A Call to Cultivate the Public Interest: Beyond *Pro Bono*

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This essay asserts that incorporation of the public's interests in lawyers' daily work is an essential responsibility of the profession. The Preamble to the Model Rules of Professional Conduct frames this lawyers' duty as that of a "public citizen having special responsibility for the quality of justice." Yet the modern legal profession has reduced "public interest" practice to work that is done for no or almost no fee. The transformation of lawyer from public citizen to servant of mostly private interests has taken place over the last thirty-five years, following the legal profession's embrace of *pro bono* work by volunteer lawyers.

To understand this change, the authors look at current *pro bono* culture and trace the tools that were developed to cultivate it from seedlings. These tools include: the use of coordinators for volunteer attorneys (beginning with a federal requirement for legal services programs that accompanied funding cuts during the early 1980s); Model Rule of Professional Conduct 6.1—Voluntary *Pro Bono Publico* Service; rankings systems promoted by legal publications; a proliferation of awards for *pro bono* service; and law student organizations that promote and provide *pro bono* service in collaboration with the local bar. Society, government and the legal profession use the *pro bono* and "public interest" labels to allocate resources and legitimacy. The authors examine these classifications and conclude that the boundaries of "public interest" need to be expanded.

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How might the profession cultivate the ideal of lawyer as public citizen into the client-centered private practice of law and also lift up the lawyers who already are bringing value to the public through their private practice? This essay, the first of two planned pieces, will analyze how the profession came to equate public service with *pro bono* and to unintentionally narrow the definition of public interest law work. The second essay will suggest a few practical actions for expanding the profession's working definitions and practice of public interest work.

INTRODUCTION

It is a truth widely acknowledged that access to justice in America is limited, at least for those who do not possess high incomes.[1] A corollary truth is that lawyers are widely understood to be a profession that serves the narrow, often money-focused interests of the privileged.[2]

This view of American justice and of the profession concerns many lawyers, whose responses to the realities of inequality and access issues vary. They include the promotion of limited license legal technician programs, unbundling of legal services, support of self-help for litigants, and simplification and automation of legal

1. *See* THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014 57 (2014), *available at* http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf ("[The United States] lags behind its peers in providing equal treatment to ethnic minorities and other disadvantaged groups. Civil legal assistance is frequently expensive or unavailable, and the gaps between rich and poor individuals in terms of both actual use of and satisfaction with the court system is significant."). The United States ranked nineteenth in the "Overall Scores and Rankings" for 2014. *Id*. at 8, 161 (accounting for "Constraints on Government Powers," "Absence of Corruption," "Open Government," "Fundamental Rights," "Order and Security," "Regulatory Enforcement," "Civil Justice," "Criminal Justice," and forms of "Informal Justice").

2. *See* Tim A. Baker, *A Survey of Professionalism and Civility*, 38 IND. L. REV. 1305, 1312 (2005); *see also* Nika Kabiri, *Lawyers Just Can't Get No Respect (Part 1 of 5)*, LAWYERNOMICS BLOG, http://lawyernomics.avvo.com/reputation-management/lawyers-just-cant-get-no-respect-part-1-of-5.html (last visited Dec. 27, 2015); *see also* Susan T. Fiske & Cydney Dupree, *Gaining Trust as well as Respect in Communicating to Motivated Audiences about Science Topics*, 111 PROC. NAT'L ACAD. SCI. 4, 13595 (Sept. 16, 2014), *available at* http://www.pnas.org/content/111/Supplement_4/13593.full.pdf ("[Lawyers] earn respect but not trust. Being seen as competent but cold might not seem problematic until one recalls that communicator credibility requires not just status and expertise (competence) but also trustworthiness (warmth).").

processes. Legal leaders also call for more funding for civil legal services and for public lawyers such as criminal defenders and city and county attorneys. The profession, appropriately, has expended less effort on improving its poor image.

Pro bono service has been the profession's primary response to the narrative of lawyers as servants of greed and power. *Pro bono* also is aimed at the issue of unequal access to legal help. In fact, the idea has spread that donated lawyers' work allows *more* services to be distributed than when the lawyers are paid because public and non-profit funds for lawyers are so scarce, even for meeting critical legal needs. An example in the county where we live and work is a contract to represent children in proceedings when their parents' rights to raise them are being terminated.[3] The contract was awarded to a non-profit that organizes attorneys to represent the children on a volunteer basis. Such volunteer efforts are held up by legal publications, bar associations, courts, and firms as examples of good citizenship to encourage more volunteering, to enhance the reputation of the profession, and, perhaps, to assuage its guilt.[4]

Yet as the profession asks more of its own to donate their expertise and lobbies for more government-funded legal positions, it should not become distracted from supporting an equally important means to justice: that provided by public-spirited lawyers in private practice who represent clients in an affordable manner and also address justice issues in that work. How can we produce more of these lawyers and sustain the ones we have? Why don't law students know more about these lawyers?[5] One answer is that the model of

3. Minnesota Judicial Branch, Report of Children's Justice Initiative Parent Legal Representation Workgroup to Minnesota Judicial Council 5 (Nov. 17, 2008), *available at* http://mncourts.gov/Documents/0/Public/Other/Parent_Legal_Representation_Workgroup_Report_(Final_11-17-08).doc.

4. *See, e.g.*, Barbara L. Jones, *Attorneys of the Year 2014*, MINN. LAW. (Feb. 20, 2015), http://minnlawyer.com/2015/02/20/2014-attorneys-of-the-year-from-the-editor/ (honoring Attorneys of the Year for "leadership, involvement in major cases or other newsworthy events, excellence in corporate or transactional services, and *public service*."); *Pro Bono Publico Award*, HENNEPIN CNTY. B. ASS'N, http://www.hcba.org/?page=Pro_Bono_Award (last visited Feb. 18, 2016); *2013 Scales of Justice Awards*, DORSEY & WHITNEY LLP (July 2014), https://www.dorsey.com/newsresources/news/pro-bono/2014/07/2013-scales-of-justice-awards.

