriers and Incentives to Pro Bono Participation (June 10, 2005) (unpublished manuscript, on file with the Hofstra Law Review).

73. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 20-21; *see also* CASEY & CO., *supra* note 70, at 28 (noting that Missouri solos and those in firms of 2-4 lawyers are most likely to give free legal advice to the poor, and lowest rate of participation among mid-sized firms of 20-99 lawyers); Horton, *supra* note 69, at 58 (reporting that 48.5% of Georgia lawyers in firms of five or fewer attorneys did pro bono work as compared to 25% of large firm attorneys).

74. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 13, at 16 (reporting that lawyers over age 61 perform most free pro bono work); STANDING COMM. ON PRO BONO LEGAL SERV., REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR, AND THE FLORIDA BAR FOUNDATION ON THE VOLUNTARY PRO BONO ATTORNEY PLAN (2006), at app. G [hereinafter STANDING COMMITTEE ON PRO BONO REPORT] (indicating lawyers over 65 are most likely to perform pro bono work).

75. RUGGIERE & CARPANZANO, *supra* note 5, at 14.

*B. Pro Bono Participation by Solo and
Small Firm Lawyers—The Numbers*

State bar statistics provide a clearer picture of the nature and extent of pro bono participation in solo and small firm settings. For example, a Maryland report of the pro bono service of admitted lawyers in 2007 revealed that a higher percentage of lawyers in rural areas—who tend to practice in solo and small firms—rendered pro bono services than lawyers in other regions.⁷⁶ A larger percentage of solo and small firm practitioners (two to five lawyers) engage in some pro bono work than lawyers in other private practice settings.⁷⁷ Thus, 77.3% of solo practitioners and 70.6% of small firm members did pro bono work, as compared to 68.4% of lawyers who performed pro bono work in firms of over fifty lawyers.⁷⁸ The largest number of all pro bono hours were devoted to family/domestic practice, and almost 70% of the family law bar provided pro bono service.⁷⁹

Likewise, the State Bar of Texas surveyed 500 members about their pro bono activities in 2007 and found that 76.7% of rural lawyers provided free direct or indirect legal services to benefit the poor.⁸⁰ Urban lawyers in small firms (one to five lawyers) were more likely to perform free legal direct or indirect services to the poor than lawyers in other practice settings.⁸¹ Rural lawyers (54.7%) and urban small firm lawyers (44.5%) also were significantly more likely to provide legal services at substantially reduced fees than lawyers in other practice settings.⁸²

It appears that not only do more solo and small firm lawyers provide free and reduced fee services to the poor than other lawyers, but that the average number of hours they provide may rival or exceed the average number of hours devoted by lawyers who perform pro bono in other practice settings.⁸³ Comparisons are admittedly extremely difficult

76. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 9, 21.

77. *Id.* at 23. “Pro bono” is defined expansively in accordance with MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT R. 6.1 (2008). *See supra* note 50 and accompanying text.

78. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 23.

79. *Id.* at 15-16.

80. RUGGIERE & CARPANZANO, *supra* note 5, at 10.

81. *Id.* (reporting that 74.8% of urban small firm lawyers provided such services versus 63.5% of urban large firm lawyers).

82. *Id.* at 13. In contrast, only 24% of lawyers in medium-sized urban firms and 14.7% of lawyers in large firm urban practice provided these reduced fee services. *Id.*; *see also* CASEY & CO., *supra* note 70, at 29, 32-33 (reporting similar phenomenon in Missouri).

83. The states’ statistics described later in the text support this claim, but are at odds with the ABA’s most recent survey. *See* SUPPORTING JUSTICE II, *supra* note 3, at 13 (reporting that lawyers in firms of 100+ lawyers who performed pro bono work provided, on average, sixty-two hours of pro bono work for persons of limited means, as compared to forty-three hours provided by solo practitioners). Data from *American Lawyer* also indicate that lawyers who work in large firms that

here, especially because large firm lawyers—who are required to keep detailed account of their billable and non-billable time—may keep more accurate records than solo and small firm lawyers. Nevertheless, Missouri solo and small firm (one to nine) lawyers who perform pro bono reported that they devoted substantially more time, on average, to providing free legal help to the poor (56.93 hours) than large firm lawyers who performed pro bono (30.56 hours).⁸⁴ A 2005 Texas study revealed that urban small firm lawyers provided, on average, more hours of free legal or indirect services (47.90 hours) than medium sized firms (38.00 hours), but not substantially more than urban large firm lawyers (46.40 hours).⁸⁵ Wisconsin solo lawyers, and Missouri solo and small firm lawyers who reported that they performed pro bono work, provided substantially more reduced fee hours to individuals of limited means than large firm lawyers who performed pro bono.⁸⁶

The most common reason cited by all lawyers for not doing more pro bono work was lack of time.⁸⁷ Some small firm lawyers who represented low-income clients on a regular basis believe that they do “de facto” pro bono and could not take on any more pro bono work.⁸⁸ Lack of administrative support may also discourage pro bono work by some solo and small firm lawyers.⁸⁹

C. *Qualitative Research on Pro Bono in the Solo and Small Firm Context*

There are a few studies of solo and small firm lawyers that provide deeper insight into their pro bono practices and attitudes. In his 1972 study of lawyers in Erie County, New York, Philip Lochner found that

have deliberately made a substantial commitment to pro bono perform more hours of pro bono than solo or small firm lawyers, but it is unclear that this is true of many large firm lawyers who work in firms that have no such commitment. *See Ranking the Firms*, AM. LAW., July 2008, at 127.

84. CASEY & CO., *supra* note 70, at 33.

85. D'ARLENE VER DUIN ET AL., STATE BAR OF TEXAS SURVEY OF 2005 PRO BONO 12 (2007). In 2006, the differences in Texas among practice settings in the average number of hours devoted to free direct and indirect services to the poor were not statistically significant. RUGGIERE, *supra* note 64, at 12. It is important to note that the Texas studies define “large firms” as law firms with over forty lawyers.

86. CASEY & CO., *supra* note 70, at 33; STATE BAR OF WIS., *supra* note 69, at 17; *see also* RUGGIERE & CARPANZANO, *supra* note 5, at 13 (reporting similar findings).

87. KELLY CARMODY & ASSOCS., *supra* note 67, at 16; I N.Y. STATE UNIFIED COURT SYS., THE FUTURE OF PRO BONO IN NEW YORK: REPORT ON THE 2002 PRO BONO ACTIVITIES OF THE NEW YORK STATE BAR 17 (2004); RUGGIERE, *supra* note 64, at 40; SUPPORTING JUSTICE II, *supra* note 3, at 23; Modell, *supra* note 72.

88. *See* RHODE, *supra* note 27, at 135.

