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Low Bono Legal Counsel: Closing The Access To Justice Gap By Providing The Middle Class With Affordable Attorneys.

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ARTICLES

LOW BONO LEGAL COUNSEL: CLOSING THE ACCESS TO JUSTICE GAP BY PROVIDING THE MIDDLE CLASS WITH AFFORDABLE ATTORNEYS

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I. INTRODUCTION

It is becoming increasingly difficult for the middle class to obtain legal counsel. The average income for the middle class resident is too high to qualify for *pro bono* legal services, which are based on the federal poverty guidelines, but not high enough to afford market rate attorneys. To address this issue, a section of the legal community is providing “low bono” legal counsel to these middle class clients—both through small organizations and solo or small firm attorneys. These attorneys charge rates that are well below market rates to allow middle class clients affordable access to legal counsel that is unquestionably making a difference for the clients these attorneys represent. To help these clients find affordable counsel and to reduce the access to justice gap on a larger scale, a wider reaching approach is necessary. Access to Justice Lawyer Referral Service (ATJLRS) was created with the goal of serving this purpose by matching attorneys willing to provide reduced rate counsel to clients in

need of reduced rate legal services. This article begins by examining the definition and history of low bono legal counsel. Next, it discusses the access to justice gap. Finally, it introduces ATJLRS as a proposed solution to provide legal counsel to the middle class in a scalable manner. The article provides a blue print to address the organizational and ethical considerations associated with such organizations, so others may easily replicate and improve upon ATJLRS in their local communities.

II. WHAT IS “LOW BONO” LEGAL COUNSEL?

The term *pro bono* and the corresponding association with providing legal services to clients without charging the clients a fee is widely recognized in colloquial language.¹ The inability to afford market rate legal representation is not the sole requirement for obtaining *pro bono* services.² If this were true, the majority of Americans would be eligible for free legal representation.³ *Pro bono* clients very often must be legal U.S. residents and must have an income level at, or near the federal poverty guideline.⁴

Although *Black’s Law Dictionary* does not recognize “low bono” as a legal term,⁵ the legal profession uses the term to characterize an attorney’s willingness to provide legal counsel at below market rates⁶ by offering discounted hourly rates and reduced retainer amounts⁷ to clients who do not qualify for *pro bono* legal services, but cannot afford market rate attorneys.⁸ While the recipients of low bono legal services have low to

1. See Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 702–03 (2009) (stating lawyers in the United States have always provided some type of *pro bono* services to clients who are unable to pay for the legal services, and while there may not be a universal meaning, the term “*pro bono*” has been “understood to mean free legal work or work performed at reduced rates”).

2. See generally *id.* at 699 (discussing different types of *pro bono* clients—poor, near poor, working poor, middle class—some of which are unable to afford representation).

3. See *id.* at 734 (discussing the middle class, poor, working poor, and near poor’s struggle to afford their lawyers).

4. *Id.* at 699, 725–26 n.1.

5. Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 3 (2014). See generally BLACK’S LAW DICTIONARY (10th ed. 2014) (lacking a definition for “low bono” in *Black’s Law Dictionary*).

6. See Herrera, *supra* note 5, at 3–4 (“Generally, a low bono rate is 40%–50% lower than the prevailing market rate.”).

7. See *id.* (stating an attorney agrees to reduce her fee in a low bono payment arrangement based on the market rate).

8. See Levin, *supra* note 1, at 701 (discussing how many attorneys consider themselves to be doing *pro bono* work when they provide legal services at a reduced rate for individuals who would be unable to pay otherwise).

moderate income levels, their income is typically too far above the federal poverty threshold⁹ to qualify for the available pro bono legal services.¹⁰ Additionally, immigration status is typically not a barrier for a client's low bono eligibility.¹¹

III. HISTORY OF LOW BONO LEGAL COUNSEL IN THE UNITED STATES

For as long as lawyers have been practicing, there have been individuals without the financial capacity to pay the prevailing market rate for legal counsel.¹² Historically, people who could not afford legal counsel generally relied on members of the local bar association to donate their legal services.¹³ During times of economic strife, such as the Great Depression Era, attorneys, like many businesses, lacked the capacity to volunteer time and provide charitable services, including the establishment of private projects that helped those of limited financial means.¹⁴

Practicing attorneys are not required to fulfill any pro bono obligation; however, the American Bar Association (ABA) noted, "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."¹⁵ In addition, the ABA encourages attorneys to participate in serving those of limited means "regardless of [the lawyer's] professional prominence or professional workload."¹⁶

9. *Id.* at 701, 725–26.

10. *See infra* Section III.B for a discussion of the federal poverty guidelines and how they impact an individual's ability to obtain legal counsel.

11. *See infra* Section III.B for a discussion of how immigration status impacts an individual's ability to obtain legal counsel.

12. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2–25 (AM. BAR ASS'N 1980) ("Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals.").

13. *See* Gary G. Bellow, *The Extension of Legal Services to the Poor: New Approaches to the Bar's Responsibility*, in *THE PATH OF THE LAW FROM 1967*, at 115–16 (Arthur E. Sutherland ed., Harvard Law School 1968) (discussing a number of false presumptions made in providing legal services to those unable to afford legal assistance and proposes several alternative approaches); Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 *LOY. L.A. L. REV.* 1, 9 (2009) ("At the time, poor people 'relied largely upon the charitable impulses of [members of the bar] to supply service to those who could not pay the going rate.'").

14. Herrera, *supra* note 13, at 10.

15. MODEL CODE OF PROF'L RESPONSIBILITY EC 2–25. These statements were made before the ABA amended Rule 6.1 of the MODEL RULES OF PROFESSIONAL CONDUCT in 1993 to include the fifty-hour pro bono goal. *Id.*

16. *Id.*

A. *Attorneys Helping the Disadvantaged and ABA Model Rule of Professional Conduct 6.1*

In 1993, the ABA formally recognized the need for attorneys to assist the disadvantaged by amending the *ABA Model Rules of Professional Conduct*.¹⁷ Rule 6.1 explains, “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono public legal services per year,”¹⁸ which may include services to “persons of limited means”¹⁹ in a criminal or civil context.²⁰ Every state has adopted some version of the recommended fifty-hour guideline, and in doing so, has created a standard reiterating the importance of promoting pro bono services.²¹ The ABA recognizes that effective low-cost assistance from the legal profession is only feasible if attorneys receive reasonable financial compensation from clients with financial means.²² The ABA also recognizes that the potential clients who are unable to pay, or can only pay a minimal amount, should still be “able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.”²³ Establishing an adequate or reasonable fee for legal services requires “consideration of all relevant circumstances.”²⁴ By creating and organizing programs that provide low-cost legal services, the legal profession can better help serve the disadvantaged segment of the population.²⁵ The ABA emphasizes that all lawyers should support the creation of these programs to “meet [the] need for legal services.”²⁶

Despite being many years removed from the Great Depression, the reality is that many lawyers, especially solo and small firm attorneys, do not have the ability, or means necessary, to fulfill the fifty-hour pro bono service recommended by the ABA.²⁷ Given their smaller cash flows,²⁸

17. Robert N. Weiner, *Testimony of the Standing Committee on Pro Bono and Public Service*, A.B.A. (Feb. 2000) http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/weiner.html.

18. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983).

19. *Id.*

20. *Id.* at r. 6.1 cmt.

21. *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sept. 17, 2015).

22. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-16 (AM. BAR ASS'N 1980).

23. *Id.*

24. *Id.* at EC 2-18.

25. *See id.* (opining attorneys have a continuing obligation to render “free legal services to those unable to pay reasonable fees”).

26. *Id.*

27. *See Levin, supra* note 1, at 701 (discussing the inability of small firms to commit to pro bono). “Since [attorneys’] compensation is very directly tied to what they earn on an

the solo and small firm attorneys simply lack the resources available to larger law firms.²⁹ The result is that attorneys end up replacing a portion of their primary source of income (billable hours to paying clients), with non-paying pro bono services. Another obstacle for small firms and solo practitioners is the continual pressure to obtain new clients³⁰ to financially support their businesses.³¹ In addition, if the attorney or firm is accepting pro bono clients, it may be more difficult to balance the existing full-rate clients³² with the corresponding duty of diligent and competent representation to all clients.³³ This may limit the attorney's ability to expand the law firm to a size where pro bono work is more feasible.³⁴

Of course, there is little sympathy for attorneys when there are people facing significant legal consequences and cannot afford traditional legal counsel at the corresponding traditional market rates. Low bono legal services developed as a response to the growing demand for affordable legal services for individuals who simply lacked the financial capacity to hire a lawyer.³⁵ Fairfax County, Virginia, is home to the largest courthouse in northern Virginia, where attorneys (and *pro se* litigants) file hundreds of new cases every day.³⁶ On a typical weekday in the Fair General District Court, the initial return or initial appearance docket may

hourly or flat fee basis, every hour they spend performing pro bono work directly affects their monthly take-home income." *Id.* See generally Robert Farrington, *Law School and Student Debt: Be Careful*, FORBES (Dec. 18, 2014, 8:46 AM), <http://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/> (stating the average debt for a law school graduate attending public schools was \$84,000 and \$122,000 for those attending private schools).

28. Levin, *supra* note 1, at 702.

29. See *id.* at 704 (discussing the available resources of large firms to commit to pro bono services).

30. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 323 (2004).

31. See *id.* at 323–24 (commenting on the struggles of small firms to bring in business).

32. See generally Levin, *supra* note 1, at 716, 729 (discussing reasons why firms may not want to devote time and resources to pro bono work).

33. Levin, *supra* note 30, at 324. "The ability of . . . lawyers to provide competent representation is affected by decisions they make about the number of areas in which they practice law, the number and types of clients" they have, the willingness to ask for help from colleagues, and their ability to know when and if the law changes. *Id.*

34. See Levin, *supra* note 1, at 702 (stating cash flow can make it difficult for lawyers to hire additional administrative support).

35. See Herrera, *supra* note 5, at 4 (explaining the creation of the Greater Access and Assistance Project and its effort to provide legal assistance to individuals who did not qualify for free legal services but who could not afford legal services otherwise).

36. See generally *Demographics & Data*, FAIRFAX COUNTY VA., <http://www.fairfaxcounty.gov/government/about/data/> (last visited Sept. 24, 2015) ("Fairfax County is . . . the most populous jurisdiction in Virginia.").

have 300 cases.³⁷ Until we can drastically reduce all the possible circumstances and scenarios that result in these cases being filed, developing ways for the attorneys to help the parties involved in the litigation is the least we can do as a legal community.³⁸

B. *The Introduction of Low Bono Legal Services*

It is unclear how the term “low bono” originated, but the reference first appeared in a report in the Greater Access and Assistance Project (GAAP).³⁹ GAAP is an innovative program sponsored by the ABA’s Young Lawyers Division⁴⁰ that allows recent law graduates to gain practical experience by providing low bono legal services.⁴¹ The program provides civil legal services to individuals who are not eligible for pro bono services, but cannot afford the fees of a market rate attorney.⁴²

A 1994 report by the ABA showed a majority of low-to-moderate income individuals faced with legal issues did not want assistance from an attorney.⁴³ Michael Bedke, a former member of the Legal Services’ Board of Directors and chair of the ABA’s Young Lawyers Division, made two observations regarding the ABA report: (1) these individuals either did not have the money to hire an attorney, or (2) these individuals earned too much money to qualify for pro bono assistance from the Legal

37. This excludes any cases in the Juvenile and Domestic Relations Court—which certainly impacts the low bono clients—and the circuit court—which has a lesser impact on the low bono clients (except for the felony cases) as cases under \$25,000 may be filed in either the circuit or general district court but only cases above \$25,000 can be filed in the circuit court. See *Fairfax County General District Court*, FAIRFAX COUNTY VA., <http://www.fairfaxcounty.gov/courts/gdc/> (last visited Sept. 24, 2015) (explaining the authority of general district courts).

