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THE PRO BONO REQUIREMENT IN INCUBATOR PROGRAMS: A REFLECTION ON STRUCTURING PRO BONO WORK FOR PROGRAM ATTORNEYS

DAVIDA FINGER*

INTRODUCTION

This article explores the pro bono lawyering requirement in connection with incubator programs for post-graduate lawyering. While there is no single definition of an “incubator program,” the term generally refers to a model where newly admitted lawyers in solo practice are provided with physical support such as office space and meeting rooms, technical support such as instruction on law practice management and skills development courses, and lawyering support such as access to mentors. The common goal of incubator programs is that participating attorneys will receive tools to help them build and sustain their solo practices.

Pro bono work itself “means something different to lawyers across different organizational sectors within the hierarchy of the legal profession.”¹ Incubator programs can certainly be viewed as an emerging sector in the legal profession given the proliferation of these programs around the country in recent years. Some incubator programs focus on solo practitioners serving low-income communities exclusively.² Other programs use the pro bono lawyering requirement as a tool to deliver some legal services to low- and moderate-means populations while new solo practitioners build solo law practices.³ By including a pro bono requirement to provide legal services for low to

* ©2015, Davida Finger. All rights reserved. Thank you to Patrick Murphree for his excellent research assistance. Davida Finger, Associate Clinical Professor, Loyola University New Orleans College of Law.

¹ Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW AND SOC'Y REV. 113, 141 (2007).

² Fred Rooney & Justin Steele, *Exporting the Legal Incubator: A Conversation with Fred Rooney*, 9 U. MASS L. REV. 108, 111 (2014) (describing the CUNY model).

³ See, e.g., Fern Fisher, *Incubating Law Firms to Enhance Social Justice and Launch Pads: Law Graduates Providing Access to Justice*, in REINVENTING THE PRACTICE OF LAW: EMERGING MODELS TO ENHANCE AFFORDABLE LEGAL SERVICES 127, 136 (Luz Herrera ed., 2014) (describing the Community Legal Resource Network Incubator for Justice); see also G.M. Filisko, *Law firm incubators help both grads and needy clients*, Fred Rooney says, LEGAL REBELS (Sept. 18, 2013, 1:30 PM), http://www.abajournal.com/legalrebels/article/2013_legal_rebel_profile_fred_rooney/

moderate means people who cannot otherwise afford attorneys, an incubator program acknowledges social justice goals. This advances an ideal of service to others as a professional norm and should contribute to the professional identity of new attorneys.

The author surveyed incubator programs nationally to learn how the pro bono requirement has been implemented.⁴ The short survey asked whether incubator programs: 1) include a pro bono requirement for participating attorneys; 2) quantify the pro bono requirement by requiring certain numbers of hours or cases; 3) provide a stipend to program attorneys for the pro bono work; and 4) serve a low/moderate means and/or any other specific population through the pro bono lawyering work.⁵

After reviewing the survey findings, this article discusses ways that private attorneys have engaged in pro bono work including through low bono lawyering. Low bono lawyering, where attorneys provide reduced fee services, is a particularly important way that solo practitioners engage with serving low and moderate means individuals. The article concludes by offering recommendations based on the author's critical assessment of the Loyola University New Orleans College of Law ("Loyola") incubator program, which currently has a 450 hour-per-year pro bono requirement.⁶

I. INCUBATOR PROGRAMS AND THE PRO BONO REQUIREMENT

The author surveyed the programs listed in the American Bar Association (ABA) directory on Incubator and Residency programs in the United States with the goal of better understanding how incu-

⁴ Posting of Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law, dfinger@loyno.edu, to ABA Incubator Program Listserv (March 17, 2015) (on file with author) ("How much time must program attorneys work on pro bono matters? Is a stipend awarded to program attorneys for pro bono lawyering time? Must pro bono work be targeted to low and/or moderate means individuals? Any other criteria [e.g., case type, referral source] in connection with the pro bono requirement?") The author surveyed the ABA listed programs by email and telephone; the data that is discussed here are the results of that electronic/telephonic survey.