5. Such lawyers and law firms do exist. Co-author Juergens started her own public interest solo practice in a cluster of other solo and small practitioners in Oakland, California in the 1970s, practiced that way for eight years before beginning to teach at William Mitchell, and

pro bono that has become dominant seems to absorb most of the public interest aspirations of students and new lawyers who do not seek or find a publicly-funded or non-profit job.

Insightful student comments after interviews at law firms encouraged this exploration of public interest and *pro bono* culture. Shown walls of framed *pro bono* awards, one student noted a pervasive money culture in the rest of the work of the law firm where he interviewed. Another student at a callback interview was surprised by the disparity between the recruiters' pitch about the firm's valuing of *pro bono* and the subtly dismissive responses of other lawyers in the firm to her queries about volunteer opportunities. Students asking about meaning in the jobs for which they were interviewing were given stories of *pro bono* work and assured that up to one hundred hours per year of such work would be allowed. Yet those one hundred hours seemed meager indeed when the future lawyer reflected upon the two thousand billable hour requirement of the job. In the face of declining numbers of legal services, public defender, and non-profit law office jobs, a soon-to-be law graduate asked how he can find work that takes the common good to heart. While lamenting the dearth of jobs in the so-called "public interest" sector, the student reveals the professional culture that has taught him he cannot look for public interest work in private practice settings (other than volunteer work). Had the idea of working "for the public good"—*pro bono publico*—been captured by firms and used to burnish auras as they serve purely financial interests in their other work?

Another sign of the diminution of public interest law work and its conflation with *pro bono* work is the "student award of merit" given at every Mitchell Hamline School of Law graduation to a student

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has developed relationships with public-interest-oriented private firms and community-based justice-oriented small and solo firms in her community in Minnesota over the thirty-one years that she has worked here. Private public interest law firms also exist. *See, e.g.*, HARVARD LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFFS' FIRM GUIDE (2013), *available at* http://hls.harvard.edu/content/uploads/2015/08/Private-Public-Interest-and-Plaintiffs-Firm-guide.pdf; *See generally* Scott L. Cummings & Ann Southworth, BETWEEN PROFIT AND PRINCIPLE: THE PRIVATE PUBLIC INTEREST FIRM, IN PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds., 2009).

with high scholastic performance who also contributed greatly to the community or to student organizations. Some of the hardest working students who were most active and deeply dedicated to justice are not strong nominees for the award because only *uncompensated* activities count in the assessment of community and organizational involvement. Why did their labor for low pay, often on behalf of working people, not count as much as *pro bono* hours in the official tally of public service "merit?" While those who win the award are very deserving, the restrictive definition of public service causes consternation every time one must decide whom to nominate.

Two changes in professional culture are needed. First, bar leaders and law teachers ought to foster a culture where lawyers are expected to work in the spirit of public service, even when being paid in private practice. Law students should be taught that every lawyer is a "public citizen with a special responsibility for the quality of justice,"[6] *not* just in her spare time after her regular (paying) work is done or when she lands a job funded by the government or a non-profit.

Integration of community concerns—the public interest—into the profession's representation of private interests is a challenge. If met, it could soften the harsh persona of lawyers as deal breakers and justice mongers. Roscoe Pound famously defined "profession" as a group "pursuing a learned art as a common calling in the spirit of public service—no less public service because it may incidentally be a means of livelihood."[7] This pervasive public service ideal of a half century ago contrasts strikingly with the limited conception of public service in the legal profession today.

Changing the legal profession's culture to include consideration of the public interest in private practice is doable. Already, wise counselors discuss goals with clients in a way that brings the public aspect of contemplated action to the clients' attention. Lawyers are expressly allowed to reference "moral, economic, social and political factors" in the course of advising clients even as clients control the objectives of the representation.[8] Clients often hope to address larger

6. MODEL RULES OF PROF'L CONDUCT Preamble cmt. 1 (2015).
7. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).
8. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2015).

concerns when hiring lawyers, as when a dangerous condition has injured them and they wish to make it safe for others, or when some new construction plan anticipates the project's impact on the public and takes that into account. Lawyers can either explore that larger concern with their clients, or overlook it—conversations about the community interests at stake are not required. Nonetheless, lawyers advising clients should keep in mind the reality described in a recent *Los Angeles Times* commentary: "Democracy depends on the belief that normal people, going about their business, are outraged when they see injustice and want to change it."[9] In other words, "normal people" respond to injustice that affects others, and will include that in their goals for representation if their lawyers are creative and offer ways of doing so.

Second, professional culture must devise ways for more lawyers to bend their entire practices to serve their communities, including their members of modest means. Public interest work for pay does survive as the focus in some private firms. This happens in two main ways: (1) some firms specialize in areas of law where work on behalf of individual clients also impacts the common good, such as plaintiffs' civil or employment rights firms; (2) and some community-based small firms orient their practices to address the justice needs of a community and its individuals in an affordable and collaborative way.

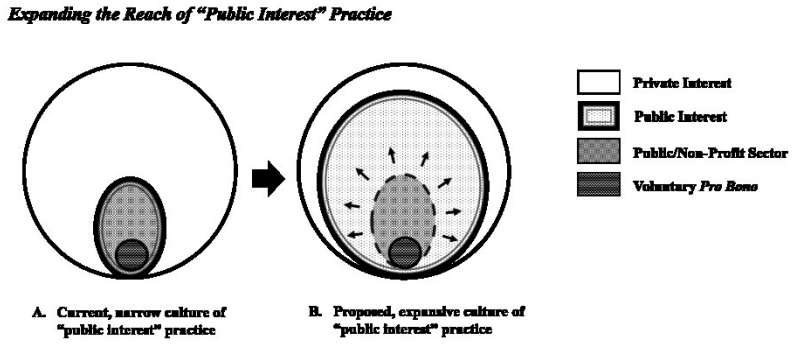
These models of public-spirited law work—paid for by clients and by attorneys' fee awards—have receded from view within the profession. Ironically, over the last thirty-five years an increase in legal volunteer work has accompanied a gradual reframing of "public interest" in law work.[10] The idea of public interest service has shrunk so that lawyers and most law-related institutions understand it either to be work done on a volunteer basis—*pro bono* work, given free to individuals or organizations with few resources—or work done by government attorneys and non-profit organizations, e.g., prosecutors,

9. Noah Berlatsky, *The Year in Outrage: Our Constant Indignation Is Wearying, but Often Necessary*, L.A. TIMES (Dec. 22, 2015), http://www.latimes.com/opinion/op-ed/la-oe-1222-berlatsky-year-in-outrage-20151222-story.html.