38. Eliminating the underlying causes of the cases is a noble objective. The majority of attorneys providing low bono services understand there is an underserved population in the community and would likely rejoice at the notion that their professional services would become obsolete—meaning that the majority of those in need would become financially stable enough to afford traditional market rate services. However, there may be a small handful of attorneys that would disagree as a matter of financial self-preservation.

39. Herrera, *supra* note 5, at 4.

40. *Bar Briefs: Young Lawyers*, 34 ARIZ. ATT’Y 47, 47 (1998); see also Julia A. Bahner & Rachelle Anderson, *Washington State Young Lawyers Bridge the GAAP by Offering Low-Bono Services*, A.B.A., http://www.americanbar.org/publications/affiliate_home/affiliate_index/yld_affiliate_july07_bahner.html (last visited Jan. 5, 2016) (reporting the GAAP program has received over \$4,000 from the ABA).

41. Bahner & Anderson, *supra* note 40.

42. See *id.* (explaining the purpose of the GAAP).

43. See generally Joseph Wharton, *Legal Help for the Working Poor: Young Lawyers Division Spearheads Nationwide Effort*, A.B.A. J., Dec. 1994, at 108 (addressing the issue of why low-to-moderate income people with legal problems do not seek legal services from attorneys).

Services Corporation (LSC).⁴⁴ As such, Bedke headed the GAAP program to address these issues.⁴⁵ Bedke derived much of his inspiration from Hunton & Williams, LLP,⁴⁶ a Richmond, Virginia, firm that expanded their pro bono efforts after recognizing the legal needs of the working middle class were a bigger problem than the current legal aid services could handle.⁴⁷

Upon realizing the firm lacked the manpower to meet the needs of a large metropolitan area such as Richmond, Hunton & Williams focused on a smaller population in the Church Hill area.⁴⁸ Although Church Hill contained a lot of “substandard and abandoned private housing, many public housing units, and a serious drug and crime problem,” the firm opened an office to serve this community.⁴⁹ After debating whether to offer pro bono or low bono legal services, the firm decided to charge clients a minimal \$50 per case.⁵⁰ The firm based the decision to charge this nominal fee based on “the belief that the client-lawyer relationship is better served when the client is earnest about the matter and has to make an investment in the undertaking.”⁵¹ Not surprisingly, the size of this fee led to a community response that was *uniformly supportive*, allowing Hunton & Williams “to provide service to people who generally go unrepresented and to accept the cases that most lawyers” would decline.⁵²

More and more practitioners began providing low bono services largely due to The Hunton & Williams Church Hill project and Bedke’s GAAP program.⁵³ Specifically, since the creation of the GAAP program, other organizations have expressed interest in opening offices or starting a program to help individuals earning low-to-moderate incomes.⁵⁴ While each program differs regarding attorney fees, “with some providing services

44. *Id.*

45. *See generally id.* (mentioning the GAAP was Bedke’s “brainchild” and the program’s purpose).

46. *Id.* *See generally* George H. Hettrick, *Doing Good: How One Law Firm Started A Low-Fee Branch Office to Help Those in Need*, A.B.A. J., Dec. 1992, at 78 (describing the purpose of Hunton & Williams’ pro bono efforts in Richmond, Virginia).

47. *See* Hettrick, *supra* note 46, at 78 (discussing the type of legal aid and eligibility requirements Hunton & Williams would provide to individuals).

48. *Id.* at 80.

49. *Id.* at 79.

50. *See id.* (explaining the debate between providing pro bono or reduced rates).

51. *Id.*

52. *Id.*

53. *See generally* Wharton, *supra* note 43, at 108 (asserting others are approaching the issue of providing needed low bono services throughout the country).

54. *Id.*; *see also* Bahner & Anderson, *supra* note 40 (discussing the creation of the GAAP program that provides legal aid to people who do not qualify for pro bono assistance but cannot afford to hire private legal counsel).

pro bono, and others adopting a ‘low bono’ approach,” each are “essentially accomplishing the same goal” of helping the underserved.⁵⁵

IV. THE PROBLEM: CLOSING THE ACCESS TO JUSTICE GAP

Fifty million Americans qualify for the federally funded civil legal aid.⁵⁶ Studies have shown that millions of low-income individuals throughout the country do not have access to free or affordable legal counsel.⁵⁷ Despite efforts to increase pro bono services that aid the most economically disadvantaged, only 50% of the individuals who qualify actually benefit from the services.⁵⁸ This is especially true for civil matters, which often times have life changing consequences.⁵⁹ A recent study conducted by the World Justice Project’s Rule of Law Index, which collects legal data on the experiences of people, out of “102 countries, the United States ranks 65th for the accessibility and affordability of its civil justice” system.⁶⁰ This reiterates the argument that a justice gap is present when it comes to providing adequate civil legal representation in the United States.⁶¹ Not surprisingly, U.S. citizens most affected by this gap are those with incomes hovering around the median and therefore may not qualify for free legal aid services.⁶²

55. Wharton, *supra* note 43, at 108.

56. *About the Initiative*, U.S. DEP’T. OF JUSTICE, ACCESS TO JUSTICE, <http://www.justice.gov/atj/about-initiative> (last updated Oct. 20, 2014).

57. Theresa Amato, Opinion, *Put Lawyers Where They’re Needed*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/17/opinion/put-lawyers-where-theyre-needed.html?action=click&contentCollection=Magazine&module=MostEmailed&version=Full®ion=Marginalia&src=me&pgtype=article&_r=0. “The problem is twofold. First, school fees have consistently outpaced inflation over the last 30 years, and on average, 86 percent of law students graduate with six-figure debt. Without help, the drag of this debt makes it near-impossible for willing graduates to take lower-paying legal services jobs.” *Id.*

58. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 12–13 (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf (documenting that, despite the existence of legal aid programs, the nation’s poor still face significant challenges in obtaining legal assistance).

59. See Amato, *supra* note 57 (referring to civil matters such as child-custody disputes and home foreclosures where legal representation is essential).

60. *Id.* In the poll, the United States ranks 19 out of the 102 countries polled, relatively high rankings for the openness of government, absence of corruption, and regulatory enforcement (11 out of 102, 20 out of 102, and 20 out of 102 respectively). *Id.*

61. *Rule of Law Index 2015*, WORLD JUST. PROJECT, <http://data.worldjusticeproject.org/#/groups/USA> (last visited Sept. 4, 2015).

62. See Herrera, *supra* note 5, at 4 (arguing the needs of the “Gap Population” are just as important as the needs of those individuals who qualify for pro bono).

A. *The Right to Counsel: A Missed Opportunity to Close the Access to Justice Gap*

The Sixth Amendment explicitly states that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense.”⁶³ The Supreme Court of the United States interpreted this statute to mean that defendants have a right to counsel at criminal trials.⁶⁴ However, the Court left the issue of “how to provide counsel to indigent defendants” to the state legislatures.⁶⁵ Nonetheless, this was a tremendous victory for indigent criminal defendants.⁶⁶

On the civil side, however, indigent parties do not enjoy the same guaranteed right to counsel.⁶⁷ Approximately eighteen years after *Gideon*, in *Lassiter v. Department of Social Services*,⁶⁸ the Supreme Court decided not to extend the right to counsel for indigent civil litigants, holding “the absence of counsel’s guidance . . . did not render the proceedings fundamentally unfair.”⁶⁹ As a result, both federal and state governments⁷⁰ “assume[] the task of increasing, though not ensuring, access to lawyers’ services” to individuals who typically cannot afford representation at market rates.⁷¹ Since the right to counsel does not extend to parties in civil cases, the federal and state governments are not responsible for pro-

63. U.S. CONST. amend. VI, § 1.

64. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); Lua Kamal Yuille, Note, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 866 (2004). The Supreme Court has limited the right to counsel within a criminal trial for petty offenses for which defendants are not “sentenced to a term of imprisonment.” *Scott v. Illinois*, 440 U.S. 367, 374 (1979).

65. Yuille, *supra* note 64, at 867.

66. *See id.* at 868 (stating our system of indigent criminal defense is now “fiercely protected as a fundamental aspect of American democratic society”).

67. *See* Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S87 (2000) (declaring no federal court has held indigent parties in civil cases are given a constitutional right to counsel).

68. 452 U.S. 18 (1981).

69. *Id.* at 33.

70. *E.g.*, VA. CODE ANN. § 16.1-266 (2015) (effective July 1, 2005) (stating the statutory rule in Virginia that appoints counsel or guardianship for someone who is not capable of representing themselves); *see Lassiter*, 452 U.S. at 36 (holding due process is flexible and not always constitutionally required outside a criminal context). In Virginia, courts may appoint attorneys to represent adults in civil cases relating to abuse and neglect of children, termination of parental rights, entrustment, or relief of custody. § 16.1-266.

71. Yuille, *supra* note 64, at 872.

viding any type of legal representation to those who cannot afford traditional market rates.⁷²

B. The Gap Defined: Civil Cases for Clients Who Do Not Qualify for Pro Bono Legal Counsel

The Sixth Amendment functionally resolves the issue of access to justice for low bono criminal cases,⁷³ and legal services organizations are dedicated to helping those least financially capable with civil cases.⁷⁴ This creates a gap between those who qualify for pro bono counsel (criminal indigent and civil legal services) and those who can afford access to counsel based on their income.⁷⁵ Filling this gap are the civil cases for clients who do not qualify for pro bono services and cannot afford to hire an attorney at market rates.⁷⁶

Generally, legal service organizations that provide pro bono counsel place the cut-off at 200% above the poverty threshold,⁷⁷ though some

72. See generally LEGAL SERVS. CORP., *supra* note 58, at 5 (“The difference between the legal assistance available and the level that is necessary to meet the needs of low-income Americans is the ‘justice gap.’”). This reiterates the point that the justice gap is widening because financial limitations prevent justice from being served as many cannot afford to bring a lawsuit in a civil court. *Id.*

73. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (expanding the Sixth Amendment (through the Fourteenth Amendment) to require the appointment of counsel to indigent individuals in state criminal court proceedings). Unlike civil cases where the organizations providing pro bono legal service apply strict eligibility requirements, the criminal defendants in need of counsel typically need only state during their arraignment that they cannot afford an attorney and the court is required to appoint a private attorney or a public defender to the defendant. See John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent*, WASH. & LEE L. REV. 1173, 1175–76 (2013) (noting the Court does not set a specific guideline to determine who is unable to afford counsel, but simply says that those who claim to be unable to afford a lawyer are entitled to court-appointed counsel). In most cases, neither a defendant’s specific income level nor immigration status is considered by the court prior to appointing counsel. *Id.* at 1176.