89. VER DUIN ET AL., *supra* note 85, at 40-41; *see also* SUPPORTING JUSTICE II, *supra* note 3, at 20 (noting that solo practitioners were more likely than large firm practitioners to believe that increased administrative support would encourage pro bono participation).

solo lawyers did not seek out no fee and “low fee” work, which often came to them through intermediaries who were business or professional contacts who knew someone who needed a lawyer.⁹⁰ Most of the clients were middle- or lower-class individuals who were young or who held clerical jobs or jobs as skilled or unskilled manual laborers.⁹¹ These clients were not usually the genuinely poor, but rather the “temporarily disadvantaged” who lacked the savings to pay for a lawyer.⁹² The predominant reason why the lawyers took these clients was the hope that the current no fee/low fee client would become a paying client or that it would otherwise help their business.⁹³ Less often, lawyers took on this work for charitable reasons or because of a sense of obligation to the community or to the ethnic group to which the attorney belonged.⁹⁴ The amount of time spent on these pro bono matters was generally less than the time afforded a paying client and the effort expended was, at times, not as high.⁹⁵

Lochner’s observations are consistent with Carroll Seron’s findings in her 1990 study of solo and small firm (under fifteen) lawyers in the New York City area. Seron reported that the lawyers’ views of the professional obligation to be of service was seen as an individual moral obligation that grew out of their day-to-day work with individual clients.⁹⁶ Pro bono was variously defined by these lawyers, but almost all of the lawyers she interviewed claimed to have done pro bono work as they defined it.⁹⁷ While they strongly opposed mandatory pro bono,⁹⁸ these lawyers often viewed themselves as performing pro bono work when they worked for clients who could not pay for their legal services.⁹⁹ Some of this pro bono was planned, as when a lawyer decided at the outset of the representation to charge a reduced fee or no fee. More often, it was unplanned.¹⁰⁰ Some of these lawyers also viewed

90. Lochner, *supra* note 52, at 436-37.

91. *Id.* at 449-52.

92. *Id.* at 451.

93. *Id.* at 444-45.

94. *Id.* at 442-43.

95. *Id.* at 456, 459.

96. SERON, *supra* note 17, at 130-31.

97. *Id.* at 132.

98. *Id.* at 129-31. This attitude apparently continues to be prevalent. According to a 2004 study, solo and small firm attorneys are significantly less likely to support mandatory pro bono than larger firm lawyers. Granfield, *supra* note 6, at 132.

99. SERON, *supra* note 17, at 132.

100. *Id.* at 133.

their contingent fee cases or their paid work as appointed counsel in criminal cases as a type of pro bono work.¹⁰¹

Likewise, Lynn Mather, Craig McEwen, and Richard Maiman reported in their study of New England divorce lawyers that virtually all the lawyers they interviewed—who were predominantly solo and small firm lawyers—provide services to some needy clients who are unable to pay the full fees for legal assistance.¹⁰² While some of their pro bono work came from bar-organized referral systems, the work often came from people who simply showed up in their offices.¹⁰³ Some divorce lawyers took on needy clients knowing that they could not pay or could only pay a discounted fee, while a larger group reported feeling an obligation to continue representing a paying client who could no longer afford the lawyer's fee. Most of this informal pro bono work was performed by solo practitioners and those who were already representing lower-income and moderate-income clients.¹⁰⁴ Divorce lawyers in the largest firms were least likely to reduce their fees.¹⁰⁵

The *Divorce Lawyer Study* provides many rich insights into the perceptions and performance of pro bono work in that setting, but two of the findings appear particularly important. First, lawyers who worked in firms sometimes encountered significant pressure from partners and employees to turn down pro bono work, because if a client could not pay, it adversely affected the entire firm.¹⁰⁶ Firm policies and procedures sometimes limited decisions about billing or were used as a “scapegoat” to explain the firm's financial requirements to clients. In contrast, solo practitioners were less likely than firm lawyers to have as much support for tough business practices or to be able to easily distinguish themselves from “office policy.”¹⁰⁷ Second, the financial challenges of running a law practice and the emphasis placed by the legal community on good billing practices left some lawyers who provided reduced fee pro bono assistance feeling like it reflected poor office management practices.¹⁰⁸ As noted in the *Divorce Lawyer Study*, there is little bar

101. *Id.* This is a view that was also reflected in the comments of a few participants in the state studies. See, e.g., JEFFERY L. BROWN, STATE BAR OF WIS., PRO BONO CONTRIBUTIONS OF STATE BAR MEMBERS: THE 2005 PRO BONO SURVEY 12 (2006).

102. MATHER ET AL., *supra* note 14, at 135. In the study, 75% of the lawyers worked in firms of one to four lawyers and an additional 12% worked in firms of five to nine lawyers. *Id.* at tbl.A.1, at 198.

103. *Id.* at 135-36.

104. *Id.* at 136-37.

105. *Id.* at 135-38.

106. *Id.* at 137, 151-53.

107. *Id.* at 152-53.

108. *Id.* at 138-39, 151.

recognition for this type of pro bono work and the literature on law office management consistently advises on how to collect fees promptly and insure full payment from clients. Thus, lawyers who provided reduced fee assistance were just as likely to report guilt as pride in connection with their pro bono work.¹⁰⁹

In contrast, Michael Kelly, in his *Lives of Lawyers*, described a small firm, which he called Marks & Feinberg, that deliberately sought to represent low-income clients. The founding partners of the firm had worked for not-for-profit legal defense funds before forming their partnership, which primarily did criminal defense work and civil rights litigation.¹¹⁰ The lawyers' criminal defense work was "blue collar" defense and occasional court-appointed first-degree murder cases. The civil rights and discrimination litigation was conducted primarily in cases in which statutory attorneys' fees were available if the lawyers prevailed.¹¹¹ These lawyers had no budgeting system and no way of systematically measuring whether their caseload could generate enough profit to sustain the firm.¹¹² Not surprisingly, they perpetually struggled to "squeak by" financially.¹¹³

These studies of solo and small firm lawyers provide some insight into the manner in which pro bono work is viewed and provided by these practitioners. They reveal that pro bono work often grows out of the lawyers' existing practices and their personal relationships, rather than out of deliberate efforts to seek out legal work that will benefit the poor. This observation is consistent with Seron's finding that solo and small firm lawyers' view of their professional responsibility obligations is "firmly located within a framework of their day-to-day caseload of clients" rather than out of some socially based commitment to a collective good.¹¹⁴

IV. THE DELIVERY OF PRO BONO SERVICES BY SOLO AND SMALL FIRM PRACTITIONERS

The studies described above provide very useful insights into the ways in which solo and small firm lawyers come to perform pro bono work, but they do not fully identify all the mechanisms through which these lawyers deliver pro bono to underserved clients. These delivery mechanisms, which are often imbedded in fee-generating activities for

109. *Id.* at 138-39.

