MH MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 39 | Issue 1 Article 7

2012

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Recommended Citation
Juergens, Ann (2012) "Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients," *William Mitchell Law Review*: Vol. 39: Iss. 1, Article 7.
Available at: http://open.mitchellhamline.edu/wmlr/vol39/iss1/7

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VALUING SMALL FIRM AND SOLO LAW PRACTICE: MODELS FOR EXPANDING SERVICE TO MIDDLE-INCOME CLIENTS

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† Professor of Law, William Mitchell College of Law. Thanks to Lisa Radzak, Carey Vosler, and Carrie Weber for their invaluable research assistance, and to the College for its support of my research over the years. I am grateful for the time and patience of the twenty-nine lawyers whose interviews form the basis for a section of this article, and for the cheerful diligence with which Caldene Bonde and Linda Thorstad transcribed those interviews. Every student in the Work of the Lawyer: Small Firm, Non-Profits & the Quality of Justice seminar from spring 2012 contributed to my thinking here, and the papers of Jenny Nystrom, Kate Zerwas Graham, Geri Anderson, Paul Ziezulewicz, and Eric Bain led me to some of the sources the article relies upon.

Published by Mitchell Hamline Open Access, 2012

"Small is not important. BIG is what matters." [Lawyer #13]
"It sounds trite: I like to help people who need help." [Lawyer #27]
"These are faces, not causes." [Lawyer #16]

I. INTRODUCTION

Distribution of legal services to the American public continues its skew to the top. Data show stunningly low levels of access to civil legal services for most people except for those at the very top in income.[1] Low-income persons encounter barriers to accessing even no-cost legal services,[2] while people in the middle three income quintiles face unmet legal needs that are almost as great as those of persons in the bottom twenty percent.[3] At the same time, the

1. This article will focus primarily on people's civil legal needs because of the author's greater experience with them, because studies of need concentrate on them, and because of the state's duty to provide a lawyer to any person facing incarceration on a criminal charge who cannot afford to pay a lawyer. *See* MINN. STAT. § 611.14 (2010); MINN. R. CRIM. P. 5.04 (2010); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963). The public defense system still leaves thousands of working people without adequate counsel in criminal matters. Minn. Court Info. Office, Criminal Representation Statistics (2012) (on file with author) (providing that between 2007 and September 5, 2012, out of a total of 328,816 major criminal cases, excluding fifth degree assault, misdemeanor driving while intoxicated, and traffic and parking offenses, defendants were represented by public defenders in an average of 55.6% of cases, and an average of 11.1% of defendants represented themselves *pro se*); *see also* Patrick Thornton, *What to Do About Overworked PDs?*, MINN. LAWYER (July 13, 2012), http://minnlawyer.com/2012/07/13/what-to-do-about-overworked-pds ("The defenders reported they did not have time to adequately prepare their clients, or even meet with them until their second court appearance, or to effectively prepare for each case.").

2. *See* HANNAH LIEBERMAN CONSULTING, LLC & JOHN A. TULL & ASSOC., OVERCOMING BARRIERS THAT PREVENT LOW-INCOME PERSONS FROM RESOLVING CIVIL LEGAL PROBLEMS, at vi (Sept. 2011), *available at* http://www.mncourts.gov/Documents/0/Public/administration/Final_MN-CABS_Study_September_2011.pdf. Commonly known as CABS-MN, the study was commissioned by the Legal Assistance to the Disadvantaged Committee of the Minnesota State Bar Association and found, among other key findings, that "[t]he need [for civil legal aid programs] far outstrips their resources." *Id.*

3. *See* AM. BAR ASS'N., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), *available at* http://www.americanbar.org/content/dam/aba/migrated

percentage of legal resources devoted to individual people has fallen over the past half century as legal resources shift toward work on behalf of commercial entities.[4]

The legal profession has responded to alarms about lack of access for the public with initiatives to fight or fill cuts to legal services programs,[5] to promote lawyers' provision of free services through pro bono assistance,[6] to assist self-help representation,[7]

/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf [hereinafter LEGAL NEEDS AND CIVIL JUSTICE SURVEY] (finding "[n]early three[-]fourths [(71%)] of the legal needs of low-income households and nearly two[-]thirds [(61%)] of legal needs of moderate-income households were *not* taken to the civil justice system").

4. *See* George Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1635 (2006) (using the Martindale-Hubbell Law Directory to document a shift from mid-sized to large, multi-office firms); *see also* Gillian K. Hadfield, *The Price of Law: How Much the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 998 (2000) (using an economic analysis to explain that commercial interests have the resources to outbid individuals for access to legal services, with the result that individuals are priced out of the market and the system has become distorted so that it primarily serves economic interests and does not also fulfill justice interests). Whether inability to afford a lawyer constitutes a harm of any weight is beyond the scope of this article, though some may argue that middle-income people have turned away from lawyers because lawyers do not add any value to their transactions or disputes. This article assumes that they do.

5. *See, e.g.*, Patty Murray, *Bar Association Looks to Address Legal Assistance Budget Cuts*, WIS. PUB. RADIO NEWS (July 24, 2012), http://news.wpr.org/post/bar-association-looks-address-legal-assistance-budget-cuts. The American Bar Foundation recognized lack of access concerns and has undertaken to map the state of access to civil justice in every state, issuing its first report in October 2011. *See* REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 3 (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

6. Pro bono service is mandated by the Model (and Minnesota) Rules of Professional Conduct and is defined as the duty to "provide legal services to those unable to pay." *See* MINN. RULES OF PROF'L CONDUCT R. 6.1 (2008); MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012); *see also* Anne Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES, May 1, 2012, http://www.nytimes.com/2012/05/02/nyregion/new-lawyers-in-new-york-to-be-required-to-do-some-work-free.html.

7. *See* AM. BAR ASS'N STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4 (Nov. 2009), *available at* http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf; Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 110 (2001) (documenting that in Washington, 77% of family court cases involved a self-represented litigant in 1995, an increase of about 54% since 1991). *Pro se* representation has ballooned, and one of the responses to the overwhelmed courts has been the establishment of self-help centers at

and to allow the unbundling of legal services.[8] To a lesser degree, lawyers have raised ideas about taking matters outside of the legal system away from the need for a lawyer,[9] and of allowing diverse services to be provided by non-lawyer professionals who have received differing levels of training—similar to current practice in the medical profession.[10] These are important projects, especially those of restoring funding for legal services for low-income persons and for self-help services for all litigants, and of increasing lawyers' participation in pro bono representation.

While the profession focuses on ways to meet the critical legal needs of low-income citizens, the needs of the middle group are largely left for the market to fill. The painful fact is that the market has failed to distribute lawyer services to a majority of Americans with legal needs.[11] Ironically, the legal needs of middle-income Americans have risen with the economic crisis[12] even as unemployment among new lawyers has increased.[13] A large supply

courthouses. *See, e.g.*, Dee DePass, *Into Court Alone, with Help*, STAR TRIB., Aug. 12, 2009, http://www.startribune.com/business/53079972.html?page=all&prepage=1&c=y&refer=y (discussing how students from William Mitchell worked with the Minnesota Justice Foundation and the law school to establish a self-help clinic that gives legal advice to consumers on Saturdays).

8. *See infra* Part IV.D; *see also* AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 11 (1996). The issues of access have been studied for some decades. *See, e.g.*, Symposium, *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 1749 (1999).

9. *See, e.g.*, J. Bruce Peterson, *Time, Perhaps, to Get Courts out of Divorce*, STAR TRIB., July 12, 2012, http://www.startribune.com/opinion/commentaries/162286176.html?refer=y.

10. *See* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 PROF. LAW. 79, 81 (2012) (urging greater exploration of stratification of the legal profession—by training and licensing professionals other than lawyers to provide legal help—as a way to increase access to legal services).

11. *See* HANNAH LIEBERMAN CONSULTING, LLC & JOHN A. TULL & ASSOC., *supra* note 2, at vi; Hadfield, *supra* note 4, at 998.

12. *See* Rigertas, *supra* note 10, at 87. Problems with credit, with home mortgages, with unemployment, health care, and bankruptcy have proliferated with the recession. The Legal Services Corporation's 2010 annual report found dramatic increases in legal need related to the economy: mortgage foreclosures up 128%, unemployment compensation cases up 80%, and domestic violence cases up 9%. LEGAL SERVS. CORP., 2010 ANNUAL REPORT 2 (2010), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC-2010-Annual-Report-FINAL.PDF.

13. *See Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NAT'L ASS'N FOR LAW PLACEMENT, http://www.nalp.org/0712research (last visited Oct. 6, 2012); *see also* William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, 97 A.B.A. J. 40 (July 2011).

of trained lawyers without work theoretically should translate into lower costs and more legal needs being met. Yet the cost of legal services has continued to rise.[14] Significant unmet need coupled with the high cost of services and numerous underemployed new lawyers are allied problems that the profession can ill afford to ignore. The challenge is to use this tempest to rethink the profession's approach to solving legal problems, to lower the cost of service and expand the distribution of justice.[15]

This article assumes that it is a legitimate goal of the profession to increase access to civil justice facilitated *by lawyers*—as contrasted with access facilitated by self, by paralegals, by document assemblers—and that the profession must chart alternatives beyond pro bono, legal aid, and *pro se* justice for clients. That project is the focus of this article.

Why are lawyers unattainable for so much of the populace? The two biggest obstacles to legal services for middle-income people seem to be affordability and lack of information, particularly information about when a lawyer might be useful.[16]

The last comprehensive national legal-needs study that included middle-income people was completed by the American Bar Association almost twenty years ago, in 1994.[17] Based on interviews with 3000 American households with incomes below the

14. One of the various factors contributing to the rise in cost of legal services is the high cost of legal education, which has more than tripled in the past twenty years. *See* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=3&pagewanted=1; *see also* AM. BAR ASS'N COMM'N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 16 (2003), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lrapfinalreport.authcheckdam.pdf [hereinafter COMM'N ON LOAN REPAYMENT] ("By 2002, the median tuition for residents in public law schools was over five times as high as it had been in 1985. The average tuition in private law schools was nearly four times as high.").

15. *See* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152–55 (2010) [hereinafter *Higher Demand, Lower Supply?*].

16. LEGAL NEEDS AND CIVIL JUSTICE SURVEY, *supra* note 3, at 26, 28 ("Reasons for not turning to the justice system when faced with a legal need differ between low- and moderate-income households. A sense that legal assistance will not help and fear of the cost are the principal reasons given by low-income respondents. Moderate-income respondents are more likely to dismiss the matter as not all that serious a problem and think they can deal with it on their own. They . . . share the view that the justice system would not help.").

17. *Id.* at 2.

top 20% of the population, the researchers found that about half of all of these households faced "some situation that raised a legal issue during the twelve months of 1992."[18] Yet only 39% of moderate-income households with legal needs turned to lawyers, paralegals, or the courts for help.[19] They either handled their "serious situation" by themselves, turned to other sources for help, or took no action at all.[20]

In fact, it is difficult for individuals to determine when they need to pay for full lawyer service or when self-help, brief advice, document assembly software, or inaction will be sufficient. When middle-income people investigate obtaining full lawyer service, they learn that it is so expensive that they assume—often correctly—that they cannot afford the help of a lawyer, and so turn to methods for engaging with legal issues and the justice system that most often avoid the use of lawyers.[21]

When middle-income people do realize that a lawyer might help them—whether because they need help with a difficult divorce or estate matter; are being forced into the court system by foreclosure, medical bills, or another creditor; are buying a small business; or are petitioning their city in a land use matter—they find their way mostly to small firms and solo practitioners. It has long been the case that the highest number of lawyer practitioners in Minnesota and in the United States are in small or solo firms.[22]

It is an opportune time to reflect on the merits and drawbacks of the seemingly old-fashioned, but increasingly modern concept of

18. *Id.* at 9. The most common problems involved personal finances (creditors, insurance companies, inability to obtain credit, or tax difficulties). *Id.* at 11. The next most common categories were real estate transactions, community problems such as environmental hazards, employment problems, family and domestic issues, personal injuries, and wills or estate administration. *Id.* at 11–12.

19. *Id.* at 17.

20. *Id.*; *see also Higher Demand, Lower Supply?*, *supra* note 15, at 150–51 (finding that individuals in America give up on their legal claims more frequently than citizens of other countries, where there may be fewer legal remedies on the books, but where people apparently have fewer barriers to using the remedies that exist).

21. Of course, people turn to self-help and to non-lawyers for reasons other than that they cannot afford lawyers or do not understand how a lawyer may be able to help. Perhaps they accept unredressed injustice as part of normal life, or value solving problems directly on their own. *See* Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1329–34 (1964).

22. *See Analysis of the Legal Profession and Law Firms (as of 2007)*, HARV. L. SCH., http://www.law.harvard.edu/programs/plp/pages/statistics.php (last visited Oct. 6, 2012); *see also infra* notes 55–58 and accompanying text (providing further data regarding proportions of lawyers in solo and small firms).

small firm and solo firm practice. As wealth disparity in the United States grows to the highest it has been since the 1920s[23] and more legal resources are devoted to business instead of individuals,[24] small practices hold promise for addressing the unmet needs of the middle-income group, and simultaneously, for providing meaningful work for underemployed lawyers.

The legal profession has been in flux for more than a decade. That has accelerated since the economic downturn that began in 2007. The momentum has been toward treating law as a business with legal work as a commodity that is bought and sold without consideration for whether the client and lawyer have an ongoing relationship. This contrasts with the traditional view of law as a profession where relationships with clients govern the flow of work.[25] This drift is noted by others who say that disruptive technologies will transform legal practice and make bespoke legal services and businesses obsolete.[26] Whether or not that will come to pass, it is clear that technology is reshaping aspects of law practice. For example, it displaces lawyers when an e-discovery software program reviews thousands of pages of documents more efficiently than any lawyer could humanly do, or when the Internet provides

23. *See, e.g.*, Jim Hightower, *Shoveling America's Wealth to the Top*, INST. FOR POL'Y STUD. (Jan. 2, 2012), http://www.ips-dc.org/articles/shoveling_americas_wealth_to_the_top; Gus Lubin, *15 Mind-Blowing Facts About Wealth and Inequality in America*, BUS. INSIDER (Apr. 9, 2010, 10:33 AM), http://www.businessinsider.com/15-charts-about-wealth-and-inequality-in-america-2010-4?op=1; *Trends in the Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFF., http://www.cbo.gov/publication/42729 (last updated Oct. 25, 2011).

24. *See* JOHN P. HEINZ ET AL., URBAN LAWYERS 41–43 (2005) (documenting a substantial rise between 1975 and 1995 in the proportion of time Chicago lawyers spent on corporate or entity matters as contrasted with time spent on personal and small business work, from 53% to 64%); *see also Higher Demand, Lower Supply?*, *supra* note 15, at 144 (using U.S. census data to conclude that no more than 40% of legal service work was done on behalf of individual people, including work done by government lawyers on behalf of ordinary citizens, as contrasted with work for corporations and business); Hadfield, *supra* note 4, at 961 (decrying "the overwhelmingly commercial focus of our legal system . . . [in which c]ommercial clients command a huge fraction of legal effort, effectively squeezing the interests of individuals, particularly their most precious and democratically vital interests, to the margins").

25. *See* George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1655 (2006) (using Martindale-Hubble data from 1998–2004 on firms larger than four lawyers to conclude there is a decline in relationship lawyering in the industry). A full discussion of recent changes in the legal profession is beyond the scope of this article, but the sources cited here provide further insight into it.

26. *See, e.g.*, RICHARD SUSSKIND, THE END OF LAWYERS? 269–84 (2008).

legal information or do-it-yourself forms for people who formerly had no choice but to approach a lawyer for them.[27]

The trend toward commodification and displacement of the client-lawyer relationship by technology is not yet as true in small firms as in large-sized firms, with mid-sized firms somewhere in between. Small and solo firm lawyers are still largely dependent on ongoing relationships to sustain themselves. Along with mid-sized firms, small firms are surviving in part because they are able to be nimble in response to client needs.[28] Some large firms have begun to disaggregate as lawyers leave for specialized small firms; small firms are not decreasing in numbers to the same extent.[29]

Small practices are widespread, physically located in a variety of business and residential districts, small rural towns, suburbs, and big cities. As the profession debates access to legal services, two of the chief merits of attorneys in small and solo firms are that they are everywhere—including on the still-egalitarian Internet—and almost always cost less than other sources of paid legal (i.e., law-licensed) services.[30]

27. *See* Edward Poll, *Law Firm Size Matters, but Not Like It Used To*, MINN. LAW., May 14, 2012, http://minnlawyer.com/2012/05/11/law-firm-size-matters-but-not-like-it-used-to (asserting technology as one reason why large law firms are declining in profitability more than smaller firms, and must change their economic model).