74. Legal Services Corporation Financial Eligibility, 45 C.F.R. §§ 1611, 1611.3–1611.5 (2014).

75. *Id.*

76. *Id.*

77. See *id.* (confirming each recipient must not be over the 125% Federal Poverty Guideline, unless the recipient qualifies for an exception under § 1611.5 and is under the 200% Federal Poverty Line). Legal Services Corporation is a 501(c)(3) nonprofit corporation that was established by Congress in 1974 to provide civil legal aid to low income Americans and has become the single largest funder of civil legal aid in the United States, funding 134 independent nonprofit legal aid programs with approximately 800 offices, which includes Northern Virginia Legal Services, the largest direct legal services organization in northern Virginia. *Who We Are*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Oct. 18, 2015). Each year, LSC publishes an appendix based on the

serve clients with income levels up to 300% above the poverty threshold.⁷⁸ The federal standard categorizes the poverty threshold as follows:

Household Size	100% Poverty Level	200% Above Poverty Level	300% Above Poverty Level	400% Above Poverty Level
1	\$11,770	\$23,540	\$35,310	\$47,080
2	\$15,930	\$31,860	\$47,790	\$63,720
3	\$20,090	\$40,180	\$60,270	\$80,360
4	\$24,250	\$48,500	\$72,750	\$97,000
5	\$28,410	\$56,820	\$85,230	\$113,640
6	\$32,570	\$65,140	\$97,710	\$130,280
7	\$36,730	\$73,460	\$110,190	\$146,920
8	\$40,890	\$81,780	\$122,670	\$163,560
For each additional person add:	\$4,160	\$8,320	\$12,480	\$16,640

Table 1: 2015 Annual Federal Poverty Guidelines⁷⁹

Clients with income above the designated poverty threshold are turned away from free legal services, yet they are unable to afford market rates charged by most private law firms, which can start at \$300 an hour.⁸⁰ Simple economic supply and demand suggests that the market rates charged by attorneys and law firms are financially reasonable,⁸¹ but that

U.S. Department of Health & Human Services poverty guidelines, providing to the organizations receiving funding from LSC (who is funded by Congress) client eligibility information, which is equal to 125% above the federal poverty threshold and 200% above the threshold if an exception applies. 45 C.F.R. §§ 1611, 1611.3–1611.5; see *Services*, NEIGHBORHOOD LEGAL SERVS. PROGRAM, <http://www.nlsp.org/services> (last visited Oct. 18, 2015) (“We serve clients who are residents of the District of Columbia and whose household income is at or below 125% of the federal poverty guidelines (FPG). In some cases, we may be able to serve people with a household income at or below 200% of the FPG.”). See *generally Get Help*, LEGAL AID JUST. CTR., <http://www.justice4all.org/get-help> (last visited Oct. 18, 2015) (“The Legal Aid Justice Center provides free legal services on non-criminal matters to income-eligible persons in our service areas.”).

78. See *Worker's Rights Clinic*, EMP. JUST. CTR.: NEED LEGAL HELP?, <http://www.dcejc.org/need-legal-help> (last visited Oct. 18, 2015) (providing an income guideline chart with figures for 300% above the federal poverty guidelines and corresponding household sizes).

79. Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3236, 3237 (Jan. 22, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-01-22/pdf/2015-01120.pdf>.

80. See *LEGAL SERVS. CORP.*, *supra* note 58, at 23–24 (concluding that a significant factor in the number of pro se litigants is the lack of resources available from free legal aid services, even though these litigants would qualify for such programs).

81. See *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983) *aff'd in part, rev'd in part*, 746 F.2d 4 (D.C. Cir. 1984) (“The hourly rate generally depends upon the attorneys’ experience and reputation, the type of work involved, and the level of skill nec-

does not necessarily mean these fees are affordable for most people. Nonetheless, the D.C. Circuit has endorsed such market rates as “reasonable.”⁸² Specifically, in *Laffey v. Northwest Airlines, Inc.*,⁸³ the U.S. Attorney’s Office for the District of Columbia developed the Laffey Matrix that defined “reasonable” attorney’s fees when a prevailing party seeks to recover attorney’s fees.⁸⁴ Currently, the Laffey Matrix dictates that “reasonable” attorney fees include: (1) hourly rates of \$520 an hour for an attorney with over 20 years of experience; (2) \$255 an hour for attorneys with one to three years of experience; and (3) \$150 an hour for law clerks or paralegals.⁸⁵ Although the Laffey Matrix’s original function involved complex federal litigation, it is also applied in other jurisdictions and in other types of cases as well.⁸⁶ Further, Virginia courts, the jurisdiction for my law firm, have held that market rates in Virginia are higher than the market rates in D.C., so the rates established by the Laffey Matrix are actually too low to determine reasonable rates for Virginia attorneys.⁸⁷

essary to conduct the case. Other relevant considerations include the time limitations imposed by the case, the amount to be obtained in the litigation, and the undesirability of the case.”).

82. *See id.* (stating the reasonable standard for setting an hourly rate is compiled through a measure of the attorney’s experience, the usual rate for the community, the type of case, possible limitations of the case, the amount possible to obtain in litigation, and the risk factors involved); *see also* *Berke v. Fed. Bureau of Prisons*, 942 F. Supp. 2d 71, 77–78 (D.D.C. 2013) (holding the Laffey Matrix is the starting point to determining a reasonable rate for an attorney requesting compensation).

83. 746 F.2d 4.

84. LAFFEY MATRIX—2014–2015, U.S. ATT’YS OFF. FOR THE DIST. OF COLUMBIA (2015), http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf.

85. *See id.* (interpreting the matrix from *Laffey*, 572 F. Supp. at 354). *See also* *Laffey Matrix*, LAFFEYMATRIX.COM, <http://www.laffeymatrix.com/see.html> (last visited Feb. 2, 2016) (employing a different reasonable hourly rate calculation based on the Consumer Price Index for legal services as opposed to the overall Consumer Price Index, which results in materially higher hourly rates).

86. *See* *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 710 (3d Cir. N.J. 2005) (allowing the district court to use the Laffey Matrix on remand to determine the firm’s hourly rates); *see also* *Ilick v. Miller*, 68 F. Supp. 2d 1169, 1176 (D. Nev. 1999) (concluding the Laffey Matrix was the correct basis for establishing hourly fee rates for attorneys’ services); *Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 949 (N.D. Cal. 2010) (acknowledging although the Laffey Matrix was tailored for the District of Columbia and their community’s cost of living, this court still chose to apply an adjusted Laffey Matrix hourly rate). *But see* *Grissom v. Mills Corp.*, 549 F.3d 313, 322–23 (4th Cir. Va. 2008) (declining to apply the Laffey Matrix absent evidence the same rates would apply in Virginia).

87. *See* *Taylor v. Republic Servs., Inc.*, Case No. 1:12-cv-00523-GBL-IDD, slip op. (E.D. Va. Jan. 29, 2014) (citing *Vienna Metro v. Pulte Home Corp.*, Case No. 1:10-cv-00502, and *Tech Sys., Inc. v. Pyles*, Case No. 1:12-cv-00374) (explaining the Eastern District of Virginia has adopted the Vienna Metro Matrix to determine reasonable attorney rates in

The practical implication of the Laffey Matrix gives law firms in this region permission to charge these “reasonable” rates, even for non-complex civil litigation in the state courts, while members of the working middle class are unable to afford adequate legal counsel.

In Virginia, the minimum wage is \$7.25 per hour,⁸⁸ here is a practical example to demonstrate more specifically how unreasonable these rates are for the middle class. Theoretically, if a four-person family has two parents each working forty hours a week, fifty-two weeks a year,⁸⁹ earning \$15.00 an hour, which is over twice the minimum wage, the family will have a combined annual income of \$62,400.⁹⁰ At that income level and the high cost of living in a large metropolitan area, like metro Washington, D.C., the family is approximately \$14,000 above the 200% cut-off, so does not qualify for pro bono aid provided by the local legal service organizations.⁹¹ With pre-tax income of \$62,400, with two dependents, the family will pay approximately \$4,151.00 in federal taxes.⁹² After accounting for rent, car payment(s), groceries, clothing, gas, cell phone(s), internet, cable, this family could not possibly afford a traditional attorney and their corresponding fees, should legal counsel be necessary.

Additionally, when an individual cannot afford the reasonable market rates and is hoping to qualify for pro bono legal services, the individual's legal status to reside in the United States becomes very relevant. Because of the funding sources and corresponding requirements, many legal service organizations are not able to help individuals or families because

northern Virginia, which sets the rates as follows: paralegal at \$130–\$350 an hour, attorney with one to three years of experience at \$250–\$435 an hour, four to seven years of experience at \$350–\$700 an hour, eight to ten years at \$465–\$640, eleven to nineteen years at \$520–\$770, and twenty years and beyond at \$505–\$820).

88. *Minimum Wage Laws in the States—January 1, 2016*, U.S. DEP'T. OF LABOR, <http://www.dol.gov/whd/minwage/america.htm#Virginia> (last visited Oct. 18, 2015).

89. Working a full fifty-two weeks a year is likely unrealistic because it assumes the hourly employee does not get sick, does not take any unpaid leave, or gets paid leave (even more unrealistic for an hourly employee), so the hypothetical is likely painting a more positive picture than reality.

90. See *Minimum Wage Laws in the States—January 1, 2016*, *supra* note 88 (multiplying Virginia's minimum wage by four is \$29 USD).

91. 45 C.F.R. § 1611 (2015). *But see id.* § 1611.5 (listing exceptions where and individual could qualify for legal aid if they exceed the 125% poverty line). Levin, *supra* note 1, at 726; U.S. DEP'T OF HEALTH & HUM. SERV. OFF. OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, 2015 POVERTY GUIDELINES (Sept. 3, 2015).

92. See generally *1040 Tax Tables 2014*, IRS, at 84 (2014), <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf> (listing the approximate amount that will be withheld for a married couple filing jointly with an income of \$72,750).

of their immigration status—even if the individual or family would otherwise qualify for aid.⁹³

C. *The Financial Impracticality of Retaining Legal Counsel*

Another category of underserved clients includes individuals in need of legal representation who choose not to retain a lawyer because it is financially impractical. In other words, the claim is not large enough to justify the financial risk associated with hiring a traditional firm charging market rates. The fees paid to the attorney would essentially negate any potential winnings, thus many clients simply decide litigation is not worth the risk. Even if the plaintiff's damages exceed the projected attorney's fees, once the client places a value on the time, hassle, and stress of litigation, proceeding with a market rate attorney simply becomes ill advised. Even if the client has an attorney's fees provision allowing the recovery of attorney's fees or a cause of action that allows for the recovery of attorney's fees, the client still has to pay the attorney out of pocket. Further, winning a judgment is no guarantee that the plaintiff-client will ever collect on the judgment or the corresponding attorney's fee award.⁹⁴

According to an analysis done by the U.S. Census Bureau, an income of approximately \$55,000 places the household above the median household income.⁹⁵ Based on the previously discussed hypothetical of the family of four where both parents are earning over twice the minimum wage, this suggests that 50% of U.S. households have income levels insuf-

93. See generally 45 C.F.R. § 1626 (stating aliens do not qualify for legal assistance unless certain requirements are met); Ronald S. Flagg, *Access to Civil Justice: Keeping America's Promise*, 42 KAN. J.L. & PUB. POL'Y 571, 574–77 (2015) (explaining LSC's inability to meet the demand of clients seeking legal representation is partially due to the decrease in LSC funding and restrictions imposed by law).

94. See Jeffrey C. Bright, *Unilateral Attorney's Fees Clause: A Proposal to Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 101 (2012) (stating an individual's wealth class determines whether or not that individual will be able to pay for judgment costs and attorney's fees). Small claims court is an option in some instances because parties are prohibited from being represented by counsel, but the courts' jurisdictional limits (\$5,000.00 in Virginia) will prohibit some plaintiffs from utilizing the small claims court system. FAIRFAX CTY. GEN. DIST. CT, SMALL CLAIMS COURT PROCEDURES, <http://www.fairfaxcounty.gov/courts/gdc/publications/small-claims-court-procedures-english.pdf>. A second and perhaps more significant obstacle is that defendants have the right to remove a small claims court case to a non-small claims court by right, so if the plaintiff is filing a complaint against a business entity, like a large residential landlord or a large general contractor, the defendant's attorney will almost certainly remove the case from small claims court to be able to represent the defendant. *Id.*

95. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 6–7 (Sept. 2015) <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

ficient to obtain legal counsel.⁹⁶ For reference, the top 25% of households make approximately \$90,000.⁹⁷ It is unclear at what income level a household can afford legal counsel as it depends on the specifics of the household and the complexity of the case, but even income in the top 25% of all U.S. income, does not ensure that the household can afford traditional counsel for a complicated or extended legal battle.