110. KELLY, *supra* note 19, at 145-46.

111. *Id.* at 156.

112. *Id.* at 168.

113. *Id.* at 162, 170.

114. SERON, *supra* note 17, at 130.

these lawyers, further highlight some of the differences between the pro bono experiences of these lawyers and the elite bar. Exploration of the different mechanisms through which solo and small firm lawyers deliver pro bono services can help to provide a deeper understanding of the meaning of “pro bono” in this practice setting as well as inform efforts to increase pro bono service by these lawyers.

A. *Occasional Planned No Fee Pro Bono*¹¹⁵

Solo and small firm lawyers provide planned no fee pro bono in two different ways. First, lawyers in solo and small firm practice, like lawyers in large firm practices, participate in formal bar, court, or legal services pro bono referral programs in which individuals of limited means are referred to volunteer attorneys who provide their services for free. Solo and small firm lawyers may take on these matters even in areas in which they do not normally practice or when their practices do not regularly serve underserved populations. Thus, solo and small firm lawyers may volunteer to participate in pro bono programs that pair clients of limited means with lawyers who will provide them with free advice or represent them for no fee in civil matters including consumer law, family law, employment, housing, or will drafting.¹¹⁶ Or solo and small firm lawyers, like larger firm lawyers, may volunteer to work with other organized pro bono projects, such as those that provide assistance to death row clients or detainees at Guantanamo Bay.¹¹⁷

Second, some of the planned no fee pro bono work comes to solo and small firm lawyers through friends and family, or from individuals who simply walk in the door and “tug at your heartstrings.”¹¹⁸ This may be especially common in rural areas, where lawyers personally know

115. The term “planned” pro bono is used to describe cases that the lawyer agrees to take on at the outset of a representation on a free or reduced fee basis. It contrasts with the situation in Part IV.D, where lawyers may provide “unplanned” pro bono because their clients can no longer pay.

116. See, e.g., Bar Association of Erie County, Volunteer Lawyers Project, <http://www.ecbavlp.org/SingleItem.aspx?docid=2> (last visited July 25, 2009); Fairfax Bar Association, Northern Virginia Pro Bono Law Center, <http://fairfaxbar.org/displaycommon.cfm?an=1&subarticlenbr=170> (last visited July 25, 2009).

117. Carol Rosenberg, *Official Assailed After Call to Boycott Gitmo Law Firms*, HOUS. CHRON., Jan. 13, 2007, at A19.

118. Stull, *supra* note 12, at 2; see also SUPPORTING JUSTICE II, *supra* note 3, at 14 (reporting that solo practitioners were more likely to receive referrals from another attorney outside the firm or from friends or family than were lawyers in large firms). It should also be noted that many lawyers will provide occasional planned reduced fee pro bono to these individuals. See, e.g., CASEY & CO., *supra* note 70, at 10; MATHER ET AL., *supra* note 14, at 136; SUPPORTING JUSTICE II, *supra* note 3, at 14. This category does not easily fit under any of the other categories described in Part IV and so it is noted here.

many of the people in the community.¹¹⁹ It is unclear how much of this pro bono work benefits the poor and how much of it goes to individuals who are more solidly middle class. As Philip Lochner noted in the 1970s, the lawyers who provided pro bono services for individuals referred to them by their business associates, friends, and families often represented middle-class individuals who were going through hard times, rather than truly indigent clients. As many of these individuals were simply experiencing transient difficulties, this investment of time may ultimately benefit the lawyer's practice if these individuals later become paying clients.

B. Formal Reduced Fee Programs

Solo and small firm attorneys also provide reduced fee services through formal programs designed to assist individuals of limited means. Formal reduced fee programs take two forms. In the first, the lawyer receives the reduced fee from the government or a legal services organization, and the client receives legal assistance without cost to the client. In the second, which is often run by a bar association, legal services organization, or other non-profit organization, the lawyer receives the reduced fee directly from the client. These programs are grouped together because they both result in lawyers being paid a reduced fee through a formal program that is designed to benefit low-income clients. The programs are also explicitly recognized as pro bono activities under ABA Model Rule 6.1, although they are in a less preferred category than the provision of free legal services.¹²⁰

Perhaps the best-known example of a reduced fee program in which the government pays the lawyer is court-appointed counsel for indigent clients in criminal cases. These lawyers typically serve on a panel of criminal defense lawyers who are willing to serve as appointed counsel at fixed rates. The compensation mostly ranges from \$60 to \$100 per hour and some have capped maximums.¹²¹ Appointed counsel work is undertaken by lawyers while building their practices, by more

119. See Trisha Renaud, *Rural Law: No Place to Hide: In the Country, People Know Who You Are and How Good*, LAW.COM, Oct. 11, 2000, <http://www.law.com/jsp/article.jsp?id=9000055109074>.

120. See MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 7 (including as "additional" pro bono services that are encouraged "instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means" such as "judicare programs and acceptance of court appointments . . .").

121. See SPANGENBERGER GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 4-8 (2007), http://www.abanet.org/legalservices/sclaid/defender/downloads/2007FelonyCompRatesUpdate_Nonfelony.pdf.

experienced lawyers to supplement their income from their established law practices, and by other lawyers who feel an obligation to provide access to justice for indigent clients.¹²²

A few jurisdictions have also institutionalized programs in civil cases that pay private attorneys a low hourly fee to provide legal services to low income individuals.¹²³ One such program, which started in 1966, is Wisconsin Judicare, Inc. Judicare is funded by the LSC as well as the state, and uses the private bar to represent low-income persons who would qualify for assistance from LSC-funded programs. Eligible clients are given Judicare cards and when they have a legal problem, they take their card to a participating attorney. If the case is approved, the lawyer is paid a low hourly fee (currently \$45/hour) for the work performed.¹²⁴

In other instances, some lawyers provide reduced fee services at low fixed rates through formal programs that require low- and moderate-income clients to pay the reduced fees directly to the lawyers. For example, the Maryland Legal Services Corporation has launched the Child Custody Representation Project to provide representation to low-income individuals in contested child custody cases. Lawyers are paid \$50 per hour and an amount not exceeding \$1000 per case, and may report this work in their annual pro bono reports.¹²⁵ Similarly, the Oregon State Bar has instituted a Modest Means Program, which refers low-income individuals (up to 200% of the federal poverty guidelines) to lawyers who are willing to provide legal services in the areas of family law, landlord-tenant, and criminal defense at a rate of no more than \$60 per hour. It bills itself as a “low bono” alternative for clients who cannot qualify for assistance from LSC-funded programs.¹²⁶

122. See, e.g., Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 606-07 (2001).

123. See, e.g., Welcome to the Website of Anoka County, Judicare of Anoka County, Inc., http://www.co.anoka.mn.us/v1_seniors/legal-taxes/judicare.asp (last visited July 25, 2009); State Bar of Georgia, About the Pro Bono Project, http://www.gabar.org/related_organizations/pro_bono_project/about_the_pro_bono_project (last visited July 25, 2009).