28. Dave Galbenski, *Rate Trends: Surprises and Warning Signs*, LUMEN LEGAL BLOG (June 8, 2012), http://www.lumenlegalblog.com/rate-trends-surprises-and-warning-signs (analyzing Hildebrandt Peer Monitor Index and concluding that legal work is "flowing downhill" from Am Law 100 to Am Law 101–200 firms on account of the latter's greater flexibility); Dana Olsen, *Bye-Bye Big Firm: Is the Exodus of Lawyers from Big Law to Small Firms Here to Stay?* LAW.COM (Apr. 1, 2012), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202545285843 (stating small firms provide greater flexibility than large firms).

29. *See* Olsen, *supra* note 28; *see also* N.Y. ST. B. ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 16 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108. Recent data on the legal market show that corporate clients seeking value are moving their work from the top 100 most profitable law firms down to the next 100 most profitable firms. Galbenski, *supra* note 28; *see also* Dave Galbenski, *Are We Looking at the Right Numbers? Stay Focused on Reducing Expenses*, LUMEN LEGAL BLOG (June 14, 2012), http://www.lumenlegalblog.com/are-we-looking-at-the-right-numbers-stay-focused-on-reducing-expenses; Petra Pasternak, *Large Firm Layoffs Lead to Small Firm Startups*, LAW.COM (Feb. 11, 2009), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202428200271&slreturn=20120624162939.

30. *See, e.g.*, MICH. STATE BAR, 2010 ECONOMICS OF LAW PRACTICE ATTORNEY INCOME AND BILLING RATE SUMMARY REPORT 8 (2011), *available at* http://www.michbar.org/pmrc/articles/0000146.pdf (reporting the 2010 average hourly billing rate in a Michigan solo law firm was $203 compared to $313 in firms

Not surprisingly, small firms and solo practices yield the lowest earnings for lawyers on average.[31] They are the least visible and arguably have the least status of all lawyers.[32] Many in the law industry assume that these lawyers had no alternatives to the small firm or solo practice, that they hung out their shingles because no one would hire them.[33] These notions bear scrutiny.

This article asserts that solo and small firm practitioners are an overlooked yet key group when it comes to solving the "justice gap" for middle-income Americans. It is true that solo and small firms did not prevent the growth of that gap and even stood by as it widened. Yet as the profession searches for new roles in solving problems for individuals and small enterprises, and shapes new forms of practice in collaboration with other professionals and community-based entities,[34] a fresh look at the oldest form of

with greater than fifty attorneys); OHIO STATE BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN OHIO 23 (2010), *available at* http://www.ohiobar.org/General%20Resources/pub/2010_Economics_of_Law_Practice_Study.pdf (reporting the 2010 average hourly billing rate in an Ohio solo law firm was $175 compared to $325 in firms with greater than fifty attorneys).

31. *Occupational Outlook Handbook: Lawyers,* U.S. BUREAU OF LAB. STAT. (Apr. 26, 2012), http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-5.

32. HEINZ ET AL., *supra* note 24, at 81–97. Heinz analyzed the prestige of lawyers in Chicago along a variety of vectors, and found that prestige was related to factors that included status of clients, area of law, and perceived intellectual challenge of the work. *Id.* Lawyers for individuals generally had significantly lower prestige than did lawyers for big business; this correlated with a finding that lawyers in solo practice and firms of less than ten lawyers had prestige scores that were lower than in any other private or corporate practice setting. *Id.*; *see also* Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients,* 70 FORDHAM L. REV. 719, 722–27 (2001). Carle argued that while a majority of attorneys work in solo or small firm practices that predominantly represent middle-class individuals, these positions are viewed as less prestigious than working for either wealthy clients or for the poor. Carle, *supra.* Carle maintains that a paradigm shift is needed and those attorneys representing the poor and middle-class should be held in esteem equal to or above those working for the wealthy. *Id.* Students in my clinic and externship classes have confirmed this bias against solo and small firms when queried and believe it comes from the law school rather than from themselves.

33. *See* Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 860–61 (2001) (study of forty-one New York solo and small firm lawyers, calling out the stereotype that these lawyers are undereducated and less sophisticated than those in larger firms and showing, *inter alia*, that almost half worked in government positions or law firms with more than twenty attorneys before moving to their present practice, and only five entered solo practice immediately after admission to the bar).

34. Mark Curriden, *Future Law: Rethink Client Needs, or Else*, 97 A.B.A. J. 60, 60 (Mar. 2011) (discussing how technology and online resources have made access to legal information easier and more affordable, thus law schools should increase

practice makes sense.

The article will briefly lay out the problem of affordability and access to legal services for middle-income clients. Next, it will analyze the author's small, qualitative study of Minnesota practitioners who are delivering services to those clients. Their work is more complex, satisfying, and remunerative than is commonly assumed. The last section of the article will sketch steps to expand the distribution of legal services to middle-income clients, focusing on engaged lawyers who practice solo or in small groups.

II. WHAT WE KNOW ABOUT LEGAL SERVICES FOR MIDDLE-INCOME PEOPLE

With few exceptions, middle-income people must pay for the help of a lawyer when they need it.[35] Mostly, they are not eligible for free legal aid, public defenders (for criminal matters),[36] or the services of volunteer attorneys.[37]

Before examining the issue of unmet legal needs of middle-

training in communication and collaboration in order to offer more innovative solutions for clients); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2133 (2007) (concluding essay in a volume on community lawyering campaigns, considering the importance of transforming traditional lawyer-client relationships and of collaborative approaches to solving a threat to the client group); Marsha M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context*, 56 N.Y.L. SCH. L. REV. 367, 371–72 (2011–2012) (discussing how the "great recession" has left many low- and moderate-income individuals with the inability to afford legal services and asserting that attorneys should transition from the traditional roles of litigators, counselors, and advocates to new roles as collaborators, evaluators, and facilitators in order to make legal resources more accessible, usable, and affordable).

35. While legal services programs are required by law to restrict their services to individuals whose incomes are no higher than 125% of the federal poverty level, they are allowed to serve American Indians, the elderly, and people with disabilities who are not indigent. Some non-profit and pro bono programs also provide services, without regard to indigent status, to veterans, people living with HIV/AIDS, and other specified groups. SANDEFUR & SMYTH, *supra* note 5, at 10.

36. *See* MINN. STAT. § 611.14 (2010).

37. *See* S. MINN. REGIONAL LEGAL SERVICES, http://customers.hbci.com/~smrlswi (last visited Oct. 6, 2012) (providing "free civil legal help to low income persons with a household income at or below 125% of the federal poverty level"); VOLUNTEER LAW. NETWORK, http://www.volunteerlawyersnetwork.org/index.php (last visited Oct. 6, 2012) (explaining that clients' household income has to be at 125% or below for full representation services and at 300% or below for full briefing services). There is no right to an attorney for most civil legal matters as there is for most criminal defendants.

income people, it bears emphasizing that systems providing free legal aid and volunteer attorney services to low-income people are not able to fulfill their many needs, despite the lawyers' valiant efforts. There are just too few lawyers doing this work. A 2009 Legal Services Corporation report found that for every person assisted by legal services programs, one eligible person was turned away.[38] As funding for legal aid programs plummets, low-income Americans' legal needs are likely to be met even less often.[39] Pro bono services for low-income people are sparse as well. During 2008, Minnesota lawyers voluntarily responding to a survey reported that they performed about 200,000 hours of pro bono service.[40] In states where reporting of pro bono service is mandated, only about one-third of lawyers provide any such service, and only half of that has been service provided directly to persons of limited means.[41] Important as it is, pro bono service is not the strategy that will close the justice gap for low-income people, and,

38. HELAINE M. BARNETT, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 12 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. The situation in Minnesota is at least as bad as it is nationally, according to the CABS-MN completed in 2011. *See* HANNAH LIEBERMAN CONSULTING, LLC & JOHN A. TULL & ASSOC., *supra* note 2, at 46.

39. Jessie Van Berkel, *Minnesota's Resources for Legal Aid Are Drying Up Fast*, MINN. POST, Feb. 28, 2011, http://www.minnpost.com/politics-policy/2011/02/minnesotas-resources-legal-aid-are-drying-fast.

40. MINN. STATE BAR ASS'N, 2009 REPORT ON PRO BONO LEGAL SERVICES 4 (2009), *available at* http://www2.mnbar.org/committees/lad/2009ProBono.pdf. This survey provides the only data the author could find that provides any basis for even estimating attorney pro bono hours in Minnesota. A voluntary survey distributed to "law firms, solo practitioners, public sector lawyers, in-house corporate legal departments, and legal services and volunteer lawyer programs throughout the state," there is no way to discern how many lawyers' work is included in the 200,000 reported hours. *Id.* Even if one posits that about one-quarter of the active lawyers in the state responded—a high response rate for such a survey—this would translate into less than 40 hours of pro bono work per responding lawyer for the year. Assuming an average lawyer work year of about 2000 hours, this pro bono service would comprise about 2% of all legal work for the responding lawyers. *See id.*; *see also* AM. BAR. ASS'N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 4 (2005), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf (finding that the average American lawyer spent thirty-nine hours per year giving free service to poor individuals or organizations serving the poor; again, based on a 2000 hour work year, this is 2% of all effort); Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 LAW & INEQ. 77, 77 (1994).

41. Rigertas, *supra* note 10, at 93–94 (citing data for Illinois).

as discussed further in Part III.A, work for most middle-income people is not counted as pro bono.

Middle-income people's non-use of lawyers when facing legal need has not gone entirely unnoticed by the profession.[42] First, some state bar responses to the access gap for the poor are available also to the middle group, for example, unbundled legal services and self-help representation programs. Further, many bar associations have begun programs to match qualifying persons of "modest means" with an attorney who has agreed to charge lower than average fees.[43] These are often called "low bono" services.[44] In some places they are subsidized, in others they are not. A close look at these programs reveals they are aimed at those just above legal aid and pro bono attorney eligibility, that is, at the working poor more than at those in the very middle quintiles of income.[45] Modest means referral panels typically require extensive verification of income and assets, an administrative fee, a retainer for the attorney, and are not available to those who are 250% or more above the federal poverty level.[46] The numbers served through these programs are still low.[47]

42. *See* LEGAL NEEDS AND CIVIL JUSTICE SURVEY, *supra* note 3, at 9, 17–18, 27 (discussing the contexts, case types and choices of the surveyed moderate-income people when they faced a legal need, and finding that they turn to the civil legal system only 39% of the time).

43. AM. BAR ASS'N STANDING COMM. ON LAWYER REFERRAL & INFO. SERV., 2008 MODEST MEANS SURVEY 7–10 (2008) [hereinafter MODEST MEANS SURVEY], *available at* http://apps.americanbar.org/legalservices/lris/clearinghouse/downloads/2008_modest_means_survey.pdf (including a state-by-state listing of programs serving persons of modest means, and describing the frequently onerous requirements to qualify for referral to a lawyer who agrees to charge lower fees).

44. See LOWOBONO, http://www.lowbono.org (last visited Dec. 8, 2012) for an example of a website for "the support, training, and mentoring of solo and small firm lawyers who provide discounted, or 'low bono,' legal services to underrepresented communities."

45. *See, e.g.*, MODEST MEANS SURVEY, *supra* note 43, at 125. Hennepin County's low-fee family law referral program requires documentation that a potential client's income is no more than 250% of the federal poverty level before a referral will be made to an attorney who agrees to charge $55 per hour after receiving a $500 retainer fee up front. *Id.* The program does not have an enforcement system, leaving its services to screening clients for income and referring them to attorneys who have agreed to charge these rates. *Id.* at 126.

46. *Id.* at 128. In 2012, this means an annual family income of $53,000 for four people.

47. *Id.* at 39–43 (citing numbers of people helped in each state's program). In the nineteen states that have programs or that reported data about their programs, 4722 attorneys are members of modest means panels. *Id.* At the time of the survey, the only reported program in Minnesota was Hennepin County Bar

Other efforts to bring legal information and advice to middle-income people are slowly emerging in response to the justice gap.[48] California has a particularly diverse group of approaches to this population. Yet most of the "modest means" projects in a recently updated ABA listing concentrate on getting self-help services or legal information—rather than lawyers' services—to the persons in need of help.[49]

The current reality when middle-income persons cannot afford to pay for a private lawyer's help, when they *believe* they cannot afford to pay for that help, and when they doubt that a lawyer is *able* to help, is that they turn to handling their legal matters by themselves. This has fed a rising tide of self-represented litigants into our court systems, from family court to bankruptcy court and housing court, with mixed results.[50] It also has spawned many do-it-yourself legal documents such as leases, wills, and business contracts. Direct access to information and legal documents is a good thing, but information is never a complete substitute for understanding. There is still abundant need for legal counseling and problem-solving assistance. Without legal advice, some of the self-assembled documents will reveal serious flaws when their strength is tested.[51]

The "access-to-justice crisis in the criminal and civil justice system" was recognized by the federal government when the United States Department of Justice announced the Access to Justice Initiative (ATJ) in March 2010.[52] ATJ is supporting projects to

Association's Low Fee Family Law Project.

48. *Innovative Programs to Help People of Modest Means Obtain Legal Help*, AM. BAR ASS'N, http://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income.html (last updated Nov. 28, 2011).

49. *Id.*

50. *See infra* notes 133–41 and accompanying text.

51. Geri Anderson, LegalZoom: Friend or Foe to the Legal Community? (Apr. 27, 2012) (unpublished manuscript, William Mitchell College of Law) (on file with author) (detailing the often serious flaws in wills and estate documents created by consumer users of Internet document assembly services such as LegalZoom). The author's clinical practice has brought many leases to her attention, many of which appear to have been assembled from the Internet and used by landlords without regard to all of the ways they violate the laws of Minnesota. When representing tenants, we exploit the weaknesses of leases whose clauses are not enforceable in Minnesota courts. The misinformation in these clauses damages tenants at least as much as they cost the occasional landlord whose illegal lease clause is voided.

52. *The Access to Justice Initiative*, U.S. DEP'T JUST., http://www.justice.gov/atj (last visited Oct. 7, 2012).

investigate and decrease the gap between the need for legal service and its availability.[53] In addition to increasing free services for the poor, it seeks to promote "less lawyer-intensive and less court-intensive solutions to legal problems."[54]

The ATJ project goals assume that lawyers are unaffordable for middle-income citizens as they are for low-income citizens. It is trying to craft solutions to increase services for low-income clients but appears to write off lawyer-based solutions for middle-income clients. Presumably it does so because no one can imagine public subsidies for lawyers for this populace and no one imagines lawyers voluntarily making themselves less expensive. (The latter solution seems especially unrealistic in the face of law school tuition costs that have tripled in the last thirty years, a rate far greater than that of inflation.[55])

Still, there are many lawyers who potentially could serve the middle group. More lawyers work in private practice than in any other category of legal employment, such as government, judiciary, education, corporate counsel, non-profits, and so forth. In 2007, according to ABA estimates and American Bar Foundation statistics, there was one private attorney providing services for every 429 people in the United States.[56] While 75.2% of all attorneys were in private practice, 68% of all attorneys in private practice were in solo or small firms of ten or fewer lawyers.[57] This means that 51.14% of all attorneys were in these smaller firms.

53. ATJ aims to:

> [(1)] Advance new statutory, policy, and practice changes that support development of quality indigent defense and civil legal aid delivery systems at the state and federal level; [(2)] Promote less lawyer-intensive and court-intensive solutions to legal problems; and [(3)] Expand research on innovative strategies to close the gap between the need for, and the availability of, quality legal assistance.

Id.

54. *Id.*

55. COMM'N ON LOAN REPAYMENT, *supra* note 14, at 16; Segal, *supra* note 14. The average debt of a new lawyer is now approaching $100,000, yet it is possible to make payments on that debt and also stay solvent while earning even $38,000 a year. Paul Ziezulewicz, A Perfect Storm: How Decreased Funding for Legal Services and Sky-Rocketing Law School Tuition are Making it More Difficult Than Ever to Increase Access to Justice for Low-Income Minnesotans (Apr. 2012) (unpublished manuscript, William Mitchell College of Law) (on file with author) (analyzing the budget for a law school graduate in Minnesota with $100,000 in debt).

56. BARNETT, *supra* note 38, at 20.

57. *Id.* at 20 n.26.