⁵ This article does not offer comprehensive or detailed information about the amply documented legal needs of and barriers to access to justice for low and moderate means people in the U.S. Barriers to access to justice for this country's low and moderate means population have become more resonant in recent years. See generally, *Documenting the Justice Gap*, LEGAL SERVICES CORPORATION, http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (last visited May 22, 2015).

⁶ The author is the founding director. See Loyola Incubator Program, <http://www.loyno.edu/lawclinic/incubator-program> (last visited May 22, 2015). Pilot program funding was gratefully received from the American Bar Association's Catalyst Grant with a matching grant from Ed and Cathy Womac.

bator programs include pro bono lawyering.⁷ The survey revealed that the widespread use of a pro bono requirement is part and parcel of the burgeoning national movement of incubator programs.

Of the 39 programs listed in the ABA directory, 23 programs reported a requirement for program attorneys to complete pro bono work as part of their participation in the respective incubator program.⁸ The pro bono requirement varies considerably from program to program. The findings of the author's short survey are described below and demonstrate the variety of ways the pro bono requirement has been implemented.

A. Pro Bono Hours

- 50 hours per year by 2 programs;⁹
- 100 hours per year by 3 programs;¹⁰
- 120 hours per year by 1 program;¹¹
- 200 hours per year by 1 program;¹²
- 250 hours per year by 1 program;¹³
- 300 hours per year by 1 program;¹⁴

⁷ *Incubator/Residency Program Profiles*, AM. BAR. ASSOC., http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles.html (last visited May 4, 2015).

⁸ For the UCLA program, see Lauri Gavel, *UCLA Law to help prep new attorneys to serve clients of modest means*, UCLA NEWSROOM (Jan. 13, 2015), <http://newsroom.ucla.edu/dept/faculty/ucla-law-to-help-prep-new-attorneys-to-serve-clients-of-modest-means>.

⁹ The programs are the Thomas Jefferson School of Law Center for Solo Practitioners and the Charlotte School of Law Small Practice Center. Telephone interview with Lilys McCoy, Dir. of the Ctr. for Solo Practitioners and the Solo Practice Concentration, Thomas Jefferson Sch. of Law (Apr. 10, 2015); e-mail from Mark Heekin, Asst. Prof. of Law, Charlotte Sch. of Law to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 26, 2015) (on file with author).

¹⁰ The programs are the California Western School of Law Access to Law Initiative, the Touro College Jacob D. Fuchsberg Law Center, and the Widener University/Dauphin County Bar Association Incubator Program. E-mail from Robert Seibel, Dir., Access to Law Initiative to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 17, 2015) (on file with author); e-mail from Rosemarie Barnett, Coordinator, Touro Law Center to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Apr. 1, 2015) (on file with author); telephone interview with Rosemarie Barnett, Coordinator, Touro Law Center (Apr. 1, 2015); e-mail from Palmer Lockard, Assoc. Prof. of Law, Widener Sch. of Law, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 17, 2015) (on file with author).

¹¹ The program is ESQ.Build-Sole Practitioner Incubator at the University of Memphis Cecil C. Humphreys Sch. of Law. Telephone interview with Anne Fritz, Exec. Dir., Memphis Bar Assoc. (Apr. 1, 2015).

¹² The program is the Los Angeles Incubator Consortium. Gavel, *supra* note 8.

¹³ The program is the Florida International LawBridge. Telephone interview with Tony Santos, Dir., Florida International LawBridge (Apr. 1, 2015).