124. Wisconsin Judicare, Inc., Join Wisconsin Judicare's Panel of Attorneys, <http://www.judicare.org/pai/enroll.html> (last visited July 25, 2009).

125. Lawrence Hurley, *MD Legal Services Corp. Launches Program to Help Parents in Custody Cases*, DAILY REC. (Balt., Md.), Mar. 4, 2005, at 1.

126. See OREGON STATE BAR, MODEST MEANS PROGRAM, MODEST MEANS PANELIST INFORMATION 1-2 (2008), http://www.osbar.org/_docs/forms/modestmeans.pdf. Local bar associations in a few other jurisdictions have also established modest means programs for low to moderate-income individuals who cannot otherwise qualify for free legal services. See, e.g., Nebraska State Bar Association, For the Public: Low Income Legal Services: Volunteer Lawyers Project, <http://www.nebar.com/displaycommon.cfm?an=1&subarticlenbr=84> (last visited July 25, 2009) (referring individuals earning at 150-175% of poverty level to lawyers who will work at a 60% reduction of the regular fee); New Haven County Bar Association, Lawyer Referral Service,

Little information has been gathered systematically about which lawyers participate in these programs and for how long. It seems likely, however, that solo and small firm lawyers, who are more likely to practice in personal plight areas, are the primary providers of these reduced fee legal services.¹²⁷ For example, in the Maryland Child Custody Project, only lawyers with three years of experience in contested child custody cases are permitted to participate, which limits the pool of lawyers to mostly solo and small firm practitioners. In some cases, deliberate efforts are made to attract lawyer volunteers who are seeking to supplement their incomes while establishing themselves in solo or small firm practice.¹²⁸

C. *Low Bono Law Practices*

A third way in which solo and small firm lawyers deliver legal services to persons of limited means is through law practices that are consciously positioned to serve low-income individuals. During the last dozen years, law schools and other groups have worked with solo and small firm practitioners to organize and support “low bono” law firm practices that routinely provide free or reduced fee work to clients. For example, the Law School Consortium Project, which began in 1997, is a network of sixteen law schools that help solo and small firm attorneys who are interested in serving low- and middle-income communities and in finding an economically viable way in which to do so.¹²⁹ It created the Community Legal Resource Network (“CLRN”), which includes about

Modest Means Reduced Fee Referral Service, <http://www.newhavenbar.org/lrs.php#modest> (last visited July 25, 2009) (referring individuals with assets of no more than 250% of federal poverty guidelines to an attorney who will consult with clients for \$60/hr.); Orange County Bar Association, LRIS Modest Means Program, <http://www.ocbar.org/modestmeans.htm> (last visited July 25, 2009) (referring clients who meet program income guidelines to lawyers who will provide services at substantially reduced rates).

127. In addition, sometimes programs develop where there are relatively few lawyers. For example, Wisconsin Judicare only services clients in northern Wisconsin, where most lawyers practice in solo and small firms.

128. For example, the San Diego County Bar Association’s Modest Means Program advertises that by joining the panel, lawyers can “[b]uild their client base” and “expand [their] network.” San Diego County Bar Association Lawyer Referral & Information Service, Program Overview, <https://www.sdcba.org/index.cfm?pg=ProgramOverview> (last visited July 25, 2009); San Diego County Bar Association Lawyer Referral & Information Service, How to Join LRIS, <https://www.sdcba.org/index.cfm?pg=HowtoJoin> (last visited July 25, 2009).

129. Greg Winter, *Law Schools Urge Graduates to Start Small and Think Local*, N.Y. TIMES, Dec. 16, 2002, at B1; Law School Consortium Project, About Us, <http://www.lawschoolconsortium.net/about/index.html> (last visited July 1, 2009); *Solos, Small Firms Team Up to Support “Low Bono” Legal Work*, LAW.COM, Mar. 31, 2005, <http://www.law.com/jsp/article.jsp?id=900005542885>.

800 solo and small firm practitioners¹³⁰ and provides support for these lawyers through mentoring, listservs, and discounted support services, such as electronic research and insurance.¹³¹ A survey of the practitioners in the network revealed that on average, 42% of the matters were handled on a low bono/discounted basis, 37% were full fee, 7% were fee-shifting awards, and the remainder were free legal work. The lawyers characterized slightly more than half of their clients as “impoverished” or “low income.”¹³² Likewise, the Civil Justice Network is a consortium of solo and small law firms in Maryland, Washington, D.C., and Virginia, whose members seek to “grow their own practices while increasing access to the legal system by providing affordable, high quality legal services to traditionally under-served members of the public in their own communities.”¹³³

Lawyers who consciously set out to develop law practices that serve persons of limited means are in some cases cause-lawyers and are considerably less likely to view their reduced fee arrangements as evidence of bad business practices. There is no question, however, that these practices can be economically difficult to sustain. For example, when one CLRN member was asked to describe the difference between her previous practice at a not-for-profit organization that represented immigrants and her current practice as a solo practitioner, she responded:

[I]n terms of the professional context and my client base is similar—a lot of the people who end up being clients could easily be clients [of] the office. Some of them are a little—[are] more on their feet financially but not always [pause]—I mean [I’m] making some—somewhat more—doing better financially but I’m not . . . I think the phrase that’s come up is this is low bono [laughs]—just a little—I

130. E-mail from Lovely A. Dhillon, Founding President and CEO, Law School Consortium Project, to Leslie Levin, Professor of Law, University of Connecticut School of Law (Jan. 15, 2008) (on file with the Hofstra Law Review).

131. Cynthia L. Cooper, *Law Schools & “Low Bono”*: Consortium Helps Solo Practitioners, *Small-Firm Alumni Offer Affordable Help to Clients in Crisis*, EQUAL JUST. MAG., Fall 2002, available at http://ejm.lsc.gov/EJMIssue3/LawSchool/pro_bono_spotlight.htm.

132. LAW SCH. CONSORTIUM PROJECT, LAW SCHOOL NETWORK PRACTITIONER SURVEY REPORT 3-4 (2005), available at http://www.law.berkeley.edu/files/thcsj/practitioner_survey.pdf.