10. See *infra* "Tracing the Growth of Today's *Pro Bono* Culture" for sources supporting the development of "public interest" practice into a field characterized by legal services provided without an expectation of fee.

public defenders, legal services workers, and so forth. One result of the new framing of public interest is the virtual elimination of pressure within the profession to take the common good into account.

The two images below help in visualizing today's public interest culture and the expansion of public interest in a reframed professional culture.[11]



MODEL A: TODAY'S CULTURE—SMALL PUBLIC INTEREST, LARGE PRIVATE INTEREST: Visual representation of today's professional culture described in preceding paragraph, where *pro bono* and public sector/non-profit work are the whole of public interest.

MODEL B: CALLED-FOR CULTURE—EXPANDED PUBLIC INTEREST WITHIN PRIVATE PRACTICE: Visual representation of the professional culture the authors call to cultivate, where the public interest emanates beyond the current public/non-profit sector and *pro bono* space and expands into the representation of private interests, even as that representation's goals are decided by the client in conversation with the lawyer.

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11. These visual representations do not portray precise proportions of each sector of practice. However, the American Bar Association's lawyer demographic report for 2015 indicates that between 10 and 14 percent of attorneys practice in a form of public interest practice, with 8 percent practicing in government, 1 percent practicing in legal aid/public defender work, 1 percent practicing in education, 3 percent practicing in the judiciary, and 1 percent in private associations. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

The professional culture should develop tools to encourage and honor marketplace public interest law work (*i.e.*, that outside the dotted line boundary in Model B above) and train students and new lawyers in it. To realize this idea, one must understand how the culture grew to its current state.

I. TRACING THE GROWTH OF TODAY'S *PRO BONO* CULTURE

The history of the legal profession's efforts to expand access to justice for the underrepresented reveals innovative means that developed to help close the justice gap. Since the 1980s, various tools emerged to incentivize private, voluntary *pro bono* work to meet demands for free legal services in the face of declining government funding. Analyzing the development of the tools used to expand *pro bono* representation provides an opportunity to (1) honor victories in expanding access to justice through *pro bono* work, and (2) consider how these tools may be applied to fuel further public-spirited legal practice in the private sector by broadening the conception of "public interest" in legal practice.

A. Pre-Pro Bono: Creating a Demand for Private Volunteer Lawyer Services

In the 1960s, heightened federal funding to combat poverty reflected a growing government interest in access to justice work.[12] In 1965, as a part of President Johnson's War on Poverty, funding from the new Office of Economic Opportunity (OEO) helped form the federal Legal Services Program (LSP).[13] The federal government awarded over $25 million to more than 150 legal services programs

12. ALAN W. HOUSEMAN & LINDA E. PERLE, CENTER FOR LAW AND SOCIAL POLICY, EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 11 (2007).

13. Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1213 n.2 (2002) (citing Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as 42 U.S.C. §§ 2701–2995d, 2781 (1994)).

in the United States,[14] which provided attorneys with "training, leadership and support to undertake impact litigation" and dramatically increased full-service legal representation to the poor and underrepresented.[15]

Furthering the federal government's commitment to free civil legal services, Congress passed the Legal Service Corporation (LSC) Act in 1974.[16] The LSC Act increased legal aid funding, sought to develop programs outside of urban areas, and "relaxed restrictions on legal activity."[17] In Minnesota, for instance, the LSC Act led to the formation of the Minnesota Legal Services Coalition, which sought to provide "minimum access" to legal services in all eighty-seven counties.[18]

While the LSC Act expanded funding, it also required the LSC to complete a "comprehensive, independent study of the existing staff attorney program" to consider "alternative and supplemental methods of delivery of legal services to eligible clients."[19] The final Delivery Systems Study concluded that a model using volunteer private attorneys could be integrated into the LSC delivery system to meet the same ends as the full-time staff attorney model.[20]

Just as the expansion of access through the LSC Act was realized, political backlash against government-funded legal services motivated the use of alternative legal service delivery models

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14. Tom I. Romero II & Bruce A. Beneke, *100 Years Strong: Southern Minnesota Regional Legal Services and the On-Going Pursuit for Equal Rights and Equal Justice*, 31 HAMLINE J. PUB. L. & POL'Y 1, 11 (2009).

15. *Id.* at 12.

16. Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. § 2996 (2016)).

17. Romero II & Beneke, *supra* note 14, at 16.

18. Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 LAW & INEQ. 77, 83–84 n.33 (1994).

19. LEGAL SERVS. CORP., THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES i (1980), *available at* http://legalaidresearch.org/wp-content/uploads/lsc-delivery-systems-study-19801.pdf [hereinafter DELIVERY SYSTEMS STUDY]; *see also* Jeremy Cooper, *The Delivery Systems Study: A Report to Congress and the President of the United States. The Legal Services Corporation June 1980*, 44 MOD. L. REV. 310 (1981) (providing an overview and analysis of the Delivery Systems Study).