But private lawyers' billing rates—at least in medium and large firms—have risen steadily,[58] even as the income of American families adjusted for inflation has declined since 1999 for all income groups other than the top 20%.[59] More Americans are below the poverty line now than at any time since 1958, and their net worth has dropped 39% between 2007 and 2010.[60] (Most lawyers' incomes have also fallen with the economic setback that began in the mid-2000s.[61]) These conflicting economic trends—rising lawyer rates and falling personal income—help explain the challenges facing middle-income people when they need legal help.

In the face of substantial unmet legal need, why haven't more firms morphed their practices to fill the needs of middle-income households? Is it impossible for lawyers to become more affordable and more accessible to middle-income clients? Let one assume for the moment that public subsidies to lawyers or their middle-income potential clients are either infeasible or undesirable. Instead, imagine legal solutions for middle-income people that do not

58. *The 2011 Law Firm Billing Survey*, NAT'L L. J. (Dec. 19, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202535946626&slreturn=1. The average firm-wide billing rate, which combines partner and associate rates, increased by 4.4% during 2011, according to this survey. *Id.* That followed on the heels of a 2.7% increase in 2010 and a 2.5% increase in 2009. *Id.*; *see also* U.S. DEP'T OF JUSTICE, LAFFEY MATRIX—2003–2012 (July 6, 2011), http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf. The Laffey Matrix provides a chart of fees for use in civil cases where an award of "reasonable" attorneys' fees may be awarded to the prevailing party under a fee-shifting statute. U.S. DEP'T OF JUSTICE, *supra.* Fees under the schedule have increased steadily, from $180/hour for a lawyer with one to three years' experience in 2003–04 to $240/hour in 2011–12, an increase of 33% over nine years. *Id.*

59. *See Wealthiest Americans Dramatically Increase Income*, MARKETING CHARTS (Feb. 25, 2011), http://www.marketingcharts.com/direct/wealthiest-americans-dramatically-increase-income-16296/.

60. Michael Sivy, *Our Net Worth is Down 39%. How Worried Should We Be?*, TIME, June 20, 2012, http://business.time.com/2012/06/20/our-net-worth-is-down-39-how-worried-should-we-be; Sabrina Tavernise, *Soaring Poverty Casts Spotlight on 'Lost Decade,'* N.Y. TIMES, Sept. 13, 2011, http://www.nytimes.com/2011/09/14/us/14census.html. In 2011, real median household income was 8.9% lower than the median household income in 1999. Press Release, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2011 (Sept. 12, 2012), *available at* http://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html.

61. *See* Wendy Kaufman, *Job, Tuition Woes a Drain on Law Schools*, NAT'L PUB. RADIO (July 23, 2012), http://www.npr.org/2012/07/23/157217098/job-tuition-woes-a-drain-on-law-schools.

involve government supports, but rely on public-spirited lawyers who are modest in their demands for income. Might the benefits of a well-realized small practice be sufficient to reward lawyers for the generally lower pay it yields?

In order to reach more middle-income persons with legal needs, the special qualities of firms that are succeeding in serving that population must be understood. And public discussions of solutions to the "access-to-justice crisis" must include ideas for more effective deployment of these firms' lawyers.[62]

III. LAWYERS FOR MIDDLE-INCOME CLIENTS: WHY AND HOW DO THEY SUSTAIN THEIR PRACTICE?

A. A Study of Lawyers for Middle-Income People

Heartened by the attention that was being paid to the justice gap in America,[63] but convinced that the profession needed to explore further means of facing the failure to distribute legal services to a majority of Americans with legal needs, the author undertook a small qualitative study of lawyers who served primarily middle-income clients. Discouraged by the bar's general inattention to the justice needs of those who were middle-income, this was to be a lawyer-centered rather than a client-centered study. The study was designed to seek out lawyers who are somehow affordable to middle-income people and to uncover the strategies and values that made their practice possible.

The project, begun in 2004, was also triggered by the profession's seeming undervaluation of the work of practitioners who serve middle-income people—a message that is palpable especially in the law school setting. The low regard seems a measure of respect based on relative wealth, on the reality that large firm lawyers work for the most moneyed clients and have the highest incomes, while small and solo firms are where working people go for legal help—when they go to a lawyer at all—and

62. *The Access to Justice Initiative*, *supra* note 52. Many other questions must be investigated as well, of course, such as the current legal needs of what Mansfield and Trubek call "ordinary people." Mansfield & Trubek, *supra* note 34, at 369. The ABA has not invested in a comprehensive legal needs study since 1994, even as increasingly sophisticated information is available about the legal needs of businesses. *See Higher Demand, Lower Supply?*, *supra* note 15, at 130.

63. *See, e.g.*, Editorial, *Addressing the Justice Gap*, N.Y. TIMES, Aug. 23, 2011, http://www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html.

where lawyers' incomes are lowest.[64] Is that really the reason why more law students do not aim to work in practices that serve middle-income clients?

Lack of familiarity is a non-monetary reason why solo and small firm practitioners are overlooked in the law school environment: they rarely recruit new attorneys in on-campus interviews (known as "OCI") at the law schools; law professors are seldom hired from their ranks;[65] they do not tend to sponsor law school events; and their members are not featured as law school speakers as often as attorneys from larger firms, government, and the "public interest" bar.[66] Free subscriptions to the student version of the ABA Journal further reinforce the message that success is landing a big firm job. There is simply no paved path for students to learn about or enter this form of practice, even for those who are interested in it.[67]

64. *See* CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 (2004); HEINZ, *supra* note 24, at 81–97; *How Much Do Law Firms Pay New Associates? A 16-Year Retrospective*, NAT'L ASS'N FOR LAW PLACEMENT (Oct. 2011), http://www.nalp.org/new_associate_sal_oct2011. Keep in mind that small firms also represent higher-income people and businesses, in addition to being the primary place where middle-income people seek representation.

65. *See* Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 129–30 (2010) (recounting studies of law professor credentials and laying out author's own study, which found that between 2000 and 2009, new tenure-track law professor hires had a median of three years of practice experience, and half of those with experience had it as associates in law firms); *see also* Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 329, 336–39 (2005) (documenting the hiring of law professors between 2003–2004, in terms of law firm experience, public interest law experience, and governmental law experience); Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 596 (2003) ("The results [of his study of law school hiring from 1999–2000] show that the prototypical new law teacher graduated from an elite school . . . , was on the staff of the law review or another journal while in law school, clerked for a judge (usually a federal judge), published one or two articles or notes (though many published nothing at all), and practiced for several years (usually in a law firm or a corporate counsel's office) before entering academia."). In Nathanson's study, no category exists for solo or small firms, but "law firm" experience, here as elsewhere, is assumed to mean large firm. *See* Nathanson, *supra*.

66. This assertion is based on the author's personal observation during twenty-eight years in legal education.

67. The lack of a well-marked roadway does not prevent William Mitchell law students, among others, from finding their way to small and solo firm work. Students do locate these practitioners and work as law clerks and as volunteers in pro bono work. Some students also extern for credit at small firms. The author

Another factor in the undervaluing of small firm and solo practitioners is that they are not perceived as being within the noble sphere of "public interest" lawyers. Public interest work is defined in various ways.[68] It is generally seen as work for the greater good that is performed at virtually no charge to the client, rather than with any hint of commerce tainting it.[69] Today, most of those considered to be public interest lawyers are funded by the government and non-profit organizations. Others work on public interest matters for free on a pro bono basis while being supported by other paid work. In contrast, small firm lawyers of necessity charge their clients fees for most of their work (though they also perform intentional pro bono work).

Scholars sometimes assume that public interest lawyering oriented toward social change originated in the 1960s and was separate from what lawyers did in private practice.[70] However, long before the birth of the Legal Services Corporation in the 1960s—when the definition of public interest work was enshrined as that of specialists in non-profit settings—rebellious solo and small firm private practitioners helped their communities resist and change oppressive social norms.[71]

taught an externship seminar that required that each student find a placement in a small or solo practice or in a non-profit.

68. Thomas L. Hilbink, *You Know The Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 659 (2004). The study of "cause lawyering" over the last few decades does occasionally include private practitioners in its definition of cause lawyers, who are generally defined as those who

> deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement.

Id. (citing AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING & THE STATE IN A GLOBAL ERA 13 (2001)).

69. *See* Carle, *supra* note 32, at 735 (documenting the history of the emergence of the Rules of Professional Conduct counting only unpaid legal work toward meeting a lawyer's pro bono duty); Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 30–39 (2009) (critiquing the exclusion of lower cost attorneys for middle-income people from the bar's paradigm for provision of legal services, which focuses on provision of "free" services to a fraction of all those who cannot afford an attorney).

70. *See* Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS & PROFESSIONAL RESPONSIBILITIES 201 (Austin Sarat & Stuart Scheingold eds., 1998).

71. For the story of an early lawyer in Minnesota who engaged in community-based civil rights work in the 1920s, 1930s, and 1940s, see generally Ann Juergens,

Through a related and interesting evolution, the Rules of Professional Conduct do not allow paid work to be counted toward the primary pro bono obligation.[72] In contrast to the world where "public interest" lawyers have some status and are fulfilling the aspirations of the lawyers' professional responsibility rules, even the most public-spirited and lowest-paid lawyers' work is not deemed as honorable or as impressive as the work done by paid non-profit and volunteer attorneys. While the distinction between work done for pay from clients and work done without pay from clients may be useful, it also operates subtly to devalue the justice efforts of small firm practitioners who charge lower-than-average fees for their work.[73]

Finally, and as mentioned above, a common conception of the practitioners who serve neither the deserving poor nor the well-off is that they could not make it in the competitive world of big firms and prestigious boutique firms.[74] They have ended up in the in-between world—between "public interest" work and the big-money client worlds—because of lack of ability. A related view is that these

Lena Olive Smith: A Minnesota Civil Rights Pioneer, 28 WM. MITCHELL L. REV. 397 (2001).

72. MINN. RULES OF PROF'L CONDUCT R. 6.1 (defining the obligation to provide legal services "to those unable to pay" and exhorting lawyers to provide a "substantial majority" of their fifty hours of pro bono legal services "without fee or expectation of fee to persons of limited means," though it does acknowledge that additional services may be provided "at a substantially reduced fee to persons of limited means"). For a dynamic and exasperating history of the development of the rules defining pro bono as being only for unpaid legal work, thereby excluding attorneys with lower income client bases who could not afford to work for free, see generally Carle, *supra* note 32, at 734; Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 UNIV. CHI. L. SCH. ROUNDTABLE 281 (2001); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002).

73. *See* Herrera, *supra* note 69.

74. "Boutique" firms are generally defined as those that specialize in a highly specific field of law such as computer software patents and energy regulation law. They may be quite small, but do not generally serve many middle-income clients. Evidence of the conception of solo firm lawyers is readily available in the blogosphere. *See, e.g.*, Tom Wallerstein, *From Biglaw to Boutique: Greener Grass*, ABOVE THE LAW (May 31, 2012, 2:38 PM), http://abovethelaw.com/2012/05/from-biglaw-to-boutique-greener-grass ("Some Biglaw associates assume that the only reason an attorney becomes a solo or joins a small firm out of law school is because he didn't have any other options. As they become slightly more senior, and the ranks thin, some Biglaw associates assume that those who leave simply couldn't hack it and only the elite remain."); *see also* Levin, *supra* note 33, at 847, 896 (describing how solo and small firm lawyers occupy the "mid to lower rungs of the legal profession's hierarchy").

practitioners may be as intelligent as any, but lack vision and ambition, and their work is boring. However noble Atticus Finch and his kindred spirits may have been, small community-based practice for ordinary people is a lawyering model that seems not to be relevant in today's environment where clients and citizens move often and do not maintain loyalty to any service people.[75]

For all such reasons, practice for working people by lawyers in small private firms is held in lower regard than other forms of practice.[76] This study of lawyers for middle-income clients aims to explore the basis, or lack of basis, for common perceptions of these lawyers as well.

B. Methods

The first task for the study was to identify lawyers whose clients were mostly middle-income. At the time, the income for the middle sixty percent of Minnesota families ranged from $20,515 to $76,342.[77] (The most recent numbers for income of the three middle quintiles are not greatly changed if inflation is taken into account, especially at the bottom end. As of 2010, they ranged from $23,730 to $103,000).[78] I set out to find lawyers who could vouch that more than half of their clients fell into this group.

This was a methodological challenge, in some ways indicative of the issue underlying the research. Lawyers for middle-income households have low visibility. They have no organizational affiliation or obvious groups that represent their interests. There

75. *See* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1665 (1989).

76. HEINZ ET AL., *supra* note 24, at 81–97.

77. Email from Wendy Thomas, Director Data Access Core, Minnesota Population Center, to Lisa Radzak, author's research assistant (Feb. 11, 2004) [hereinafter Thomas Feb. 11, 2004 Email] (on file with author) (citing Steven Ruggles & Matthew Sobek, et al., Census of Population and Housing, 2000: Summary File 3, Table P52/P53/P54 (using data from the Integrated Public Use Microdata Series: Version 3.0, Minneapolis: Historical Census Projects, University of Minnesota, 2003, http://www.ipums.org)); *see also* Email from Wendy Thomas, Director Data Access Core, Minnesota Population Center, to Lisa Radzak, author's research assistant (Mar. 24, 2004) (on file with author) (establishing that the average household size in Minnesota in 2000 was 2.52).

78. Email from Brandon Trampe, Research Assistant, Minnesota Population Center, to Carrie Weber, author's research assistant (May 29, 2012) (on file with the author) (citing Steven Ruggles, et al., Census of Population and Housing, 2010 (using data from the Integrated Public Use Microdata Series: Version 5.0, Minneapolis: Historical Census Projects, University of Minnesota, 2010, http://www.ipums.org)).

was no site that described lawyers or firms by name who served this group in Minnesota. Contrast this with lists of legal aid offices and volunteer attorney services on the one hand and lawyers for the biggest businesses in Minnesota on the other hand.

Faced with no obvious starting point, I systematically asked everyone I knew—friends, relatives, colleagues, and many whom I did not know, found in newspaper articles, the telephone book, the web, and Minnesota bar directories—for names of Minnesota lawyers whom they believed served primarily middle-income clients. I decided to exclude personal injury specialists from the study because they serve clients regardless of their income, and cost is not a major barrier to accessing a lawyer in injury cases.[79]

The process for finding such practitioners was revealing. I contacted sources from multiple lawyer organizations, colleagues in the academy, legal aid societies, and the state bar association. Most of those from the legal establishment could think of virtually no one whose primary client group was middle-income people, at least when one excluded personal injury lawyers. I tried in vain to learn of even one lawyer in a medium or large firm who might fall into the category I had identified. On the other hand, as soon as I spoke directly with small firm practitioners, I learned a wealth of names of potential lawyers for the study. The William Mitchell alumni office produced lists of solo practitioners and of lawyers in practice outside the Twin Cities, along with their areas of practice. The Martindale-Hubbell directory yielded names of small firm and solo practitioners in counties outside the Twin Cities.

Once a pool of potential subjects was assembled, though not yet contacted, I gathered the demographics of the Minnesota bar and sought to approximate a similar mix for the subjects of the study. Each selected attorney was sent a letter explaining the purpose of the study and asking if she or he would consent to being interviewed for it. Almost every lawyer who was approached agreed to meet with me and was then sent a list of questions to help them prepare for several hours of audio-taped interview. In order to safeguard clients' privacy and their own personal interests, every attorney was promised that her or his identity would be kept

79. This is true so long as the injury to the potential plaintiff is serious enough to warrant a lawyer's efforts, and, it follows, a contingency fee. By excluding personal injury lawyers, it is likely that the study subjects had a lower emphasis on litigation than had they been included.

confidential. Each subject consented in writing to the study.[80] Overall, the subjects were gracious about participating.

I interviewed a total of twenty-nine attorneys, and all but four of the interviews took place in the subject's office. Their offices were located mostly in smaller office buildings and converted houses or duplexes. However, one interview was conducted in an older skyscraper, and one was conducted in the lawyer's home. Twenty-four of the subjects worked within the seven-county Twin Cities metropolitan area, mirroring the Minnesota bar in which 83% of lawyers practiced within the metro.[81] The remaining five lived and worked at least eighty-five miles outside the metro area. Twelve of the twenty-nine subjects were female, a slightly higher proportion than that of the Minnesota bar which was, and is, approximately one-third women.[82] Twenty-six of the subjects were white, two were African-American, and one was Asian-American, which was, and is, a slightly higher proportion of attorneys of

80. In the letter explaining the study as a prelude to obtaining the subjects' written consent, the lawyers were also given the name and contact information of a member of the William Mitchell College of Law administration and asked to call if they had questions or concerns about any aspect of being a subject in the study whether before or after the interview took place. No such calls were ever received.