133. Civil Justice, Inc., Member Information, http://www.civiljusticenetwork.org/pages/member_benefits.html (last visited July 25, 2009); see also Ann W. Parks, *Low-Bono’s Go-To First-Rate MD Lawyer Nevett Steele Jr.*, DAILY REC. (Balt., Md.), Jan. 27, 2006, available at http://www.law.umaryland.edu/about/news_details.html?news=106. The Civil Justice Network also provides mentoring, marketing, and law office management services to its members, who in turn provide legal services at discounted rates to clients of low and moderate means. Civil Justice, Inc., *supra*.

mean I'm not—[my] financial situation is not sort of like starkly different in some ways¹³⁴

Maintaining these practices takes a toll on the lawyers. Working in personal plight areas such as family or immigration law can be emotionally draining. Cases may be complex, but fees are low. As the lawyer quoted above explained, even if it is possible to take time off for a vacation, she typically cannot afford to travel because her income is inadequate. Not surprisingly, burn-out is a problem because it can be difficult to sustain the pace with so little remuneration and so many demands on the lawyer.

D. Unplanned Pro Bono: Non-Payers Who Become Pro Bono Clients

When a lawyer has a client who can no longer afford to pay her fees, the lawyer may find herself providing free or reduced fee services, but not always for those who are indigent and certainly not in an entirely voluntary sense. In some cases, the lawyer may feel a desire or a moral commitment to continue to represent the client. In other cases, the lawyer may not, but cannot readily withdraw from representing a client, especially when litigation is ongoing. Social relations within small communities may also make withdrawal difficult.¹³⁵ Ethical obligations to handle client matters competently may require lawyers to continue to perform some legal work, even when it becomes apparent that the client will be unable to pay. Not surprisingly, the cases handled on this basis may not receive the same attention as paying matters.

Solo and small firm lawyers who perform free or reduced fee work under these circumstances sometimes view it as pro bono work, although it is not recognized as such under ABA Model Rule 6.1(a), which only includes work undertaken without expectation of a fee. It is this type of work that is most likely to be viewed as a failure of the lawyer's business management skills,¹³⁶ even though there may be some altruism involved in the lawyer's continuing willingness to represent the client

134. Interview with Attorney in Queens, N.Y. (Sept. 21, 2006) (on file with the Hofstra Law Review).

135. See DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 127 (1990) (noting that “[d]oing legal work within such an intimate environment, and where public scrutiny is constant, creates a level of accountability that probably exceeds that of larger-scale settings”). See generally *id.* at 127-29, 136.

136. The law office management literature promotes this view. As one well-known author of books designed to help solo and small firm lawyers start their practices advises, “you should withdraw from a case as soon as clients give you the indications [sic] that they’re not going to live up to their fee agreement.” JAY G. FOONBERG, HOW TO START AND BUILD A LAW PRACTICE 329 (5th ed. 2004).

for little or no compensation. Not surprisingly, it is difficult to determine how much work is performed by solo and small firm lawyers on this basis. These lawyers have little incentive to keep track of the amount of unplanned free or reduced fee work that they provide in these situations because it does not seem to “count,” and they may prefer not to think about how often they actually perform it.

V. IMPLICATIONS AND IDEAS FOR INCREASING PRO BONO REPRESENTATION

The preceding description of the pro bono practices of solo and small firm practitioners reconfirms Heinz and Laumann’s observation that there are two distinct sectors of the U.S. legal profession: One represents individuals and the other represents large organizations.¹³⁷ Not only do the lawyers who practice in these sectors serve different types of clients and practice in different office environments, but their conception and performance of pro bono work also differ in important respects. This does not mean that there are not significant differences in pro bono practices among solo and small firms based on their clientele, their financial resources, and their commitment to performing pro bono work. Nevertheless, the pro bono experience in solo and small law firms is more similar among these firms than to the large firm pro bono experience.

Moreover, Model Rule 6.1, which was promulgated by the historically elite ABA, reflects the views and practices of the elite (corporate) segment of the profession, and not those of solo and small firm lawyers.¹³⁸ As will be discussed below, to the extent that the ABA’s Model Rule 6.1 has come to reflect the dominant view of what pro bono means in practice, it minimizes the important contributions of solo and small firm lawyers. It may actually operate to discourage some of the free and reduced fee work that would otherwise be performed by these attorneys. Thus, one important question to consider is whether to revise Model Rule 6.1 to reflect a less elite view of pro bono and to place some of the day-to-day contributions of solo and small firm lawyers in a more positive light. A second question is how to increase the participation of

137. HEINZ ET AL., *supra* note 5, at 29.

138. It is telling that in its 2008 report on pro bono, the ABA found that one-third of the lawyers who participated in its survey performed some substantially reduced fee pro bono work, but it did not attempt to measure how much reduced fee pro bono was being done. SUPPORTING JUSTICE II, *supra* note 3, at 4. In addition, survey respondents “were asked not to consider a situation as pro bono in which a service was provided for free because a client failed to pay the bill,” regardless of the client’s financial circumstances. *See id.* at 7.

solo and small firm lawyers in pro bono activities that will address more of the legal needs of persons of limited means.

A. Redefining Pro Bono

In order to encourage more pro bono work by solo and small firm practitioners, it is important to consider redefining “pro bono” in a way that recognizes the realities of practice in that setting and gives the contributions of these lawyers a positive meaning. As previously noted, ABA Model Rule 6.1 provides that “[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year” and that “[i]n fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means”¹³⁹ Only secondarily does ABA Model Rule 6.1(b) provide that lawyers should provide any additional services through, *inter alia*, “delivery of legal services at a substantially reduced fee to persons of limited means.”¹⁴⁰ “Persons of limited means” are “those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs.”¹⁴¹ The LSC guidelines make eligible those who earn at or below 125% of the federal poverty level guidelines, which in 2009 is \$27,563 for a family of four.¹⁴²

The poverty guidelines are extremely low and are based on forty-year-old methodology that no longer reflects the economic realities of living in the United States.¹⁴³ In 2009, even 200% of the poverty guidelines only amounts to an income of \$44,100 for a family of four.¹⁴⁴ Persons earning up to this income level fall within the definition of the “working poor.”¹⁴⁵

The pro bono practices of solo and small firm lawyers highlight a problem that has been largely ignored by the elite bar: many

139. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008).

140. *Id.* at R. 6.1(b)(2).

141. *Id.* at R. 6.1 cmt. 3.

142. *See supra* note 1.

143. *See, e.g.*, THESIA I. GARNER & KATHLEEN S. SHORT, CREATING A CONSISTENT POVERTY MEASURE OVER TIME USING NAS PROCEDURES: 1996-2005 (2008), http://www.census.gov/hhes/www/povmeas/papers/experimental_measures_96_05v8.pdf; MEASURING POVERTY: A NEW APPROACH 2 (Constance F. Citro & Robert T. Michael eds., 1995); PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY 13 (1990).

144. Financial Eligibility, 45 C.F.R. § 1611 app. A (2009).

145. *See, e.g.*, U.S. Census Bureau, Poverty—Definitions, <http://www.census.gov/hhes/www/poverty/definitions.html> (last visited July 1, 2009).