20. *See* DELIVERY SYSTEMS STUDY, *supra* note 19, at ii. ("The policy analysis indicates that there are a number of delivery methods, involving staff attorneys, attorneys in private practice, and combinations of the two, that can be used to deliver effective and economical legal services if appropriate local conditions and sound program management exist . . . .").

analyzed in the Delivery Systems Study.[21] The Reagan Administration used the study to legitimize funding cuts. In 1982, the Administration decreased LSC funding by 25 percent.[22] The Administration pointed to the Delivery Systems Study's finding that "legal services provided by private attorneys [are] equally effective to the staff attorney model used by the Corporation, in which attorneys are hired directly by local legal services programs."[23] Seeing voluntary *pro bono* as an alternative to government-funded legal services, the Administration proclaimed that "*pro bono* efforts by private attorneys, as part of their professional responsibility, could substantially augment legal services funding."[24]

Consequently, rather than adding more full-time staff attorneys to legal services organizations, LSC funding went to recruit, train, and connect *pro bono* volunteers with low-income clients.[25] As cuts were made, the LSC board started requiring LSC grantees to apportion ten percent of annual LSC grants to expanding direct *pro bono* services by private attorneys.[26]

Cuts in government funding of Legal Services have been deep and ongoing,[27] and have been correlated in part with increased expectation of and reliance on donated services—*pro bono*.[28] In other

21. HOUSEMAN & PERLE, *supra* note 12, at 29–30.

22. McCaffrey, *supra* note 18, at 87.

23. KAREN SPAR, CONG. RESEARCH SERV., IB81071, LEGAL SERVICES CORPORATION: PROPOSED TERMINATION, at CRS-3 (1983).

24. *Id.*

25. McCaffrey, *supra* note 18, at 87.

26. *Id.*; *see also* Houseman, *supra* note 13, at 1218 (suggesting that this requirement arose out of a Congressional Delivery System Study completed in 1980 that encouraged LSC to require grantees to use 12.5 percent of their LSC funding for private attorney pro bono work).

27. By 2008, though federal dollars for legal aid had risen since 1980, when adjusted for inflation funding was nearly 53 percent below what it was in 1980. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2367 n.40 (2010).

28. Cynthia F. Adcock, *Beyond Externships and Clinics: Integrating Access to Justice Education into the Curriculum*, 62 J. LEGAL EDUC. 566, 568 (2013) ("The private bar's response to the legal services crisis was to create pro bono programs, which grew exponentially. 'In 1980, there were approximately 80 pro bono programs, many of them quite limited in scope. In 1989, these programs number[ed] in the 500s.'") Outside of the United States, Australia has explicitly pointed to the growth of a *pro bono* culture as justification to cut their legal aid budget. Richard Abel, *The Paradoxes of Pro Bono*, 78 FORDHAM L. REV. 2443 (2010). In other civil law countries with fewer large firms and less institutionalized *pro bono*, funding for legal aid has remained steady. *Id.*

words, *pro bono* has had an unintended and quiet role in justifying decreases in public funding of Legal Services.[29]

B. Building a Pro Bono Culture: Tools to Incentivize Private Voluntary Representation

As government funding dwindled, bar associations, LSC attorneys, law students, non-profits, and private members of the bar rolled up their sleeves to continue the expansion of access to affordable legal services that the LSC Act enabled. Since the 1980s, invested public interest practitioners helped build a *pro bono* culture that has come to define public interest law practice. The tools they used include: the Model Rules of Professional Conduct, *pro bono* legal service coordinators, volunteer law student organizations, awards, and law firm rankings.

First, professional standards governing the legal profession have helped standardize the profession's aspiration to expand "public service" lawyering. The 1969 Model Code of Professional Responsibility, Ethical Consideration 2-25, represented the first American Bar Association (ABA) expression of an affirmative professional responsibility for individual attorneys to provide legal services to the poor.[30] In 1975, the ABA passed the Montreal Resolution, which sought not only to exhort the provision of services to the poor, but to define "public interest" legal services for the first time.[31] The Resolution divided "public interest" into five categories: poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice.[32] After the Montreal Resolution, the ABA Special Committee on Public Interest Practice urged state and local bar associations to promote "public interest" legal services to members.[33]

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29. James L. Baillie & Judith Bernstein-Baker*, In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education,* 13 LAW & INEQ. 51, 58 (1994).

30. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969); *see also* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 117–27 (2002) (discussing the history of EC 2-25).

31. Baillie & Bernstein-Baker, *supra* note 29, at 58.

32. *Id.*

33. Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 92–93 (1990).

In 1983, the ABA House of Delegates enacted Model Rule 6.1 regarding the professional responsibility to provide "*pro bono* public service."[34] This first public service rule set the aspirational standard that continues through today.[35] However, the 1983 rule was more broadly framed than today's rule, stating simply that a lawyer should "render public interest legal service" either by providing free or reduced fee legal services, and including "activities for improving the law, [and] the legal system" in the same sentence as the definition of public interest service.[36]

Since the ABA created Model Rule 6.1 in 1983, amendments to the rule have continued to reflect and shape professional culture. In 1993, the ABA added a more specific fifty hour aspirational standard and tightened the focus toward *free* services.[37] In 2002, after calls to make the rule mandatory, amendments reaffirmed the voluntary nature of *pro bono* service.[38] The current Model Rule 6.1 makes work for no fee primary, beginning with the first sentence. "Reduced fee" work has been tightened to "*substantially* reduced fee" work (emphasis added).[39] "Substantially reduced fee" work is explicitly subordinated to work for no fee, and may count as public service only after a "substantial majority" of the fifty hours is done for free, and even then only under specifically enumerated conditions.[40] While the authors of the rule sought to prevent self-interested work from being counted as public service, the rule's insistence on free work, its increased parsing of the definition and burgeoning length (now up to 205 words in nine subparts from the original 69 words in two

34. Baillie & Bernstein-Baker, *supra* note 31, at 57 ("Rule 6.1 Pro Bono Public Service: A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.").

35. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013) ("Public Service, Rule 6.1: Voluntary Pro Bono Public Service. Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year . . . .").

36. *See* Baillie & Bernstein-Baker, *supra* note 31, at 57–58.

37. *Id.* at 58–60.

38. Maute, *supra* note 30, at 146.

39. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013).