¹⁴ The program is the Lawyer Entrepreneur Assistance Program (LEAP) Legal Aid Society of Orange County associated with Whittier Law School and Chapman University Fowler School of Law. E-mail from Andrew Benard, LEAP Fellow, Legal Aid Soc'y of

- 450 hours per year by 2 programs;¹⁵
- 480 hours per year by 2 programs in the first 6 months (20 per week);¹⁶
- 600 hours per year by 1 program;¹⁷
- 672 hours per year by 1 program;¹⁸
- 30-40% of program attorney time is spent on pro bono matters over the course of the year by 1 program;¹⁹
- 30 per month with a decreasing number of hours as rent for the office space increases by 1 program;²⁰
- Cases: 1, 2, and 4 respectively required by 3 programs;²¹

Orange Cnty to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 18, 2015) (on file with author); e-mail from Martin Pritikin, Assoc. Dean, Whittier Law Sch. to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 27, 2015) (on file with author).

¹⁵ The programs are the Loyola Incubator Program and the Detroit Mercy School of Law Solo & Small Firm Incubator (expecting reduction to 100 hours per year for the next cohort). E-mail from Tammy Marie Kudials, Clinical Program Adm'r, Univ. of Detroit Mercy Sch. of Law to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 17, 2015) (on file with author).

¹⁶ The programs are the Chicago Bar Foundation Justice Entrepreneurs Project and the Bay Area Legal Incubator.

E-mail from Taylor Hammond, Dir., Justice Entrepreneurs Project, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 19, 2015) (on file with author); Tiela Chambers, Volunteer Legal Serv. Program, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 16, 2015) (on file with author).

¹⁷ The program is the Family Law Fellowship Eastside Legal Assistance Program (ELAP). E-mail from Michelle Raiford, Managing Attorney, ELAP, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 25, 2015) (on file with author).

¹⁸ The program is the New Solo Practitioner Incubator at the Monterey College of Law. E-mail from Sarah Sturtevant, Assoc. Dean, Monterey Coll. of Law, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Apr. 2, 2015) (on file with author).

¹⁹ The program is the Maurice A. Deane School of Law at Hofstra University Access to Justice Incubator. E-mail from Lisa Petrocelli, Exec. Dir., Hofstra Law Access to Justice Incubator, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Apr. 1, 2015) (on file with author).

²⁰ The program is the Louisiana Civil Justice Center Legal Innovators for Tomorrow (LIFT). E-mail from Amy Duncan, Program Dir., LIFT, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 30, 2015) (on file with author).

²¹ The programs are Columbus Bar, INC, the California Lawyers for the Arts Modest Means Incubator Program, and the Vermont Bar Association and Vermont Law School, Vermont Lawyer Incubator Pilot Project. E-mail from Jocelyn Armstrong, Asst. Exec. Dir., Columbus Bar Assoc., to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 17, 2015) (on file with author); e-mail from Bob Pimm, Chief Learning Off. and Dir. of Legal Serv., Cal. Lawyers for the Arts, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 19, 2015) (on file with author); e-mail from Margaret Barry, Assoc. Dean, Vermont Law Sch., to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Apr. 7, 2015) (on file with author).

- No specific number of hours required by 2 programs;²²

B. Stipend for Incubator Program Attorney's Pro Bono Work

The survey question regarding whether a stipend is provided to program attorneys revealed that just 2 incubator programs provide a stipend for fulfilling the pro bono requirement. The incubator program Loyola is one of these 2 programs; the program provides a stipend for the 450 required pro bono hours over the course of the year-long program. While most programs did not report providing cash stipends, various programs did report providing office space, mentors, and trainings to help support the required pro bono lawyering requirement.

- 2 programs reported that a cash stipend, \$500.00 monthly, is provided to program attorneys in exchange for the pro bono lawyering hours contributed;²³
- Of those 2 programs, 1 program offers the \$500.00 monthly stipend for the full year while the other offers the stipend for the first 6 months of the program only;²⁴
- 1 program reported offering a salary with benefits to all program attorneys.²⁵

From these findings, the author would like to learn more about the impact of the various pro bono requirements on program attorneys. The author is specifically interested in understanding how the pro bono requirement might impact the professional identity of the participating program attorneys. A follow up survey might include a host of questions such as:

Do the required pro bono hours include low bono hours where the program attorney has accepted a case at a low bono rate?