Americans—and not just those whose incomes are easily measured in relation to the federal poverty guidelines—cannot afford the legal fees charged by lawyers for assistance with important legal matters that arise in their everyday lives. Many solo and small firm lawyers are confronted with this reality on a regular basis and attempt to address some of the needs of those individuals while still earning a living. Rather than ignore this fact, consideration should be given to rewriting the organized bar's pro bono rules with this reality in mind. This requires four changes in the ABA's current rule.

First, the meaning of "persons of limited means" should be broadened to recognize that there are additional individuals in the United States who genuinely cannot afford a lawyer's fees, and that assistance to these individuals should be encouraged where basic rights, relationships, or entitlements are at issue. The current definition of "persons of limited means," which are those individuals whose income and financial resources are at or slightly above 125% of the poverty guidelines, is simply too low. As noted, there are many people who cannot pay for a lawyer, even if their income is at 200% of the poverty level or somewhat higher.¹⁴⁶ Indeed, a 2005 study concluded that on average nationwide, working families with two parents and two children require an income of \$48,778 to meet the family budget, and that budget did not include legal services.¹⁴⁷ In cases where important personal rights or relationships are at stake (e.g., criminal, employment, family, or immigration law) or entitlements (e.g., social security or workers' compensation) or housing are at issue, the definition of "persons of limited means" should be expanded and tied to a measure that more closely reflects economic realities and accounts for the significant cost of living differences in the continental United States. For instance, it might be defined as individuals whose income and assets are less than two-thirds of the state's median family income. Thus, two-thirds of the median family income for a four-person family in Arkansas and

146. At least one state has recognized that even individuals with incomes at 200% to 300% of the poverty guidelines may, in some cases, be unable to afford a lawyer and may be entitled to a public defender. See DEKALB BAR ASS'N, STANDARDS FOR DETERMINING INDIGENCE 2 (2005), http://www.dekalbbar.org/legislative_pdf/standard_indigency_revcommentary.pdf (indicating that persons earning from 200% to 300% of poverty level in Georgia may, in some felony cases involving extraordinary cost, be eligible for public defender services). The Illinois Supreme Court has also recognized that pro bono should be defined to include not just legal work for those whose income falls within 125% of the federal poverty level, but to those who are among the "working poor." ILL. COMP. STAT. ANN. 756(f)(1)-(3) (West Supp. 2008).

147. See SYLVIA A. ALLEGRETTO, BASIC FAMILY BUDGETS: WORKING FAMILIES' INCOMES OFTEN FAIL TO MEET LIVING EXPENSES AROUND THE U.S., BRIEFING PAPER NO. 165. (Econ. Policy Inst. 2005), available at <http://www.epi.org/content.cfm/bp165>.

Mississippi is just under \$37,000 and in New York and California is roughly \$51,500.¹⁴⁸

Second, substantially reduced fee legal work should not be relegated to a secondary position in the Model Rules—or worse, excluded altogether from the definition of “pro bono” under some state bar rules. Treating free legal work as the most favored form of pro bono reinforces the status hierarchies in the profession and devalues a good deal of the work that solo and small firm lawyers perform for underserved populations. There is admittedly good reason to encourage “no-fee” legal work—which does not require payment by the government or the client—because it provides a substantial benefit to the recipient. But Model Rule 6.1 also conveys that no-fee pro bono is the “purest” form of pro bono, when the “purity” of the motivations underlying no-fee pro bono work is debatable. Many large firm lawyers draw precisely the same salaries for their pro bono work as for their paid legal work, even if no fee is charged for the work performed for their pro bono clients. In contrast, even reduced fee pro bono performed by solo and small firm lawyers can require a significant sacrifice. To the extent that the Model Rules seek to convey the values of the profession, they should not communicate that this reduced fee work of solo and small firm lawyers is less highly valued than the free work performed in large law firms.

Third, the Comment accompanying ABA Model Rule 6.1 that states “services rendered cannot be considered pro bono if an anticipated fee is uncollected”¹⁴⁹ deserves reconsideration. Obviously, a lawyer who performs legal work believing she will be paid and then is unable to collect the fee has not undertaken the work with an altruistic motive. But what “counts” as pro bono for large firm lawyers is not based entirely on a lawyer’s altruistic motives, as evidenced by the fact that some large firm lawyers undertake pro bono work, at least in part, for recruiting and marketing reasons. In some circumstances, such as when a low-income client becomes unemployed during the course of the representation, and the solo or small firm lawyer continues to represent the client without an expectation of full payment, this type of behavior should be encouraged and “counted” by the organized bar as pro bono. The fact that this

148. U.S. Department of Justice, U.S. Trustee Program, Census Bureau Median Family Income by Family Size, http://www.usdoj.gov/ust/ea/bapcpa/20080317/bci_data/median_income_table.htm (last visited July 25, 2009). I do not mean to suggest that linking the definition of “persons of limited means” to the state median income is necessarily the best approach. It is simply better than the current measure, which is far too low and is insensitive to significant regional cost of living differences.

149. MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 4 (2008).

situation may occur with some frequency in certain types of solo and small firm practices—or that it arises out of the lawyer’s day-to-day work—does not change the fact that the lawyer is at that point working for free or at reduced rates for a client who would not otherwise be able to obtain legal assistance.

Finally, there is a danger that by expanding the definition of pro bono to include clients with somewhat higher incomes and situations where lawyers originally expected to be paid, some lawyers will claim that they have performed “pro bono” work in situations where the term should not be applied. One way to minimize this occurrence would be to define a “substantially reduced fee” as a reduction by 50% or more of the rate typically charged a middle-class client for the same type of work in the community. The work should only “count” as pro bono if performed for persons of limited means (as defined above) and if the reduction occurred because a client became unable to pay, rather than because of a fee dispute or other disagreement with the client. In addition, the willingness to continue to work for a formerly paying client at a substantially reduced rate should only count as pro bono if the matter involves important personal rights or relationships, government entitlements, or access to housing.

B. Other Factors Affecting Pro Bono Participation

Although rules of professional conduct inform lawyers’ understanding of the norms of the profession, a rule change alone—and particularly an exhortatory rule—will not, by itself, significantly alter lawyer conduct. In order to identify effective strategies for encouraging solo and small firm practitioners to perform pro bono work and to make it easier for them to do so, it is important to consider the other factors that are likely to affect their ability, opportunity, and willingness to perform pro bono work. Those factors most likely include the lawyer’s existing clientele, individual personal factors, and their workplace and communities of practice.