40. *Id.*

sentences) have complicated its meaning and reduced the impact of its message to lawyers. The role of public service in the identity of the profession is now summed up in the first sentence of the rule: "Every lawyer has a professional responsibility to provide legal services to those unable to pay."[41]

Second, bar associations, non-profits, and large law firms started to use *pro bono* coordinator positions to connect volunteer attorneys with clients. For example, in 1981, the Minnesota State Bar Association (MSBA) hired one of the first full-time attorneys in the country to "coordinate statewide efforts to increase access of civil legal services to low-income Minnesotans."[42] As a part of her job, the coordinator created a "network of local volunteer attorney programs" serving every county in Minnesota and "established a separate non-profit corporation to secure funding and provide technical support for volunteer attorney programs."[43] More recently, large law firms began hiring *pro bono* coordinators to connect firm attorneys with volunteer opportunities as pressure from industry rankings, law students, and the profession for more *pro bono* service increased.[44]

Pro bono coordinators have both helped connect volunteer attorneys with clients in need of services and developed strategies to encourage attorneys to volunteer their services. For example, coordinators have hosted volunteer nights at companies and firms, provided interpreters to volunteers, and catered *pro bono* opportunities to volunteers' scheduling constraints and interests.[45]

Third, law schools and law student organizations have mobilized students to promote and provide *pro bono* opportunities. In several states, including Minnesota, the availability of funding further inspired local law schools to expand *pro bono* contributions through volunteer efforts.[46] Minnesota law students formed the Minnesota Justice Foundation (MJF) in 1981 in response to the LSC budget

41. *Id.*
42. McCaffrey, *supra* note 18, at 88.
43. *Id.*
44. Cummings & Rhode, *supra* note 27, at 2360–61 (discussing the trend of large law firms hiring *pro bono* counsel to coordinate firm *pro bono* services).
45. *See id.*; *see also* McCaffrey, *supra* note 18, at 91.
46. *See* McCaffrey, *supra* note 18, at 93.

cuts.[47] The students who founded MJF thought that their peers should be more involved in improving access for those who could not afford legal services and "in the struggle to change the system."[48] In 1982, the organization incorporated as a non-profit corporation to coordinate volunteer placements of law students.[49] Students continue to provide important voices and ideas in seeking new ways to address injustice in America and in the world.

In addition to law students, law school administrations and state bar licensing authorities have increased *pro bono* opportunities and expectations. Law schools have formalized *pro bono* graduation requirements and student volunteer programs.[50] The ABA now requires law schools to incorporate *pro bono* into the school curriculum.[51] Just recently, New York became the first state to require law students to perform fifty hours of *pro bono* services before being admitted to the state's bar.[52] The Board of Continuing Legal Education in Minnesota counts *pro bono* work hours toward continuing legal education requirements.[53]

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47. *Id.*; *Our History*, MINN. JUSTICE FOUND., https://www.mnjustice.org/about-mjf/history/ (last visited Dec. 28, 2015).

48. *See* McCaffrey, *supra* note 18, at 93.

49. MINN. JUSTICE FOUND., *supra* note 47.

50. *See, e.g.*, Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1356 (2007); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2416 (1999); Richard F. Storrow & Patti Gearhart Turner, *Where Equal Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 UMKC L. REV. 493, 495–96 (2003).

51. A.B.A. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 303(B)(2) (2015), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ Standards/2015_2016_chapter_3.authcheckdam.pdf.

52. *See, e.g.*, Anne Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES (May 1, 2012), http://www.nytimes.com/2012/05/02/nyregion/new-lawyers-in-new-york-to-be-required-to-do-some-work-free.html?_r=0; A.B.A. STANDING COMM. ON PRO BONO AND PUB. SERV., NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE POTENTIAL PROS AND CONS (Oct. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf. *But see* Justin Hansford, *Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 FORDHAM URB. L.J. 1141, 1143 (2014) (arguing the mandate will only work in creating a pro bono culture if there is "rigorous exploration of professional ideals, targeted, focused experiences in law practice directly related to public service values like economic justice, racial justice, and voting rights, and thorough data gathering, supervision, and training").

53. *Rules of the Board of Continuing Legal Education 6(C),* MINN. STATE BD.

Fourth, awards and recognitions for *pro bono* service have incentivized volunteerism. For instance, MSBA began to give annual awards for *pro bono* service in 1991.[54] Today, the MSBA recognizes attorneys who satisfy the fifty hour aspirational standard set forth in Rule 6.1 as North Star Lawyers.[55] The majority of local and state bar associations now recognize and feature public service awards at annual bar events and in bar publications, which has helped honor attorney contributions as well as incentivized others to contribute.[56]

Fifth, major legal publications started to weigh *pro bono* programs in law firm rankings, which prompted a rapid expansion of large firm commitment to *pro bono* service. In the 1970s, there were fewer than twenty-five formal *pro bono* programs at large firms.[57] In 1994, the *American Lawyer* publication began ranking firms "based on the depth and breadth of their pro bono performance."[58] A decade later, the same publication started publishing an "A-List" that included the top twenty law firms based on a law firm's "overall pro bono performance as an important factor."[59] The ranking system placed *pro bono* contributions as a "prominent factor in firm reputation and influenced the recruitment of associates."[60] Since *pro bono* service has been a part of the ranking calculus, more attorneys at large firms are providing *pro bono* service.[61] At the very least, harnessing the

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CONTINUING LEGAL EDUC. (July, 2016), https://www.mbcle.state.mn.us/mbcle/pages/rules.asp#rule6d ("A lawyer may claim 1 hour of standard CLE credit for every 6 hours of pro bono legal representation . . . . No more than 6 hours of credit may be claimed per reporting period by a lawyer for pro bono legal representation.").

54. McCaffrey, *supra* note 18, at 90.

55. *See North Star Lawyer*, MINN. ST. B. ASS'N, http://www.mnbar.org/members/access-to-justice/pro-bono/northstar#.VUbacCFVjsE (last visited Dec. 27, 2015).

56. Cummings & Rhode, *supra* note 27, at 2369.

57. *Id.* at 2370.

58. *Id.* at 2371.

59. *Id.*

60. *Id.* at 2372.

61. *See id.* at 2359 ("The average attorney [in 2009] at an Am 200 firm logged over sixty hours of pro bono contributions per year. Contributions were also up among participants in the Pro Bono Institute's Law Firm Pro Bono Challenge"); *see also id.* at 2374 ("As the scale of firms and their contributions increased, it became more crucial to have someone playing a sustained coordinating and monitoring role. Membership on firm pro bono committees tended to rotate year-to-year and even the most active members understood their committee duties to be ancillary to their billable work.").

capacity of large firms has helped raise the profile of private *pro bono* contributions.