The organizations providing pro bono legal counsel are providing a tremendous service and very often have the most qualified staff attorneys.⁹⁸ The primary funding source for these organizations often comes from the LSC, the largest contributor of civil legal aid in the country.⁹⁹ Since 1974, LSC has promoted equal access to justice and provided grants to legal service providers in order to serve low-income communities.¹⁰⁰ In 2013, LSC-funded programs assisted approximately 1.8 million people,¹⁰¹ with 70% of that client base comprised of women.¹⁰² Despite the LSC's invaluable work, however, Congress has consistently underfunded the program.¹⁰³ This has contributed to the widening of the justice gap, resulting in nearly two million Americans—citizens eligible to receive help from LSC funded organizations—not receiving adequate representation as originally designed by the organization.¹⁰⁴ If LSC cannot provide funding to all the eligible pro bono clients through the LSC funded organizations, it seems unlikely that LSC will expand funding to low bono clients.

The reality of this justice gap is that individuals with a modest income are representing their own complex legal matters out of sheer neces-

96. *See generally* 45 C.F.R. app. § 1611 (expressing individuals earning 125% above the poverty line do not qualify for legal financial assistance); DENAVAS-WALT & PROCTOR, *supra* note 95, at 8–9; Levin, *supra* note 1, at 726 (stating even people that earn 200% above the poverty are unable to pay attorney's fees); 2015 *Poverty Guidelines*, *supra* note 91 (listing the poverty line according to persons in a family or household).

97. DENAVAS-WALT & PROCTOR, *supra* note 95, at 8–9.

98. *See* 42 U.S.C. § 2996 (2012) (stating a need for providing high quality legal representation to those not financially equipped).

99. Yuille, *supra* note 64, at 878.

100. *Id.* at 873. *See generally* About LSC, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Aug. 31, 2015) (stating LSC's purpose, who and how many it funds, and the several types of legal issues it assists).

101. Flagg, *supra* note 93, at 577. *See* About LSC, *supra* note 100.

102. LEGAL SERVS. CORP., *supra* note 58, at 27.

103. Flagg, *supra* note 93, at 574–77. *See generally* LEGAL SERVS. CORP., *supra* note 58, at 9–10 (reporting a vast amount of unrepresented individuals due to a lack of available resources); Amato, *supra* note 57 (indicating the gap between lack of supply in lawyers and the increasing demand of representation is due to insufficient resources and interested advocates).

104. Amato, *supra* note 57.

sity.¹⁰⁵ The result is that working class individuals such as teachers, firefighters, social workers, and government employees are financially limited from hiring an attorney to protect some of their most basic civil rights.¹⁰⁶ Attorneys must address this issue by adhering to the legal profession's standards of ethical conduct, specifically, the recommendations regarding pro bono and low bono work.¹⁰⁷

V. INTRODUCING ACCESS TO JUSTICE LAWYER REFERRAL SERVICE:
A LAWYER REFERRAL SERVICE FOR
MODEST MEANS CLIENTS

“Like the poor, Americans of average means need lawyers to advise them about legal issues that arise in their everyday lives but many of them cannot afford lawyers who charge hourly rates that exceed \$300 per hour.”¹⁰⁸ This pretense inspired the creation of ATJLRS, a lawyer referral service that assists individuals in finding low bono legal counsel.¹⁰⁹ For three years, my private for-profit law firm, Steven Krieger Law, PLLC, has primarily served low bono clients in northern Virginia and Washington, D.C. As such, through first-hand experience, I can attest to the staggering lack of affordable legal services for people who do not qualify for the pro bono legal services, but cannot afford to pay attorneys' fees at market rates.

A. *How ATJLRS Will Help Close the Access to Justice Gap*

ATJLRS will operate like many other lawyer referral services.¹¹⁰ The prospective client will pay a modest fee to ATJLRS for a referral to an

105. See Herrera, *supra* note 13, at 5 (stating courts are plagued by individuals illiterate in the law who, out of necessity, represent themselves in complex legal matters).

106. *Id.* A legal needs study by the ABA indicated that moderate-income individuals have unmet legal needs similar to the poor. *Id.* at 6.

107. See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-1 (AM. BAR ASS'N 1980) (stating it is a function of the legal profession to assist in making legal services fully available).

108. Herrera, *supra* note 5, at 3.

109. ACCESS TO JUSTICE LAWYER REFERRAL SERVICE, BYLAWS OF ATJLRS, A VA. NONSTOCK CORP. 1 (2015) (on file with The Scholar). The service is a Virginia corporation, categorized as a non-profit organization. See also ACCESS TO JUSTICE LAWYER REFERRAL SERVICE, ATJLRS OVERVIEW & CLIENT ELIGIBILITY INFO. 1 (2015) [hereinafter ATJLRS OVERVIEW & ELIGIBILITY] (on file with The Scholar) (stating ATJLRS is a legal referral service organized to help clients of modest means find affordable legal service).

110. See, e.g., *About LRS*, Law. Referral Serv. of Cent. Tex., <http://www.austinlrs.com/about-lrs.html> (last visited Sep. 28, 2015) (stating an individual who uses the referral service pays \$20, is referred to an attorney, and once referred only deals with that attorney); see also *For the Public*, THE HOUS. LAW. REFERRAL SERV., <http://hrls.org/for-the-public/>

attorney with expertise in the relevant practice area¹¹¹ and who has agreed not to charge the client or ATJLRS for a thirty-minute consultation.¹¹² The referral to the attorney will be conducted in a systematic and objective manner to avoid the possibility of bias and conflict of interest when assigning referrals to attorneys. Once ATJLRS obtains the referral fee, the service is removed as a third party, leaving only the attorney-client relationship.¹¹³

Attorneys interested in joining ATJLRS must complete an annual membership application that requires a variety of criteria including: certification showing the attorney is free of sanctions or ethical misconduct, proof of malpractice insurance, statement of interest in providing low bono services, office space available to meet clients in the jurisdiction for which the attorney is seeking referrals.¹¹⁴ Additionally, each attorney is required to pay an annual membership fee to ATJLRS.¹¹⁵ Finally, each attorney must agree to the ATJLRS terms of service.¹¹⁶

The fee terms include two main components. First, charging clients based on the ATJLRS fee schedule below, which is based on the client's percentage of income between 200%–450% above the national poverty threshold. Second, a notice and disclaimer¹¹⁷ to the client in the attorney's professional service agreement that discloses a modest remittance

(last visited Sept. 28, 2015) (stating an individual seeking referral service pays \$20 and is referred to an attorney from a list of practices).

111. *See generally* ATJLRS OVERVIEW & ELIGIBILITY, *supra* note 109 (implying only a small fee will be charged because the mission of ATJLRS is to help clients who cannot otherwise find affordable legal services).

112. ACCESS TO JUSTICE LAWYER REFERRAL SERVICE, REFERRAL ATT'Y AGREEMENT BETWEEN ATJLRS & PARTICIPATING ATT'YS 1 (2015) [hereinafter ATJLRS ATT'Y AGREEMENT] (on file with The Scholar).

113. *See id.* at 3 (mandating that ATJLRS not interfere with or control the attorney's performance to the client); *see also* ACCESS TO JUSTICE LAWYER REFERRAL SERVICE, ATJLRS ATT'Y MEMBERSHIP APPLICATION (2015) [hereinafter ATJLRS MEMBERSHIP APPLICATION] (on file with The Scholar) (stating ATJLRS is not a provider of legal services).

114. *See* ATJLRS MEMBERSHIP APPLICATION, *supra* note 113 (requiring that applicants be in good standing with the Bar Association, have malpractice insurance, and state primary reason for interest in ATJLRS).

115. ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 3.

116. ATJLRS MEMBERSHIP APPLICATION, *supra* note 113. The details of the terms of service include the ATJLRS fee schedule and consent to ATJLRS's authority to terminate the agreement if the attorney fails to maintain any of the required components or if ATJLRS receives a significant complaint related to the attorney's representation. *Id.*

117. ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 2. The following is a sample of notice and disclosure language to be inserted into the attorney-client professional services agreement: "Client acknowledges and agrees that Attorney will remit X% of the total legal fees paid by the Client to Attorney, excluding costs, to ATJLRS even though ATJLRS will not be providing any direct legal services to Client." *Id.*

of all earned fees back to ATJLRS and requires the attorney to submit referral reports back to ATJLRS to track these fee remittances.¹¹⁸

Above Poverty Level	200%	250%	300%	350%	400%	450%
Hourly Rate	\$115	\$130	\$140	\$150	\$160	\$175

The above fee schedule sets maximum hourly attorney rates.¹¹⁹ Attorneys may charge less, but not more, than the schedule dictates if the client has a particular need or special circumstance.¹²⁰ The schedule serves several functions.¹²¹ First, it ensures uniform billing rates regardless of which attorney gets the referral.¹²² For example, Client 1 pays for the referral and gets Consumer Law Attorney A. Client 1 should not pay more (or less) than Client 2, who has a comparable income level and gets Consumer Law Attorney B, simply based on the objective referral process. Second, it provides the attorneys with a mechanism to eliminate any type of negotiation with potential clients who think the fee schedule is inappropriate by stating that the fee schedule is a condition of remaining on the ATJLRS referral list.¹²³ Again, an attorney could decide to charge a client a lower hourly rate, but that option is not advertised by ATJLRS, so it is up to the attorneys to disclose this information if they see fit.¹²⁴

ATJLRS will require attorneys who received referrals to produce a signed status update for each prospective client referred to the attorney.¹²⁵ For clients retained by the attorney, ATJLRS requires that a percentage of the earned fees, after costs, be remitted back to ATJLRS.¹²⁶

118. *Id.* at 2–3.

119. *Id.* at 2.

120. *See generally id.* (suggesting attorneys can charge less than the schedule through ATJLRS's omission of directly disallowing such practice).

121. *See id.* at 2 (discussing who and how the fee schedule is determined, remittance of fees that attorneys must comply with, and how fee sharing is addressed within the non-profit organization).

122. *Id.* (suggesting since the ATJLRS shall determine the hourly rate that a client will be charged and shall provide such information to the attorney, the fee schedule allows all clients to be billed through a uniform method as opposed to the discretion of the attorney who gets the referral).

123. *Id.* (suggesting since the ATJLRS shall determine the hourly rate charged, the attorney does not have control of the fee and cannot charge a certain rate as a condition of remaining on the referral list).

124. *See generally id.* (specifying the ATJLRS does not allow an attorney to charge more than the maximum fee determined through the fee schedule but does not address whether an attorney may charge a lower hourly rate).

125. *See id.* at 3 (“The Attorney shall provide ATJLRS with reports and data on cases referred regarding the [services performed], fees charged, and outcomes of the matter.”).

126. *Id.* at 2. “The Attorney shall remit 15 percent of [fees paid by Client, not including costs] to ATJLRS within thirty (30) days of receipt from the Client or other source.