A lawyer’s regular clientele will directly affect the extent to which the lawyer is exposed to lower-income individuals who need legal assistance and the ability of the lawyer to draw on his or her existing knowledge base to assist such individuals. Thus, some solo and small firm practitioners will perform pro bono work simply because the opportunity directly presents itself and the lawyer knows how to help. Lawyers who are trying to earn a living in low bono private practices routinely encounter the opportunity to serve low-income clients and draw on their existing legal knowledge to help them. A second and much

larger group is other solo and small firm lawyers who serve individual clients in personal plight matters, but who represent primarily middle class and wealthier clients. These lawyers are likely to receive referrals or “walk in” clients who are seeking pro bono assistance. They also encounter clients who started the representation intending to pay, but who experience a reversal of circumstances before the end of the representation that render full payment impossible. There is also a third group of lawyers, which is comprised of attorneys who mostly represent organizations and work in practice areas found in larger corporate law firms. These lawyers are less likely to encounter low-income individuals in their regular practices who present legal problems that they can readily address.

Of course, even when the opportunity to perform pro bono work presents itself in the ordinary course of a law practice, not all lawyers will agree to perform the work. Lawyers’ willingness to provide pro bono assistance will also vary based on individual personal factors including, *inter alia*, financial circumstances, their level of office support, their career stage, and their family commitments. Thus, new lawyers who do not yet have a full practice may be willing to take on pro bono work to gain experience, contacts, and—down the road—possibly paying clients. For other lawyers, pressures to pay the rent and support staff may trump the willingness to perform pro bono work, especially where paying clients are available. In solo practices, where there is no one else but the lawyer to do the work, and often limited support staff, pro bono work may not feel “possible.”

It seems clear, however, that even opportunity and individual factors do not entirely account for the decision to perform pro bono work. Lawyers consistently report that the main reasons they perform pro bono work are a sense of satisfaction and a sense of obligation.¹⁵⁰ From where does this sense of *obligation* arise? Recent research suggests that it may not come from pro bono experiences in law school.¹⁵¹ As Robert Granfield has noted, workplace may be a stronger predictor of pro bono than law school socialization.¹⁵² Workplace

150. RHODE, *supra* note 27, at 136; Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1399 (2007) (reporting that the most significant motivating factors were intrinsic satisfaction from doing pro bono work and the normative obligation from being part of a profession). In 2005, almost 69% of all respondents surveyed in Texas agreed or strongly agreed that “[t]he provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer.” VER DUIN ET AL., *supra* note 85, at 44.

151. Granfield, *supra* note 150, at 1382-85 (reporting that mandatory pro bono in law school does not appear to increase an individual’s participation in pro bono work in practice).

152. *Id.* at 1391.

settings account for differences in volunteer behavior and “[s]uch differences are likely due to the institutionalized norms, values, pressures, and constraints that exist within distinct workplaces”¹⁵³ Other scholars have also suggested that the greatest external influence on altruistic behavior by lawyers is probably the “practice site.”¹⁵⁴

In solo and small firm practice, however, the “workplace” is not necessarily the discrete law firm. Solo attorneys often share an office suite with other lawyers. Even small firms sometimes share office space with other lawyers.¹⁵⁵ These lawyers learn from watching other lawyers in a variety of contexts.¹⁵⁶ Thus, solo and small firm lawyers are socialized not only in the office spaces that they occupy, but in court and in other places where they observe colleagues.¹⁵⁷

For this reason, it may be useful to think about the communities of practice within which these lawyers operate and how they might affect the lawyers’ views of pro bono. Mather and others found that divorce lawyers, who often practice in solo and small firm settings, are heavily influenced by their “communities of practice,” that is, the “groups of lawyers with whom practitioners interact and to whom they compare themselves” who help shape the decision-making of lawyers through collegial influence and controls.¹⁵⁸ The norms and choices of divorce lawyers are linked to, and shaped by, their communities of practice.¹⁵⁹ Thus, it is useful to consider how the communities of practice of solo and small firm lawyers may contribute to creating their views of pro bono work and any sense of obligation to perform it.

Presumably the lawyers who work in low bono practices and join networks like the CLRN are part of a community that reinforces the value of providing legal services to underserved populations. But for other solo and small firm lawyers who work in personal plight areas, there may be few positive messages that would communicate a sense of *obligation* to perform pro bono work. No doubt some lawyers observe pro bono work performed by others in their offices. But much of it may not be perceived as pro bono work, since it receives little or no recognition by the organized bar or from peers. Moreover, free work or reduced fee work performed for clients who are unable to pay may not be discussed much among office colleagues. Such work may be

153. Granfield, *supra* note 6, at 142.

154. See Boon & Whyte, *supra* note 11, at 172-73.

155. See Levin, *supra* note 18, at 864-65.

156. SERON, *supra* note 17, at 8-9; Levin, *supra* note 18, at 879-80.

157. CARLIN, *supra* note 40, at 166-67.

158. MATHER ET AL., *supra* note 14, at 6.

159. *Id.* at 14.

perceived as a sign of poor law office management rather than as a positive societal contribution. Other small firm lawyers in the community are not likely to broadcast that they provide pro bono services; they often feel ambivalent about it, and they may not want to attract more of it. Finally, for solo and small firm lawyers with organizational clients, pro bono opportunities may not naturally present themselves within their offices or communities of practice. In the absence of a culture that encourages reaching out for pro bono work—or special knowledge about how to perform it—it is less likely to be undertaken by these lawyers.

C. *Strategies for Increasing Pro Bono Participation*

Local and specialty bar associations could play an important role in promoting pro bono work among solo and small firm lawyers. Many solo and small firm practitioners belong to at least one voluntary bar association, and it is often a local or specialty bar association rather than an elite one.¹⁶⁰ For some solo and small firm lawyers, these bar associations play an especially important role in their socialization and their professional development. This is true, for example, of plaintiffs' personal injury lawyers, who frequently belong to state trial lawyers' associations, immigration lawyers, who often belong to the American Immigration Lawyers Association ("AILA"), and family law attorneys who often belong to the family law sections of their local bar associations. These bar associations are not viewed as being allied with the elite bar and are the locus of community for some solo and small firm lawyers.¹⁶¹ Pro bono initiatives and awards by these bar groups could convey a powerful and positive message about the importance of performing pro bono work.

An example of a specialty bar effectively encouraging pro bono by its members can be found in the relatively recent efforts of the plaintiffs' personal injury bar, the American Association for Justice (formerly known as "ATLA"). Prior to 2001, the plaintiffs' personal injury bar, which is comprised mostly of solo and small firm lawyers, did not have a culture of promoting pro bono work.¹⁶² This changed when ATLA

160. See Levin, *supra* note 20, at 333.

161. See, e.g., Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 *LAW & SOC. INQUIRY* 399, 428, 433 (2009); Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 *ARIZ. ST. L.J.* 589, 614-16 (2005).

162. The Association's website espouses the view that its lawyers work in the public interest by protecting "the democratic values inherent in the civil justice system." American Association for

organized a large pro bono project known such as “Trial Lawyers Care,” which provided free legal services to over 1700 victim-families making claims based on the events of September 11, 2001.¹⁶³ This pro bono initiative involved almost 1100 trial lawyers who might not otherwise have performed pro bono work and suggests one way in which a specialty bar can help to promote a sense of obligation to do so.