Overall these tools successfully increased private voluntary legal services. However, the reduction of "public interest" to free and undercompensated legal services has left the spirit of public service in broader legal practice as an incidental, a "market exception."[62] And private practitioners who incorporated a strong public interest commitment were left somewhat stranded as a constituency within the profession. In fact, the core of the lawyer's professional identity has been affected.

II. A CONSEQUENCE OF SUCCESS: PRACTICAL ISSUES OF DEFINING "PUBLIC INTEREST" TOO NARROWLY

Efforts to increase free legal representation trapped the common conception of "public interest" law into a space now characterized by lack of compensation. Definitions of public interest law are a source of discord in legal scholarship—further evidence of the need for approaches that move beyond free or undercompensated representation. In addition, specific, working definitions of "public interest law" reveal the narrow scope of public interest practice that we instill in law students as they enter the legal profession.

A. Defining "Public Interest" in Theory: Questioning the Access Perspective

The project of reframing public interest law is important, as its definition guides many ways that respect and resources are distributed within the profession and the justice system.

A common generic and politically neutral description of public interest law practice is "lawyering for interests that lack adequate representation in the legal process."[63] This definition characterizes public interest practice in proceduralist terms, which is an approach

62. Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 492 (2014); *see generally* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2125 (2004).

63. Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 746 (2001).

to "cause lawyering" that assumes the system is "fair and just," but that increased access to representation is needed.[64] This access perspective of public interest law has been critiqued as being aimed only at providing legal representation, rather than at addressing root causes of poverty and injustice.[65] It assumes that service for the public good can be structured through definitions of the lawyers' profit status or fee limits or client indigency. It also does not incorporate the idea that the spirit of public service should infuse lawyering even for private interests.

The legal profession, adopting an access perspective on public interest law through the Model Rules of Professional Conduct, has framed public interest lawyering and the duty to improve access to justice as a duty to participate in "public service" lawyering.[66] As laid out in Model Rules 6.1 through 6.5, public service is focused on legal services provided "without fee or expectation of fee to persons of limited means."[67] The Model Rules' approach to public interest work builds on the access perspective to public interest lawyering by

64. Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 665–66 (2004). Hilbink's framework for defining public interest lawyering includes the proceduralist, elite/vanguard and grassroots approaches to lawyering. An elite/vanguard approach emphasizes test-case litigation and law reform, based on the assumption that "law is a superior form of politics" that seeks to change substantive law in effort to change society." *Id.* at 673. A grassroots approach "rejects the majestic vision of law" and is "skeptical of law's utility as a tool of social change" and sees legal action as "only one weapon in a widespread assault on injustice." *Id.* at 681–82.

65. Sabbeth, *supra* note 62, at 444; *see also* David R. Esquivel, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 351 (1996); *see also* Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1, 9 (1994) (arguing that poverty lawyers must "rededicate themselves to a specific vision for poverty law – helping poor people move up and out of poverty."); *see generally* Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, *in* NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY (Robert W. Gordon and Margaret J. Radin eds., 1992).

66. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1–6.5 (2015).

67. *Id.* Although Model Rule 6.1(b) allows for providing services with expectation of fee, Comment 5 expresses a preference for services provided without an expectation of fee. *Id.* at R. 6.1 cmt. 5 ("[T]o the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b)."). For a discussion of the types of services that fall under Model Rules 6.1 (a) and (b), including examples and statistics, *see generally* SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS, A.B.A. STANDING COMMITTEE ON PRO BONO AND PUB. SERV. (Mar. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf.

incorporating the view of public service as charity work, as *noblesse oblige*[68]—an obligation of the privileged and well-off to help those less fortunate.[69]

This narrow concept of public service has contributed to a polarization of private practice from forms of public interest lawyering that seek systemic change.[70] The Rules did not incorporate a model that locates public service as grassroots work being done by lawyers who were not members of the professional elite. This would have included lawyers such as the early African-American women and men who brought civil rights cases on behalf of their communities as they also represented them in real estate, family and criminal matters.[71] Most solo and small firm lawyers, including many immigrants, could not afford to offer much work for free.[72] But their fees were affordable in the first place; they routinely reduced their fees or would forgive fees when a client could not continue to pay; and they took the interests of their community into consideration with their clients when framing remedies for injustice.[73]

In response to the proceduralist access narrative, legal scholars suggest moving toward a "harmonious balance between law and

68. Susan D. Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81, 81 (2001).

69. *Noblesse Oblige*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Maute, *supra* note 30, at 96–98 (providing a history of *noblesse oblige* in legal practice and the transformation into a professional responsibility).

70. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, *supra* note 63, at 735–36.

71. *See* Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, *supra* note 68, at 81; *see also* Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 397 (2001).

72. 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, 718–30 (2009) (discussing examples of how small and solo practices provide free or affordable legal services, including: referrals, structuring a low bono practice, and support from formal reduced fee programs such as Judicare or Modest Means).

73. Some now term this practice as "low bono." *See* Luz E. Herrera, *Encouraging the Development of "Low Bono" Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 3–4 (2014); *see also* Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 6–8 (2009). The authors question the use of the term "low bono," as it frames the fee arrangement as an exception and has some stigmatizing effect on the "recipients." These clients are paying customers, as are high-paying clients. If the profession were proposing to term many legal services as "high priced" at the same time the "low bono" term were adopted, it could change the perspective.

organizing."[74] For example, legal support of social justice movements could reach beyond responding to isolated individual claims, which is the approach traditionally taught in law school.[75] The link between law and organizing could help structure partnerships between lawyers and community-based organizations.[76] This thread of scholarship recalls community lawyers in the first half of the twentieth century—most of them solo and small firm practitioners—who worked closely with grassroots organizations such as the NAACP, and "rebellious" lawyers from the 1960s, 1970s, and 1980s who worked with and were paid by community organizations in a range of power struggles with government and corporations.[77] Moreover, the idea of balancing law and organizing today is reflected in initiatives such as Community Economic Development (CED) enterprises,[78] which some have called "the new public interest law."[79]

If public interest law is to include work for the empowerment of communities as well as simple access for individuals, then public interest definitions must include that which honors the agency of clients and communities and allows the most power in their relations with lawyers. Legal work that is compensated directly by clients or by the operation of fee-shifting rules gives power to clients within the

74. Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 619 (2011).