Do the required pro bono hours include unplanned pro bono when moderate-means clients do not pay and become a pro bono case?

²² The programs are the University of Missouri-Kansas City School of Law Solo and Small Firm Incubator. E-mail from Malika Simmons, Visiting Asst. Clinical Prof., Univ. of Missouri-Kansas City Coll. of Law, to Davida Finger, Assoc. Clinical Prof., Loyola Univ. New Orleans Coll. of Law (Mar. 30, 2015) (on file with author); Telephone interview with Karin Anderson Ponzer, Assist. Dir. & Supervising Atty., Pace Community Law Practice (May 20, 2015)(providing a two year experience with a salary funded fellowship year first followed by an option to enroll in the incubator program for the second year where the state pro bono requirement is at least 50 hours).

²³ The programs are Loyola University New Orleans College of Law Incubator Program and the Bay Area Legal Incubator. E-mail from Tiela Chambers, *supra* note 16.

²⁴ *Id.*

²⁵ The program is the Maurice A. Deane School of Law at Hofstra University Access to Justice Incubator. Email from Lisa Petrocelli, *supra* note 19.

What are the stated goals of the pro bono requirement for the incubator program?

Do incubator programs use reporting tools to track the required pro bono hours?

How do program attorneys balance pro bono hour requirements with the other needs of a start-up solo practice?

Are required pro bono hours linked to civil, criminal, or other practice areas?

Do program attorneys report that the pro bono requirement was useful in terms of: developing their solo practice such as with: developing skills, building a reputation, increasing professional networks, and any other measures?

Do program attorneys report satisfaction with the pro bono requirement as part of the incubator program? What does satisfaction mean to the program attorney?

Do program attorneys at set intervals after completing the incubator program report that the pro bono requirement contributed to professional identity in lasting ways?

For all of the above questions, best practices dictate outlining objectives and using associated assessment tools to measure and evaluate the pro bono requirement. In these times of ever shrinking budgets for the legal academy, including for law schools working independently and in partnerships to maintain and build new incubator programs, how funding can be spent most advantageously to serve incubator programs' goals is a paramount issue.

C. Population Served by the Pro Bono Requirement

In terms of the populations served by the pro bono lawyering work, 19 of the programs that reported a pro bono requirement do not impose specific criteria other than requiring that the pro bono work serve low-to-moderate means people. Domestic violence victims must be served by 2 of the programs; arts and entertainment matters are the focus of 1 program.²⁶

The next section of this article discusses ways that private attorneys in the U.S., specifically solo practitioners, have engaged in pro bono service in terms of the type of service provided and the number of pro bono hours delivered.

²⁶ The programs are the Thomas Jefferson School of Law Center for Solo Practitioners, the Eastside Legal Assistance Program (ELAP) Family Law Fellowship, and the California Lawyers for the Arts Modest Means Incubator Program. Telephone Interview with Lilys McCoy, *supra* note 9; e-mail from Michelle Raiford, *supra* note 17; e-mail from Bob Pimm, *supra* note 21.

II. SOLO PRACTICE, PRO BONO, AND THE IMPORTANCE OF LOW BONO

A. *Delivery of Pro Bono Services*

In the U.S., private attorneys deliver most legal services to the poor through pro bono work.²⁷ The American Bar Association's Standing Committee on Pro Bono and Public Service ("ABA Committee") has measured attorneys' pro bono hours in two categories:²⁸

- 1) direct legal representation provided to persons of limited means or organizations that support the needs of persons of limited means for which no compensation was received or expected and;
- 2) any other law-related service provided for a reduced fee or no cost (without expectation of fee) to any type of client, not including activities performed to develop a paying client or anything that is part of paying job responsibilities.²⁹

For both categories of service, private practice attorneys provided significantly more pro bono hours than did corporate or government attorneys.³⁰ Moreover, private practice lawyers were the most likely to provide service to persons of limited means.³¹

Within the private practice category, solo practitioners outperformed attorneys in most of the other firm sizes. For category 1, only one subset of attorneys, those at large firms (101-plus attorneys), reported more pro bono hours than did the subset of solo practitioners.³² For category 2, with reduced fee representation being the most common type of lawyering service provided in that category,

²⁷ AM. BAR. ASSOC. STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 5 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lb_pb_Supporting_Justice_III_final.authcheckdam.pdf.