81. This figure came from the Minnesota State Bar Association website in early 2004, which the author encountered while conducting the survey.

82. Given the limited data on lawyer demographics readily available from the practicing bar, I made a data analysis request, via my research assistant, to the University of Minnesota's Integrated Public Use Microdata Series, and learned data-based demographic figures for Minnesota lawyers. Those are what are used here. Email from Wendy Thomas, Director Data Access Core, Minnesota Population Center, to Lisa Radzak, author's research assistant (Mar. 26, 2004) [hereinafter Thomas Mar. 26, 2004 Email] (on file with author) (analyzing Census Bureau data for Minnesota in 2000 that established: 32% female attorneys in Minnesota, 94% white, 3% black, 2% Asian, 1% American Indian, and less than 1% Multiracial/Other). As for the current proportion of women lawyers, as of November 2010, still only 31% lawyers in the United States were women. A.B.A. COMM'N ON WOMEN IN THE PROF., A CURRENT GLANCE AT WOMEN IN THE LAW 2011, AT 4 (Jan. 2011), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf. The higher proportion in my study was appropriate, it turns out, because of the fact that a higher proportion of women go into solo practice than do men. *See* Levin, *supra* note 33, at 853. Interestingly, no one working with lawyers knew for certain the genders of the members of the Minnesota bar. The Minnesota Women Lawyers Executive Director said "anecdotally" she thought that 5000 to 6000—about one-third—of Minnesota's lawyers were women. Email from Debra Pexa, to author (Feb. 17, 2004) (on file with author). The Lawyer Statistical Report 2000 put the percentage of women lawyers in Minnesota at 24% percent. CARSON, *supra* note 64, at 127.

color—10%—than the Minnesota bar as a whole—6%.[83] Length of time in practice was matched as closely as possible to the bar demographic data available: 10% had thirty or more years of practice experience; 31% had twenty to thirty years of practice experience; 34% had ten to twenty years of practice experience; 17% had six to nine years of practice experience; and 7% had three to five years of practice experience.[84] Though age and sexual orientation data for Minnesota attorneys is not available, the sample attorneys represented a range of ages and several were gay.

The key criterion for inclusion in the study was that more than half of the lawyers' clients had to come from middle-income households. Each attorney specifically vouched that more than half of their clientele fell within the middle sixty percent of Minnesotans by income.[85] This criterion did not require that an attorney be in a small or solo practice in order to be included in the study. My extensive efforts were simply unsuccessful in finding any lawyers in firms larger than seven attorneys who could meet this criterion. The study of lawyers for middle-income clients became a study of solo and small firm practitioners after it was begun.

The sample of lawyers recruited was solid; though consisting only of solo and small firm practitioners, it was roughly representative of the Minnesota bar in most other respects.

C. Practice Areas; Firm Size; Income; Hours Worked

By design, the subject attorneys practiced in a range of areas, excluding, as noted, personal injury specialists. Most specialized in two or three areas of law, and several specialized in one area. The attorneys' areas of specialization included alternative dispute resolution, bankruptcy, consumer/collection, contracts, criminal defense, disability rights/special education, discrimination/civil

83. Thomas Mar. 26, 2004 Email, *supra* note 82.

84. The Minnesota bar's years of practice compared as follows: 14.3% had thirty years or more of practice experience; 23.5% had twenty to thirty years of practice experience; 26.6% had ten to twenty years of practice experience; 11.6% had six to nine years of practice experience; and 10% had three to five years of practice experience. CLARA N. NELSON, THE LAWYERS STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 27 (2004). The overlap at twenty and thirty years of practice experience was contained in the data available about the Minnesota bar. *Id.*

85. Again, from $20,515 to $76,342 per household, as noted before. Thomas Feb. 11, 2004 Email, *supra* note 77.

rights, estate planning/probate/elder law, family, general (some combination of many of these), housing, immigration, non-profit organizations, small business formation and other business matters, and social security. Though I made many efforts, I could not find any intellectual property practitioners who could vouch that at least half of their clients were in the middle-income group.

Sixteen of the twenty-nine lawyers were solo practitioners, and four of those solos practiced with no staff assistance. The remaining twelve solo practitioners employed one or one-and-a-half assistants. The thirteen lawyers who were not solo practitioners practiced in thirteen different firms ranging in size from two lawyers to seven lawyers. These firms averaged two assistants per attorney. Practices requiring large numbers of court and administrative filings, particularly immigration and family law, relied more on paralegals than others.

Personal and professional lives overlapped comfortably in almost a quarter of the studied offices. Seven of the sampled attorneys worked closely with a family member: four with a spouse, and three with a sibling who was a lawyer or non-lawyer administrator. This was a factor that these seven lawyers remarked upon as a boon in their work settings.

An interesting, yet perhaps logical, finding was that the median income of these lawyers matched closely the income of their higher income clients. The lawyers studied reported a median net income of $75,320.[86] The top 20% of Minnesotans by income earned $76,342 and over. Almost all of these lawyers were solidly in the top 25% of Minnesotans by income, and five of them were well into the top 10%. Though their incomes were not guaranteed by an employer, in 2004 these lawyers were more highly paid than the vast majority of Americans. They had health insurance too.

86. Three of the interviewees declined to share their net income during the interview. Thus, the income numbers here include those only of the twenty-six lawyers who agreed to share that information with the author. I used median rather than average or mean because the highest earners distorted that number. *See Salary Statistics for Attorneys in Minneapolis*, SALARY.COM, http://swz.salary.com/SalaryWizard/Attorney-I-Salary-Details-Minneapolis-MN.aspx (last visited Oct. 7, 2012) (reporting a median salary of $89,381 for entry level attorneys in Minneapolis); *cf.* 37 NAT'L ASS'N FOR LAW PLACEMENT, CLASS OF 2010: JOBS & JDS: EMPLOYMENT AND SALARIES OF NEW GRADUATES 29 (showing the national median of starting salaries for associates in firms with two to ten attorneys to be $50,000).

The two lowest earners were lawyers with the fewest years of experience. The top five earners netted $110,000 to $250,000 annually; these were the only attorneys with six-figure incomes and each was a specialist—in immigration, criminal, estates and probate, and federal consumer debt protection practice. One of the highest earners was a full-service immigration specialist with many staff assistants and a high overhead. Another of the highest earners was a more narrow range specialist; this lawyer had much lower overhead, specialized in one fairly concise set of statutes, and had one assistant.

To earn their income, the studied lawyers worked from thirty-two to seventy hours per week, with a median of 48.7 hours per week. They indulged in zero to six weeks of vacation per year, with a median 2.2 weeks of vacation. These were full-time working lawyers who did not take a great deal of time off.

Their fee arrangements defy characterization, other than to say they were a mix of hourly, flat, and contingency fees, or a various combination of those. The hourly rates ranged from $50 per hour to $300 per hour, with some including caps on the total bill or with a switch to a flat fee after a certain total was reached. Flat fees varied with the matter. Contingency fees spanned 20% to 45% of any recovery for the client.

Experience and the efficiencies allowed by specialization made more of a difference in earnings than did hours of effort; more hours logged did not usually translate into higher incomes. The top three attorneys in terms of hours worked earned an average of about $42,000, well below the median. The top five in terms of earnings, on the other hand, worked forty-seven hours per week in their specialized practices—slightly below the median hours worked.

D. Paths to Practice with Middle-Income Clients

A common narrative about "success" in law involves securing a prestigious clerkship, then moving to a well-known large firm and drawing a high salary working long hours for corporate clients.[87] This is a fine ambition so long as other narratives of success are also

87. *See generally* Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) (discussing the relationship between professionalism, intrinsic values, and career satisfaction in law students and lawyers).

given weight by the academy, bench, and bar. Yet that often has not been the case. (The current difficult legal job market may be altering how the profession imagines success. It is increasingly the case that securing *any* job as a lawyer is a sign of some success for law graduates.) Popular wisdom often frames the highest paying work as the "best" work.[88] The idea that small firm practitioners had no alternative to this form of practice persists.

The attorneys in the study belied that common knowledge. Twenty-four of the twenty-nine subjects had good work alternatives at the time they went into their small practice; the other five turned to solo and small practice either right out of law school, as planned, or when another job ended. Nine of the lawyers had from eight to seventeen years of practice experience before entering their small practice. All but one of the subjects had at least two years of substantial legal work experience (including one whose work was as a full-time firm clerk during law school) before embarking on small firm practice.[89] Those other practice settings included large law firms (seven), judges' chambers (three), corporate counsel offices (four); county attorney, public defender, and legal aid offices (eleven). Five had earned master's degrees in addition to their law degrees. These were not inexperienced, new lawyers who could get no other employment.

Why did the subject lawyers enter solo or small private practice when they had alternative, often better-paying, legal work? For a few, the move into small practice evolved without a plan, because of a geographic move or an unexpected opportunity to earn more income. "I had no plan to do this. But when we moved back to

88. AmLaw100 firms are held up as "top" firms based solely on revenue and profits per partner. *See* Brian Leiter, *The Top 15 Schools From Which the Most "Prestigious" Law Firms Hire New Lawyers: 2008*, BRIAN LEITER'S L. SCH. RANKINGS (Oct. 13, 2008), http://www.leiterrankings.com/jobs/2008job_biglaw.shtml (characterizing large law firms as "prestigious").

89. This number of years of experience before going solo or small is likely not as typical today as it was in 2004. Since then, the contraction of the legal job market combined with unprecedented numbers of new law graduates has led more new lawyers to begin practicing on their own. *See* Anika Anand, *Law Grads Going Solo and Loving It*, MSNBC NEWS (June 20, 2011, 12:22 PM), http://www.msnbc.msn.com/id/43442917/ns/business-careers/t/law-grads-going-solo-loving-it (citing NALP survey findings that 5.7% of 2010 graduates started their own practices, a rise from 3.7% in 2008 and the highest percentage since 1997). While this has made the practical quality of new lawyers' legal education more salient, it is difficult to find any knowledgeable source who does not recommend obtaining some experience with other lawyers before embarking on one's own, for the good of the clients if not the fiscal health of the lawyer.

Minnesota, I didn't like the firms that did [my specialty] work, so I hung out my shingle." [Lawyer #16]

Most gave specific statements of deliberate reasons for leaving what they were doing to strike out on their own or move to a small setting. Their personal understanding of success did not require the highest in dollars earned or status of clients. They were willing to trade a steady paycheck for other values.

About a quarter went into small practice when they found something missing from their earlier practice experiences. "The big firm was horribly boring; no humans were involved in my work." [Lawyer #2] "I worked for another firm and knew I could do things better." [Lawyer #23] "I quit when a partner badgered me about work three days after I'd given birth. He pushed me so I jumped . . . and went out on my own." [Lawyer #28] "I didn't like my rich clients [during four years in a big firm]. I wanted to do good, not crush people." [Lawyer #7]

When asked whether a larger cause (other than independence, making a living, etc.) motivated their work, fifteen lawyers said "yes!" Those causes ranged from "protecting property rights for those without much" to "influencing parenting, especially in dads" to "making the law better." Of the group who named a larger cause motivating their work, only seven of the fifteen began their small practice to advance that cause. These were lawyers for whom it was important to make a difference with a particular community or group. "I come from poor immigrants and want to work up to saving my community." [Lawyer #10] "I had a good job [as a lawyer in a government office], but no one in the market was helping disabled kids. People kept asking me for help . . . so I opened my own office. I wanted to show it could be done in the market, without subsidies." [Lawyer #25] "I was raised to be egalitarian by a human rights activist mom." [Lawyer #3] "I wanted to do good, see social justice." [Lawyer #9] "I wanted to keep [financial] predators in check." [Lawyer #12]

Another group had no particular cause, but learned from experience after law school that they did not enjoy being anyone's employee and would prefer to work for themselves. "I thought I wanted traditional success—Ivy League law school, big firm job—but found that I hated it. I liked independence." [Lawyer #13] "I was enjoying my field but was being confined at my job—I wanted freedom. Small firms are healthier: they are more fun, allow more variety, and have less pressure than the big ones." [Lawyer #21]

Three of the lawyers knew from the beginning that they wanted to be their own boss in a solo or small firm; that was part of their purpose in going to law school. "I went to law school so I would not have to be anyone's employee." [Lawyer #11] "I never looked elsewhere. I went to law school with this end in mind." [Lawyer #12]

These lawyers were self-directed and had substantial legal experience before choosing small practice. Half were motivated by causes above and beyond the individuals whom they helped. They went into small practice because they valued their ability to think and act independently over security at some other work. While secure law jobs are less available now than when these practitioners entered small practice, those who begin a small practice must still be capable of entrepreneurial action and reflection if they are to survive in it.

E. Primary Source of Satisfaction; Disadvantages of Their Practice

When asked the primary source of satisfaction in their practice, the largest group of lawyers answered, "*helping people—seeing clients grow and get what they need.*" Ten of the twenty-nine lawyers gave some version of this answer. "When clients walk away whole, when you have helped clients do for themselves, given them some dignity." [Lawyer #18] "Helping people, empowering them to take responsibility and make decisions." [Lawyer #1] "To help a person who truly needs help. You're all they have, and you're in control." [Lawyer #21] "The greatest source of satisfaction is when clients who are so down and out get some of the independence that I value so much." [Lawyer #11] "It sounds trite: I like to help people who need help." [Lawyer #27]

"*Making a difference, solving a problem*" was the source of satisfaction identified by eight of the subject attorneys. Though this sounds closely related to the "I like to help people" answer, these answers used distinct language. The distinction, to my eyes and ears, was between attorneys who expressed satisfaction in terms of the problem-solving itself and those who focused on the person of the client as the source of contentment and pride. The significance of this difference is unclear; for example, neither answer was more associated with one gender or particular practice area than the other. "There is great satisfaction in fighting about things that make a difference in people's lives." [Lawyer #4] "Solving families' problems is really gratifying." [Lawyer #8]

"*Getting to know people, having good relationships*" with them was the answer that five lawyers recognized as their greatest satisfaction in practice. Again, this answer is closely related to those already mentioned yet can be distinguished. The emphasis was on the relationship, not on the helping or on the problem, as in the above answers. The few lawyers who worked with small enterprises, whether non-profits or businesses, were among those five who named client relationships as the prime satisfaction. "I *like* who I serve. They are inspiring people working on every problem with lots of heart." [Lawyers #28] "I get to have great relationships with a lot of people." [Lawyer #23]

"*Winning, being in control, doing a good job in trial*" was the greatest satisfaction for six lawyers. Of course each of the lawyers who named "winning" and "control" litigated a substantial amount in their practice, three of them on behalf of criminal defendants. "The power of access to the courts is very satisfying." [Lawyer #3] "There are many [(sources of satisfaction)]. Number one is winning." [Lawyer #13] "Winning in trial. Those little moments in the work itself that are fun, like a cross examination when you do it well." [Lawyer #6] "My greatest source of satisfaction is beating the cops." [Lawyer #22]

These narratives about the positive qualities of practice for middle-income clients reveal substantive work that differs from that of plenty of other practice settings. Even the lawyer subjects who were seeking to change the world did not name "seeing changes in social policy" as a source of satisfaction. Nor were these achievers discussing "intellectual challenge" as the best thing about their practice. Rather, these attorneys were deriving fulfillment principally from their relationships with people, from helping them and solving their problems. Our interviews revealed that they found ample intellectual challenge in their work, but those two words or similar ones were not on the satisfaction list for any of them. This was people work, emotional work as well as mental work, and the practitioners appreciated that quality in it.

The interviews also delved into what the lawyers found to be disadvantages in their practices. Rather than ask them to rank the worst thing about their practice, they were asked a more open-ended question about its burdens.

The high level of responsibility and the money pressures of small practice were recurring themes. Ten lawyers tagged "stress" or something very close to that ("exhaustion") as a drawback of

their practice. The stress was related to being in charge—of enterprise finances and of their clients' matters. This was true even for those who named the wish for control and independence as a fundamental reason for entering this type of practice. The duty to maintain cash flow for themselves and staff also took a toll in tension. The lawyers' stress sometimes expressed itself physically, as in abdominal problems requiring surgery, alcoholism, smoking, "aging a little faster," and overeating. Two of the lawyers volunteered that they had been through treatment for alcohol abuse. One of the lawyers was disbarred a few years following our interview after "borrowing" money from the firm trust account to fund another client's case.