75. *Id.*; *see also* Amy Bradshaw, *Exploring Law Students' Attitudes, Beliefs, and Experiences About the Relationship Between Business Law and Public Interest Law*, 20 WIS. WOMEN'S L.J. 287, 291–92 (2005).

76. *See, e.g.,* Newman, *supra* note 74, at 619.

77. *See, e.g.*, Juergens, *supra* note 71, at 398 (discussing the partnership of Lena Olive Smith and the NAACP in the 1920s and 1930s); *see also* Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 952 (1992) ("The rebellious idea of lawyering for the subordinated seeks to address the three defects in conventional lawyering just described: the interpersonal domination of clients by lawyers; the disempowerment that accompanies reliance on litigation-based dispute resolution or its equivalent; and the inefficacy of intrasystemic remedies to achieve meaningful change in the lives of poor clients.").

78. The CED is a federal grant program that supports "the economic needs of low-income individuals and families through the creation of sustainable business development and employment opportunities." *Community Economic Development (CED)*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.acf.hhs.gov/programs/ocs/programs/ced (last visited Dec. 27, 2015).

79. Bradshaw, *supra* note 75, at 290–91 (citing Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997)).

lawyer-client relationship; it should be acknowledged and built into the definition of public interest law. That is not yet the light toward which these definitions have been leaning.

B. Defining "Public Interest" in Practice: Indicators That the Public Interest Has Fallen Outside the Frame of Private Practice

The Model Rules no longer define types of "public interest" law as they did when that was first articulated in the 1970s.[80] Yet one finds definitions of "public interest" in loan repayment assistance programs, in *pro bono* network organizations, in the National Association for Law Placement (NALP) categorizations of jobs, and in other key institutions. These institutions reflect the profession's understanding of public interest law and of public service as work done as a volunteer or for no charge to the client.[81] These institutional definitions, by reinforcing narrow definitions of "public interest" and public service practice, affect law students' planning for legal careers.[82] Four influential examples follow.

First, the Loan Repayment Assistance Program of Minnesota (LRAP-MN) is an organization that provides loan forgiveness subsidies to lawyers practicing in "public service" practices.[83] For determining eligibility for loan forgiveness subsidies, LRAP-MN defines public service as:

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80. Baillie & Bernstein-Baker, *supra* note 29, at 58–59 (discussing the A.B.A.'s 1975 Montreal Resolution, which defined "public interest" as "poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice"). Today's Model Rule 6.1 does not define "public interest" law and does not use the words "public interest." Rule 6.1 now motivates attorneys to provide "at least (50) hours of pro bono public services per year." MODEL RULES OF PROF'L CONDUCT R. 6.1 (2015). The rule specifies that *pro bono* services may include: legal services to "persons of limited means," legal services to organizations serving those of "limited means" or "seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational" matters, as well as participating in activities to improve the "law, the legal system, or the legal profession." *Id.*

81. For a discussion of additional institutions defining "public interest" lawyering, see Sabbeth, *supra* note 62, at 452. Sabbeth discusses ways that "institutions have operationalized the concept" of public interest lawyering through tax benefits, solicitation rules, and fee shifting statutes. *Id.*

82. Bradshaw, *supra* note 75, at 291–92 (discussing the dwindling market for "pure" public interest jobs for students).

83. *About Us*, LRAP MINN., http://lrapmn.org/about/ (last visited Feb. 17, 2016).

> Full-time employment in a 501(c)(3) or 501(c)(4) nonprofit organization as an attorney providing legal advice or representation to low-income clients based upon financial eligibility criteria or support services for this work. . . . A graduated income cap applies. For example, the gross income of an applicant with 1–2 years of experience in qualifying employment cannot exceed $51,500.[84]

LRAP-MN's working definition of "public service" (1) restricts work to full-time employment at a nonprofit organization, which excludes private practice; (2) limits work to serving "low-income clients" rather than expanding potential services to clients of modest means; and (3) sets an income cap at $51,500. Thus, if a lawyer earns less than $51,500, but is earning her livelihood being responsive to justice needs in her community and being paid by clients of modest means, the lawyer would not be eligible for the LRAP-MN subsidy. Broadening the definition of eligible public service work to include community-centered private practitioners who address injustice in their work would encourage more new lawyers to do this, especially as they build their practices and earn less than the income cap.

Second, the Minnesota Justice Foundation (MJF)—as previously discussed in this essay—is a non-profit organization, begun by law students, that "strives for justice by creating opportunities for law students to perform public interest and pro bono legal services."[85] MJF does not expressly define "public interest," but its website explains that the organization serves people who are "low-income," "below the Federal poverty guideline" and works to expand the capacity of free legal services in Minnesota.[86] The organization is well-regarded and important in our state. A more robust definition of public interest—going beyond the access perspective and spelling out that student referrals to for-profit firms are allowed for work that adds value to the public—would help such organizations expand their

84. *Applicants*, LRAP MINN., http://lrapmn.org/applicants/ (last visited Dec. 8, 2015).

85. *Mission & Core Values*, MINN. JUSTICE FOUND., http//www.mnjustice.org/about-mjf/mission-core-values/ (last visited Feb. 18, 2016).

86. *Why We Are Needed*, MINN. JUSTICE FOUND., http://www.mnjustice.org/about-mjf/why-we-are-needed/ (last visited Dec. 8, 2015).

influence within law schools and the profession, even as they keep an eye on preserving their nonprofit status.