Financial assistance via grant money and donations will certainly help provide a short-term solution to assist the development of ATJLRS, but to ensure long-term viability, ATJLRS must sustain a consistent income stream of remitted fees, referral fees, and attorney membership fees.¹²⁷

In the event of a dispute about fees or another component of attorney representation, formal complaint procedures are in place for clients to report to ATJLRS about unsatisfactory representation.¹²⁸ The attorney will be permitted to withdraw from representation while ATJLRS finds a suitable replacement and the ATJLRS Attorney Review Panel will evaluate the merits of the complaint and the attorney's continued eligibility to receive referrals.¹²⁹ During the investigation, if an offense justifies such an action, an attorney's membership may be suspended and ultimately terminated at the discretion of the Attorney Review Panel.¹³⁰

If the attorney agrees to the ATJLRS terms of service, and the membership application is approved the attorney will be permitted to select a limited number of practice areas¹³¹ for which the attorney is competent and willing to accept referrals.¹³² General practice areas may include: Bankruptcy, Consumer Protection,¹³³ Contracts, Criminal/Traffic, Debt

ATJLRS may periodically provide report forms to be completed and returned with remittances of fees not yet paid." *Id.*

127. See generally *Nonprofit Trends to Watch in 2015*, NAT'L COUNCIL OF NONPROFITS (2015), <https://www.councilofnonprofits.org/sites/default/files/documents/2015-nonprofit-trends-to-watch.pdf> (discussing the number one nonprofit trend: the "resource squeeze"). "Nonprofit leaders' biggest challenge for 2015 will be assessing needed resources, including raising the money needed to sustainably advance nonprofit missions." *Id.*

128. See ATJLRS OVERVIEW & ELIGIBILITY, *supra* note 109, at 2 ("ATJLRS maintains an Attorney Review Panel. Any issues between you and your Attorney may be brought to the Panel.").

129. See ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 1:

If an Attorney charged with misconduct has been referred to a Disciplinary Board or any circuit court, or agrees to or is placed under disciplinary terms, ATJLRS will not make referrals to that Attorney until (a) completion of the disciplinary proceedings without limitations having been placed on the Attorney member's license to practice law or terms having been imposed, or (b) following removal of such limitations and/or successful compliance with the terms imposed.

130. See ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 3–4 (stating ATJLRS will not make referrals until completion of disciplinary proceedings and may remove the attorney from the program if they no longer meet the eligibility requirements or violate any of the provisions in the agreement).

131. ATJLRS MEMBERSHIP APPLICATION, *supra* note 113, at 2.

132. ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 1.

133. Although the identifying information has been changed to protect the attorney-client privilege, here is an actual client that benefited from low bono services similar to those offered by ATJLRS. A senior citizen living in Washington D.C. had been saving for years to hire a contractor to perform a modest renovation on her home. The client signed

Collection, Elder Law, Employment, Family,¹³⁴ Immigration,¹³⁵ Juvenile,

an agreement with a contractor she believed to be reputable. After a year of “working on the project” the contractor had not completed the project and the components that were complete were not performed satisfactorily. It took the client many years to save for the renovation and did not have the financial resources to hire a traditional attorney to file a claim against this contractor. However, because this individual found an attorney willing to provide legal counsel at a reduced rate, this individual had the option to fight back.

134. For example, a recently disabled parent needs to modify child support payments. When the parent providing support has an unexpected life event—an injury that does not allow for the same level of earnings or a medical procedure that was more expensive than anticipated—the support payments will not immediately change just because an individual’s earnings have changed. If the individual cannot make the support payments, the individual is unlikely to have the resources to hire a traditional attorney and if payments are not made or the court order modified, the individual may be jailed (which only serves to accumulate more support arrearages). However, this parent was able to find a reduced rate attorney to assist in the modification of support payments.

135. The H-1B program provides non-U.S. citizens a legal way to work in the United States if two main conditions are met by the employee and employer: (1) The employee must be a professional level worker with a bachelor’s degree (or equivalent); and (2) There must be insufficient U.S. workers for the type of work the employee will be performing (qualifying positions are generally in the fields of IT, hotel management, physical therapists, and other white collar positions). Nonimmigrant Classes, 8 C.F.R. § 214, § 214.2 (2015). To get approval for a particular employee, the employer must file a Labor Condition Application (LCA), which specifies the wages that will be paid to the employee (annually or hourly), whether the employee will be full-time or part-time, the duration of the employment, and other details related to the employment and employer. *Id.* In some instances, employers are not complying with the regulations, which often results in the employee not being fully compensated or the employee being charged expenses for which the employer is obligated, or both. *See generally Id.* (showing revoked petitions invalidate the employer’s ability to continue employment which would lead to non-compensation). The lack of financial compensation can take many forms, but the most common form is called “benching,” where the employer does not have full-time work or any assignment for the employee when the employee arrives in the United States, so employer decides to “bench” the employee or make the employee find an assignment, project, or full-time position and not pay the employee during this period—even though the employer is required by law to pay the employee in accordance with the LCA. *Understanding H-1B Requirements*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements> (last visited Sept. 25, 2015); *see* 8 C.F.R. §§ 214, 214.2 (requiring all employees to be listed on an LCA, which shows the extra effort required that results in potential abuse by employers who “bench” as many on an LCA as possible to avoid reapplication). In some instances, after “benching” the employee, the employer will require the employee to sign a “voluntary” leave form. *See H1 Visa Holder Rights*, IMMHELP.COM, <http://www.immihelp.com/visas/h1b/h1-visa-holder-rights.html> (last visited Oct. 19, 2015) (stating many employers run out of cash and find ways to delay paying H-1B visa employees). Employees are indeed allowed to take voluntary leave, but employers are not permitted to require employees to “request” leave to avoid paying the wages until a job is obtained. *See Id.* (providing guidance that H-1B employees should expect the same hours and treatment regarding shifts as other employees). Often, the benched employee is too afraid to challenge the employer in fear of losing the position and is too afraid of seeking a transfer to other H1-B employers because the work agreement

Landlord/Tenant,¹³⁶ Personal Injury, Social Security/Disability, and Wills/Trusts. Several of the referral areas, like criminal/traffic and family law, have additional application requirements to ensure that the attorney has sufficient experience in handling these cases before ATJLRS is willing to refer clients to these attorneys.¹³⁷

B. *Ethical Considerations When Starting a Low Bono Lawyer Referral Service*

Although ATJLRS will not initially represent clients, there are still many ethical issues that should be addressed. In order to avoid additional ethical pitfalls, regular consultation between the referral service and the local bar association's ethic board is critical. Below are a summary of issues and resolutions related to ATJLRS based on the ABA *Model Rules of Professional Responsibility* and the Virginia *Rules of Professional Responsibility*.¹³⁸

often contains an improper (and often illegal) provision that requires the employee to pay a fee, in some cases exceeding \$30,000, if the employee wants to transfer. *See id.* (clarifying employers cannot require a fee for H-1B employees leaving employment prior to contract termination). These employees are in the United States because of a promise of a good paying job, but since the employee is not being paid, they cannot afford a market-rate attorney. With the help of an attorney charging below market rates, the H-1B employee was able to recover damages. *See id.* (exemplifying the expected fee for an attorney in order to handle H-1B employer abuses).

136. In northern Virginia, a tenant signs an application to lease a property. Although no lease was signed and the tenant did not take possession of the property, the landlord was convinced that an agreement existed and proceeded to sue the tenant for unpaid rent equivalent to five months. As a young professional, the tenant did not have the financial resources to afford a traditional rate attorney, but unquestionably had to defend the lawsuit filed by the landlord and was able to defend the suit with the help of a reduced rate attorney. Similarly, landlords may find themselves in situations where they require legal counsel, but simply cannot afford traditional rates. For example, in northern Virginia, a landlord purchased a home during the real estate bubble and then subsequently became unemployed after the bubble burst. Instead of selling the home that was "under water," the landlord decided to rent the property hoping the rent would cover the mortgage payments and the real estate market would recover. Unfortunately, the tenant stopped paying rent and the landlord needed to evict the tenant, but because of the mortgage payment, the landlord's inability to find suitable employment, and the tenant's failure to pay the rent, the landlord could not afford a market-rate attorney. However, with a reduced-rate attorney, the landlord was able to obtain the necessary assistance.

137. *See generally* ATJLRS MEMBERSHIP APPLICATION, *supra* note 113, at 2 (implying an attorney who is applying for membership must meet a certain number of years of area specific practice experience before qualifying for referrals).

138. Unless otherwise stated, the issues and explanations discussed in this section were provided by Seth M. Guggenheim, Assistant Ethics Counsel from the Virginia State Bar, and his assistance and counsel were of great aid in properly organizing ATJLRS to comply with the Virginia State Bar Rules of Professional Conduct. E-mail from Seth M.

1. May ATJLRS Set the Fees for Member Attorneys?

The ability to set affordable rates for all referrals and attorneys is critical to the success of ATJLRS.¹³⁹ Ethical rules require that all fees be “reasonable.”¹⁴⁰ Since the fees set by ATJLRS are well below the market rate for attorneys, the fees are reasonable, thus they may be dictated by ATJLRS.¹⁴¹ Additionally, because ATJLRS will not be directly regulating the attorney member’s professional judgment, the attorney member’s professional independence should be maintained.¹⁴²

2. May ATJLRS require member attorneys to remit fees?

Most states promulgate rules regarding advertising or direct contact with prospective clients that permit a “qualified lawyer referral service”¹⁴³ or a “non-for-profit qualified lawyer referral service”¹⁴⁴ to charge a referral fee for introducing prospective clients to member attorneys.¹⁴⁵ However, the referral fees and membership fees¹⁴⁶ are not sufficient to sustain ATJLRS, which is why the remittance of fees is so critical to the financial stability of ATJLRS.¹⁴⁷ Certainly, ATJLRS will accept

Guggenheim, Assistant Ethics Counsel, Virginia Bar, to Steven Krieger (May 28, 2014) (on file with The Scholar).

139. See *supra* Section IV.A for a discussion about the importance of setting rates for the referrals and attorneys.

140. VA. STATE BAR PROF’L GUIDELINES r. 1.5(a) (2009); MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 1983).

141. ATJLRS ATT’Y AGREEMENT, *supra* note 112, at 2; see Herrera, *supra* note 5, at 4 (discussing that although market rates for lawyers vary depending on geographic regions, a “low bono rate is 40%–50% lower than the prevailing market rate”).

142. See VA. STATE BAR PROF’L GUIDELINES at r. 5.4 (detailing the responsibilities of an attorney to remain professionally independent). See generally MODEL RULES OF PROF’L CONDUCT r. 5.4 (proposing rules that limit attorneys sharing fees and “protect the lawyers professional independence of judgment”).

143. Not-for-profit lawyer referral services is defined as “consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.” MODEL RULES OF PROF’L CONDUCT r. 7.2(b)(2) cmt. 6.

144. E.g., VA. STATE BAR PROF’L GUIDELINES r. 7.2(c)(2).

145. See generally MODEL RULES OF PROF’L CONDUCT r. 7.2(b)(2) (“[Lawyers] shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may pay the usual charges of a qualified lawyer referral service that has been approved.”).

146. Membership fees do not involve client money or fee splitting, and therefore, do not fall within the scope of ethical considerations for attorneys. *Id.* at r. 1.5.