Others named difficulties including: being very busy with not enough assistance, maintaining momentum, being patient and kind even when clients are acting poorly, dealing with hostility from adversaries and agencies, and overcoming lulls in obtaining new clients and work.

On the other hand, twelve of the lawyers asserted that their current practice was fun and healthy and less stressful than their earlier work setting. They prided themselves on creating a humane work environment.[90] Related to this factor was the finding, mentioned above, that almost 25% of participants worked with a spouse or sibling every day. Most every lawyer described themselves as happy in their work, even the lawyer who, several years after our interview, left the practice for the ministry.

Exploring whether there were some disadvantages to the lower status of small firm practice, the subjects were asked whether such perceptions had affected them. The lawyers had a good perspective on this even as they acknowledged the reality of the perception of lower prestige. "This is just market conditioning; Coke is better!" [Lawyer #12] "You cannot *achieve* happiness." [Lawyer #5] "Solos and judges respect solo practitioners. Big firms do not." [Lawyer #26] "We solo practitioners get more respect in a small town, but specialists get more respect than generalists." [Lawyer #19]

While occasionally irksome, most found the perception of lower status for small firms to be a limitation for the beholder more

90. *See* Trubek & Kransberger, *supra* note 70, at 204 (pointing out that "critical" or "rebellious" or "transformative" lawyers, who champion "nonhierarchical and humane lawyer/client relationships" should also seek "to transform the workplace into a collegial and equitable site").

than for them. Perhaps this equanimity in the face of lower professional status grew out of the maturity required by their practices.[91]

Yet perhaps it flowed simply from the many benefits the study participants found in their practices. The lawyers found advantage in their continuing and substantial relationships with clients, in their experience of independence and control, and in the creation of caring and civilized work environments.

F. Most Important Skill for Sustaining Solo or Small Firm Practice? Relationship Building

A striking point in the interviews was the attorneys' responses to the query of what they considered to be the most important skill for sustaining their practice. No suggestions of possible answers to this question were made, rather each attorney framed an answer with her or his own words. The overlap in the language of the answers was significant.

The "*ability to build relationships and trust*" was the skill most often mentioned, with similar words used by at least ten of the subjects. This finding makes sense when remembering that the same number of lawyers—but not the same individuals—named their primary source of satisfaction as helping people and getting them what they need. The relationships the respondents meant were primarily those with clients and potential clients. These were very client-centered lawyers.

Three lawyers concluded that their "*ability to communicate clearly and to collaborate with non-lawyers*" were the skills most important to sustaining their practice. This may not be so distinct from the "ability to build relationships and trust" skill mentioned most often, as these "non-lawyers" were the clients. Yet these three lawyers did not use the language of relationships and trust, so they have been separated from those ten who used those words in describing the most important skill for their practice.

"*Competence, quality control, the ability to get the legal work done*" were named as the most important skills for sustaining practice by

91. Deborah Schmedemann, *Do Best Practices in Legal Education Include an Obligation to the Legal Profession to Integrate Theory, Skills, and Doctrine in the Law School Curriculum?* 1 J. ASS'N LEGAL WRITING DIRECTORS 127, 129 (2002) (describing the author's many conversations with practitioners on the qualities needed in various areas of practice—"maturity" was the quality most associated with solo and small firm practice).

seven attorneys. If your work is not good, you will lose respect and will get no new client referrals. The reality for most of the firms was that quality control was an ongoing challenge, especially while maintaining productivity.

Finally, "*directness, ability to be frank with clients, and valuing a case well*"—especially when the odds or amounts for their case were less than hoped for—were most important to five of the attorneys. Lawyers who named this had seen practices fold when lawyers were unable to clearly communicate bad news to clients. The ability to be frank is akin to the "*ability to get business, ask for money, and manage cash flow*," which four other attorneys concluded was most important to sustaining their practice.

Asked specifically whether the ability to deploy technology efficiently was a critical skill, these attorneys shrugged. The answer was "not so much." I anticipated that technology use would be pervasive and would shape the attorneys' efforts in their practices. Technology use was ubiquitous—every lawyer used computers and email and almost all used time-keeping and billing and case management software. Most had a web presence, but it was not central to their practice at that time (this was before wireless service and data phones were ubiquitous). Instead, as described above, the emphasis was on relationships. Technology was a sort of kitchen tool, not the meal. In fact, on inquiring about how technology enabled the practitioners to sustain their practices, I learned that virtually all of the cost savings produced by the practitioners' use of technology had been eaten by rising health care costs. Lawyers had to adopt technology to keep up, but its use was more a background reality than a foreground skill.

The subordinate position of technology makes sense within the culture of these lawyers' practices. Their attitude toward technology—necessary but subservient—also points to an advantage these lawyers should have as the Internet and associated technology become more essential to practice. As individuals and businesses gain more access to legal information than they have ever had in the past—via websites run by the courts, by government agencies, by legal aid, bar associations, non-profits, and businesses—the part of lawyers' work that requires human judgment, deep analysis, and careful planning becomes more valuable.

On the other hand, easily retrievable legal information means that lawyers will no longer be able to rely on manufactured

complexity to support their practices. Instead they will have to depend upon the quality of their relationships and on their ability to help clients with decisions that cannot be managed by computers and non-lawyers. These were already the skills and tactics that this sample of lawyers were relying upon.

The lawyers' sources of clients gave insight into why "building relationships" led the list of skills needed to sustain their small firm practices. Almost all of their clients came from referrals from other people—from satisfied clients and other attorneys, and, for several, from accountants, doctors, social workers, and other professionals. In other words, the source of their clients, of their work, was their relationships. Only three mentioned that referrals from panels—for example, an arbitration panel, a senior federation panel, a bar association panel—also brought new clients to them. One lawyer brought in 40% of new clients via the firm's savvy website that contained consumer information about a specialized area of law.

Marketing strategies (other than connecting with people in their field) were few and far between, perhaps explainable by their experience that most clients came through direct referrals from other people. Most of the lawyers made a few efforts at sales, such as writing for their websites, appearing regularly on a community radio show, and placing a small yellow pages advertisement. Those who used yellow pages advertisement reported that its value as a source of clients was beginning to drop precipitously, as phone technology changed and the web expanded (this was 2004). A criminal defense lawyer mailed solicitation letters directly to potential clients, within the ethics rules governing such mailings. A family law specialist found that grocery cart placards were cheap and surprisingly effective advertisements. At least nine found clients in the course of doing some form of community legal education or public speaking, though this was not always thought of as "marketing" as it was done for a range of reasons.

G. Concluding Observations

The studied lawyers provide useful narratives and food for thought about working with middle-income clients.[92] The lawyers' observations begin to update the view of solo and small firm practice that has deteriorated over the decades as law firms have

92. Even as no claim of statistically valid findings is made with respect to these interviews.

grown larger and larger in size. They give a glimpse into what the private bar already does to bring a variety of legal services to middle-income clients. They also offer insight into what it may take to induce more lawyers to serve middle-income clients.

The lawyers' work for middle-income clients is marked both by deep satisfaction and significant stress. No one identified "lack of meaning" as a problem in their work, in part because survival of the practice enterprise provided some meaning in itself. Relationships are primary, both as sources of satisfaction and as sources of clients.

The primacy of relationships, collaboration, and communication for this group also reveals that the model of the lawyer as a hired gunslinger who rides in and out of town is not especially salient with them. In the course of most of their representations the lawyers had to respond to the values of a greater community of which they were a part. They did not have large clients whose interests took over their practices, rather many smaller clients whose interests had to be balanced in complex ways with the interests of other clients and with the lawyers' own values and limits. Each lawyer reported that she did tell clients "no" at times, that there were definitely things she would not do for clients.[93] The solutions the lawyers proposed for their clients seemed to take some version of community into account, even if that community was simply the network of people on whom the lawyers' reputation (and practice) depended.

The great majority of the lawyers created warm work environments; explicitly appreciated the importance of their assistants' work to their practice; participated themselves in caregiving of children, parents and other family members; and allowed assistants to work part-time and flexible hours to accommodate their family lives.[94] Yet these practitioners did not

93. For example, one family law attorney would tell clients in advance of a custody evaluation that they should be prepared to accept the evaluator's findings, that they would need to find another lawyer if they wished to appeal the finding. The lawyer did this in an effort both to keep litigation costs under control for the client and to keep the family conflict from rising to toxic levels to the detriment of the long-term relationship between the parent and children. *See generally* Linda A. Olup, *Controlling Divorce Costs*, 34 FAM. ADVOC. 14, 15 (2011) (discussing the use of "neutral experts" as one of a number of means of keeping divorce costs low). This lawyer also believed that the custody evaluators generally did a good job. Other lawyers would say "no" to being paid to represent clients in, for example, Conciliation Court hearings because of the low cost-benefit ratio, even when the client was open to hiring them in such a matter.

94. There is some evidence that women in particular have chosen to work in

take full advantage of the potential flexibility of their positions. They did not give themselves much vacation. Only two attorneys worked less than forty hours per week; those two—both men—had small children and limited their work to "thirty to thirty-five" and "thirty-five to forty" hours per week. Only a few were at the leading edge of technological advance. Most had a vision for making larger change through their work, but only one included a new paradigm for practice in her plan for larger change.

These practitioners are neither as isolated nor as underperforming as some imagine. They are engaged with their work, their families, and their communities. They serve a clientele that has difficulty finding representation. How might the profession support an increase in the number of middle-income clients who employ their services and in the numbers of lawyers who focus their practices on such clients?

IV. NOTIONS FOR MAKING MORE LAWYER SERVICES ACCESSIBLE TO MIDDLE-INCOME CLIENTS

An important first step in the profession's planning to become more affordable and more accessible should be to undertake a legal needs survey. A survey should include a rigorous assessment of the needs of all people in America under the top 20% by income. This has not been done nationally for twenty years nor in Minnesota ever.[95] Among other tasks, a comprehensive survey should identify types of need including legal planning and transactional needs, levels of cost that are prohibitive, and factors other than cost that influence middle-income people away from lawyers' offices. This information would provide a basis for more than notional ways to make lawyer services available and more useful to working people.

Questions beyond those that can be answered in one survey also need investigation.[96] For example, we do not know the average

solo and small firm settings because of the quality of life and care-giving arrangements they allow. *See* CARROLL SERON, THE BUSINESS OF PRACTICING LAW 12–13, 42–44 (1996); Levin, *supra* note 33, at 861–62.

95. *See, e.g.*, LEGAL NEEDS AND CIVIL JUSTICE SURVEY, *supra* note 3.

96. The subject of legal services for middle-income people is drawing increased attention as the role of a healthy middle-class in a robust economy is examined. The Dwight Opperman Institute of Judicial Administration at New York University School of Law, for example, is planning a book and follow-up symposium on the subject in 2013. NYU LAW CALENDAR, https://its.law.nyu.edu/eventcalendar/ (last visited Dec. 14, 2012) (keyword

cost to middle-income clients of the legal services they do obtain. (In the studied sample, the lawyers were not able to estimate an average cost to clients, in part because they described such an array of payment agreements even within each practice.) How do middle-income clients appraise the value of the services they receive from their lawyers? Is there any way to determine what the clients would have lost had they not had lawyers' help, that is, to assess the consequences to people who forego lawyers for matters such as small business formation, community planning for disruption, divorce, foreclosure, wills, events of discrimination or of environmental degradation? These matters, and others, are ripe for inquiry (as discussed further below in Part IV.B).

The profession should act even while such questions are studied. Here, then, are sketches of five broad ideas that are based on the conversations with the studied lawyers, on other scholars' work, and on the author's own ten years' experience in community-based solo practice, and experience teaching William Mitchell's Civil Advocacy Clinic and an externship course, "Work of the Lawyer: Small Firms, Non-Profits & the Quality of Justice."[97]

A. Decrease Overhead and Fees—with Creativity, Technology, and Entrepreneurial Energy

Keeping one's needs simple is a time-honored strategy. It bears reasserting in this context. Lower overhead enables the work itself to be offered at a lower cost.

One of the primary reasons why small firms and solo practitioners are able to deliver services at a lower cost than most medium and large firms is that they have more flexibility to keep overhead low. Since the study of lawyers serving middle-income clients was completed, several key technological advances have allowed efficiencies that lead small practices to use more technology tools today than they did in 2004. For example,

search for "Conference on Access to Justice for Working Americans of Average Means"). On December 14, 2012, Professor Samuel Estreicher was kind enough to ask me to contribute a chapter, based on this article, to the book in the works.

97. Since fall 1989, I have co-taught the Civil Advocacy Clinic at William Mitchell almost every semester with my thoughtful colleague Peter Knapp. I have also taught the "Work of the Lawyer" externship course in fall 2008 and spring 2012 and supervised a dozen students placed in solo, small firm and non-profit placements. Students spent fifty to one hundred hours as externs (or in paid employment, not for academic credit) in those placements, while also reading and writing for a two-hour weekly seminar.

expensive office space has become less and less essential for success in a small practice. Electronic filing mandated in federal, and increasingly, in state courts[98] has made the location of one's office next to the courthouse less significant than it used to be. Space for books has evaporated, as most legal practice materials are accessible over the Internet. File storage space has dwindled because so much can be stored electronically, whether on flash drives, discs, or in the cloud. Receptionists have been dispensed with in many small firms; some lawyers use virtual receptionists via the web and cell phone technology.[99] Computers, telephones, and office equipment have shrunk and become portable.

Frankly, all that is necessary for law practice today besides a license,[100] malpractice insurance (not required by law in Minnesota but indispensable for responsible attorneys), and health insurance,[101] is a good laptop computer, a combined scanner/printer/copier, a telephone, and Internet service.[102]

98. The Federal Rules of Civil Procedure mandates electronic filing for all documents in civil cases. FED. R. CIV. P. 5(d)(3) (2012). Minnesota's Hennepin and Ramsey Counties began piloting a similar mandate effective September 1, 2012. *See Mandatory eFile and eServe*, MINN. JUD. BRANCH, http://www.mncourts.gov/district/4/?page=4645 (last visited Oct. 7, 2012).

99. *See, e.g.*, RUBY RECEPTIONISTS, http://www.callruby.com/?gclid=CKSoo8_BxLECFVJntgodwBYACA (last visited Oct. 7, 2012) (advertising a Portland, Oregon-based virtual receptionist service).

100. This has become the elephant in the room. Paying for at least three years of law school is a license prerequisite in all but about seven states. NAT'L COUNCIL OF BAR EXAM'R & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012, at 20–21 (2012), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf. This is one item of overhead that has become unwieldy for newer lawyers. Law schools should rein in tuition or otherwise restructure legal education if they want their graduates to practice for those in addition to the top twenty percent. How to accomplish that is too large a subject for this article, as is a discussion of strategies for rigorously limiting the amount of debt one acquires in law school (e.g., share housing, get a job, bring lunch, drink home-brewed coffee, eat home-cooked beans for dinner, don't own a car unless you *must*, then own a cheap one).

101. The high cost and low availability of health insurance for solo practitioners was a recurring comment in my conversations with the lawyers in the study. The state bar association had no plan where lawyers in small firms could band together and buy group health insurance though that was possible for disability and life insurance. The Affordable Care Act of 2010 is designed both to require the purchase of health insurance by 2014 and to create insurance exchanges for that purpose. *See Key Features of the Affordable Care Act, By Year*, HEALTHCARE.GOV, http://www.healthcare.gov/law/timeline/full.html (last visited Oct. 7, 2012).

102. There are some older attorneys who still operate with typewriters and without Internet connectivity, yet they built their practices before computers and

Wireless capacity combined with portable computers and cell phones have allowed attorneys to work in a variety of spaces, from home to coffee house, where no rent is necessary. Recently, co-location offices have sprung up where for $100 to $250 per month attorneys can work in a space alongside other entrepreneurs.[103] Private booths for confidential phone conversations and private client meeting space are available at some of them. Membership may buy unlimited access to the office space, meeting-room access, use of a networked printer/scanner/copier, unlimited internet access, and coffee. Co-location and possible collaboration with the start-up businesses, non-profit organizations, writers, artists, and other users of these spaces are some of their promising amenities. The line between the virtual law office and the traditional law office is becoming a little blurry as attorneys experiment with work spaces.[104]

Marketing in the past few years—again, after the study—has moved largely to the web as more people and businesses utilize the web, and that trend is accelerating. According to a recent Nielsen study, search engines are the number one resource for individuals and small owners looking for information about local businesses and services.[105] In other words, a website is a basic requirement for any law firm today except for those few attorneys who are getting all

the Internet became indispensable. Most of these older attorneys I have learned of also have a younger person in the office who provides some links to the world wide web.