Third, NALP groups "public interest" and "government employment" together under "public service" employment.[87] NALP has a separate website that serves as "the premiere online public service job database (PSJD) connecting public interest law job-seekers with job opportunities."[88] Public interest sectors include: government, non-profit, private public interest law firms (mostly medium-sized civil rights, employment, and specialized area firms), think tanks/policy organizations (foundations), and international (international development, United Nations jobs).[89]

NALP's framing of public interest is further confused in the Class of 2015 NALP Employment Report and Salary Survey. Graduates who wish to designate their job as one in public interest must choose between (1) community education and organization, (2) civil legal services, (3) policy/advocacy, (4) public or appellate defender, and (5) other.[90] These categories restrict public interest to free legal services or nonprofit advocacy, leaving community-centered private practice addressing injustice to be wrapped into the large, undistinguished statistic of private practice or "other."[91] Although a graduate may select that a private practice firm "is a public interest law firm," classification as a "public interest law firm" is not defined in the survey and may only include a qualifying "public interest law firm" as defined by the Internal Revenue Service.[92]

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87. *Public Service Initiatives*, NAT'L ASS'N LAW PLACEMENT, www.nalp.org/publicservice (last visited Dec. 8, 2015). However, "public interest" and "government" are separated as employment types for NALP employment reports that law schools post on school websites for prospective students. MITCHELL HAMLINE SCH. OF LAW, NALP SUMMARY REPORT, CLASS OF 2014 (2014), *available at* http://mitchellhamline.edu/careers/wp-content/uploads/sites/10/2015/09/NALP-Summary-Report-2014.pdf.

88. *Public Service Initiatives*, PUB. SERV. JOB DATABASE, http://www.nalp.org/publicservice (last visited Feb. 18, 2016).

89. *Id.*

90. NAT'L ASS'N LAW PLACEMENT, GRADUATE SURVEY FORM—CLASS OF 2015 NALP EMPLOYMENT REPORT AND SALARY SURVEY (Aug. 2015), *available at* http://www.nalp.org/uploads/ERSS/NALPgradsurvey2015aug2015.pdf.

91. *Id.*

92. *See* Sabbeth, *supra* note 62, at 452–58 (discussing the strict practice limitations for Public Interest Law Firms (PILF), which are recognized by the IRS as a type of charity under I.R.C. Section 501(c)(3)).

In sum, the thousands of prospective lawyers, current students, or recent graduates going to NALP or reporting to NALP would be challenged to envision private practice as a category of workplace where public interest or public service work routinely may take place. These compilations of data and surveys might be sources of imagination and inspiration for law graduates and employers were they to construct public interest so that it could more easily include practice that is compensated directly by the client or through fee awards. More overlap of public interest categories with private practice also would enable the spirit of public service to migrate more easily into spaces of practice that are now designated as "private."

Fourth, the College Cost Reduction and Access Act of 2007 offers lowers monthly student loan payments on federally guaranteed loans whether or not the graduate is working in public service.[93] But, for "public service" employees, it cancels all remaining debt after ten years of public service employment. Debt is cancelled after twenty or twenty-five years of payments under the income-based repayment plan.[94] This is a substantial incentive to work for employers who meet the public service definition. The act defines "Public service" as "full-time employment" in "public interest law," which "refers to legal services provided by a public service organization that are funded in whole or in part by a local, State, Federal, or Tribal government."[95]

Again, public service in the Act's definition is conflated with public interest law services provided from offices funded by the government or non-profit sources. Therefore, as with LRAP-MN's definition, if a lawyer is earning her livelihood being responsive to

93. Public Service Loan Forgiveness Program, 34 C.F.R. § 685.219 (2012).

94. Public Service Loan Forgiveness Program, 34 C.F.R. § 685.221 (2016).

95. *See* 34 C.F.R. § 685.219 ("Public service organization means: (1) A Federal, State, local, or Tribal government organization, agency, or entity; (2) A public child or family service agency; (3) A non-profit organization under section 501(c)(3) of the Internal Revenue Code that—(i) Is exempt from taxation under section 501(a) of the Internal Revenue Code; and (ii) Is not an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing; (4) A Tribal college or university; or (5) A private organization that—(i) Provides the following public services: . . . public interest law services, . . . and (ii) Is not a business organized for profit, a labor union, a partisan political organization, or an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing.").

justice needs in her community and being paid by clients of modest means, and is earning the same as a legal services attorney, the lawyer in private practice would pay loans for twenty-five years, while the legal services attorney would pay loans for ten years. Both forms of practice are essential to bridging the widening justice and equality gap, but only the career providing free legal services includes substantial financial incentives for its practice.

In sum, today's common perception that public interest law is characterized by lack of compensation by the client locates public interest practice firmly "outside the mainstream market for legal services."[96] This leaves the spirit of public service as inconsequential, non-essential, while law practice remains at core merely a means of livelihood.[97]

CONCLUSION

The legal profession and law schools have overlooked the potential of private practitioners to meet the need for justice among working people; they also have tended to forget those practitioners when creating programs—other than *pro bono* volunteer programs—to address injustice. The public interest definitional hierarchy of free or undercompensated services over reasonably paid services is understandable for many reasons. Among the least conscious motives may be that when the legal profession is not widely trusted, emphasizing members' good volunteer works helps to inoculate the profession from further public dissatisfaction with our performance.

It is time to pick up the tools used to create a robust *pro bono* culture—enhanced professional standards, institutions serving as connectors of clients with lawyers, mobilization of law students, awards, methods for measuring and ranking public interest contributions—and cultivate the public interest back into the fields of private practice law work. First, those tools could be adapted to create more fertile conditions for lawyers who want to alleviate injustice and subordination and be paid directly by the communities and individuals whom they are serving. Second, the profession and

96. Sabbeth, *supra* note 62, at 441.
97. *See, e.g.*, Erichson, *supra* note 62, at 2115.

the legal academy should encourage and train succeeding generations of private practice lawyers to elicit larger issues of justice in their everyday conversations and collaborations with clients.

One idea for fostering the culture of public interest within private practice is to create loan forgiveness eligibility for those in for-profit settings who can meet a new definition of public interest practice. Another is to explore the utility of social benefit entity status for small law practices that wish to be explicit about their commitment to social justice even as they are "for-profit." The ethical rules regarding client counseling could be developed to value more nuance about the common good in attorney-client conversations. Local governments could enable collective action by private actors to maintain common resources, work that could use the help of community lawyers. Statutes allowing attorney fee awards could be strengthened to assist the survival of practitioners who enforce rights that enhance public good. Telling the stories of those who labor in progressive for-profit practices could supplement the proliferating celebrations of *pro bono* contributions.

Such possibilities will be the subject of another essay.