147. See *supra* Section IV. A for a discussion about the importance of remittance and membership fees (stating a “combination of the remitted fees, referral fees, and attorney membership fees are critical to sustain ATJLRS financially as grant money and large donations are not a long-term solution”).

donations and is able to apply for grants, but the remittance of fees provides a long-term and more sustainable solution to the funding issues that plague many non-profit organizations.¹⁴⁸

The primary ethical concerns involving fee remittances are reasonableness of the fee, and protecting the professional independence of the attorney.¹⁴⁹ In Virginia, the fee remittance did not violate the Professional Guidelines because the fee schedule is inherently reasonable since it is well below the market rates for attorneys.¹⁵⁰ The fees did not impact the professional independence of the attorney because the rates were the same for all attorneys and ATJLRS makes the referrals based on an objective, rotating, and systematic basis among the attorney members (as opposed to hand-selecting attorneys for whom to make the referrals).¹⁵¹

In D.C., fee remittances similar to those used by ATJLRS were permissible in 1989,¹⁵² but were then deemed impermissible in 1998 as a violation of D.C. Rule 5.4(a) (Professional Independence of a Lawyer).¹⁵³ By 2005, the pendulum had swung back to allow fee remittances to a lawyer referral service by explaining that the policy considerations for Rule 5.4(a) are “whether a proposed arrangement would interfere with a lawyer’s independent judgment” and “whether refusing to permit the arrangement would result in fewer legal resources being available for those in need of them.”¹⁵⁴ In 2007, an additional exemption to Rule 5.4(a) was adopted to limit the fee splitting to “legal fees, whether awarded by a

148. See generally *Nonprofit Trends to Watch in 2015*, *supra* note 127, at 1 (discussing the number one nonprofit trend: the “resource squeeze”). “Nonprofit leaders’ biggest challenge for 2015 will be assessing needed resources, including raising the money needed to sustainably advance nonprofit missions.” *Id.*

149. Cf. VA. STATE BAR PROF’L GUIDELINES r. 5.4 cmt., r. 1.5(a) (2009) (inferring the purpose of the rule is to protect an attorneys independent judgment by regulating lawyers’ fees, requiring that all fees are reasonable)

150. See *supra* Section III. B (“Specifically, the U.S. Attorney’s Office for the District of Columbia created the Laffey Matrix to determine ‘reasonable’ attorney’s fees when a prevailing party is seeking to recover attorney’s fees.”)

151. ATJLRS ATT’Y AGREEMENT, *supra* note 112, at 2 (suggesting since the ATJLRS shall determine the hourly rate that a client will be charged and shall provide such information to the attorney, the fee schedule allows all clients to be billed through a uniform method as opposed to the discretion of the attorney receiving the referral).

152. See CODE OF PROF’L RESPONSIBILITY AND OPS. OF THE D.C. BAR LEGAL ETHICS COMM., Formal Op. 201 (1969) (D.C. BAR, amended 1980) (holding a non-profit could accept fee remissions up to one-sixth of the fees the attorneys collected from the referred client if the attorney agreed to charge a reduced rate).

153. See D.C. RULES OF PROF’L CONDUCT, Formal Op. 286 (1998) (DIST. OF COLUMBIA BAR, amended 2007) (holding “a payment to a nonlawyer for the referral of business, tied to the amount of revenue received by the lawyer from the referred business” violated Rule 5.4(a) as it would compromise the lawyer’s independence).

154. See *id.* at Op. 329 (holding fee-sharing arrangements are allowed under specific circumstances and the arrangements must comply with public policies).

tribunal or received in settlement of a matter with nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under section 501(c)(3) of the Internal Revenue Code.”¹⁵⁵ As such, fee remittances earned by the member attorney through general litigation were excluded and could not be remitted to the referring organization.¹⁵⁶ In 2014, ATJLRS contacted the D.C. Bar Ethics Counsel to inquire about amending the rules to permit ATJLRS to operate in D.C. Since D.C. Rule 5.4(a) excludes litigation, the only basis to permit litigation based fee remittance is if the remittance is a “usual fee” charged by a “lawyer referral service” under D.C. Rule 7.1.¹⁵⁷ Ultimately, this resulted in D.C. Legal Ethics Opinion 369, which held that the fee remittance to a lawyer referral service is permissible within Rule 7.1, comment six if the lawyer referral service:

- is generally open to D.C. Bar members who agree to its reduced-fee prerequisite;
- takes reasonable steps to ensure that lawyers to whom matters are referred are competent to handle such matters;
- does not interfere with the lawyers’ professional independence of judgment;
- requires only reasonable referral fees . . . ;
- requires that all lawyers in its network have reasonably adequate malpractice insurance;
- has a neutral dispute resolution mechanism; and
- does not refer matters to lawyers who own, operate, manage, or are employed by the [lawyer referral service].¹⁵⁸

As evidenced between the stark difference between Virginia and D.C., prior to D.C. Legal Ethics Opinion 369, each jurisdiction will have its own interpretation of the ethical rules, so obtaining clarity on this issue from local bar counsel is highly advisable.

155. RULES OF PROF’L CONDUCT r. 5.4(a) (D.C. BAR 1991) (amended 2007).

156. *See generally id.* at r. 5.4(a) (addressing the instance when an attorney may share legal fees with a nonlawyer).

157. *Id.* at r. 7.1 cmt. 6. Comment six states in full: “Payments for Advertising: A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.” *Id.*

158. D.C. RULES OF PROF’L CONDUCT, Formal Op. 369 (citations omitted).

3. May a Lawyer Affiliated with ATJLRS Accept Referrals from ATJLRS?

Absent false or misleading advertising¹⁵⁹ and conflicts of interest,¹⁶⁰ if there is an unbiased system and a procedure for a client to complain about the representation¹⁶¹ that allows the attorney to withdraw from representation while ATJLRS attorney review panel evaluates the merits of the complaint and the attorney's continued eligibility,¹⁶² then, assuming all other membership requirements are met, a director or employee of the referral service who is also engaged in the practice of law should be eligible for panel membership. In contrast, D.C. Legal Ethics Opinion 369 makes it very clear that a lawyer referral service may "not refer matters to lawyers who own, operate, manage, or are employed by the [lawyer referral service]."¹⁶³

4. Is there a Minimum Number of Member Attorneys Needed Per Jurisdiction and Practice Area Before Operations May Begin?

There must be a pool of qualified attorneys in each region where the organization operates to avoid the misconception that the organization is merely a conduit to steer work to a few select attorneys or firms.¹⁶⁴ Virginia Legal Ethics Opinion 1348 *suggests* five members per region, but this is a simple suggestion to help attorney's avoid any potential deception.¹⁶⁵ As such, a similar conclusion may be drawn related to the number of attorneys needed per practice area. To be safe, at least in Virginia, having five attorneys per jurisdiction (like northern Virginia) seems to be a conservative approach.

159. VA. STATE BAR PROF'L GUIDELINES r. 7.1 (2009); MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 1983).

160. VA. STATE BAR PROF'L GUIDELINES r. 1.7, r. 1.8.

161. *See* ATJLRS OVERVIEW & ELIGIBILITY, *supra* note 109, at 2 (stating ATJRS maintains an Attorney Review Panel where clients may formally file complaints against attorneys for review).

162. ATJLRS ATT'Y AGREEMENT, *supra* note 112, at 3.

163. D.C. RULES OF PROF'L CONDUCT, Formal Op. 369 (2015).

164. *See generally* Hettrick, *supra* note 46, at 80 (discussing a situation where a law firm found substantial success and efficiency in educating the public on exactly what it did and did not do before clients took the time to visit the office).

165. VA STATE BAR PROF'L GUIDELINES, Formal Op. 1348 (1990).

5. Are there Ethical Considerations When Selecting the Entity's Name?

The entity must be careful not to misrepresent itself.¹⁶⁶ For example, prior to selecting ATJLRS, the service considered using the name "Low Bono Attorney Network of Greater DC."¹⁶⁷ This posed a problem because this name improperly suggests to the public that the entity is a law firm, or a group of attorneys associated with each other for the practice of law.¹⁶⁸ To avoid confusion, ATJLRS elected to include the words "Lawyer Referral Service" in the name, as it more accurately represents the function of the service.¹⁶⁹

6. Is it a necessity to obtain a formal ethics opinion to share with potential attorney members?

As is the case in Virginia, if the above-mentioned ethical issues are considered, a legal ethics opinion from local counsel may not be necessary.¹⁷⁰ Certainly, some prospective attorney members may request such an opinion, however, if the above-mentioned issues are discussed with the ethics counsel, there is nothing preventing an organization like ATJLRS from sharing those communications with concerned attorneys. Conversely, as is the case in D.C., if the jurisdiction lacks the necessary permissions or explicitly prohibits a particular action, a legal ethics opinion may be the only avenue to allow an entity like ATJLRS to proceed in the desired operational manner.

C. *Other Low Bono Programs in the United States*

Programs in support of low bono legal practice are becoming more prevalent throughout the United States.¹⁷¹ As the gap between meeting

166. *See generally id.* at r. 7.5 (providing guidelines lawyers must follow when representing themselves and their firms).

167. *Id.* at r. 7.5.

168. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 7.5 (AM. BAR ASS'N 1983); *cf.* ACCESS TO JUSTICE LAWYER REFERRAL SERVICE, ARTICLES OF INCORPORATION OF ATJLRS, A VA. NONSTOCK CORP., 1 (2015) [hereinafter ATJLRS ARTICLES OF INCORPORATION] (on file with The Scholar) (showing the organization's official name includes a reference to the fact that it is a referral service program).

169. ATJLRS ARTICLES OF INCORPORATION, *supra* note 168, at 1.

170. *See generally* VA STATE BAR PROF'L GUIDELINES, Formal Op. 1348 (1990) (explaining necessary criteria to comport with ethical guidelines in operating a referral service). The ethical considerations include: fee sharing with non-lawyers, payment for recommending a lawyer's services, reasonableness of fees, advertising, vetting of attorney panel members, costs of referral service membership, remittances to the service based on fees collected, and client eligibility for services. *Id.*

171. *E.g.* Hettrick, *supra* note 46, at 78 (showing one of many examples of low bono legal practices that are becoming more prevalent); *see also* Deborah Howard, *The Law*

the requirements to receive pro bono counsel and being able to afford a private attorney expands, many organizations are developing alternative solutions to provide the middle class with affordable options.¹⁷² One potential solution for low bono services across the country includes using ATJLRS as a foundation or template for others to expand upon as specific regional demands dictate. This, however, is only one solution to the bigger issue.

Short of a massive influx of financial capital dedicated to expanding pro bono legal services by Congress (which does not seem likely)¹⁷³ or extremely wealthy private donors, there does not appear to be a silver bullet, so the more programs serving low bono clients the better.¹⁷⁴ Below is a summary of categories regarding low bono programs used to address the access to justice gap.

1. Law School Incubator Programs

Law schools have made significant contributions to addressing the needs of low bono clients.¹⁷⁵ One such initiative is the Law School Consortium Project (LSCP).¹⁷⁶ The program began in 1997, encompassing sixteen law schools that sought to work with local law firms to service the legal needs of low-to-moderate income communities.¹⁷⁷

Originally designed as an experiment, the program's founding member schools' primary focus included: (1) providing greater access to quality low bono legal services; (2) increasing guidance for solo and small firm lawyers to help them better provide low bono services; and (3) providing a way for law school graduates with debt, due to the high cost of a legal education, to find meaningful public interest work.¹⁷⁸

School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and Communities, 29 *FORDHAM URB. L.J.* 1245, 1247 (2006) (providing examples of alternative programs for low-income clients to include law school support).

172. *See, e.g.*, ATJLRS OVERVIEW & ELIGIBILITY, *supra* note 109, at 1 (providing a set fee schedule where legal service rates are determined based on each individual's income level).

173. LEGAL SERVS. CORP., *supra* note 58.

174. *See generally* Levin, *supra* note 1 (discussing the importance of solo and small law firm pro bono services as an additional option for clients who may not qualify for LSC-funded programs but genuinely cannot afford a lawyer).

175. *See* Herrera, *supra* note 13, at 9 (describing the impact of law school initiatives and programs for augmenting low bono efforts). *See generally* Bellow, *supra* note 13, at 120 (speaking on alternative approaches for providing low cost legal services).