²⁸ Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 155, 160 (Robert Granfield & Lynn Mather eds., 2009) (noting that the ABA survey data "must be viewed with caution. The terminology used in some of the surveys is vague and comparisons are difficult . . . it is also likely that there is some response bias.").

²⁹ AM. BAR. ASSOC. STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 27, at vi. These categories track the ABA's Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013).

³⁰ The private practice type was broken down into the following five attorney subgroups: 1) solo practitioners; 2) firms of 2-10 attorneys; 3) firms of 11-50 attorneys; 4) firms of 51-100 attorneys; and 5) firms of 101+ attorneys. AM. BAR. ASSOC. STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 27, at 4.

³¹ *Id.* at 6.

³² *Id.* at 5. Solo practitioners reported 62.7 hours. *Id.*

49% of solos provided legal services for a reduced fee, higher than the percentage of attorneys reporting pro bono service in this category at all other size firms.³³

Solo practitioners account for approximately half of all private practice attorneys.³⁴ Taken together with the ABA Committee data, it appears that solo practitioners are devoting a significant portion of the pro bono time that U.S. lawyers devote. Thus, even with the institutionalization of pro bono lawyering over the last two decades³⁵—efforts that were not popular with the solo and small firm attorneys—solo practitioners have remained engaged in pro bono lawyering. For solo practitioners, pro bono work seems to develop from their existing personal relationships with clients and their legal docket in contrast to other lawyers making “deliberate efforts to seek out legal work that will benefit the poor.”³⁶

In terms of actual number of pro bono hours performed, solo and small firm attorneys reported 62.7 (overall average for all attorneys was 56.5) hours for category 1; for category 2, the average for the report hours of service by all private practice attorneys was 38.5.³⁷ With this in mind, it would seem that a pro bono requirement in line with the ABA aspirational benchmark of 50 hours would approximate

³³ *Id.* at 8. On average, fees were reduced about 48 percent. *Id.* at vii.

³⁴ AM. BAR ASSOC., LAWYER DEMOGRAPHICS 1, 1 (2014), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf. Reduced fee programs take two forms: 1) lawyer receives reduced fee from government or legal services organization; 2) lawyer receives reduced fee directly from client. Levin, *supra* note 28, at 165.

³⁵ The bar initiatives and movement to institutionalized pro bono is well covered. See, e.g., Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 6-33, 55 107 (2004) (“Although solo and small-firm practitioners play important roles in the pro bono system, the focus is on large law firms, which have been targeted as those in the best position to make significant pro bono investments.”); Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 155, 157-8 (Robert Granfield & Lynn Mather eds., 2009); DEBORAH RHODE, PRO BONO IN PRINCIPLE AND PRACTICE 18-19 (2005). A critique of mandating pro bono work centers on the fact that “it requires largely superficial involvement by private attorneys.” Luz E. Herrera, *Rethinking Private Attorney Involvement Though a “Low Bono” Lens*, 43 LOY. L.A. L. REV. 1, 30 (2009).

³⁶ Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 155, 163-64 (Robert Granfield & Lynn Mather eds., 2009) (citing studies by Philip Lochner, Carroll Seron, and Lynn Mather et al., *Divorce Lawyers at Work*, to support the idea that solo and small firm lawyers view pro bono as a moral obligation emerging from their daily client interactions).