103. *See, e.g.*, COCO, http://cocomsp.com/ (last visited Oct. 7, 2012) (managing spaces in Minneapolis and St. Paul where independent workers, small businesses, and corporate workgroups can gather to work); *see also* John Reinan, *CoCo's Collaborative Office Space: A Place for Independent-Minded Workers*, MINN. POST, Sept. 24, 2012, http://www.minnpost.com/business/2012/09/coco-s-collaborative-office-space-place-independent-minded-workers#.UGics7g9P_s.email; THE 3RD PLACE, http://the3rdplace.us/ (last visited Oct. 7, 2012) (advertising coworking space in Minnesota).

104. No one really knows how many lawyers practice entirely via the Internet, never meeting clients in person and conducting all of their business "virtually" over the Internet. It does not seem to be a large number, but I have found no enumeration of them. One of the most prolific advocates for and writers on virtual law practice is Stephanie Kimbro. Her website, Virtual Law Practice, includes a discussion of the ethics of such practice. *See* Stephanie Kimbro, *Response to "Ethical Pitfalls of Virtual Law Practice,"* VIRTUAL L. PRAC. (Nov. 10, 2009), http://virtuallawpractice.org/2009/11/response-to-ethical-pitfalls-of-virtual-law-practice/.

105. *'Great Divide' Separates Small Biz, Online Consumers*, MARKETING CHARTS (Jan. 21, 2009), http://www.marketingcharts.com/interactive/%E2%80%98great-divide%E2%80%99-separates-small-biz-online-consumers-7612/. This cite is from Eric Bain's paper written for spring 2012 "Work of the Lawyer" seminar.

the clients they can handle without one.

Law firm websites are used for a range of tasks—gathering clients is a primary one. Once the platform is set up, web content costs time but not necessarily cash to produce. This is an arena where creativity reaps solid rewards. For example, website names alone can convey meaning beyond the lawyers' names (e.g., www.DavisMeansBusiness.com, www.ConsumerLawyer.MN, www.CivilRightsMN.com, and www.SchoolLawCenter.com). Information about the law may be posted on a firm website with captions designed to pop up in response to potential client web search queries (e.g., "how to answer a debt collection lawsuit"). There is a whole industry to help any organization optimize search engine results for its website, and lawyers are learning to think about search engine optimization with each posting on their website. A related web-based strategy is to post free legal information that includes guidance on when consultation with a lawyer is needed. Other small firm attorneys blog as a way to encourage potential clients to become actual clients or to increase their network of attorney referral sources.[106]

Listservs in various practice areas are relied upon for information and support by small firm practitioners who do not have a ready-made web of colleagues as in a large firm. In Minnesota, the state bar association supports some listservs.[107] Others have been formed by specialist practitioners who want to share strategies and useful stories about certain industries, opposing parties, their attorneys, judges, and so forth with a group of like-minded attorneys.

Lawyers are finding efficiencies by using document assembly programs for writings that are susceptible to the use of templates.[108] A website may provide clients with intake forms to complete online

106. For examples of good law blogs, see BUDGE L. OFFICES, www.budgelaw.com (last visited Oct. 7, 2012) (stating that it was voted one of twenty-five best law practice blogs for two years in a row) and *The Top 25 Minnesota Blawgs, 2010 Edition*, PRACTICE BLAWG, http://practiceblawg.com/top25/2010-selections (last visited Oct. 7, 2012).

107. *See MSBA Member Listservs*, PRACTICELAW.ORG, http://www.practicelaw.org/78 (last visited Oct. 7, 2012).

108. See *generally FYI: Document Assembly*, AM. BAR ASS'N, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/docassembly.html (last visited Oct. 7, 2012) (discussing document assembly programs and how they can enhance consistency and allow greater efficiencies for law offices, and noting that 34% of respondents in a 2009 legal technology survey reported using such programs).

before an initial meeting with an attorney (though caution advises running a conflicts check before soliciting that information). This saves time for the client and the lawyer and helps to prepare each for a live meeting.

In sum, overhead costs for producing legal work and gaining clients are potentially lower than they have been in many years. A facility with technology is fundamental if one wishes to operate with minimal investment in physical and staff infrastructure—office, books, paper, receptionist, and so forth. Infrastructure that can do double duty, such as a conference room that is also offered to small business clients for meetings,[109] is more economical than space that is dedicated to one use. Locating an office near public transportation may save on the cost of space or subsidies for client parking in addition to providing a travel cost savings for clients.

Once overhead is paid, lawyers must pay themselves. There is some evidence that rates for small firm practitioners are trending down in conjunction with the downturn in the economy, even as medium and large firms continue to slowly raise their hourly rates.[110] The loss of income and net worth for a large swath of middle-income Americans has increased some of their legal needs, for example, for foreclosure defense or mortgage fraud, bankruptcy, consumer debt-collection defense, employment claims, unemployment insurance claims, health care coverage, and so forth. But their ability to pay for legal help has been impaired by the same forces.

Some lawyers for those potential clients are learning to charge hourly and flat fees lower than the prevailing rates and still stay in business. Over the course of the last twenty years, for example, law students in the Civil Advocacy Clinic at William Mitchell College of Law have had to choose an hourly rate for an assignment in which they craft a bill for a client whose matter they have worked on. The bills are not sent but form the basis for a class discussion on charging for one's time. We ask the students to use an hourly rate

109. This idea comes from Minneapolis-based attorney Sam Glover, who represents start-up technology businesses, *see* STARTUPLAWYER.MN, http://startuplawyer.mn/ (last visited Oct. 7, 2012), and experiments with approaches to small law business. He is one of the founders of Lawyerist.com, a website and blog which provides "advice on law firm marketing, practice management, technology, career development, law school success, legal ethics, and how to start a law practice." *See About*, LAWYERIST.COM, http://lawyerist.com/about/ (last visited Oct. 7, 2012).

110. *The 2011 Law Firm Billing Survey*, *supra* note 58.

rather than a flat fee so they experience the boundaries regarding accounting to clients for one's work. Most of the students have worked or are working for some form of legal employer and, as graduating seniors, usually have some minimal sense of the market rates for an attorney's services. Analyzing the rates chosen over the last twelve years (the years for which this data is still available in writing), with twenty to twenty-four students each year assigning a dollar amount to their time, reveals a rough approximation of the rise and fall of new lawyers' expectations.[111]

In fall 1998, the average hourly rate chosen by students for their bills was $112, with an individual low rate of $60 and a high of $150 per hour. These rates rose gradually, took a small dip following the World Trade Center attack in September 2001, and then grew again by spring 2005 to an average hourly rate of $162, with a low of $120 and high of $200 per hour. Rates maintained around that level for the next few years, always coming in higher during the spring semester as students added up their loans and looked for legal work.

In fall 2008, the students' billing rates peaked at $164 per hour, with a low rate of $90 and a high of $300 per hour. When the economy sank that fall and spring as financial and brokerage firms failed, student hourly rates dropped quickly. By fall 2009, the average hourly rate lost a decade's gains as it returned to $112 per hour. From spring 2009 through spring 2012—the last five semesters—the rates are the lowest of the decade, dipping to $93 in fall 2011. By spring 2012, the lowest hourly rate had sunk to $40 per hour, and the highest to $150, though the average was slightly up—to $105.

Students are responding to the marketplace, it seems, by becoming more realistic about the value of their services in it. Our clinic class's unscientific sample hints that hourly rates in some arenas may be trending downward since late 2008. Pricing structures are changing, and flexible small firms are on the cutting edge in experimenting with some of these changes, as discussed further in the next section.

Hourly price information alone is not enough to convince a middle-income person to hire a lawyer. Even at the rate of $50 per hour, many of the services the clinic students provide would not be

111. *See* Compilation of Data from Civil Advocacy Clinic Student Hourly Rate Assignment Fall 1998–Spring 2012 (on file with author) (containing unpublished compilation of data from student assignments).

within reach to a middle-income client, unless the students devised an agreement that capped those fees at an amount commensurate with the possible benefit to the client. For example, though it is distressing that a person may need to pay a lawyer to win their right to collect unemployment insurance, a person whose benefits are in jeopardy might be willing to pay up to two months of benefits to a lawyer in exchange for a better chance that he or she would prevail.

In my solo practice in Oakland, California, I represented many tenants in conflicts with their landlords.[112] The housing shortage there was so great that if tenants were forced to move from their rented home, they would have to move miles away or to another town. That meant moving children to new schools, longer commutes to work, and so forth. I learned to evaluate the risk of battling a landlord over rent increases[113] or needed repairs in terms of the costs a family would have to pay if they were forced to move. Those costs included increased monthly rent, moving costs, and family disruption. I did a good amount of business with clients who were willing to risk as much as three or more months' rent for the opportunity to stay in their home, prevent disruption of their children, and hold the landlord accountable for repairs or for complying with other local laws. It did not hurt that my hourly fee was under the prevailing market rate, and that the office I shared with three other attorneys in a converted house on Telegraph Avenue was modest. Clients could see that they were not paying for an address, imported carpets, and expensive furniture.

In sum, to survive in business, I had to learn to conduct honest discussions of the costs and potential benefits of hiring me,

112. I maintained a solo law practice on Telegraph Avenue in Oakland from 1978 until I returned to Minnesota in 1984, where I continued my law practice while I taught part-time at William Mitchell. I represented residential and commercial tenants in landlord matters and handled other kinds of civil litigation and advice as well. My practice included co-counseling in the defense of the City of Berkeley's rent regulation ordinances from district court to the California Supreme Court. *See, e.g.*, Fisher v. City of Berkeley, 693 P.2d 261 (Cal. 1984). My contract with the City provided a payment of $40 per hour. The combination of individual client service work and constitutional litigation was challenging and satisfying.

113. A modified form of rent control was enacted in Berkeley, California, following the passage of a state constitutional initiative to reduce property taxes for landowners, the Jarvis-Gann Initiative, Proposition I. *See* CAL. CONST. art. XIIIA, § 1. When virtually none of the resulting property tax savings were shared with tenants (e.g., through lower or even stable rents), several rent-related city ordinances were enacted in Berkeley by vote of the people. Eighty percent of the residents of the City of Berkeley were renters at the time.

grounded in the practical realities of my clients' lives, and to follow that up with delivery of high quality representation. Experience was my impatient teacher; and it reinforced the truth that good rugs do not cover poor reputation.

Fee-shifting statutes are an under-utilized source of payment for work on behalf of middle-income clients. Every lawyer should have some knowledge of local and national laws that provide for attorneys fee awards for the prevailing party. Lawyers trained at legal aid societies, public defenders, county attorney offices, and grant-funded offices seldom have a well-developed sense of when and how one might get paid by the opposing side, as these lawyers have been barred from doing so or have not needed to do so. Searching for such statutes is a habit not generally developed in law school exercises. This must change. One portal to these statutes is the Minnesota House Research Department's compilation of all fee-shifting provisions in Minnesota law as of December 2011. The list in chart form is a fat and fascinating forty pages long.[114]

A few small firm practitioners are avoiding or reducing fee costs for clients by experimenting with incorporation as non-profit organizations while representing individuals.[115] To succeed at this, the firm must have goals that go beyond representing individual clients or making a living as lawyers; the organization's work must conform with federal guidelines for educational or charitable organizations. Limits on what can be done with large attorney fee awards are one of the complications of maintaining non-profit status, and the burden of keeping up a non-profit organizational structure with a board of directors, formal meetings, and so forth, must be weighed against the advantages of potential charitable donations and the corporate form. Perhaps most importantly,

114. *See* MATT GEHRING, MINN. HOUSE OF REPRESENTATIVES, ATTORNEY FEE AWARDS IN MINNESOTA STATUTES (Dec. 2011), http://www.house.leg.state.mn.us /hrd/pubs/attyfee.pdf.

115. Gender Justice, formed in 2010, is one such organization. It "[s]eeks to eliminate gender barriers through litigation, public policy advocacy, and education programs." *Mission Statement*, GENDER JUSTICE, http:// www.genderjustice. us (last visited Oct. 7, 2012). Its two lawyer founders were specialists in gender discrimination law and now aspire to finance their work through grant funding as well as attorney fee awards from litigation. *Id.* The Minnesota Law Collective is another small law office becoming non-profit: "[O]ur first priority is educating our communities about the law, our rights, the legal system and new developments in the courts and in the legislature." MINN. L. COLLECTIVE, http://www.mnlawcollective.org (last visited Oct. 7, 2012). They also represent clients in criminal matters, expungements, and civil appeals. *Id.*

clients of the organization must be informed of and content with the social and educational goals of the enterprise, for if and when the interests of client and organization diverge, the representation may have to end.[116]

Finally, specialization allows lawyers to work more efficiently because they can use their legal knowledge repeatedly, rather than learning about many different things as more general practitioners must do. The most focused specialists in the lawyer study earned the most, yet did not work the most hours. Specialization in one or two areas of law helps generate referrals and also seems to lend credibility to practitioners in small firms.[117] Rural communities do not support specialization to the same extent that urban ones do. [Lawyer #19] While specialization is less common and less narrowly focused in rural communities, most lawyers there do not take every type of case that walks in the door.

All in all, as one of the studied lawyers [Lawyer #26] observed, it helps a great deal to know how to be happily frugal if one wants to work with a middle-income client group.

B. Increase Transparency—About the Costs, Risks, and Benefits of Lawyers' Services

Traditionally, it has been difficult for a working person to learn in advance how much an attorney may cost, at least for any lawyer other than those for whom flat fees paid in advance are the norm, such as criminal defenders. The common attorney's view was that a potential client should come to the office and discuss their matter in person before money was mentioned, so that the lawyer could make the pitch for his services more convincingly. This is an old salesman's trope.

The Internet is changing the way people buy services as well as products. Many shop, sell, bank, invest, pay taxes, work, and obtain degrees online. Nonetheless, a face-to-face meeting persists as the desired norm for most attorneys and clients before entering a representation agreement.[118] As discussed above, relationships are

116. *See generally* MINN. RULES OF PROF'L CONDUCT R. 1.7 (2008) (discussing conflicts of interest).

117. *See* Margaret Graham Tebo, *Battling the Solo Stigma*, 90 A.B.A. J. 31, 31 (Feb. 2004).

118. There has been some increase in the provision of legal services over the Internet, for example, in "virtual law offices." *See, e.g.*, STEPHANIE L. KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE 8 (ABA Law

the source of most client referrals, as well as of many of the satisfaction and skill challenges here.

The web is often enlisted in beginning that attorney-client relationship. Potential clients seek information about the firm, an area of law, and probable costs when deciding whether to hire a lawyer. It seems increasingly essential for a firm to post thick information about fees and services on its website when aspiring to represent middle-income people and small businesses.[119] I have heard practitioners comment that their practice picked up after they posted prices on their website. Fees that are displayed are mostly flat fees for specified legal tasks (e.g., incorporation or dissolution without children) or explanations of the varying methods for charging fees (e.g., hourly rate for the first two hours, then a flat rate, and so forth).[120] Seldom are hourly rate numbers posted for anyone to see, though that—like most other things on the web—may change.

Flat fees and subscription pricing (for ongoing clients) are increasing in use among small firm practitioners.[121] Why? Because

Practice Management Section ed., 2010). Yet some who have tried that route have not sustained it, in part because it is less satisfying to maintain automated systems and contact over the Internet than to help people in person. While technology enthusiasts proselytize that the way to dent the problem of access for low-income people is via document-assembly programs and self-help-guided interviews over the web, this has not yet been widely adopted and has suffered the same challenges to sustaining the effort. *See* Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1122–28 (2009) (giving a lively overview of document assembly programs, beginning in 1978 with a short-lived success, concluding with hope for a collaborative, national, and low-cost document assembly system that could assist in delivering lower cost legal services).

119. *See, e.g.*, BUDGE LAW OFFICES, http://budgelaw.com (last visited Oct. 7, 2012); *Fees*, SHAH PEERALLY LAW GRP., PC, http://www.peerallylaw.com /en/content/view/178 (last visited Oct. 7, 2012); *Fees and Policies that Apply to All Clients*, DAVID J. WILLIS ATTORNEY, http://www.lonestarlandlaw.com/Fees.html (last visited Oct. 7, 2012); *So What Is This Going to Cost?*, DAVIS MEANS BUS., http://www.davismeansbusiness.com/fees (last visited Oct. 7, 2012); STARTUP LAWYER, http://startuplawyer.com (last visited Oct. 7, 2012).