Local bar associations and specialty bars that are comprised primarily of solo and small firm lawyers could also do more to organize short-term pro bono efforts that benefit individuals of limited means. An example would be AILA’s Citizenship Day, on which immigration lawyers make themselves available to individuals who have questions about their eligibility for United States citizenship. Bar associations can also enlist lawyers who do not work in personal plight areas by offering them on-site training on the day of the pro bono activity to enable them to assist individuals of limited means with legal problems that fall outside the lawyers’ usual practice areas.

Another way to increase pro bono activity among solo and small firm lawyers is for local and specialty bar associations to actively promote the view that certain reduced fee legal work is valuable “pro bono.” One way to do this is to create more reduced fee lawyer referral programs for individuals of limited means. The bar associations can thereby provide to small firm lawyers some of the services that are provided by the large law firm pro bono coordinators: they can identify suitable pro bono opportunities, develop guidelines for client participation, and provide lawyers with training and “mentors” to answer questions. These modest means programs could be advertised as an opportunity for lawyers to not only perform an important service, but to gain experience while building a practice.¹⁶⁴ Bar associations could also sponsor office management programs in which lawyers could discuss the best ways to manage their planned and “unplanned” reduced fee pro bono. If the provision of pro bono—including reduced fee pro bono—is actively discussed and promoted by these bar associations, it could help alter negative perceptions about taking on this work.

Justice, Mission & History, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm> (last visited July 25, 2009). Thus, it is not surprising that some trial lawyers view the contingent fee work that they take on without a guarantee of payment as pro bono work. See CASEY & CO., *supra* note 70, at 2; SERON, *supra* note 17, at 133.

163. See TRIAL LAWYERS CARE, THE ASS’N OF TRIAL LAWYERS OF AM., REPORT TO CONGRESS: THOUSANDS OF HEROES: THE REST OF US COULD ONLY HELP 5-6 (2004), <http://www.atlanet.org/homepage/TLCreport.pdf>.

164. Indeed, some solo and small firm lawyers may value pro bono work precisely for the potential to acquire clients and to practice some lawyering skills. Granfield, *supra* note 6, at 132-33.

A further benefit to having local bar associations more actively involved in increasing pro bono participation by solo and small firm lawyers would be to engage their help in addressing the malpractice insurance problem. Some solo and small firm lawyers do not have legal malpractice insurance, even for their paying clients, or do not have coverage to practice in areas outside their usual areas of expertise. Lawyers who receive pro bono referrals from legal services organizations are often covered by the organization's malpractice policy, but many solo and small firm practitioners do not take on pro bono work through these formal referrals. Lawyers in solo practice were more likely than lawyers in other settings to believe that free malpractice coverage for pro bono work would encourage lawyers to perform pro bono.¹⁶⁵ Efforts to obtain malpractice coverage for pro bono work would be more effectively addressed at the collective bar association level rather than by individual lawyers.

Finally, bar associations could advocate for rule changes that would permit solo and small firm lawyers to provide unbundled legal services or "discrete task representation." This representation occurs when an attorney provides a specific service to a client who is otherwise handling an action *pro se*. Unbundled services may include, inter alia, preparing a set of papers, conducting some factual investigation, or other limited activities.¹⁶⁶ Solo and small firm lawyers have cited the ability to "unbundle" services as a factor that would encourage pro bono participation.¹⁶⁷ Enabling solo and small firm lawyers to limit the scope of their assistance to discrete tasks may encourage them to perform some pro bono services that they would not otherwise provide to individuals who cannot afford legal representation.

VI. CONCLUSION

The meaning of pro bono in solo and small firm practice is often fundamentally different than in large law firms. Notwithstanding the differences in the large firm and small firm pro bono experience,

165. See SUPPORTING JUSTICE II, *supra* note 3, at 20-21 (noting that solo practitioners were significantly more likely than larger firm lawyers to believe that free malpractice insurance would encourage other lawyers to perform pro bono work); see also RHODE, *supra* note 27, at 135 (reporting that lack of malpractice insurance was a concern for some lawyers); BROWN, *supra* note 101, at 16 (noting high number of respondents who indicated free malpractice insurance would lead them to increase their pro bono participation).

166. See, e.g., Civil Justice, Unbundled Legal Services, <http://www.civiljusticenetwork.org/pages/unbundled.html> (last visited July 25, 2009).

167. BROWN, *supra* note 101, at app. B (see table titled "The Ability to Work on a Discrete Legal Task, Such as an Initial Consultation, Rather Than a Full Representation of the Client * How Many Lawyers in your Firm/Office?").

however, pro bono as a professional *value* may be an area in which large firm and small firm lawyers can share more common ground than the differences suggest. The core concept underlying ABA Model Rule 6.1—that lawyers should aspire to perform pro bono work for individuals who genuinely cannot afford a lawyer—is a concept about which many lawyers can generally agree. Disagreements arise when discussions of “mandatory” pro bono are raised, especially because the actual costs and burdens of doing it vary significantly across practice settings. Differences also arise from the bar’s official definition of “pro bono,” which currently reflects the views of the bar elite and has the unintended consequence of causing even solo and small firm lawyers to denigrate much of the reduced fee work they perform for needy clients.

The definition of “pro bono” has important implications, not just for the unity of the bar’s vision, but for the poor, the working poor, and for the middle class, as well. Lawyers’ fees can be expensive, and it is not just the poor or near-poor who sometimes find themselves unable to pay for legal advice. When solo and small firm lawyers provide pro bono assistance for individuals of limited means, the lawyers still need to pay their rent and their office staff. They may need to “make up” for what they lost in income by increasing the fees they charge their paying clients. Yet these paying clients are often middle-class individuals who, like the poor and near-poor, need legal assistance but genuinely struggle to pay for it. If all of these people are to obtain access to justice, they need to be able to afford their lawyers.

Ultimately, by looking at pro bono in the solo and small firm context—and the intersection of pro bono with the everyday work lives of these lawyers—the fault lines in the delivery of legal services in the United States emerge. The LSC and other experts are in complete agreement that existing legal services programs and pro bono performed by the private bar will not address all of the unmet needs of the fifty million individuals who are eligible for LSC-funded programs. There are, in addition, millions more who do not qualify for assistance from LSC-funded programs, but genuinely cannot afford a lawyer. As the cost of legal services increases in the United States, it is unclear how even the average individual will afford legal representation in the future. Closer examination of the solo and small firm experience with providing free and reduced fee services may help identify productive strategies for addressing some of those needs. In the end, however, significant reforms in the delivery of United States legal services will be needed to ensure that many ordinary individuals can obtain legal representation in the future.