³⁷ AM. BAR. ASSOC. STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 27, at 5, 7.

the way an average solo practitioner performs pro bono work in practice.³⁸

In terms of goals for the pro bono requirement, the professional development of the program attorney is part of that requirement. There is ample literature covering the ways in which pro bono work serves attorneys and why solo practitioners choose to engage in pro bono work. For example, solo practitioners do pro bono work both to gain experience and out of economic necessity.³⁹ Pro bono work is touted as “a vehicle for building substantive expertise and making important contacts.”⁴⁰ Pro bono work is also justified for the value it brings in terms of psychological rewards from service and making a difference in another’s life.⁴¹

A key critique of the 50-hour ABA benchmark centers on the limited number of aspirational hours; 50 hours is not an especially ambitious goal. As with the goals of pro bono, there is also ample literature covering critiques of requiring pro bono service. Professor Luz Herrera succinctly explained in reflecting on the ABA Committee’s 2009 report, “while it is heartwarming that almost three quarters of all attorneys who participated in the study reported doing a week’s worth of pro bono per year, those efforts alone cannot close the gap of access to civil legal services.”⁴² Certainly requiring some pro bono service in incubator programs is no panacea to pervasive and persistent access to justice barriers.⁴³ Compared with the unmet need for legal assistance that continues in this country, even with pro bono efforts, much progress remains to be had.⁴⁴

³⁸ ABA Rule 6.1 states that “a lawyer should aspire to render at least 50 hours of pro bono public legal services per year” and that “a substantial majority of the 50 hours” should be to persons of limited means or to organizations that support the needs of persons of limited means. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013). Close to 2/3 of attorneys surveyed by the ABA Committee on Pro Bono and Public Service reported that they provided less than 50 plus hours of legal services to persons of limited means or to organizations that address the needs of persons of limited means in the preceding year. See AM. BAR. ASSOC. STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 27, at 5, 7.

³⁹ Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC’Y REV. 431, 444 (1975) (asserting that, for solo practitioners, the “primary reasons for taking [no-fee/low-fee] cases developed out of the need to get and keep paying clients”).

⁴⁰ Cummings, *supra* note 35, at 92; see also RHODE, *supra* note 35, at 30.

⁴¹ RHODE, *supra* note 35, at 30.

⁴² Herrera, *supra* note 35 at 34; see also Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 155, 168 (Robert Granfield & Lynn Mather eds., 2009)(noting that ABA Model Rule 6.1 “minimizes the important contributions of solo and small-firm lawyers).

⁴³ See *supra* note 5.

⁴⁴ RHODE, *supra* note 35, at 166.

Knowing that pro bono is not the only answer to serving the needs of justice, incubator programs should reach for a different benchmark, one that includes different approaches to achieve different results for social justice goals. Low bono work is one aspect of lawyering that solo practitioners necessarily utilize that incubator programs can be emphasize in developing pro bono service requirements.⁴⁵

B. Low Bono as Pro Bono in Incubator Programs

Practicing attorneys and academics have long called for and written about the importance of low bono work and the need for it to be more explicitly recognized for the value it gives to otherwise underserved populations.⁴⁶ Low bono lawyering fits in as an important part of building the solo practitioner's case docket. The solo practitioner needs to pay the bills; accepting cases on a low bono basis is one way to take cases of low-to-moderate means people and yield some income in the process. This practice of offering legal services for reduced fees is nothing new with the rise of supporting solo practitioners through incubator programs.

For example, a survey of the Law School Consortium and the Community Legal Resource Network (CLRN) demonstrated the extent to which solo and small firm practitioners provide low bono services. CLRN connected hundreds of solo and small-firm practitioners; the survey revealed that attorneys handled 42% of all matters on a low bono/discounted basis with the lawyers characterizing just over half of their clients as "impoverished" or "low income."⁴⁷ CLRN eventually established the Incubator for Justice, an incubator program that supports attorneys providing low-cost legal services.⁴⁸ To accomplish this, attorneys receive training in general law office management

⁴⁵ Unbundled legal services also known as limited legal assistance, while not discussed here, is another model that incubator program attorneys can use to assist low and moderate means people. See Forrest Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994) (coining term "unbundling", which refers to the disaggregation of traditional representation with attorney and client agreeing that only certain tasks will be performed).