120. The Minnesota Law Collective's website provides sliding fee information: "Fees range from $50 to $300 for classes and representation in low-level offenses and violations, from $500–$2500 for representation in Gross Misdemeanor and Felony offenses, from $300–$800 for representation in Expungements and from $500–$2500 for representation in Appellate matters." *The Sliding Fee Scale*, MINN. L. COLLECTIVE, http://www.mnlawcollective.org/representation.html (last visited Oct. 7, 2012).

121. This is not the case for large firms, however. A recent study found that flat fees are increasing only slowly among large firms despite being embraced enthusiastically by their corporate clients. *See* Jennifer Smith, *Report: Alternative Fees*

most people prefer to know what their legal help is going to cost before they commit to it. Hourly rates that do not include a cap on total fees do not help clients predict their cost risk with any precision, and so discourage the decision to hire a lawyer. "I can't afford $175 per hour!" an elderly woman exclaimed recently when I asked whether she had success in finding an attorney to help with her $8000 conflict with a contractor. She had called an attorney who was known for helping lower- and middle-income people and, when quoted that hourly rate over the phone, believed there was no way she could get a lawyer's help with her matter. She was ineligible for a volunteer lawyer or for legal aid.

On reflection, if this solvent but economically frail homeowner had been told that she would be given a half-hour consultation for free and that the conflict would cost $750 if it fit certain criteria, she may well have asked to meet with the attorney. She was willing to invest in help to solve the conflict, but as someone who had never earned more than $25 an hour, a three-digit hourly rate was impossible for her to contemplate. Knowing the maximum cost in advance seems to make it more likely that a client will actually hire counsel, at least when that cost is commensurate with the potential benefit and risk to the client. (The attorneys shoulder risks in these arrangements as well, of course.[122])

The possible benefit of a lawyer's services has become murkier as "legal information" services proliferate. A person with a legal problem or transaction now may be weighing the cost and benefits of a licensed lawyer's services against the cost and benefits of an inexpensive do-it-yourself service. The value of a lawyer and the risks of no lawyer are difficult for most people to determine.

Lawyers must address this information deficit with communications about the value of lawyer service that is more nuanced, complex, and compelling than in the past. Look, for example, at how LegalZoom and Rocket Lawyer encourage people to think that their services are virtually as good as help from a lawyer.[123] The word "Lawyer" appears in large letters in Rocket

Continue Snail-Paced Assault on Billable Hour, WALL ST. J. L. BLOG (July 10, 2012, 8:44 AM), http://blogs.wsj.com/law/2012/07/10/report-alternative-fees-continue-snail-paced-assault-on.

122. My evidence for this assertion is anecdotal and from my own experience. *See also* Poll, *supra* note 27.

123. *See* LEGALZOOM, http://www.legalzoom.com (last visited Oct. 7, 2012); ROCKET LAWYER, http://www.rocketlawyer.com (last visited Oct. 7, 2012).

Lawyer's bright red home page banner.[124] As one scrolls to the bottom of the home page, there is a statement in tiny, grey type on grey background that reveals: "RocketLawyer.com™ provides information and software only. This site . . . does not provide or participate in any legal representation."[125]

After one has checked the boxes to prepare an online document, one must click to agree to the "Terms and Conditions" before one's assembled document will be delivered. The terms include further disclaimers:

> [T]he legal information on this site is not legal advice and is not guaranteed to be correct, complete or up-to-date. Because the law changes rapidly, RocketLawyer.com cannot guarantee that all the information on the site is completely current. The law is different from jurisdiction to jurisdiction, and is also subject to interpretation by different courts. The law is a personal matter, and no general information or legal tool like the kind RocketLawyer.com provides can fit every circumstance. Therefore, if you need legal advice for your specific problem, or if your specific problem is too complex to be addressed by our tools, you should consult a licensed attorney in your area.[126]

Rocket Lawyer's distinction between legal "information" and legal "representation" will be lost on many consumers, as will the warning that the information may not be up-to-date and may not be applicable in their jurisdiction. There is little guidance to help a customer discern whether the "information . . . RocketLawyer.com provides . . . fits [their] circumstance" or if they "need legal advice" or if their problem "is too complex to be addressed" by Rocket Lawyer's "tool."[127]

Virtual legal information services are tapping into an unmet need. Rocket Lawyer's founder says it was begun "to make the law accessible to more people" and claims that twenty million people have used Rocket Lawyer's services since it began in 2008.[128] Last year's $18,500,000 investment by Google in Rocket Lawyer presages

124. ROCKET LAWYER, *supra* note 123.

125. *Id.*

126. *Terms & Conditions*, ROCKET LAWYER, http://www.rocketlawyer.com/terms.aspx (last visited Oct. 7, 2012).

127. *See id.*

128. Charley Moore, *Rocket Lawyer Has a New Look, Thanks to You*, ROCKET LAWYER, http://www.rocketlawyer.com/article/rocket-lawyer-has-a-new-look.rl (last visited Oct. 7, 2012).

a world where public legal information will be as quickly available on the web as a photograph of the street where you live.[129] Since the Google outlay, Rocket Lawyer has made some documents free for self-assembly. Under a tab called "Pricing," one learns that it also recently added "legal plans" for monthly payments as low as $9.99 per month.[130]

Clearly, Rocket Lawyer has plans to expand rapidly. Some states are fighting online legal information services with lawsuits charging unauthorized practice of law; most are ending in settlements where the service agrees to change the most egregious misleading practices in exchange for being allowed to continue business as usual.[131]

An enormous amount of legal information should be easily available in the new web world, and lawyers' business models will have to embrace that reality. Charging hundreds of dollars to fill out a form for a client will not—should not—be possible much

129. Daniel Fisher, *Google Jumps into Online-Law Business with Rocket Lawyer*, FORBES (Aug. 11, 2011, 8:17 AM), http://www.forbes.com/sites/danielfisher/2011/08/11/google-jumps-into-online-law-business-with-rocket-lawyer/.

130. *Plans & Pricing*, ROCKET LAWYER, http://www.rocketlawyer.com/plans-pricing.rl (last visited Oct. 7, 2012). Prepaid and group legal insurance plans have never really attracted sustained business. HEINZ, *supra* note 24, at 283. One problem was that groups that offered insurance, such as AARP and unions, had difficulty informing their members about them. Another issue was that people who purchased pre-paid insurance very seldom continued to subscribe once they did not use it, or tried to use it and learned of its limitations. *See generally* WAYNE MOORE, INT'L LEGAL AID ASSISTANCE GROUP, THE IMPACT OF GROUP AND PREPAID LEGAL SERVICES: PLANS TO MEET THE NEEDS OF MIDDLE INCOME PEOPLE (2003), *available at* http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Harvard_2003/Conference_Papers/The_Impact_of_Group_and_Prepaid_Legal_Services_part1.pdf. It will be interesting to track Rocket Lawyer as it tries a new form of prepaid legal plan. *But see* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORTS OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION 64–70 (1992) (discussing the role of prepaid and group legal service plans in making progress toward providing services to persons of modest means).

131. *See* Stephanie Rabiner, *LegalZoom Sued by Alabama Bar Group for Unauthorized Practice*, FINDLAW FOR LEGAL PROF. (July 20, 2011, 5:44 AM), http://blogs.findlaw.com/strategist/2011/07/legalzoom-sued-by-alabama-bar-group-for-unauthorized-practice.html; Debra Cassens Weiss, *LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement*, A.B.A. J. (Aug. 23, 2011, 7:32 AM), http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/; Debra Cassens Weiss, *Wash. AG's Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, A.B.A. J. (Sept. 21, 2010, 8:06 AM), http://www.abajournal.com/news/article/wash._ags_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure/. These sources were gathered by Geri Anderson for a paper in the author's "Work of the Lawyer" seminar. *See* Anderson, *supra* note 51.

longer. The profession must figure out how to work with, rather than against, Rocket Lawyer and its like. To do so, lawyers will have to educate potential clients (and themselves) about the value that a full lawyer can add to those documents the person is assembling, about when a person "needs legal advice."

How might lawyers persuade consumers to come to them for counsel on wise use of the legal information and documents they have found for themselves? One strategy has the lawyer mimicking these services' approach: use the web to give away the same forms the document assembly sites are charging for (e.g., an answer to a debt collection complaint) but include enough explanation of the judgments involved that the potential client is moved to meet with the lawyer for help. Another approach is for lawyers to blog about problems they have had to correct for consumers (e.g., LegalZoom estate plans) and try to get additional former LegalZoom customers to come to them for similar fixes.[132]

Potential clients are also weighing the cost and benefits of a lawyer's services against the risks of representing one's self in court or in an administrative agency proceeding. The number of self-represented litigants ("SRLs") has ballooned over the last decade.[133] Eighty percent of divorces have at least one party SRL, the vast majority of defendants in housing court appear without a lawyer, twenty percent of bankruptcies are filed *pro se,* and some report that, in one-third of all litigation, one of the parties is self-represented.[134]

The ramifications of SRLs and what the profession, the judicial system, and society should do in response to their rising numbers is being studied.[135] The trend is another indicator that lawyers have

132. *See, e.g.*, Rania Combs, *The Problem with LegalZoom (and Other Do-It-Yourself Estate Planning Solutions)*, TEX. WILLS & TR. ONLINE: RANIA COMBS, ATT'Y AT L. (Jan. 27, 2010), http://www.texaswillsandtrustslaw.com/2010/01/27/the-problem-with-legalzoom-and-other-do-it-yourself-estate-planning-solutions/.

133. *See, e.g.*, Pro Se Implementation Committee, *2001-2012 Annual Report*, MINN. ST. B. ASS'N, http://www2.mnbar.org/committees/pro-se/annual-reports.asp (last updated May 23, 2003).

134. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 459 n.25 (2011) (citing Madelynn Herman, *Self-Representation Pro Se Statistics Memorandum*, NAT'L CTR. FOR ST. CT. (last modified May 8, 2009), http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#statecourt; Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2005)).

135. *See, e.g.*, FED. BAR ASS'N, *PRO SE* PROJECT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA AND THE FEDERAL BAR ASSOCIATION, MINNESOTA CHAPTER (2011), *available at* http://www.fedbar.org/proseproject2011.

not succeeded in making their services affordable or otherwise necessary even to people who must appear in court. Lack of transparency about cost and benefit and risk certainly play a role in that trend—as does the unacceptably high (to a person of middling means) cost of lawyers' services.

Clear-eyed information about the benefits and risks of lawyer services requires that lawyers themselves see those factors clearly. It is only when the risk of do-it-yourself representation or of doing nothing are truly greater than the risk and costs of a lawyer that people will hire lawyers. As lawyers reflect on ways to gather clients in this new world of web-assisted do-it-yourself and *pro se* representation, they need more evidence about the real merits of using a lawyer in transactions or drafting documents or disputes.

There are some empirical studies of the benefits lawyers bring to processes that have traditionally been their sole domain, even as more studies are needed. Do we have evidence that lawyers add value, say, to the defense of misdemeanors? A study of the lower courts of Boston in 1970 found the answer was: not so much.[136] To the petitioning for bankruptcy? Perhaps so. A more recent study comparing bankruptcy petitions filed *pro se* (21% of petitions were *pro se*) with those filed by attorneys found the dismissal rate of the *pro se* petitions much higher than for attorneys' filings.[137] To the formation or dissolution of small businesses? To unemployment insurance or employment discrimination claims?[138] These are

136. STEPHEN R. BING & S. STEPHEN ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 32–34, 51–55 (1970). This is a classic study finding serious flaws in the administration of justice in Boston, documenting differences in continuances, rates of pretrial release on bail, and findings of guilty and not guilty between defendants with assigned counsel, private counsel, and those with no lawyer. *Id.* Defendants who represented themselves received substantially better outcomes than defendants who were represented by an assigned lawyer. *Id.*

137. Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by* Pro Se *Debtors*, 26 EMORY BANKR. DEV. J. 5, 31–32 (2009) (examining a large sample of Chapter 7 bankruptcy cases from both before and after the 2005 federal bankruptcy reform, heightening the law's complexity, which was composed of 20% *pro se* cases and finding that filing *pro se* was associated with a much higher level of dismissals and that that phenomenon was exacerbated by the complex new bankruptcy act, after which *pro se* cases were dismissed at an even higher rate).

138. *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2210 (2011) (finding that unemployment benefit claimants who were provided full-scale representation in administrative appeal hearings fared somewhat worse than those who received no representation at all); *see also* Bill Henderson, *Research Conference on Access to Civil Justice: Empirical*

questions that are susceptible to analysis through data combined with experienced lawyers' judgment.

The investigations cited above were prompted by the rise in *pro se* litigants. Should the profession seek to simplify court processes so that SRLs are more successful in their divorces, bankruptcies, eviction, and foreclosure defenses? Of course![139] But we need more understanding of the causes of the SRL phenomenon in order to craft creative and wise responses to it.[140] And the bar and bench will need to find ways to transfer any understanding gained to the people who face legal predicaments.

As the profession seeks to understand further why so many people eschew legal help, it should also focus on offering more lower-priced legal counsel with clear risk analysis to the many people who are trying to do too much in the courts on their own.[141]

Perspectives, EMPIRICAL LEGAL STUD. (Nov. 15, 2008, 7:44 AM), http://www.elsblog.org/the_empirical_legal_studi/2008/11/research-confer.html (summarizing Laura Beth Neilsen's presentation, Address at the Research Conference on Access to Civil Justice: Pro Se Claimants in Federal Court: An Empirical Analysis of Legal Representation in Employment Civil Rights Cases (Nov. 14, 2008), and her unsurprising findings that *pro se* claimants are more likely to have their cases dismissed than are represented claimants in federal employment discrimination cases); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 167 (2003) (citing ELEANOR E. MACCOBY & ROBERT J. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 110 (1997) (finding that litigating parents had better outcomes with respect to custody of children when they were represented by an attorney than when they proceeded *pro se*)).

139. Again, a real analysis of that question is beyond the scope of this article, but see generally Peter Edelman, *When Second Best Is the Best We Can Do: Improving the Odds for Pro Se Civil Litigants*, *in* CLOSING THE JUSTICE GAP 39 (Center for American Progress ed., 2011), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose_all.pdf (outlining serious justice flaws for *pro se* litigants in Washington, D.C. housing courts and proposing further reforms).

140. Swank, *supra* note 134, at 385–86 (arguing that policy makers should not erect barriers to *pro se* litigation or, on the other hand, dilute procedural and evidentiary rule protections of the courts in reaction to SRLs until we understand better why the SRLs are there on their own); *see also* Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, *in* CLOSING THE JUSTICE GAP, *supra* note 139, at 13 (discussing the need for a better understanding of the *pro se* phenomenon, as well as for developing solutions to deal with the crises it has caused for both litigants and the courts).

141. *See* Moses, *supra* note 140, at 16; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 40–44 (2010).

C. *Build Involvement—via Community Education; via Cooperation with Non-Lawyers*

Another pathway bringing lawyers and middle-income people together is involvement in the communities and institutions of which they are a part. As noted above, one barrier standing between people and lawyers is non-lawyers' difficulty in understanding when there is a legal means to solving a problem or when a lawyer will help secure a better solution than the individuals can manage on their own. When people do not know their rights under the law they do not assert them. In addition, anti-government sentiment seems strong, and people in America may not be as trusting of legal remedies as people in other countries. This is despite our being a more law-based country than many others.[142]

Community legal education is an important component in helping empower people's own action, in preventing legal trouble, and in assisting individuals in knowing when to turn to a lawyer for assistance. For example, many tenants are misled by their landlords about the basic rules governing repairs, utility service, or return of security deposits; new unmarried fathers seldom understand the large consequences of adding or withholding their names from their babies' birth certificates;[143] and small businesses need to understand their legal situation and remedies as they work to survive light rail construction along their business corridor. The list of opportunities for community education is long and ever-renewing.

Lawyers may engage with community education in their fields of expertise as a means of business development, but also as public service and, equally important, for their own education. To be effective, community legal education should go further than simply presenting legal information in clear, easy to understand formats, though that should not be abandoned. Lawyers also need to find means for long-term involvement with the communities of which they are a part. As several clinical teachers wrote:

142. *See* Gillian K. Hadfield, *Legal Services Wanted; Lawyers Need Not Apply*, PAC. STANDARD (June 28, 2011), http://www.psmag.com/legal-affairs/legal-services-wanted-lawyers-need-not-apply-32128/.