176. Levin, *supra* note 1, at 721.

177. *Id.*

178. Howard, *supra* note 171, at 1245–46.

Participants in the LSCP ultimately concluded that pro bono legal services needed to expand to address the affordability gap between those who can and those who cannot afford legal representation.¹⁷⁹ Currently, the LSCP is a national nonprofit organization that utilizes a social entrepreneurship philosophy while working with law schools to support alumni with solo or small firms.¹⁸⁰ The lawyers involved dedicate an average of 42% of their work to low bono practice.¹⁸¹ In turn, law schools support their alumni by working with the LSCP to provide training, mentoring, networking, and other support.¹⁸² Each member school has the flexibility to develop their own program and network.¹⁸³ The network created through the LSCP provides an opportunity for law schools to support alumni in the low bono field, and improves the quality of low bono services offered while operating to provide access to justice that may not have been available to low-to-moderate income individuals.¹⁸⁴

The Seattle University School of Law developed and housed one such incubator program¹⁸⁵ with the purpose of “educat[ing] outstanding lawyers to be leaders for a just and humane world” by serving the modest means community.¹⁸⁶ New lawyers planning to engage in solo or small practice work will “incubate” a law practice for a period of one year to create a sustainable and successful low bono practice.¹⁸⁷ Participants receive training, guidance, and resources to help with implementing a low bono practice.¹⁸⁸ In addition, each participant receives a stipend, free office space, and a mentor specializing in that attorney’s practice area.¹⁸⁹

179. *See id.* at 1247 (discussing various methods to expand the legal services beyond that of pro bono).

180. *See Solo and small firms committed to serving their communities*, LOWBONO.ORG, <http://www.lowbono.org.html> (last visited Sept. 25, 2015) (discussing the LSCP’s purpose as well as its efforts to support alumni). *See generally Law Schools*, LAWSCHOOLCONSORTIUM.NET, <http://www.lawschoolconsortium.net/law-schools.html> (last visited Aug. 27, 2015) (showing an extensive list of law schools that the LSCP currently works with).

181. *See Solo and small firms committed to serving their communities*, *supra* note 180 (“The average LSCP solo/small firm practitioner has a law practice that provides 42% low bono work, 14% pro bono work, 36% full fee work and the remaining as fee-shifting cases.”).

182. *Id.*; Howard, *supra* note 171, at 1245 (describing the different services provided by various law schools who work with LSCP).

183. *Solo and small firms committed to serving their communities*, *supra* note 180.

184. Howard, *supra* note 171, at 1247.

185. *Low Bono and Solo Initiative*, ACCESS TO JUST. INST., <http://www.law.seattleu.edu/centers-and-institutes/access-to-justice-institute/public-interest-and-social-justice/low-bono-and-solo-initiative> (last visited Sept. 27, 2015).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

There are over thirty incubator or similar programs hosted by law schools¹⁹⁰ and currently, other similar programs are developing across the country.¹⁹¹

2. Limited License Legal Technicians

Washington State has moved beyond the idea that an individual who practices law must have graduated from law school.¹⁹² Washington is the first state to create a new affordable option for legal support called the Limited License Legal Technician (LLLT).¹⁹³ Like the other low bono programs, this new educational program was developed to meet the needs of individuals who are unable to afford market rate attorneys.¹⁹⁴ Legal technicians are trained and licensed to advise clients in the field of family law in Washington.¹⁹⁵ While legal technicians are not able to represent clients in court or negotiate on behalf of a client, they are legal advisors with the ability to file court documents approved by the LLLT Board.¹⁹⁶ Significantly, an individual is not required to meet the standard of low income in order to hire a legal technician.¹⁹⁷ The LLLT program, which may expand into California, Oregon, and New Mexico, has the potential to redefine how low-to-moderate income individuals utilize the legal system.¹⁹⁸

190. Karen Sloan, *Schools Collaborate on Baltimore Legal Practice Incubator*, NAT'L L.J. (July 27, 2015), <http://www.nationallawjournal.com/id=1202733203721>.

191. See generally *Incubator/Residency Program Profiles*, ABA, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles.html (last visited Sept. 27, 2015) (describing the different incubator programs around the country).

192. *Limited License Legal Technician Program*, WASH. ST. BAR ASS'N, <http://www.wsba.org/lllt> (last visited Sept. 27, 2015).

193. *Id.*

194. *Id.*; see also Jim Flynn, *Money & The Law: Washington state leads the way in bridging 'justice gap'*, THE GAZETTE (June 16, 2015), <http://gazette.com/money-the-law-washington-state-leads-the-way-in-bridging-justice-gap/article/1553870> (“[Limited License Legal Technicians] will be allowed to set up shop as independent businesses, have direct client relationships and provide a narrow range of services, hopefully for fees that are materially less than what a lawyer would charge for the same work.”).

195. *Limited License Legal Technician Program*, *supra* note 192.

196. See *id.* (stating the limited authority of a legal technician as opposed to a fully licensed attorney).

197. See Robert Ambrogi, *Who Says You Need a Law Degree to Practice Law?*, THE WASH. POST (Mar. 13, 2015), http://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-a4a1-86135599fb0f_story.html (“[T]he American Bar Association noted that ‘this includes not only the poor but the middle class because . . . middle-class people are unable to spend to retain lawyers.’”).

198. *Id.*

3. Non-profit Law Firms

In conjunction with the mega law firms Arent Fox and DLP Piper, Georgetown University Law Center is embarking on a new initiative to support low bono efforts in the Washington, D.C. area.¹⁹⁹ With office space provided by Arent Fox, the D.C. Affordable Law Firm, a nonprofit low bono firm, provides legal services to residents who are not eligible to receive free legal aid services.²⁰⁰ Each year, six graduating Georgetown Law students will receive a fifteen-month fellowship to work at the firm and be mentored by attorneys at the mega firms.²⁰¹ Working class individuals with salaries between \$25,000 and \$50,000 per year will be offered alternative payment options, including small retainers, prepaid legal insurance, and the use of fee-shifting provisions.²⁰² While similar to incubator programs throughout the country, the D.C. Affordable Law Firm offers recent graduates the unique training opportunity of working within a law firm dedicated to low bono practice.²⁰³

4. U.S. Department of Justice Office for Access to Justice

The Department of Justice Office for Access to Justice (ATJ) seeks to provide support for civil legal aid systems in the United States.²⁰⁴ ATJ works with federal agencies as well as state and local legal stakeholders to increase the availability and quality of legal counsel to those people who are unable to afford a lawyer. The Initiative operates by: (1) providing beneficial legislation, policies, and practices at the state and federal level; (2) promoting solutions that require less court and attorney resources; and (3) continually researching for new strategies.²⁰⁵ ATJ, established in 2010, assists over twenty-five million Americans who are eligible to re-

199. Press Release, Georgetown Law, Arent Fox and DLA Piper Create Nonprofit Law Firm (Apr. 13, 2015), <https://www.law.georgetown.edu/news/press-releases/georgetown-law-arent-fox-dla-piper-partner-to-create-nonprofit-law-firm.cfm>.

200. *Id.* “This new firm will help meet the needs of D.C. residents seeking affordable legal services. We hope it will also encourage a greater number[] of lawyers to devote their careers to serving these populations by providing the level and quality of training, mentoring and supervision necessary to ensure that high quality services are rendered.” *Id.*

201. *Id.*

202. Victor Li, *Georgetown Law Teams up With 2 Firms to Create ‘Low Bono’ Law Firm*, A.B.A. J. (Apr. 16, 2015, 9:00 AM), http://www.abajournal.com/lawscribbler/article/georgetown_law_2_firms_team_to_create_low_bono_law_firm.

203. *See id.* (claiming work experience with this new low bono firm is incomparable because of its unique training, expert mentorship, and tremendous practical experience).

204. *About the Office*, U.S. DEP’T OF JUST., <http://www.justice.gov/atj/about-office> (last updated Dec. 23, 2015).

205. *Id.*

ceive civil legal aid, but are denied due to lack of legal aid resources.²⁰⁶ By promoting many successful programs operating throughout the country, ATJ seeks to promote accessibility to the law, ensure fairness for all parties regardless of financial disadvantages, and increase the efficiency of legal proceedings.²⁰⁷

D. *The Unfounded Idea that Low Bono Equals Low Quality of Legal Service to the Client and Low Quality of Life for the Attorney*

While most states recognize the value of low bono law practice and how it serves as an alternative solution to an attorney's commitment to public service, there are a handful of very real concerns for attorneys primarily engaging in low bono legal counsel.²⁰⁸ The underlying obstacle is the unfounded belief that attorneys willing to provide legal counsel at below market rates will also provide below market quality of service.²⁰⁹ The reality is that many clients are dissatisfied with the quality of service received from their traditional attorney—especially when the client considers the attorney's hourly rate and total fee paid to the attorney or firm.²¹⁰ While a bias against low bono attorneys may exist, it is unclear

206. *Id.*

207. *Id.*

208. *See* Herrera, *supra* note 5, at 6 (referring to the contradiction between rules of the profession that encourage providing services at reduced rate but also mandate adequate compensation to preserve the integrity and independence of the profession). Attorneys electing to “give back” or supplement their practice with low bono cases may not face this same obstacle as attorneys with primarily low bono clients because the traditional attorney can simply disclose the true nature of the practice and their interest in low bono, which should be enough to overcome the bias—to the extent the bias actually exists. *See generally id.* at 6–7, 9–10 (explaining low bono lawyers face many types of bias in their chosen practice, including the perception that lower cost will yield a lower quality of service, the common idea that the practice of low bono work harms the profession, and the view from clients that the economic benefit is only for the lawyers).

209. *See* Herrera, *supra* note 5, at 7 (“A 1961 ABA ethics opinion states: ‘When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient.’”).

210. *See id.* at 9 (“When the economy causes the demand for traditional legal services [to] dwindle, alternatives such as low bono must be considered.”). *See generally* Sandra Prufer, *In-House Counsel Axing Law Firms*, 5 A.B.A. J. E-REPORT 1 (Sept. 8, 2006), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/migrated/litigation/mo/premium-lt/prog_materials/2007_jointcle/c03.pdf (conveying the results from a survey of about 70% of corporate counsels at large and Fortune 1000 companies; these results showed that more than half of the companies replaced their traditional counsel that year, and the results stress how customer service is of high necessity in a corporate-client relationship, especially given the cost of such private counsel).

how the bias manifests itself in actual attorney-client relations.²¹¹ I have never had a prospective (or current) client inform me that they would feel more comfortable with my representation if my rates were higher. To the contrary, new clients tell me how joyful and relieved they are to have found my firm. Most of my clients are in search of an attorney and simply cannot afford the rates of traditional firms. As such, the client's "satisfaction rating" often starts off very high because of the low bono counsel being provided to them. Additionally, from personal experience, attorneys offering low bono counsel have deep commitments to public interest and public service that began long before the decision to provide low bono counsel, and in some cases, long before law school.²¹² These attorneys are not required or forced into reducing their rates due to financial constraints; in contrast, these attorneys have chosen to reduce their hourly rates and retainers to make themselves available to middle class clients that could not otherwise afford legal counsel.²¹³ Further, these low bono attorneys are still bound by the rules of professional conduct that require the same level of competence and diligence to their client as if they were charging the full market rate.²¹⁴

The more practical concern for an attorney starting a low bono practice is having an adequate business plan and budget to ensure a comfortable quality of life for the attorney. Finances of low bono law firms are quite different from the finances of law firms billing at market rates.²¹⁵ For example, because of the lower rates, the business model is based on client

211. See generally Herrera, *supra* note 5, at 10–11 (describing a general reluctance (though only cautionary) against offering low bono services that may discredit the nobility of the legal profession).

212. I manage a list serve of about a dozen solo and small firm attorneys in the metro-DC region for whom low bono legal counsel makes up a significant portion of their practice. My interactions, both online and offline, with these attorneys have convinced me that their low bono practices is how these attorneys fulfill their commitment to public service.

213. See Herrera, *supra* note 5, at 8 (explaining the adequacy of the lawyer's compensation depends on a case-by-case basis, while also supporting the rules of professional conduct that say a lawyer must still provide the same level of competency even at a reduced rate).