⁴⁶ See e.g., Luz E. Herrera, *Encouraging the Development of "Low Bono" Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 1 (2014); see also Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 155, 169 (Robert Granfield & Lynn Mather eds., 2009) (calling for redefinition of "pro bono" in a way that recognizes the realities of practice in solo and small firm practitioner setting).

⁴⁷ Levin, *supra* note 28, at 167.

⁴⁸ *Community Legal Resource Network*, CUNY SCH. OF LAW, <http://www.law.cuny.edu/clrn.html> (last visited May 4, 2015). See Rooney & Steele, *supra* note 2.

issues such as “billing, record-keeping, technology, bookkeeping, and taxes” and are involved in “larger justice initiatives and in subject-based training.”⁴⁹ By emphasizing program attorneys’ low bono work, this incubator program engages with community lawyering and supports lawyers who regularly serve and seek to build practices around serving low-income communities.

Experts on access to justice in this country agree that existing legal services programs and pro bono efforts by the private bar cannot address the needs of low income people. Most of the low income people who do obtain attorneys will hire private attorneys. “[W]hen low-income people face civil justice problems and seek out a lawyer’s help, most of their contacts with attorneys are actually not with legal aid or pro bono attorneys, but rather with private practice lawyers and in the context of fee arrangements.”⁵⁰ Better understanding of the ways in which solo practitioners provide low bono services, including through the emerging incubator program sector, might assist in developing strategies to improve access to justice needs.⁵¹

Taking a cue from the CLRN Incubator for Justice model described above, incubator programs can encourage program attorneys to provide excellent legal services to low and moderate means people by focusing on low bono work.

III.

REFLECTIONS ON LOYOLA’S CURRENT PRO BONO REQUIREMENT

The program objectives of the new Loyola incubator program are to: 1) train new lawyers by providing skills development focused on best practices for solo practitioners interested in social justice law practice; 2) provide increased legal services and access to justice in the local community for low and moderate means populations; and 3) support Loyola graduates entering solo practice and maximize success for a the new class of Loyola alumni that completes the program each year.

The pro bono requirement is the linchpin of this year-long program. It specifies that program attorneys spend at least 10 hours a week working on pro bono matters serving individuals who fall within 200% of the poverty line for a total of 450 hours. Attorneys may select pro bono cases of their choice in any practice area. For that pro

⁴⁹ Herrera, *supra* note 46, at 28.

⁵⁰ REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA 3, 28 (2011).

⁵¹ Levin, *supra* note 28, at 175.

bono work, attorneys receive \$500.00 monthly for a total of \$6,000.00 as a stipend for their pro bono contribution.⁵²

While low bono work was not initially included within the sphere of how pro bono work would be evaluated for the program's first year, after considering the data and issues discussed in this article along, the author is mindful of many new considerations that will inform the program's pro bono requirement. Going forward, program attorneys will be encouraged to track low bono hours as part of pro bono reporting. In this way, low bono time will be more explicitly recognized and valued. Low bono work and law practice management will be newly emphasized. Interpersonal and intercultural skills will be included in the skills curriculum focusing on the provision of low bono legal services to low and moderate means people.⁵³

The call to redefine pro bono work by solo and small firm practitioners recognizes the reality of practice for those attorneys. This seems especially critical for incubator programs focused on lending support for the development of successful solo practices while working for social justice goals.⁵⁴ After all, one of the problems with the incubator model is that it is "too little, too late: it assists a very small number of graduates of an individual school."⁵⁵ Incubator programs can have more impact by supporting development of low bono practices as a means to reach low and moderate means populations who cannot otherwise easily access attorneys.

⁵² Program attorneys track their pro bono time just as other time is tracked using case management software provided free of charge to incubator program attorneys.

⁵³ NELSON MILLER, *BUILDING YOUR PRACTICE WITH PRO BONO FOR LAWYERS* 13-27 (2012).

⁵⁴ Levin, *supra* note 28, at 169.

⁵⁵ Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 402 (2013).