143. This example comes from the experience and paper of William Mitchell College of Law student Jenny Nystrom, *Community Education—Serving Unmarried Parents*, written in Spring 2012 for the "Work of the Lawyer" course (on file with author).

> To be empowering, community education—legal or otherwise—must provide information in a manner that allows the individual or community the ability to make informed choices, rather than give them another system and set of persons to be dependent upon for help. Accordingly, community education should build on the capacity of the community; be flexible; and should allow the community to recognize its ability to identify its problems and contribute to solving those problems.[144]

We know that low- and middle-income working people have all kinds of issues that bring them to court, that plague their workplaces or neighborhoods, that lead them into more debt than they can afford, or, more happily, that inspire them to create new enterprises. Lawyers should not assume they know what information these individuals need, but should find occasions in the community to listen. Only through listening will they learn the ways that they may best help.

The settings and mediums for delivering the help can be various, and lawyers need to be flexible and inventive in doing so. Besides the traditional lawyer-client relationship and law firm websites, lawyers should consider group presentations, know-your-rights brochures, media campaigns, self-help workshops, video squibs, and training of lay advocates as strategies for legal engagement with the community.[145]

Along with community education, lawyers may build involvement with a community of middle-income people through partnerships with non-lawyers. Lawyer partnerships with others may contrast with lawyers' more traditional "autonomous savior" role.[146] Practitioners in some areas of law are more adept than others at cooperating with workers in related fields. Elder law attorneys, for example, ideally draw on collaborations with social

144. Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 426 (2012).

145. *See generally* Ingrid V. Eagly, *Community Legal Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998); Randi Mandelbaum, *"Aging Out: Don't Miss Out"—A Model of Community Legal Education*, 48 FAM. CT. REV. 338 (2010); Andrea C. Yang, *Re-Considering Progressive Lawyering: The Theory and a Growing Practice in Asian Immigrant Communities*, 16 ASIAN PAC. AM. L.J. 100 (2011).

146. Mansfield & Trubek, *supra* note 34, at 376. Atticus Finch's approach to the defense of Tom Robinson, for example, has been critiqued for failing to include the community in an anti-racism initiative alongside or in place of a romanticized "white knight" narrative. *See generally Monroe* Freeman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994).

workers, nursing care managers, and medical professionals when structuring a care plan for a disabled or elderly person. Experienced criminal defense attorneys are knowledgeable about evaluation, treatment, diversion, and employment services in a community. Though realtors and title insurance companies have taken over some of the work that lawyers used to do, many of them collaborate with lawyers. Bankers, mortgage brokers, financial advisors, community organizers, and trust account officers also have opportunities to work with lawyers in assisting clients. An entire genre of medical-legal partnerships has developed over the last decade or so, assisting all sorts of persons who have overlapping medical and legal needs.[147] Environmental lawyers work with scientists and residents, farmers, food sellers, and other businesses to understand and manage impacts on the environment.

Strategic partnerships between lawyers and community-based institutions and people bring more diverse perspectives to the problem-solving tasks at hand. They also facilitate referrals of people who need legal help to lawyers knowledgeable in the subject area.

In sum, focused cooperation among lawyers, communities, and other work disciplines is a promising method for bringing legal resources to people who currently do without them.

D. Adapt Amount of Assistance to Client Capacity (Carefully)

On the subject of partnerships with non-lawyers, lawyers surely must work as partners with their clients as well. If they are to reach more working people and small businesses, lawyers need to cooperate with those potential clients to find a level of service they are comfortable with and can afford. This may mean offering less than a full-service, full-responsibility approach to the lawyer-client representation agreement. Many clients are ready and willing to play a significant role in handling their own legal matter, especially,

147. *See* NAT'L CENTER FOR MED. LEGAL P'SHIP, http://www.medical-legalpartnership.org./center (last visited Oct. 8, 2012). According to its website, Medical legal partnerships (MLPs) is a new patient care model that aims to "[i]mprove the health and well-being of vulnerable people by transforming the healthcare system to address health-harming, unmet legal needs." *Id.* There is only one medical-legal partnership in Minnesota at present, the Leonard Street & Deinard Legal Clinic in Minneapolis. *See Pro Bono*, LEONARD, STREET & DEINARD, http://www.leonard.com/pro-bono/legal-clinic (last visited Oct. 8, 2012). For further discussion of the history, genesis, and benefits of MLPs, see Mansfield & Trubek, *supra* note 34, at 374–76.

but not only, when it reduces their costs.

Advice on transactions has long been amenable to an advice only, partial-representation approach. Businesses are accustomed to using lawyers in a consulting role, not relying on them to negotiate all agreements even as they ask lawyers for advice about and help in drafting those agreements. Small firms may arrange a monthly retainer for small businesses, with the fee including periodic check-up phone conversations even when no documents need to be drafted or disputes resolved.

Clients with ongoing business advice needs differ from those with disputes or intensive personal planning needs. "Unbundled" legal services refers to lawyer services in the latter settings that are limited in scope. These may include advice, negotiation, document review, document preparation, and limited representation. In 2005, the Rules of Professional Conduct were changed to clarify that lawyer-client agreements that limited the lawyer's services would not violate the ethical duty to provide competent and diligent representation.[148] The idea that the needs of the lower- and middle-class could be better met by allowing lawyers to assist a client, for example, by ghost-writing a pleading but then ceasing representation before any court hearing, has been embraced by the bench and bar as an approved tactic.[149]

While many have welcomed the movement to offer partial services, much is still unknown about the impact of that practice. Some evidence confirms that unbundled services are just as good as full-service representation.[150] Other evidence points in the opposite

148. MINN. RULES OF PROF'L CONDUCT. R. 1.2. (2008); Patrick R. Burns, *Ethical Considerations in Providing Unbundled Legal Services*, MINN. LAW., Feb. 7, 2005, http://lprb.mncourts.gov/articles/Articles/Ethical%20Considerations%20In%20Providing%20Unbundled%20Legal%20Services.pdf. Lawyers were offering limited scope assistance to clients well before the rule change as an accommodation to clients seeking to reduce their fees. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 425 (1994).

149. *See generally* AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE (2003), *available at* http://apps.americanbar.org/litigation/taskforces/modest/report.pdf; Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 157 (2011). For ethical boundaries, see generally James M. McCauley, *Some Basic Ethical and Practical Rules Relating to Unbundling of Legal Services*, 2004 PROF. LAW. 63 (Symposium Issue) (2004).

150. D. James Greiner et al., How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court (Sept. 1, 2012) (unnumbered working paper), *available at* http://ssrn.com/abstract=1880078.

direction: full services are much better than unbundled services.[151] The profession should not assume that *some* lawyering improves outcomes more than *no* legal advice at all, as there is evidence that suggests contexts in which people are better off representing themselves than with partial representation from a lawyer.[152] Varying legal subject matter contexts, the complexity of the cases, whether the cases were litigated in district court or in a specialized forum, the culture of the provider, and the power differential between the parties each have been identified as factors affecting the effectiveness of unbundled services.[153]

As one experienced voice, Peter Edelman, cautions:

> [U]nbundling is no panacea. It's [especially] risky for lawyers to take on a limited representation role on short notice. Even knowledgeable lawyers can miss important aspects of a case if they haven't been involved from the beginning. And it's difficult to assess a case and effectively prepare an argument on the spot . . . . When the unbundled service does not resolve the case and the party has to continue on pro se, it is fair to ask how meaningful the service was.[154]

More experience and empirical studies are needed. Until then, individual attorneys and clients should proceed with educated caution in this direction, discovering through a reflective process when limited service succeeds in achieving a better outcome and in moderating the long-term cost of lawyer services.

151. *See* D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, HARV. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1948286; Steinberg, *supra* note 134, at 482.

152. A study of a court-based self-help center found that those who received unbundled services in eviction cases fared no better and no worse than those who received no services at all. UCLA SCH. LAW EMPIRICAL RESEARCH GRP., EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER FINAL REPORT 2001, at 3 (2001), *available at* http://www.courts.ca.gov/partners/documents/Final_Evaluation_Van_Nuys_SHC2001.doc. Another study found that those who received full-service representation actually fared worse than those who received no representation at all. Greiner & Pattanayak, *supra* note 138, at 2118.

153. Kate Zerwas Graham, Unbundled Legal Services: Does it Work? (Apr. 27, 2012) (unpublished manuscript, William Mitchell College of Law) (on file with author). Ms. Graham's paper provided a foundation for much of this brief overview of unbundled services.

154. Edelman, *supra* note 139, at 43.

E. Find a Role for Subsidies—from Government, Industry, and Charities

The ideas outlined above are oriented toward actions lawyers can initiate without direct government involvement. Yet, of course, legislative and administrative agency action are also needed to address the lack of legal care for middle-income people. The new federal Consumer Financial Protection Bureau is a good example of an agency whose efforts are bolstering the legal position of the bottom eighty percent.[155] State legislatures can enable further awards of attorneys' fees by statute, as noted above. They also may strengthen or weaken state agencies that help all people with their housing, financial, employment, health care, criminal, energy, environmental, parks and recreation, water and air quality, food security, and family-related legal matters.

There are many times when citizens' fundamental rights and well-being are affected in civil actions where there is no recognized constitutional right to the assistance of counsel. "Civil Gideon" is a growing national movement that urges governments to provide counsel as a matter of right at public expense to low-income persons in matters where basic human needs such as child custody, shelter, health, and safety are at stake.[156] While tax-supported funding for lawyers in these circumstances seems unlikely in the near future, deep injustices continue to occur in courtrooms for those who cannot afford a lawyer's assistance, so momentum for Civil Gideon builds.

As state Access to Justice commissions study responses to the shortage of legal assistance to the poor,[157] considerations of access

155. This new federal agency was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376-2223. Its first nominee for director, Elizabeth Warren, was not confirmed by the Senate, and President Obama appointed Richard Cordray as director in January 2012 while Congress was in recess. The agency is now undertaking many projects that are intended to protect and inform consumers. *Learn About the Bureau,* CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited Oct. 8, 2012).

156. *See* AM. BAR ASS'N TASK FORCE ON CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, at 7 (2006), *available at* http://www.legalaidnc.org/public/participate/legal_services_community/ABA_Resolution_onehundredtwelvea[1].pdf. For more on the Civil Gideon movement and related resources, the Philadelphia Bar Association has set up a corner on its website for that purpose. *See Civil Gideon Corner*, PHILA. BAR ASS'N, http://www.philadelphiabar.org/page/CivilGideon?appNum=3 (last visited Oct. 8, 2012).

157. Minnesota established an Access to Justice commission, the Minnesota State Bar Association Civil Gideon Task Force, in 2007, and issued its first report in

for the non-poor, that is, for middle-income people, should be incorporated at every step. Luz Herrera has eloquently argued for a rethinking of the federal legal services system to include affordable legal help for people of moderate-income who are not eligible for legal aid, and for incorporation of solo and small firm, community-based attorneys in the expansion plans.[158]

Courts, law schools, and industry should provide resources to develop evidence about the value that lawyers do or do not add in particular legal contexts. Studies are needed to ground decisions of how to address *pro se* litigation, when and how to offer unbundled services, and how to improve the effectiveness of the profession and the quality of justice. Empirical studies take time and resources, which small firm practitioners and legal aid societies are not in a position to champion without support.

Funding is needed to maintain referral networks that currently focus on low-income people and to expand them to operate on behalf of individuals in the middle three quintiles of income as well. In Minnesota, referral systems for low-income people have earned respect and wide-spread support. It is a huge challenge to increase such service to include people above 125% of the poverty level without diminishing support for the most vulnerable. Yet we must try it.

Law schools and bar associations should raise and dedicate resources to pave more pathways for students to enter practices dedicated to serving middle-income people and small businesses.[159] To provide incentives to enter the small firm community and justice-oriented practice, law schools must offer more exposure to and respect for it during law school. Externships and other courses focused on exploring this sector of practice should expand and

2011. MINN. STATE BAR ASS'N CIVIL GIDEON TASK FORCE, ACCESS TO JUSTICE 1 (2011), *available at* http://www2.mnbar.org/committees/CivilGideon/MSBA%20Civil%20Gideon%20Task%20Force%20-%20Access%20to%20Justice%20-%20Assessing%20Implementation%20of%20Civil%20Gideon%20in%20Minnesota%20(FINAL).pdf.

158. Herrera, *supra* note 69, at 45–48.

159. In 1997, the Open Society Institute funded the Law School Consortium Project (LSCP) with four law schools. *See History of the Law School Consortium Project*, U. MD. FRANCIS KING CAREY SCH. L., http://www.law.umaryland.edu/programs/clinic/initiatives/lscp/ (last visited Oct. 9, 2012). Its purpose was to revise law school curricula, build networks among solo and small firm practitioners, and use the law school to provide technical and substantive support to graduates who wanted to practice in solo and small firms and who included access to justice as a goal of their practice. *Id.* The LSCP "went into rest" in 2009. *Id.*

find regular spaces in the curriculum.[160] Competitive summer clerkships could be established to place students at small and solo law firms who serve middle-income people. Occasions for honoring attorneys who serve the non-poor at affordable levels should be created and publicized.

Law schools and their alumni could subsidize technical and substantive support for a network of alumni or attorneys based in or near the neighborhoods in which the law schools are located and who pledge to deliver services at a low-cost to clients. Those support services could include free continuing legal education programs in relevant areas, computer software and hardware expertise, maintenance of a listserv or website for conversation and sharing of resources, quarterly forums at the law school with speakers and policy-makers in roundtable discussions, placements of law students to contribute legal research, writing, investigation, and other support, and so forth.

If small business and the middle-class really are the engine that drives the United States economy, then business leaders should contribute generously to these initiatives as well.

V. CONCLUSION

Law used to be a respectable middle-class profession, community-based as was most work, and the source of deep satisfaction. It was not a ticket to becoming rich. The lawyers in the study typify that approach. They derive great satisfaction from their work, primarily because of the relationships built and helping of people that it involves. Theirs is personal work, work they chose and continue out of choice despite its stresses. They believe their clients value their assistance. They do not care much about prestige levels, as their commitment to small firm or solo practice is based as much on its internal as it external rewards.[161]

160. William Mitchell offers "Work of the Lawyer" and also places students in such practices every semester through its supervised, independent externship program. Several of its clinics are taught by solo or small firm practitioners who teach students the ethos of small firm practice.

161. For confirmation of the high comparative satisfaction of small firm practice, see Kenneth G. Dau-Schmidt & Kaushik Mukhopadhaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342, 362 (1999) (studying a large data set of University of Michigan Law School graduates, and finding that lawyers in small firms, government, and public interest practices "find their work intrinsically more satisfying than their counterparts in large private practices—sometimes

As we study ways to improve the delivery of legal services to all people in America, the importance of relationships to the satisfying practice of law must be kept in mind. A recent article about the delivery of medical care makes the point that physicians' sense of professional responsibility can be diminished when their service is made into a market commodity.[162] And while lawyers' outcomes for their clients are somewhat more difficult to measure with numbers, moves toward efficiency should be tempered with understanding of the importance of relationships and trust to this work. The skills of making wise judgments, of analyzing complex problems and then planning and collaborating to solve them, should be highlighted and enhanced as the legal profession adapts to the hyper-availability of legal information and other forces.

The article posits some basics for expanding service to middle-income clients, derived from actions that are already taking place. These nuts and bolts ideas include: lowering the cost of lawyers' services (which likely will involve also some lowering of lawyers' expectations for income); finding and communicating deep, true information about the value of choosing a lawyer as contrasted with proceeding without a lawyer; engaging thoroughly with communities through education and involvement with non-lawyers in similar areas of endeavor; considering with clients what amount of lawyer service is feasible and effective; and, finally, finding ways for funding to support lawyer efforts on behalf of middle-income people and the small businesses run by them.

The challenge now is to connect, only connect, middle-income clients and small firm practitioners. These firms have been under the radar and are filled with creative, ambitious, and self-directed lawyers. They need help in making a modest living while enhancing their communities' human activities and the quality of justice.

considerably more satisfying").

162. Christine K. Cassel & Sachin H. Jain, *Assessing Individual Physician Performance: Does Measurement Suppress Motivation?*, 307 JAMA 2595, 2596 (2012) (exhorting those implementing extrinsic rewards (i.e., pay-for-performance measurements) for physicians to watch for the harm that may be done when intrinsic motivations are impaired, such as patient appreciation and recognition, satisfaction at solving problems and in managing complex tasks).