214. *Id.* at 10. "The implication is that a less expensive lawyer delivers a substandard service. This concern should be acknowledged and addressed *but we must remember that the obligation to provide quality legal work is not dependent on the fee a client pays.*" *Id.* (emphasis added).

215. See *id.* at 12–17 (highlighting the factors a lawyer should consider before entering the practice of low bono work, including knowing how much they need to make to maintain their desired lifestyle, understanding the costs of forming a business and buying supplies, and being able to set forth a practical business plan).

volume.²¹⁶ While this could lead to higher occurrences of burn out and difficulty in making time for vacation,²¹⁷ the retention rate and job satisfaction rates at large law firms are not impressive.²¹⁸ This may result in the attorney burning out regardless—or the satisfaction from providing low bono counsel could delay the burn out if it is inevitable for that particular attorney.

While these practical concerns are real and an attorney considering a low bono practice is certainly justified in considering them, my low bono colleagues and I have found the concerns regarding quality of representation and work satisfaction to be significantly exaggerated.

VI. CONCLUSION

The need for low bono or modest means legal services has never been greater.²¹⁹ Although there are a variety of existing programs and initiatives, the ability to scale the current programs to meet current demand, which is essentially the entire middle class, has not been achieved. This is troubling because there are 1.3 million active practitioners in the United States,²²⁰ a number that leads every other nation in the world.²²¹ Even more troubling, lawyers, especially recent graduates, are having an increasingly difficult time finding employment.²²²

216. See *id.* at 13–14, 21–22 (“A lawyer with an understanding of how much he needs to earn to make his monthly expenses, will have a clearer vision of how much his law firm will need to produce to sustain himself and his family.”).

217. See Levin, *supra* note 1, at 723 (“Not surprisingly, burn-out is a problem because it can be difficult to sustain the pace with so little remuneration and so many demands on the lawyer.”).

218. See Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 66 (2011) (“Large law firms are losing a significant number of their newer lawyers—a whopping 37 percent of associates at big law firms, defined by the study as those employing more than 500 lawyers, quit their firms by the end of their third years of practice.”).

219. See LEGAL SERVS. CORP., *supra* note 58, at 18 (“[O]nly a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.”).

220. ABA NATIONAL LAWYER POPULATION SURVEY: HISTORICAL TREND IN TOTAL NATIONAL LAWYER POPULATION 1878–2015 (AM. BAR ASSOC. 2015), http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2015.authcheckdam.pdf [hereinafter ABA NATIONAL LAWYER POPULATION SURVEY].

221. Jeff Jacoby, *U.S. Legal Bubble Can't Pop Soon Enough*, THE BOS. GLOBE (May 9, 2014), <https://www.bostonglobe.com/opinion/2014/05/09/the-lawyer-bubble-pops-not-moment-too-soon/qAYzQ823qpf4GQl2OiPZM/story.html#>.

222. See Adam Cohen, *Just How Bad Off Are Law School Graduates*, TIME (Mar. 11, 2013), ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/ (“In 2009, just 65.4% of law school graduates got jobs for which they needed to pass the bar.”); see also J. Maureen Henderson, *Why Attending Law School is the Worst Career Decision*

With the apparent abundance and demand of lawyers in the marketplace, why does the majority of the American middle class struggle to obtain legal counsel? The answer begins with the federal poverty guidelines, which are the basis for determining if individuals qualify for the pro bono legal services.²²³ The guidelines are set too low because the assumptions about family expenditures are outdated and the method used to calculate the guidelines does not accurately reflect a family's resources.²²⁴

[T]he poverty measure such as it is today made a lot of sense in . . . the late 1960s. The problem is we haven't really updated it in a meaningful way. We've updated [the poverty guidelines] for inflation, but that just means you're measuring what it means to be poor today in what are essentially early 1960s terms.²²⁵

However, even if the federal poverty guidelines were doubled, Congress would still need to increase funding to LSC, so it could increase funding to the legal aid organizations that provide the direct legal services.²²⁶

You'll Ever Make, FORBES (June 26, 2012), <http://www.forbes.com/sites/jmaureenhenderson/2012/06/26/why-attending-law-school-is-the-worst-career-decision-youll-ever-make/> (noting not only are job openings declining, but entry salaries are declining as well); Daniel Luzer, *Why Law School Doesn't Work Anymore*, WASH. MONTHLY: POL. ANIMAL (Mar. 14, 2013, 4:18 PM), http://www.washingtonmonthly.com/political-animal-a/2013_03/why-law-school-doesnt-work-any043593.php (highlighting the fact that new law school graduates are increasingly unemployable months after graduation); Jordan Weissmann, *How the Job Market for Law School Grads Crumbled (and How It Could Come Back to Life)*, THE ATLANTIC (Feb. 5, 2013), <http://www.theatlantic.com/business/archive/2013/02/how-the-job-market-for-law-school-grads-crumbled-and-how-it-could-come-back-to-life/272852/> (furthering the assertion that the job market for attorneys has become dismal since the 2008 economic crisis); Jim Saksa, *You Can Do Anything With a Law Degree*, SLATE (May 14, 2014), http://www.slate.com/articles/life/culturebox/2014/05/you_can_do_anything_with_a_law_degree_no_no_you_cannot.htm (purporting law school grads are a step behind other graduate level students because there is no outlet for employment for many new law school grads).

223. E.g., *Frequently Asked Questions About the Legal Aid Society*, THE LEGAL AID SOCIETY, <http://www.legal-aid.org/en/las/aboutus/legalaidsocietyfaq.aspx> (last visited Oct. 16, 2015) (requiring a client's income to be at or below 125% of the federal poverty level for them to qualify for free legal representation).

224. Sarah Fass, *Measuring Poverty in the United States*, NCCP (May 2009), http://www.nccp.org/publications/pub_876.html/.

225. John Light, *Why is the Federal Poverty Line So Far Off?*, MOYERS & CO. (Sept. 18, 2013), <http://billmoyers.com/2013/09/18/why-is-the-federal-poverty-line-so-low/> (quoting Shawn Fremstad, Senior Research Associate at the Center for Economic Policy Research).

226. See Yuille, *supra* note 64, at 873–75 (outlining the funding for the LSC and how it fails to meet the needs of the masses who rely on it).

Until the federal government and Congress make these changes (and potentially even after any changes are made), the 1.3 million lawyers in the United States²²⁷ should increase efforts to tackle the issue of providing legal counsel to the middle class.²²⁸ In 2011, lawyers provided an average of fifty-six hours of pro bono services, with a median of thirty hours.²²⁹ Since the average lawyer provides approximately thirty hours of pro bono services, these same lawyers may also be willing to provide reduced rate legal services and reach the recommended minimum of fifty hours a year.²³⁰ Another large part of the problem is that 20% of the lawyers provide no pro bono services, 7% only provide between one and nine hours, and 11% provide between ten and nineteen hours, so there is a large untapped pool of attorneys who may not have the capacity to donate pro bono services, but may be very willing to provide low bono services.²³¹

ATJLRS is an attempt to close the access to justice gap by matching clients who need below market rate legal counsel with attorneys willing to provide such legal counsel. The simple referral based structure and fee remittance requirements make it easy to replicate, scale to the appropriate size, and self-reliant for funding, which increases the likelihood of success and magnitude of impact. Although there are ethical considerations that must be evaluated prior to creating a similar lawyer referral service in each community, the jurisdictions that have considered these issues have found ways to allow the organization to operate as designed.

227. *ABA National Lawyer Population Survey*, *supra* note 220, at 1878–2015.

228. As of this writing, there are no pending bills in Congress to address the poverty guideline calculations, efforts to revise the poverty guideline calculations date back to at least the early 1990's. See *MEASURING POVERTY: A NEW APPROACH* (NAT'L ACADEMIES PRESS 1995), <http://www.nap.edu/readingroom.php?book=poverty&page=summary.html> (last visited July 21, 2015) (using data from 1992 to make recommendations for an improved guideline calculation).

229. AM. BAR ASSOC. STANDING COMM. ON PRO BONO AND PUB. SERV., *SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF LAWYERS*, at vi (2013), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/l_s_pb_Supporting_Justice_III_final.authcheckdam.pdf.

230. *Id.* It is possible that some lawyers have only allocated thirty hours of time for all cases below market rates (pro bono cases and low bono cases), which could result in a cannibalization between pro bono and low bono as the two groups of clients “compete” for the lawyers’ time. However, the objective is to increase the number of lawyers participating and number of hours the lawyer has allocated to below market rate clients. See *generally* ATJLRS OVERVIEW & ELIGIBILITY, *supra* note 109, at 1 (stating ATJLRS’s mission is to help clients find affordable legal services).

231. AM. BAR ASSOC. STANDING COMM. ON PRO BONO AND PUB. SERV., *supra* note 229, at 5. Unfortunately, 20% of the lawyers provide no pro bono services, 7% only provide between one and nine hours, and 11% provide between ten and nineteen hours. *Id.*

Although an exact number is illusive, the vast majority of cases in the United States settle because both parties recognize that the risk of proceeding along the current path of litigation outweighs the benefits of changing direction.²³² Our legal system needs to make a similar realization since the status quo is not working for large segments of the population. Fortunately, steps are being taken towards this realization. Since 2010, the legal profession has been discussing the idea of a “New Normal” to help lawyers better manage their practices to adjust with the changing financial marketplace.²³³ As attorneys and law firms are evolving to stay current with the changing landscape of the legal profession, it is hopeful that many attorneys will see the mutual benefit of accepting a handful of low bono cases a year by joining an entity like ATJLRS. By making the connection between the attorney and clients as simple as possible for both parties, ATJLRS allows the attorney and client to spend their valuable resources addressing the pressing legal matter while simultaneously closing the access to justice gap.

232. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 CORNELL L. FAC. PUBL'S 111, 111 (2009) (“Regardless of the method of computing settlement rates, no reasonable estimate of settlement rates supports an aggregate rate of over 90 percent of filed cases, despite frequent references to 90 percent or higher settlement rates.”); Jay Shepherd, *Small Firms, Big Lawyers: Real Lawyers Settle Cases*, ABOVE THE LAW (Aug. 31, 2011, 2:35 PM), <http://abovethelaw.com/2011/08/small-firms-big-lawyers-real-lawyers-settle-cases/> (stating approximately 35,000 civil cases are filed in Massachusetts Superior Court with only 500 proceeding to a jury trial, which is less than 1.5%).

233. See generally Paul Lippe, *‘Prudent innovation’ at William Mitchell: Extending the reach of learning*, A.B.A. J.: LEGAL REBEL (Sept. 24, 2015, 8:30 AM), http://www.abajournal.com/legalrebels/article/prudent_innovation_at_william_mitvvhell_extending_the_reach_of_learning (discussing how law schools should follow prudent innovation and implement successful practices of other schools in efforts to successfully deal with a declining legal market); Paul Lippe, *Firms of the future must orbit around the client*, A.B.A. J.: LEGAL REBEL (Mar. 26, 2015, 1:55 PM), http://www.abajournal.com/legalrebels/article/firms_of_the_future_must_orbit_around_the_client (discussing the increase in litigation expenses and how law firms should engage more deeply with clients and improve value); Dean Lear, *Lawyers need to move beyond ‘access to justice’ to close the legal services gap*, A.B.A. J.: LEGAL REBEL (Sept. 1, 2015 8:30 AM), http://www.abajournal.com/legalrebels/article/lawyers_need_to_move_beyond_access_to_justice_to_close_the_legal_services_g (discussing how there is a legal services gap that needs to be addressed for clients of modest means who cannot afford to consult an attorney for services such as drafting a will).